ERISA Fiduciary Breach Litigation After LaRue

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I. Background

A. Statutory Provisions.
(All section references are to ERISA unless otherwise noted.)

1. § 502(a)(2) provides that a civil action may be brought:

   by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 409.

2. § 409(a) provides, in pertinent part, as follows:

   Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this title shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary.

B. Russell.

In Massachusetts Mutual Life Ins. Co. v. Russell, the Supreme Court held that a participant did not have standing to bring a claim under § 502(a)(2) to recover extracontractual or punitive damages arising from a delay in reinstating disability benefits under an unfunded welfare plan. 473 U.S. 134 (1985). In retrospect, the facts of the case do not provide any support for the dicta ("the entire text of § 409 persuades us that Congress did not intend that section to authorize any relief except for the plan itself") that was widely viewed as a key holding of the Court. Id. at 145.[1]

1. The participant/plaintiff in the case was receiving disability benefits from her employer's disability plan. Five months after commencement, the benefits were terminated due to a doctor's report finding no disabling injury. The participant appealed the decision under the plan's claim procedures, and the appeal was approved six months later by the plan administrator (the participant's doctor provided evidence that her back injury was psychosomatic rather than orthopedic). Benefits were reinstated with payment of retroactive benefits for the six-month period during which payments had been suspended.

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[1] The majority opinion concludes with a much narrower statement that § 409 does not provide "a cause of action for extra-contractual damages caused by improper or untimely processing of benefit claims." Russell at 148.

2. The alleged damages in the case did not relate to any lost or diminished plan asset or benefit. Instead, the participant's lawsuit claimed that the wrongful suspension of her benefit and delay in processing her claim had caused her stress which "aggravated the psychological condition that caused [her] back ailment." The Ninth Circuit approved the participant's claim, holding that the reference to "other equitable or remedial relief" in § 409 included damages for mental or emotional distress.

3. The claim related to an unfunded disability plan under which all benefits were paid from the sponsoring employer's general assets. Thus, no plan assets could have been lost or diminished and no fiduciary could have profited from plan assets as a result of the alleged breach.

C. Russell's Progeny.

1. Although, as described above, the Court's decision in Russell should probably have never been construed to mean anything but a limitation on the nature of the relief available under § 409, many courts concluded that the case precluded all claims for individual relief under § 502(a)(2). See, <u>Varity Corp. v. Howe</u>, 516 U.S. 489 (1996) (citing <u>Russell</u> for the proposition that the plaintiffs had no claim under § 502(a)(2) "because that provision, tied to § 409, does not provide a remedy for individual beneficiaries."); <u>Lee v. Burkhart</u>, 991 F.2d 1004, 1009 (2nd Cir 1993) (summarizing Russell as having two holdings, first that "the fiduciary duties imposed by Section 409 run to a plan and not to individual beneficiaries," and second that "Section 409 did not authorize the award of "extracontractual" damages to a beneficiary."); <u>Matassarin v. Lynch</u>, 174 F.3d 549 (5th Cir. 1999) ("The Supreme Court, noting ERISA's primary concern with the possible misuse or poor management of plan assets, has stated that the "loss to the plan" language in § [409] limits claims to those that inure to the benefit of the plan as a whole and not to the benefit only of individual plan beneficiaries."); <u>Magin v. Monsanto Co.</u>, 420 F3d 679 (7th Cir. 2005) (citing Russell for the proposition that recovery for fiduciary breach actions under § 502(a)(2) "must go to the plan as a whole, and not the individual beneficiary.").

2. Prior to the Supreme Court decision in <u>LaRue</u>, a few courts permitted "subclasses" of participants to bring claims under § 502(a)(2) even though the requested recoveries would not benefit all plan participants. *See*, <u>Kuper v. Iovenko</u>, 66 F3d 1447 (6th Cir. 1995) ("We conclude that plaintiffs' position that a subclass of Plan participants may sue for a breach of fiduciary duty is correct. Defendants' argument that a breach must harm the entire plan to give rise to liability under § 1109 would insulate fiduciaries who breach their duty so long as the breach does not harm all of a plan's participants."); <u>Milofsky, Michael v. American Airlines Inc.</u>, 444 F3d 311 (5th Cir. 2006) vacg & remg 404 F3d 338 (5th Cir. 2005); <u>In re Schering-Plough Corp Erisa Litigation</u>, 420 F3d 231 (3rd Cir. 2005).

II. The LaRue Case

A. Facts of the Case.

The factual background of the LaRue case is almost completely undeveloped in the district court, appellate court, and Supreme Court decisions because the trial and appellate court decisions granted the defendant's motion to dismiss on the pleadings. The limited facts cited in the decisions and briefs are as follows. LaRue was a participant in a defined contribution savings plan maintained and administered by his employer, DeWolff, Boberg & Associates. Plan participants could direct the investment of their plan accounts. LaRue claimed that DeWolff and the plan failed to follow his investment instructions in 2001 and 2002 and that as a result his account was depleted by approximately $150,000 (as noted by the Supreme Court in its decision, the facts do not indicate the extent to which the claimed loss related to an actual reduction in LaRue's account balance or lost profits). LaRue terminated employment with DeWolff in 2001. The suit was brought in 2004. In 2006, while the suit was pending before the Fourth Circuit, LaRue withdrew his entire account (approximately $119,000) from the plan.

B. Lower Court Decisions.

1. District Court Decision. The district court decision relates solely to the issue of whether the relief requested by LaRue (a "make whole" or "restitution" award that places him in the position he would have been had the plan administrator complied with his investment directions) is available equitable relief under § 502(a)(3). The court held that such relief is not available under Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204 (2002). The § 502(a)(2) claim was not raised or discussed in the decision.

2. Fourth Circuit Decision.

   a. § 502(a)(2) Claim. The Fourth Circuit cited Russell for the proposition that relief under § 502(a)(2) must inure to the benefit of the plan as a whole, and characterized LaRue's claim as one for individual relief ("He desires recovery to be paid into his plan account, an instrument that exists specifically for his benefit. The measure of that recovery is a loss suffered by him alone. And that loss itself allegedly arose as the result of defendants' failure to follow plaintiff's own particular instructions, thereby breaching a duty owed solely to him."). The court distinguished Kuper and In Re Schering Plough Corp. Erisa Litig. because the remedies requested in those cases would benefit more than one plan participant.

   b. § 502(a)(3) Claim. The Fourth Circuit rejected LaRue's request for "make whole" equitable relief under § 502(a)(3) because such relief was not "available as a general rule" in the equity courts (instead such relief was available only in connection with breach of trust claims). The court also rejected the request for restitution because the fiduciary in question did not possess the funds allegedly owed to LaRue (those funds did not exist at all, which was the reason for the fiduciary breach claim in the first place).

C. Supreme Court Decision.

1. Majority Opinion. Justice Stevens (who was the author of the majority opinion in Russell) wrote the majority opinion. The primary holding is that "although § 502(a)(2) does not provide a remedy for individual injuries distinct from plan injuries, that provision does authorize recovery for fiduciary breaches that impair the value of plan assets in a participant's individual account."

   a. Distinguishes Russell as follows:

      i. The misconduct alleged in Russell did not relate to the financial integrity of the plan or its assets, but instead related to consequential damages arising from a delay in processing the participant's claim.

      ii. The disability plan at issue in Russell did not have individual accounts, but instead paid a defined benefit. The "entire plan" language in Russell relates to the application of § 409 to defined benefit plans in which fiduciary misconduct will not affect an individual participant's benefit entitlement unless the misconduct creates or enhances the risk of default by the entire plan. In contrast, in a defined contribution plan, fiduciary misconduct can affect an individual participant's benefit entitlement without affecting the plan as a whole. That is, in a defined contribution plan, a fiduciary breach may create the kind of harm to which § 409 applies (see subsection (i) above) even if the entire plan is not affected.

      iii. The plaintiff in Russell received all of the benefits to which she was contractually entitled.

   b. § 404(c) would have no purpose if defined contribution plan fiduciaries never had any liability under § 409 for losses in an individual account.

   c. The majority opinion declined to consider the § 502(a)(3) claim even though the Court's grant of certiorari included that issue. (In addition to his lower court arguments for a restitution or "make whole" remedy, LaRue's Supreme Court brief also argued for a "surcharge" remedy that would effectively provide monetary damages based on historical practices of the equity courts in trust cases). Based on comments made in the oral argument, the Court appeared to conclude that disposition of the § 502(a)(2) claim made the § 502(a)(3) claim irrelevant (i.e., § 502(a)(3) is available only as a "catchall" remedy when no other relief is available under §§ 502(a)(1)(B) and 502(a)(2)). See Part III.C. below for more regarding this issue.

d. In a footnote, the majority opinion states that the case was not mooted by LaRue's withdrawal from the plan because a "participant" with a claim under § 502(a)(2) includes a former employee with a colorable claim from benefits. The mootness issue was briefed at the Supreme Court when the issue was first discovered and raised after the Court agreed to review the case.

e. In a footnote, the majority opinion states that the claim for breach of fiduciary duty under §§ 502(a)(2) and 409 applies to both claims of diminished assets and claims of lost profits. The Court reasoned that under the common law of trusts, trustees are responsible for any profit which would have accrued to the trust had a breach of trust not occurred.

2. Roberts Concurring Opinion. In a concurring opinion joined by Justice Kennedy, Chief Justice Roberts argues that the majority opinion does not decide the issue of whether the availability of relief under § 502(a)(1)(B) (a claim for benefits action) would preclude LaRue's claim under § 502(a)(2). Roberts asserts that § 502(a)(2) only provides for "appropriate" relief and that relief is not appropriate if an adequate remedy is available under § 502(a)(1)(B).[2] According to the terms of the concurring opinion, such a result is desirable because it would require claimants to exhaust administrative remedies under § 503 and would allow courts to defer to administrative decisions under the abuse of discretion standard of Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 115 (1989).[3]

a. Nature of Claim for Benefits. In the concurring opinion, Roberts characterizes LaRue's claim as a claim for benefits under § 502(a)(1)(B) rather than a claim for fiduciary breach because

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[2] The same argument was made in the majority opinion of the Court in Varity with respect to § 502(a)(3) claims. There, the Court discounted the possibility that its decision would have substantial adverse effects on plan administration by explaining that in cases in which a remedy is available under § 502(a)(1)(B) or § 502(a)(2) "there will likely be no need for further equitable relief [under § 502(a)(3)], in which case such relief normally would not be 'appropriate.'" Varity at 1079. The Roberts concurrence cites this argument in Varity, but characterizes it as a holding of Varity rather than as dicta, which it appears to be.

[3] Interestingly, Roberts advances these reasons not in the interest of judicial economy, but because the claim exhaustion requirements and deferential standard of review are "safeguards" for administrators that encourage plan sponsors to voluntarily establish benefit plans.

"LaRue's right to direct the investment of his contributions was a right granted and governed by the plan," and therefore "turns on the application and interpretation of the plan terms, specifically those governing investment options and how to exercise them." The argument seems strongest when the sole fiduciary breach is a failure to follow the plan terms under § 401(a)(1)(D) (as was the case in LaRue). But what if the fiduciary breach relates to a failure to prudently select or monitor a non-fiduciary plan service provider? In that case, the nature of the fiduciary breach may be quite different from the underlying failure of the service provider and the resulting damages (which would still depend on the terms of the plan). Would such a claim nevertheless be treated as a claim for benefits under the Roberts concurrence because the ultimate relief requested is the same as if the action had been brought as a breach of the fiduciary duty under § 404(a)(1)(D)?

b. Remedies Issues. In oral arguments regarding this issue, the discussion focused almost exclusively on the remedies challenges presented by characterizing LaRue's claim as a claim for benefits rather than a breach of fiduciary duty claim. LaRue's counsel argued that characterizing the claim as a claim for benefits would preclude any relief because the plan would not have any assets or any recourse for obtaining the profits that were lost as a result of the failure to follow his investment instructions. The oral argument included a long discussion of whether the damages could be funded by taking assets from the accounts of other participants. The ERIC amicus brief that appears to have been the source of the Roberts argument asserts that suspense accounts may serve as the source of funds for this type of action or that the plan might separately sue the breaching fiduciary to obtain the assets needed to satisfy the benefit claim. An issue not addressed by the ERIC brief or the Roberts concurrence is whether the use of plan assets to remediate a fiduciary breach would violate the prohibition against exculpatory provisions under § 410(a). Presumably the argument would be that § 410(a) does not apply to benefit claims.

3. Thomas Concurring Opinion. In contrast to the majority opinion and the Roberts concurring opinion, the Thomas concurring opinion (joined by Scalia[4]) takes the straightforward approach of simply finding that all defined contribution assets are plan assets, and therefore the loss of any such assets (whether affecting all participants or only a single participant) due to a fiduciary breach is actionable under § 502(a)(2) as long as the recovery will be paid to the plan rather than directly to an individual participant.

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[4] Note that in the oral arguments, Scalia appeared to be a strong proponent of the argument made by Roberts in his concurring opinion. However, Scalia did not join the Roberts concurrence.

Although the Thomas concurring opinion by its terms is limited to § 502(a)(2) claims under defined contribution plans, if taken literally, this broad argument might have some consequences for defined benefit plan claims. Specifically, the statement in the concurring opinion that "§§ 409(a) and 502(a)(2) permit recovery of all plan losses caused by a fiduciary breach" could be used to support claims for defined benefit plan losses in which the loss does not harm any individual participant (because the plan is overfunded). *Compare*, Harley v. Minnesota Mining & Manufacturing Co., 284 F.3d 901 (8^{th} Cir. 2002), cert den. (2003, S Ct) (determining that the "limits on judicial power imposed by Article III counsel against permitting participants or beneficiaries who have suffered no injury in fact from suing to enforce ERISA fiduciary duties on behalf of the Plan" under § 502(a)(2)) and Horvath v. Keystone Health Plan East, Inc., 333 F.3d 450 (3d Cir. 2003) (holding that a plaintiff "need not demonstrate actual harm in order to have standing [under § 502(a)(3)] to seek injunctive relief requiring that [defendant] satisfy its statutorily–created disclosure or fiduciary responsibilities," but requiring such a showing of actual harm to receive individual restitution relief.)

4. What Was Not Decided. The Court's decision in LaRue did not reach the following issues.

   a. Application of ERISA Claims Procedures to § 502(a)(2) Claim. In footnote 3 of the majority opinion, the Court explained that it had not decided whether LaRue was required to exhaust administrative remedies before seeking relief in federal court pursuant to § 502(a)(2). See part III.H of this outline below for additional discussion of this issue.

   b. Availability of a Surcharge or Make Whole Remedy under § 502(a)(3). Because the majority opinion declined to address the § 502(a)(3) claim for which certiorari was granted, the Court did not decide whether a "surcharge" or "make whole" remedy constitutes equitable relief under § 502(a)(3). It appears that the next good opportunity for the Court to address that issue is a pending request for review of the Fifth Circuit's decision that payment of life insurance benefits that would be due but for a fiduciary breach is not equitable relief under § 502(a)(3). Amschwand v. Spherion Corp., 505 F.3d 342 (5th Cir. 2007) (holding that the only relief available is return of the insurance premiums paid for coverage for which the participant was not eligible even though he was repeatedly assured that he was eligible for coverage). In March the Court asked the solicitor general for the federal government's views on this issue.

III. Implications of the Decision

A. Plan Injury Versus Personal Injury.

Even after LaRue, the distinction between plan injuries and personal injuries (i.e., between relief payable to the plan and relief payable to a participant) remains relevant.

1. In the oral argument, LaRue's counsel conceded that § 502(a)(2) would not be available if the misconduct related to the misallocation of assets among participants because in that case the "plan" (consisting of the aggregated individual accounts) would not have experienced a loss. LaRue's counsel suggested that type of misconduct is only actionable under § 502(a)(3).

2. In Young v. Principal Financial Group, Inc., 401(k) plan participants sued the third party administrator, Principal Financial Group, for misrepresentation and failure to disclose the status of affiliated agents who encouraged the participants to roll over their 401(k) plan benefits to IRAs invested in Principal Financial Group proprietary investment products. The court held that notwithstanding the decision in LaRue, the participants did not have standing under § 502(a)(2)[5] because the alleged harm and losses occurred after the participants were induced to withdraw their benefits from the ERISA plan. Thus it was not sufficient for the requested remedy to include possible repayment of the distributed assets to the plan on a "make whole" basis. Instead, the harm had to relate to the assets while they were plan assets. The court explained that

   > The Court in LaRue carefully noted that it was not providing a remedy **"for individual injuries distinct from plan injuries."** Indeed, Congress created ERISA to protect employee benefit plans, not to protect all assets that were at some point part of an ERISA plan. (emphasis in original) (internal citations omitted)

   The court recognized that its decision would effectively reward the defendant for its misdeeds if the allegations of the plaintiffs were true (because the allegation was that the defendant had fraudulently induced the participants to take distributions from the ERISA plan), but nevertheless decided that permitting a claim under § 502(a)(2) would unduly expand the reach of ERISA claims to every case in which investment advice was provided with respect to assets that had formerly been ERISA plan assets.

[5] Although the plaintiff's § 502(a)(2) claims were dismissed, the court allowed their § 502(a)(3) claims to go forward. The court ruled that the available damages under § 502(a)(3) may include disgorgement of the profits that Principal earned from its breach and transfer of their benefits back to the 401(k) plan.

The rationale in Young could be used to defeat any § 502(a)(2) claim that relates to investment losses or lost profits that would have occurred post-distribution (e.g., claims relating to delays in distributing plan assets that affect what the value of the assets would have been outside of the plan). For example, in Kline v. Fidelity Investments Institutional Operations Co., a former 401(k) plan participant sued Fidelity in its capacity as recordkeeper and custodian of plan assets for delaying the distribution of employer stock certificates from the plan (the distribution took approximately 18 months to process due to a variety of errors made by Fidelity). 2008 WL 360637 (E.D. Mich. 2008). The court held that because the participant had requested and received a distribution of her entire plan benefit, any recovery by the participant would be paid to her directly rather than to the plan. The court therefore denied standing under § 502(a)(2) notwithstanding the court's earlier determination that the Fourth Circuit decision in LaRue was incorrect and that § 502(a)(2) permits individual claims for plan losses.

B. Fiduciary Status.

After LaRue, the key battleground in § 502(a)(2) claims for individual relief is likely to shift to whether the alleged misconduct was committed by a fiduciary acting in a fiduciary capacity.

1. DOL Interpretive Bulletin 75-8 (29 CFR § 2509.75-8). In an interpretive bullet issued in 1975 and last revised in 1976, the Department of Labor ("DOL") provided guidance in a Q&A format regarding the fiduciary status of certain plan representatives and service providers.

    a. In Q&A D-2, the DOL concludes that persons who have no power to make any decisions as to plan policy, interpretations, practices or procedures, but who perform the following administrative functions for an employee benefit plan, within a framework of policies, interpretations, rules, practices and procedures made by other persons, are not fiduciaries with respect to the plan:

        i. Application of rules determining eligibility for participation or benefits;

        ii. Calculation of services and compensation credits for benefits;

        iii. Preparation of employee communications material;

        iv. Maintenance of participants' service and employment records;

        v. Preparation of reports required by government agencies;

vi. Calculation of benefits;

vii. Orientation of new participants and advising participants of their rights and options under the plan;

viii. Collection of contributions and application of contributions as provided in the plan;

ix. Preparation of reports concerning participants' benefits;

x. Processing of claims; and

xi. Making recommendations to others for decisions with respect to plan administration.

The DOL reasons that a person who performs such "purely ministerial" functions is not a fiduciary because the person does not have discretionary authority or control respecting management of the plan, does not exercise any authority or control respecting management or disposition of the assets of the plan, and does not render investment advice with respect to any money or other property of the plan and has no authority or responsibility to do so.

Arguably the processing of investment elections from participants falls within the "purely ministerial" list of administrative functions under the Interpretive Bulletin. If that is correct, then a simple mistake in the performance of such function should not give rise to a fiduciary breach claim under § 502(a)(2). That is, LaRue might lose on the merits as to whether his plan recordkeeper was acting in a fiduciary capacity, even though he has standing to bring his claim under § 502(a)(2).

b. In Q&A FR-11, the DOL explains that a plan fiduciary may rely on information, data, statistics, or analyses furnished by persons performing ministerial functions for the plan, provided that the fiduciary has exercised prudence in the selection and retention of such persons. The DOL also notes that a plan fiduciary will be deemed to have acted prudently in such selection and retention if, in the exercise of ordinary care in such situation, he has no reason to doubt the competence, integrity or responsibility of such persons.

c. In Q&A FR-14, the DOL states that if a plan provides for the delegation of fiduciary responsibilities, named fiduciaries of the plan will not be liable for acts and omissions of a person who is not a named fiduciary in carrying out the fiduciary responsibilities which such person has been designated to carry out, except as provided in section 405(a) of the Act, relating to the general rules of co-fiduciary liability, and section 405(c)(2)(A) of the Act, relating in relevant part to the designation of persons to carry out fiduciary responsibilities.

d. For examples of the application of the interpretive bulletin by courts, compare Livick v. Gillette Co., 43 EBC 2025 (1st Cir. 2008) (holding that an employee of the plan sponsor was acting in a ministerial capacity when he provided an incorrect pension estimate and that the named fiduciaries of the plan were not responsible for the actions of such ministerial agent (or for his selection or training) when the fiduciaries provided clear information and did not rely upon the information provided by the ministerial agent) and Taylor v. Peoples Natural Gas Co., 49 F.3d 982 (3rd Cir. 1995) (holding that a plan fiduciary is responsible for the mistakes made by its ministerial agent in communicating a participant's eligibility for a proposed early retirement incentive).

2. Varity Corp. v. Howe. Even though the DOL interpretive bulletin appears to take a narrow view of the extent to which plan representatives and services providers are plan fiduciaries, lower courts applying LaRue may cite the Court's decision in Varity Corp. v. Howe, 516 U.S. 489 (1996) for a more expansive view of the functional test for determining whether a person is acting in a fiduciary capacity. That test extends fiduciary status not only to discretionary management and administration of a plan, but also to any exercise of a power "appropriate" to carrying out an important plan purpose.

3. Roberts Concurrence as a Sword Rather than a Shield. Tim Hauser at the Department of Labor notes that under the Roberts concurrence, a non-fiduciary mistake could give rise to a valid claim for benefits under § 502(a)(1)(B) even though the action is for a benefit that is outside of the literal terms of the plan document. In the absence of the Roberts concurrence, such a claim would fail under § 502(a)(2) because the mistake would not involve a fiduciary breach (e.g., if the mistake was made by a ministerial agent and did not involve any fiduciary breach in the retention or monitoring of the agent).

4. Costly Defense. Even though defendants may be able to defeat § 502(a)(2) claims on the basis that the alleged mistakes were not made by a fiduciary acting in a fiduciary capacity, that defense probably will not result in dismissals on the pleadings or perhaps even at summary judgment. In Young, the court explained that the issue at the motion to dismiss on the pleadings phase of the litigation is not whether the defendants will ultimately be found to have been fiduciaries, but whether the plaintiffs have alleged sufficient facts in their complaint, which taken as true, create a plausible claim to relief. The court explained that

> "Fiduciary status is a fact sensitive inquiry and courts generally do not dismiss claims at this early [motion to dismiss] stage where the complaint sufficiently pleads defendants' ERISA fiduciary status." While the documents that Defendants have proffered in support of their argument that they are not fiduciaries may ultimately establish such as fact, those documents do not present a complete picture, as Plaintiffs may well come forth with testimony and other documentary evidence which would prove their allegations of a fiduciary relationship and counter the documentary evidence submitted by Defendants.

Young, quoting In re Schering-Plough Corp. Erisa Litig., 2007 WL 2374989, at #7 (D.N.J. 2007).

C. § 502 Claim Hierarchy. Although not a holding of the case, the Roberts concurring opinion in LaRue and the oral arguments in the case suggest that the courts may apply a hierarchy in determining which claims are permitted under § 502. That is, a claim may be brought under the third priority cause of action only if the first two are not available, and may be brought under the second priority cause of action only if the first is not available. The consequences of such a hierarchy include the application of administrative claim exhaustion requirements, the standard of review, and available remedies. The priority of causes of action would be as follows:

1. Claim for Benefits under § 502(a)(1)(B). If a claim may be brought as a claim for benefits, it cannot be brought as a fiduciary breach claim under § 502(a)(2) (*see, e.g.,* Drinkwater v. Metropolitan Life Ins. Co., 846 F.2d 821 (1st Cir. 1988)) or § 502(a)(3) (*see, e.g.,* LaRocca v. Borden, Inc., 276 F.3d 22 (1st Cir. 2002)).

2. Fiduciary Breach on behalf of the Plan under § 502(a)(2). If a claim cannot be brought as a claim for benefits but is instead a claim of fiduciary breach brought on behalf of the plan, it must be brought under § 502(a)(2) rather than § 502(a)(3). The Court in LaRue did not conclusively decide that a claim under § 502(a)(2) has a higher priority than a claim under § 502(a)(3), but that decision is implied in its refusal to decide the § 502(a)(3) issue it had previously agreed to review.

3. Fiduciary Breach "Catchall" under § 502(a)(3). The last resort for a plaintiff. Varity Corp. v. Howe; *see also, e.g.,* Doyle v. Nationwide Ins. Companies & Affiliates Employee Health Care Plan, 240 F.Supp.2d 328 (E.D. Pa. 2003) (denying claim under § 502(a)(3) because the plaintiffs had an adequate remedy under § 502(a)(1)(B)).

D. Remedies Issues.

Another battleground post-LaRue will relate to the calculation of damages resulting from fiduciary breach actions under § 502(a)(2).

1. Measuring Damages. A key issue will be how to measure lost profits and other damages in cases involving the failure to follow participant directions. When does the measuring period begin and end for such failures? How are intervening distributions and withdrawals taken into account in determining damages? For example, in the LaRue case, the participant withdrew his entire benefit after commencing the litigation. How will damages be calculated post-distribution?

2. Mitigation. For cases involving a failure to follow participant instructions, will the measuring period end when a participant becomes aware of the breach and can take mitigating action? Will amounts realized from the actual, "incorrect" investments offset damages resulting from the failure?

E. Former Participant Standing.

An important issue of standing is discussed in footnote 6 of the majority opinion in LaRue. As described above, LaRue terminated employment with DeWolff in 2001. In 2006, while his lawsuit was pending before the Fourth Circuit, LaRue withdrew his entire account (approximately $119,000) from the plan. The Court explains in footnote 6 that the case was not mooted by LaRue's withdrawal from the plan because a "participant" with a claim under § 502(a)(2) includes a former employee with a colorable claim for benefits.

1. In Re Radioshack Corp. "ERISA" Litigation. The court relied upon LaRue to hold that participants had standing to bring a "stock drop" action under § 502(a)(2) despite the fact that the plaintiffs in question had cashed out their benefits under the plan and were no longer "participants" in the plan. 2008 WL 1080329 (N.D. Tex. 2008).

2. Young v. Principal Financial Group, Inc.. As described above, the court in Young ruled that, despite LaRue, the participants did not have standing under § 502(a)(2) because the alleged injuries occurred after they had received distributions from the plan. In Young, the key issue is not that the participants were former participants, but that the alleged harm occurred after their benefits were distributed from the plan.

F. ERISA Stock Drop Cases

The Court's decision in LaRue confirms that the earlier decisions in Kuper v. Iovenko; and In re Schering-Plough Corp Erisa Litigation (see above in part I.C.2 of this outline) were correct and that employer "stock drop" cases under ERISA may be brought under § 502(a)(2) even though participants who did not invest in the employer stock fund were not injured by the alleged fiduciary breach. The first stock drop case applying the holding in LaRue is Rogers v. Baxter Int'l Inc., 2008 WL 86774 (7th Cir. 2008). In Rogers, the court held that "participants in defined-contribution plans may use § 502(a)(2), and thus § 409(a), to obtain relief if losses to an account are attributable to a pension plan fiduciary's breach of a duty owed to the plan," "even though other participants are uninjured by the acts said to constitute a breach of fiduciary duty."

G. Fiduciary Liability Insurance and the "Benefits Due" Exclusion.

1. Benefits Due Exclusion. ERISA fiduciary liability policies typically do not cover losses that constitute "benefits due" under the terms of a benefit plan. That is, the policies cover losses relating to a breach of fiduciary responsibility, but will not pay benefits due under the terms of a plan even if those benefits are due to an unanticipated plan interpretation. This exclusion could have dramatic consequence if courts follow the Roberts concurring opinion and characterize many § 502(a)(2) claims as benefit claims under § 502(a)(1)(B).

2. Exception for Individual Liability for Benefits Due. Most policies contain an exception from the general "benefits due" exclusion described above that covers benefits due if the benefit liabilities are personal liabilities of a natural person (an individual rather than a corporation, association, or other entity). Thus, if courts follow the Roberts approach and characterize LaRue-type claims as benefit claims, but solve the remedies problem described in part II.C.2.b above by imposing personal liability on the breaching individual fiduciary, the fiduciary liability policies should provide coverage as long as the fiduciary is a natural person.

3. Exception for Defense Costs. Even though fiduciary liability policies do not cover benefits due under the terms of the plan, they typically cover defense costs associated with claims against fiduciaries in connection with benefit claims.

4. Possible Policy Changes. If LaRue results in a flood of litigation, fiduciary insurers may modify policies to decrease exposure. The insurers may also demand more robust subrogation clauses to pursue claims against non-fiduciary third party administrators who make the mistakes that result in § 502(a)(2) claims.

H. Application of the ERISA Claims Process to § 502(a)(2) Actions.

Although the majority opinion in LaRue expressly states that it did not decide whether a claim under § 502(a)(2) required a claimant to exhaust administrative remedies under the plan, a majority of courts considering the issue have held that such claims do not require the exhaustion of administrative remedies. *See, e.g.,* Milofsky v. American Airlines, Inc., 404 F3d 338 (5th Cir. 2006); Smith v. Sydnor, 184 F3d 356 (4th Cir. 1999); but see, Mason v. Continental Group, Inc., 763 F.2d 1219, 1226-27 (11th Cir.1985) (holding that exhaustion is required for § 510 claims and claims for breach of fiduciary duties). In contrast, claims for benefits that are "disguised" as claims for breach of fiduciary duty may be subject to an exhaustion requirements just like any claim for benefits. *See, e.g.*, Simmons v. Willcox, 911 F.2d 1077 (5th Cir.1990).

I. Welfare Plan Claims.

As recognized by counsel to LaRue during the oral argument, the decision should have little or not effect on unfunded welfare plans. Both the majority opinion and the Thomas concurring opinion still require some loss to the plan as a predicate for the § 502(a)(2) action. An unfunded plan does not have any assets and therefore generally will not have any "losses to the plan" within the meaning of § 409(a). Although the DOL has informally indicated that the decision may have application to cases in which an employer conceals the unfunded nature of the plan or its inability to pay benefits from its general assets (such as was the case in Adamson v. Armco, Inc., 44 F3d 650 (8th Cir. 1995) (dismissing claims on statute of limitations grounds)), it is not clear at all how such an action would result in a recovery by the plan rather than individual participants and beneficiaries.

Furthermore, even if funded most medical, disability, and other welfare plans would be characterized as "defined benefit plans" under the majority opinion of LaRue. Consequently, such plans would arguably be distinguished from the individual relief permitted under § 502(a)(2) for defined contribution plans and would be subject to the "entire plan" language in Russell because, according to the majority opinion in LaRue, "[m]isconcduct by the administrators of a defined benefit plan will not affect an individual's entitlement to a defined benefit unless it creates or enhances the risk of default by the entire plan."

IV. Responses by Plan Sponsors and Fiduciaries

A. Contracts with Plan Service Providers and Fiduciaries.

Plan sponsors should review service agreements with plan fiduciaries (trustees, investment managers, and claims fiduciaries) and ministerial agents (recordkeepers and other third party administrators) to determine the allocation of liability for fiduciary and non-fiduciary mistakes and the extent of any indemnification obligations.

Such agreements should also be reviewed to determine whether participant instructions are made directly to responsible vendors or are routed, or deemed to be routed, through the plan administrator or a plan fiduciary other than the vendor.

B. Procedures for and Monitoring of Ministerial Agents.

When a plan service provider makes a mistake, plan sponsors should expect that plaintiffs will bring "failure to monitor" fiduciary breach claims in addition to claims that the service provider was a fiduciary itself. Although it is not entirely clear that fiduciary breach claims under § 502(a)(2) may be brought in connection with any mistake by a ministerial agent (as opposed to mistakes with respect to actions of a ministerial agent that are relied upon by a plan fiduciary -- see the Livick decision described in III.B.1.d above), the best defense to these types of claims will be that the named fiduciary acted prudently in selecting and monitoring the service provider. Of course, establishing detailed procedures can backfire if the procedures are not carefully followed, so some care should be taken to provide flexibility in any written guidelines providing for such monitoring.

C. Transaction Statements and SPD Disclosure of Participant Responsibilities.

For participant-directed plans and investment transaction claims that are similar to the claim at issue in the LaRue case, damages may be mitigated or avoided by providing timely statements or confirmations showing all participant transactions (combined with adequate disclosure of the nature of such statements and confirmations and the participant's obligation to carefully review the statements and confirmations). The statements should advise participants of their obligation to notify the plan administrator of any errors or omissions within a specified, limited time period after receipt. Consideration should also be given to whether the statements should advise participants that they are responsible for the investment of their own account and, subject to any frequent trading or similar restrictions, are free to correct any mistakes or omissions in the investment of such account.

The Pension Protection Act generally requires participant-directed plans to provide quarterly benefit statements which could be used for the purpose described above. However, rather than affirmatively providing statements, many plans that make statements continuously available online will have instead relied upon the DOL's guidance permitting a simplified annual notice of such availability. The mitigation argument may be much weaker for these plans.

Note that statements will not assist in the mitigation of claims if the statements themselves contain errors or are not provided in a consistent, timely manner; if the statements are contradicted by the oral statements of benefit plan representatives; or if the statements are not combined with adequate disclosure of the participant's responsibility to review statements and notify the plan administrator of any discrepancies.

D. Plan Amendments to Minimize Strict Liability.

Subject to the minimum § 404(c) timing rules for investment exchange frequency and applicable qualification requirements relating to distribution notices and consents, consider amending plans (and summary plan descriptions) to indicate that transactions requests are processed when administratively practicable rather than within specified time periods.

E. 404(c) Compliance.

Review compliance with the requirements of § 404(c) of ERISA. Although compliance with § 404(c) would not preclude a claim such as that made in the LaRue case (if LaRue's allegations are true the plan failed to follow his investment directions, and therefore did not provide him an effective opportunity to exercise control over the investment of his account), it would relieve plan fiduciaries of liability for more traditional fiduciary breach claims that relate to the investment performance of particular investment options in a participant-directed plans.

F. Fiduciary Liability Insurance.

Review fiduciary liability policies to determine the scope of coverage, "benefits due" exclusions, and subrogation commitments. If the plan does not have a fiduciary liability policy, consider purchasing one.

G. Daily Valuation and Participant Direction of Investments.

Considering the litany of recent challenges to participant-directed defined contribution plans, perhaps it is time to reevaluate the notion of participant directed plans and/or a "daily valuation" trading environment. A change to a defined contribution model in which contributions are professional managed without participation direction of investment and without daily valuation would eliminate or minimize the risks associated with many of these challenges, including plan expense issues, excessive trading, 404(c) compliance, excessive investments in employer stock, administrative complexity, participant investment education, participant investment advice, QDIA compliance, and § 502(a)(2) liability for failure to comply with participant instructions.

Such an approach would raise new issues, including the prudence of investments, the monitoring of investment managers, and, for large plans, the allocation of participants to particular investment models. The approach also would not solve all challenges, including employer stock drop litigation for plans retaining significant investments in employer stock. However, many plans probably face those issues in any event due to noncompliance with § 404(c) and QDIA requirements.

Although technology has made participant-directed, daily valuation plans possible, that does not mean that the model is desirable. The old model deserves a second look.