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Point/Counterpoint: Is Rule 23(b)(1) Still Applicable to ERISA Class Actions?

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Federal courts have seen a significant increase in the number of class actions filed against retirement plan fiduciaries under the Employee Retirement Income Security Act. In the first section of this report, two attorneys with Gibson, Dunn & Crutcher, who have represented employers and officers and directors in ERISA litigation, examine the requirements for class certification in ERISA cases and conclude that the Supreme Court's recognition that some plan participants may sue to recover losses in their individual accounts may affect plaintiffs' ability to obtain mandatory class certification under the Federal Rules of Civil Procedure. The second section of the report is a response by two plaintiffs' attorneys with Keller Rohrback, who present a very different analysis of the Supreme Court decision and its potential impact on class certification.

The Defense Perspective: Rule 23(b)(1) Is Inapplicable to ERISA Class Actions

by Mark A. Perry and Paul Blankenstein

The past several years have seen a dramatic increase in the number of putative class actions filed against retirement plan fiduciaries under ERISA.

Courts and litigants frequently assume that fiduciary breach cases under ERISA warrant "automatic" class certification under Federal Rule of Civil Procedure 23(b)(1)(B), which applies to certain claims against trusts and other entities with limited assets and multiple potential claimants. This assumption is largely based on the Supreme Court's observation in the *Russell* case, which involved a defined benefit plan, that a suit under ERISA ordinarily proceeds on behalf of "the plan as a whole."[1]

Most modern ERISA pension plans, however, are not defined benefit plans; rather, they are defined contribution plans—such as 401(k) plans—in which participants' individual investments are accounted for separately. In its recent *LaRue* decision, the Supreme Court confined *Russell*'s "plan as a whole" dictum to the defined benefit pension context from which it arose, while holding that

[1] *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 140-42, 6 EBC 1733 (1985).

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participants in a defined contribution plan may sue for individualized relief.[2]

The *LaRue* decision has profound, if largely unrecognized, ramifications for the certification of ERISA cases as class actions. In particular, *LaRue* now makes clear that most fiduciary breach claims by participants in defined contribution plans cannot be certified as a class under Rule 23(b)(1)(B) as that provision has been construed by the Supreme Court in *Ortiz v. Fibreboard Corporation*.[3] Rather, such claims must meet the more demanding requirements of Rule 23(b)(3) if they are to be certified at all.

Background

ERISA is, of course, the principal federal law governing employee benefit plans, including pension and other retirement savings plans.[4] Section 502(a) of ERISA authorizes civil suits by plan participants and others; the most common civil suits proceed under Section 502(a)(2) and seek monetary recovery for an alleged breach of fiduciary duty under Section 409.[5]

The current wave of big-ticket ERISA civil litigation can generally be divided into one of two broad categories: "stock drop" suits in which ERISA plan participants complain of the availability of employer stock as an investment option, and "plan administration" suits in which participants challenge excessive advisory fees or other mechanics of how the plan is run. These lawsuits have been filed against plan sponsors (employers), plan fiduciaries, and service providers such as investment advisers.

The stock drop cases set off the recent upswing in ERISA civil litigation after the accounting scandals of the 1990s. A large drop in the value of a publicly traded company's stock often draws a suit alleging violations of the federal securities laws.[6] Participants in 401(k) plans who held company stock in their accounts also began to file suit under ERISA § 502(a), alleging that the plan fiduciaries had breached their duties by imprudently allowing plan participants to invest (or continue to invest) in the company's stock.[7] Through 2007, approximately 150 ERISA stock drop cases had been filed in the federal courts.[8]

Starting in 2006, plan administration suits became a new instrument of choice for ERISA plaintiffs, with more than 30 such cases currently pending in the federal trial and appellate courts.[9] Although the specific claims in these suits are not as uniform as in the stock drop cases, plan administration suits generally allege a breach of fiduciary duty due to excessive fees, revenue sharing, imprudence of offering actively managed funds, and related misrepresentations.[10] In these suits, which generally involve 401(k) retirement plans, the plaintiffs typically seek to obtain monetary relief that would ultimately flow to each participant's individual account.

A little remarked, but indisputable, feature of this new wave of ERISA litigation is that most of the cases have been filed as class actions—the named plaintiffs seek to represent a class of all (or most) other participants in the plan at issue. Whether or not such claims can proceed as class actions can have enormous consequences for the litigants and the court system. Alleged misconduct with only minimal financial impact on any particular participant can become major litigation when magnified across tens or even hundreds of thousands of accounts.[11] Accordingly, a recurring issue in these cases is whether and how they can be certified as class actions.

The federal courts have exclusive jurisdiction over ERISA fiduciary-breach claims,[12] and in federal court every class action must fit within one of the three subsections of Federal Rule of Civil Procedure 23(b). The class (or collective) action was originally developed by the courts of equity,[13] but the federal rules—as substantially amended in 1966 and 2003—now provide the procedure for all class actions. As the Supreme Court has explained, "courts must be mindful that [Rule 23] as now composed sets the requirements they are bound to enforce;" Rule 23 "limits judicial inventiveness," and

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[2] *LaRue v. DeWolff, Boberg & Assocs.*, 128 S. Ct. 1020, 1025-26, 42 EBC 2857 (2008).

[3] *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 832-47 (1999).

[4] *See, e.g., Egelhoff v. Egelhoff*, 532 U.S. 141, 150, 25 EBC 2089 (2001).

[5] Section 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. 29 U.S. C. § 1132(a)(2). Section 409 requires a fiduciary who has breached a fiduciary duty to "make good to such plan any losses to the plan resulting from each such breach" and to "restore . . . profits . . . made through use of plan assets." 29 U.S.C. § 1109.

[6] *See* Craig C. Martin, Matthew J. Renaud & Omar R. Akbar, *What's Up on Stock Drops?* Moench *Revisited*, 39 J. Marshall L. Rev. 605 (2005-2006).

[7] *Id*. at 615-16. These ERISA claims often accused the plan fiduciaries of failing to disclose adverse information, raising interesting questions about the interplay between ERISA's fiduciary standards and the disclosure requirements of the federal securities laws. *See Harzewski v. Guidant Corp*, 489 F.3d 799, 805, 40 EBC 2409 (7th Cir. 2007).

[8] Practicing Law Institute, *Securities Litigation: A Practitioner's Guide* 16:1 (Jonathan C. Dickey ed., 2008).

[9] Only a few of these have reached the courts of appeals. *See, e.g., Grabek v. Northrop Grumman Corp. ERISA Litig.*, No. 07-80129, slip op. (9th Cir. Oct. 11, 2007) (accepting appeal from denial of class certification); *Ruppert v. Principal Life Ins. Co.*, No. 08-8013, slip op. (8th Cir. Oct. 28, 2008) (denying motion for immediate appeal under Rule 23(f)); *Spano v. Boeing Co.*, No. 08-8032 (7th Cir.) (application for immediate appeal from grant of class certification pending); *Hecker v. Deere & Co.*, No. 07-3605 (7th Cir.) (appeal from dismissal on the merits), *affirmed*, 45 EBC 2761 (Feb. 12, 2009).

[10] *See, e.g., Abbott v. Lockheed Martin Corp.*, No. 06-00701, 40 EBC 2329 (S.D. Ill.); *Beesley v. Int'l Paper Co.*, No. 06-00703 (S.D. Ill.); *Brown v. Medtronic, Inc.*, No. 08-04904 (D. Minn.); *Tibble v. Edison Int'l*, No. 07-05359 (C.D. Cal.).

[11] *See, e.g.,* In re Rhone-Poulenc Rorer, Inc., 51 F.3d 1293, 1298 (7th Cir. 1995).

[12] 29 U.S.C. § 1132(e)(1).

[13] *See Supreme Tribe of Ben-Hur v. Caudle*, 255 U.S. 356, 366 (1921).

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"[c]ourts are not free to amend a rule outside the process Congress ordered."[14]

Rule 23(b)(1) allows class certification when prosecution of individual lawsuits would impede the legal interest of absent class members, or the threat of multiple suits may subject the other party to incompatible standards of conduct.[15] Subsection (b)(2) is available for classes seeking injunctive or corresponding declaratory relief.[16] These classes are described as mandatory, because absent class members need not be given notice and have no ability to opt out of the class.[17] Rule 23(b)(3) is the "catch-all" of class certification. In order to fit within subsection (b)(3), the court must find that "questions of law or fact common to class members predominate over" individual questions, and that class action is the superior method of adjudication.[18] Unlike under subsections (b)(1) and (2), under (b)(3) notice must be sent to absent class members, who have a right to opt out of (and not be bound by) the litigation.[19]

Until recently, a frequently recurring view among courts and litigants has been that ERISA cases are amenable to mandatory class treatment under Rule 23(b)(1)(B).[20] The Supreme Court has said that a suit on behalf of a large class of beneficiaries to "restore the subject of the trust" is a classic example of a situation in which individual adjudication by a class member "disposes of, or substantially affects" the interests of absent class members, thus warranting Rule 23(b)(1)(B) certification.[21] The theory advanced by the plaintiffs in the plan administration cases is that, like a traditional action by beneficiaries to restore the subject of a trust, an ERISA claim proceeds on behalf of the "plan as a whole," and thus any recovery must encompass all plan participants through a mandatory class certification.

The "plan as a whole" language on which most ERISA claimants rely in seeking certification is found in the Supreme Court's *Russell* decision, in which a participant in a defined benefit plan sought to recover extra-contractual damages due to the plan fiduciaries' denial of benefits.[22] Defined benefit plans consist of a general pool of assets, rather than individual dedicated accounts like in defined contribution plans.[23] A defined benefits plan, "as its name implies, is one where the employee, upon retirement, is entitled to a fixed periodic payment."[24] The *Russell* Court held that the claim was not authorized under ERISA § 502(a)(2) because "a fair contextual reading of the statute makes it abundantly clear that its draftsmen were primarily concerned with the possible misuse of plan assets, and with remedies that would protect the entire plan, rather than with the rights of an individual beneficiary."[25] This statement makes sense in the context of a defined benefit plan where each participant is guaranteed a specific retirement income, and therefore has no individualized interest in the plan assets.[26]

Most employer-sponsored ERISA plans today are not defined benefit plans, but rather are "defined contribution" plans such as those established under Section 401(k) of the Internal Revenue Code. In a defined contribution plan, each participant contributes to their own individual account, and determines which mix of investment options best suits their needs from those available within the plan. Each participant is entitled to the value of their individual account, which varies depending on the amount contributed and the performance of their investment choices.

In the February 2008 *LaRue* decision, the Supreme Court held that the difference between defined benefit and defined contribution plans has significant consequences for ERISA claimants.[27] LaRue was a participant in an employer sponsored defined contribution plan. He claimed that the fiduciary of the plan failed to make directed changes to his investments, resulting in an investment loss. He sought to recover that loss under the fiduciary breach provisions of ERISA § § 409 and 502(a)(2).[28]

The Fourth Circuit, relying on *Russell*, found that LaRue could not bring the claim under ERISA § 502(a)(2), because he only sought recovery for the impairment of his individual account.[29] The court was "skeptical that [LaRue's] individual remedial interest can serve as a legitimate proxy for the plan in its entirety," as required under *Russell*.[30]

In a subsequent opinion, the Fourth Circuit reiterated its holding that ERISA § 502(a)(2) does not provide recovery for "individual, rather than plan, losses."[31] Emphasizing *Russell*'s holding that ERISA was designed to "protect the integrity of the plan," the court affirmed that "a § 502(a)(2) claim must 'be brought in a representative capacity on behalf of the plan as a whole.' "[32] Because LaRue sought to recover "money damages to which he believes he is individually

[14] *Amchem Prod., Inc. v. Windsor*, 521 U.S. 591, 620 (1997).
[15] Fed. R. Civ. P. 23(b)(1).
[16] Fed. R. Civ. P. 23(b)(2).
[17] Fed. R. Civ. P. 23(c)(2)(A).
[18] Fed. R. Civ. P. 23(b)(3).
[19] Fed. R. Civ. P. 23(c).
[20] *See, e.g.*, Loomis v. Exelon Corp., 41 EBC 1150 (N.D. Ill. 2007) (granting class certification under Rule 23(b)(1)(B)); Beesley v. Int'l Paper Co., 44 EBC 2837 (S.D. Ill. 2008) (same); Tussey v. ABB, Inc., 42 EBC 1616 (W.D. Mo. 2007) (same); Taylor v. United Technologies Corp., 43 EBC 2825 (D. Conn. 2008) (same).
[21] *Ortiz*, 527 U.S. at 834.
[22] 473 U.S. at 136-37.
[23] *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 439, 22 EBC 2265 (1999).
[24] *Id.*
[25] *Russell*, 473 U.S. at 136-37.
[26] *Hughes Aircraft*, 525 U.S. at 439.
[27] 128 S. Ct. at 1026.
[28] *Id.* at 1022-23.
[29] *LaRue v. DeWolff, Boberg & Associates, Inc.*, 450 F.3d 570, 573-74, 38 EBC 1001 (4th Cir. 2006).
[30] *Id.* at 574.
[31] *LaRue v. DeWolff, Boberg & Associates, Inc.*, 458 F.3d 359, 361, 38 EBC 1806 (4th Cir. 2006) (opinion on denial of rehearing en banc).
[32] *Id.* at 362 (*quoting Russell*, 472 U.S. at 141 n.9).

entitled," the action was "in no sense 'representative.' "[33]

The Supreme Court reversed the Fourth Circuit, stressing the difference between a defined benefits plan and a defined contribution plan. The court held the "references to the 'entire plan' . . . are besides the point in the defined contribution context."[34] In defined contribution plans, "fiduciary misconduct need not threaten the solvency of the entire plan to reduce benefits below the amount that participants would otherwise receive."[35] Therefore, participants in defined contribution plans can bring suit "for fiduciary breaches that impair the value of plan assets in [their] individual account."[36]

The Supreme Court's *LaRue* decision was viewed by many—including many lawyers who represent plaintiffs—as a significant expansion of potential ERISA liability. The consequences of *LaRue* for the certification of ERISA fiduciary-breach claims as class actions, however, has received much less attention. In our view, that should change.

Discussion

In many ERISA cases that are filed as ostensible class actions, the plaintiffs seek certification under Rule 23(b)(1)(B). This reflects a strategic decision to avoid Rule 23(b)(3), which contains prerequisites to certification (*i.e.*, the predominance and superiority inquiries) and additional safeguards for absent class members (mandatory notice and opt-out rights) not found in other provisions of the Rule. It also reflects the reality that the other "mandatory" provisions of Rule 23(b)—which apply to cases raising the risk of inconsistent judgments (Rule 23(b)(1)(A)) or for injunctive relief (Rule 23(b)(2))—generally are not available to ERISA claimants seeking monetary relief for alleged breaches of fiduciary duty.[37]

The Supreme Court construed the scope of Rule 23(b)(1)(B) in its seminal *Ortiz* decision. The parties in *Ortiz* sought to certify a class of asbestos plaintiffs under Rule 23(b)(1) on a limited fund theory.[38] The parties—the asbestos manufacturer, its insurance companies, and the named plaintiffs—agreed to establish a trust to process and pay class members' personal injury claims.[39] The Supreme Court held that the class of personal injury plaintiffs could not be certified under Rule 23(b)(1)(B) because mass tort actions aggregated for settlement purposes do not fit the historical limited fund rationale.[40]

Ortiz makes clear that Rule 23(b)(1)(B) was written "to capture the 'standard' class actions recognized in pre-Rule practice."[41] Unlike Rule 23(b)(3), which is "forward looking," subsection (b)(1)(B) is confined to its historical antecedents: suits that may "dispose[] of, or substantially affect[], the interests of absent class members."[42] The court described the classic "risk of impairment" cases, listing limited fund cases, suits for reorganization of fraternal-benefit societies, suits by beneficiaries to "restore the subject of the trust," and shareholder suits to declare dividends.[43] Placing a limiting construction on Rule 23(b)(1)(B) was considered "prudent" in order to "minimize[] potential conflict with the Rules Enabling Act, and avoid[] serious constitutional concerns raised by the mandatory class resolution of individual legal claims."[44]

Under *Ortiz*, some ERISA suits brought on behalf of a plan "as a whole" may be amenable to certification under Rule 23(b)(1)(B), because they are equivalent to traditional suits by beneficiaries to recover the subject of the trust. Such suits would include many claims involving traditional defined benefit plans, as well as a few claims involving defined contribution plans.

But suits that do not fit squarely into the historical antecedents described in *Ortiz*—including most suits for monetary relief by participants in defined contribution plans—cannot proceed under Rule 23(b)(1)(B) unless the plaintiffs can meet the three-part test set forth by the Supreme Court. That test requires that (1) the fund be insufficient to pay the total of the aggregated liquidated claims, (2) the whole fund be devoted to the claims, and (3) claimants must be treated equitably among themselves.[45]

LaRue has undeniable consequences for class certification in the defined contribution context, because it destroyed the earlier notion that a suit brought under ERISA § 502(a)(2) is always on behalf of the plan "as a whole." The Supreme Court made clear that the type of plan makes a material difference to the scope of relief available under ERISA, and thus to the type of claim that a participant may pursue.

Although participants in a defined benefit plan must proceed on behalf of the plan as a whole, participants in a defined contribution plan may bring suit for "fiduciary breaches that impair the value of plan assets in [their] individual account."[46] The very fact that participants

[33] *Id.*
[34] *LaRue*, 128 S. Ct. at 1025.
[35] *Id.*
[36] *Id.* at 1026.
[37] Rule 23(b)(1)(A) is not available because there is no "risk of inconsistent judgments" in actions for damages. *See McDonnell Douglas Corp. v. U.S. District Court for the Central District of Cal.*, 523 F.2d 1083, 1086 (9th Cir. 1975). Rule 23(b)(2), by its terms, applies only to claims for injunctive or corresponding declaratory relief, and is generally not applicable to claims for damages or other monetary relief. *In re Allstate Ins. Co.*, 400 F.3d 505, 507 (7th Cir. 2005). ERISA § 502(a)(3) authorizes civil suits limited to "enjoin[ing] any act or practice which violates [ERISA]" or "obtain[ing] other appropriate equitable relief," but the scope of monetary relief available under that section is extremely limited. *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 27 EBC 1065 (2002).
[38] 527 U.S. at 825.
[39] *Id.* at 827.
[40] *Id.* at 842.
[41] *Id.*
[42] *Id.*
[43] *Id.* at 833-34.
[44] *Id.* at 842.
[45] *Id.* at 838-39.
[46] *LaRue*, 128 S. Ct. at 1026.

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may sue to recover the losses in their individual accounts takes these cases out of the traditional domain of Rule 23(b)(1)(B). An adjudication as to one participant no longer determines or impedes the rights of other participants.

"Because a defined contribution plan is essentially the sum of its parts, losses attributable to the account of an individual participant are necessarily 'losses to the plan.' "[47] Loss recovered is not distributed to the plan generally and indiscriminately, however; recovery is allocated to each individual account according to the amount of loss within that account.[48] Many courts of appeals have already recognized the individual nature of the relief authorized in *LaRue*.[49]

The very nature of the plaintiffs' claims in stock drop and plan administration cases shows that the suits are not brought on behalf of the plan "as a whole." Rather than alleging an injury that harms all participants generally and indiscriminately, plaintiffs in these suits allege breaches that injure some participants, but do not affect others; breaches that injure participants in varying amounts depending upon their individual investment choices; and breaches that injure some participants while benefiting others.

LaRue's recognition of an individualized right to bring suit to recover for such losses also has due process implications. Mandatory certification under Rule 23(b)(1)(B) would prohibit absent participants from later bringing individual claims for losses in their own accounts—the absent class members' claims would fall or rise with those of the named class plaintiffs. "The legal rights of absent class members . . . . are resolved regardless of their consent, or, in a class with objectors, their express wish to the contrary."[50] "[T]he Rules Enabling Act and the general doctrine of constitutional avoidance would jointly sound a warning of the serious constitutional concerns that come with any attempt to aggregate individual" damages claims under Rule 23(b)(1)(B).[51]

Two real-world lawsuits will serve to illustrate the issue addressed in this article. Both are from California; both ultimately may be decided by the Ninth Circuit; and both involve the question whether an ERISA class action can be certified under Rule 23(b)(1)(B).

In *Kanawi v. Bechtel Corp.*,[52] a former Bechtel employee and participant in Bechtel's defined contribution plan brought suit under ERISA § 502(a)(2) for breach of fiduciary duty due to excessive fees, prohibited transactions, inclusion of imprudent investment options, and failure to disclose revenue sharing. Plaintiffs moved for class certification under Rule 23(b)(1), (2), and (3). Discussing commonality under Rule 23(a), the court noted that "[b]efore *LaRue*, recovery under ERISA § 502(a)(2) was recognized to be on behalf of a plan—individuals could not recover for their own losses."[53] The court determined that common issues of law predominated because "*LaRue* did not overrule that widely-accepted tenet of ERISA law."[54] After determining that the subsection (a) requirements were met, the court certified the class under Rule 23(b)(1) because there were "more than 17,000 individuals [who] are or have been members of the Plan."[55] The court recognized that each participant "could individually file suit for damages arising from the same conduct," but found "[t]his would create a risk of 'inconsistent and varying' adjudications, resulting in 'incompatible standards of conduct' for Defendants."[56]

In re Computer Sciences Corp.[57] also involved a participant in an employer's defined contribution plan bringing a claim for breach of fiduciary duty under ERISA § 502(a)(2). The participant alleged that Computer Sciences, as fiduciary, made negligent misrepresentations, imprudently offered company stock as an investment option, and failed to monitor the stock fund.[58] The plaintiffs moved to certify the class under either Rule 23(b)(1) or (2), but the court denied the motion because the class did not meet the requirements of either subsection. The court concluded that subsection (b)(1)(A) was not implicated because there was little chance of "diametrically opposed injunctive orders."[59] Even if a court were to enter an order enjoining defendants from further violations of ERISA, it is unlikely "another court will order Defendants to violate their ERISA fiduciary obligations."[60] After noting that *LaRue* allowed participants in a defined contribution plan to "bring ERISA 502(a)(2) claims on their own behalf," the court ruled certification under Rule 23(b)(1)(B) improper because "putative class members have an individual remedy."[61]

Although the court in *Kanawi* recognized that *LaRue* gives defined contribution plan participants the right to bring individual suits, the court failed to recognize the implication of that change for the class certification decision. After *LaRue*, a suit under ERISA § 502(a)(2) may still be brought "on behalf of the plan," but is not necessarily on behalf of the plan "as a whole." As the *Computer Sciences* decision illustrates, this is a critical distinction that, if implemented at the class-certification stage, may be outcome-determinative on the question of class certification.

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[47] *LaRue*, 128 S. Ct. at 1028 (Thomas, J., concurring).
[48] *In re Mut. Funds Inv. Litig.*, 529 F.3d 207, 218 (4th Cir. 2008).
[49] *See Rogers v. Baxter Int'l, Inc.*, 521 F.3d 702, 43 EBC 1769 (7th Cir. 2008); *Evans v. Akers*, 534 F.3d 65, 44 EBC 1385 (1st Cir. 2008); *In re Mut. Funds Inv. Litig.*, 529 F.3d 207, 43 EBC 2945 (4th Cir. 2008); *Nichols v. Alcatel USA, Inc.*, 532 F.3d 364, 44 EBC 1001 (5th Cir. 2008).
[50] *Ortiz*, 527 U.S. at 847.
[51] *Id.*
[52] 45 EBC 1470 (N.D. Cal. Nov. 3, 2008).
[53] *Id.* at 7.
[54] *Id.*
[55] *Id.* at 12.
[56] *Id.*
[57] No. 08-02398, slip op. (C.D. Cal. Sept. 2, 2008).
[58] *Id.* at 1-2.
[59] *Id.* at 3.
[60] *Id.*
[61] *Id.* at 4.

The Supreme Court has unambiguously warned against an expansive reading of Rule 23(b)(1).[62] Because of the mandatory nature of Rule 23(b)(1), its use must be confined to cases in which individual adjudications "would be dispositive of the interests of the other members not parties" to the adjudication.[63] Actions seeking monetary relief that will flow into an individual's account are simply not dispositive of other parties interests and are not analogous to the historical antecedents to Rule 23(b)(1). Because the stock drop and plan administration cases brought under ERISA generally cannot meet the Supreme Court's test, they cannot be certified under Rule 23(b)(1).

This is not to say that ERISA claims can never be certified as class actions. The Supreme Court has made clear that Rule 23's "growing edge . . . would be the opt-out class authorized by subdivision (b)(3), not the mandatory class under subdivision (b)(1)(B)."[64] Since the stock drop and plan administration cases represent the growing edge of ERISA litigation, it is fitting that they should be certified, if at all, under Rule 23(b)(3). Although this creates additional hurdles to class certification, it also affords additional—and necessary—protections to defendants and absent class members.

Conclusion

LaRue confirms that most claims for breach of fiduciary duty under ERISA, brought by participants in 401(k) and other defined contribution plans seeking monetary relief, cannot be certified as mandatory class actions under Rule 23(b)(1)(B). Rather, such claimants must satisfy the more rigorous requirements, and the more robust protections, of Rule 23(b)(3) before their claims can proceed on a class basis.

[62] *Ortiz*, 527 U.S. at 842.
[63] Fed. R. Civ. P. 23(b)(1)(B).
[64] *Ortiz*, 527 U.S. at 862.

The Plaintiff's Perspective: Rule 23(b)(1) Has Continuing Applicability to ERISA Class Actions

By Derek W. Loeser and Benjamin Gould

Most litigation under ERISA used to arise from defined benefit plans—retirement plans that, as their name suggests, promise participants a particular annual income after they retire. The well-known increase in defined contribution plans—plans that establish individual retirement accounts for participants' investments—means that the typical ERISA case today arises from an individual account plan of one kind or another.

Defendant fiduciaries in these individual account cases have often argued that § 502(a)(2) of ERISA, which authorizes plan participants to sue fiduciaries who have breached their duties and obtain relief for the plan,[65] only authorizes such actions when the breach of duty affected the entire plan—that is, *every* individual account. Relying on a phrase from the Supreme Court's decision in *Massachusetts Mutual Life Insurance Co. v. Russell*, defendants would argue that if the breach affected a subset of plan participants, a plaintiff was not seeking relief on behalf of "the plan as a whole," and so could not invoke § 502(a)(2).[66] The Supreme Court's decision last year in *LaRue* disagreed, holding that ERISA § 502(a)(2) authorizes participants in an individual account plan to sue on behalf of a subset of plan participants, or even for relief that flows only to the retirement plan account of the individual plaintiff.[67] As the Court succinctly explained, this was still relief on behalf of the plan under the plain language of ERISA.[68]

In light of this history, the above analysis by Messrs. Perry and Blankenstein is highly ingenious, but entirely unpersuasive. The authors argue that, despite appearances, *LaRue* represents not a palpable win for ERISA plaintiffs and a rebuff to a favorite argument of the ERISA defense bar, but a "profound, if largely unrecognized" victory for ERISA defendants.[69] *LaRue*, they assert, makes clear that plaintiffs who seek relief on behalf of fewer than all individual accounts cannot be certified as class actions under Federal Rule of Civil Procedure 23(b)(1), but "must meet the more demanding requirements of Rule 23(b)(3) if they are to be certified at all."[70]

A fair reading of *LaRue* indicates that the case stands for a quite different, if not an entirely opposing, proposition. Not only does nothing in the decision prevent an individual participant from bringing an action under ERISA § 502(a)(2) for losses to his account and to others similarly situated, but the holding actually emphasizes that any distinction between individual accounts and the plan itself is illusory. For that reason, a fiduciary duty action under ERISA is the perfect vehicle for a Rule 23(b)(1) class action. It allows plaintiffs with rights in a common retirement plan to have those rights adjudicated together, so that defendants are subjected to the same legal standard and no absent participant's rights in the plan are impaired.

[65] ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2).
[66] *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 140, 142 n.9, 6 EBC 1733 (1985).
[67] *LaRue v. DeWolff, Boberg & Assocs., Inc.*, 128 S. Ct. 1020, 42 EBC 2857 (2008).
[68] *See id.* at 1026; *see also id.* at 1029 (Thomas, J., concurring).
[69] Perry and Blankenstein, *supra.*
[70] *Id.*

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What *LaRue* Held

In 1985, when defined benefit plans were more common than they are now, the Supreme Court decided *Russell*. There, a participant in a defined benefit plan, proceeding under ERISA § 502(a)(2), argued that she was entitled to extracontractual damages that she had sustained because of a fiduciary's breach of duty. The Court held that ERISA § 502(a)(2) did not authorize that relief, saying that the provision was meant to provide relief to "the plan as a whole," rather than directly to individuals.[71] In the years following *Russell*, defendants sought to make use of this language whenever they could. They argued that "the plan as a whole" language—which is sensible enough when applied to a defined benefit plan, where no participant has a cordoned-off interest in particular plan assets—applied to individual account plans as well. Under defendants' reading of *Russell*, participants who asked for relief on behalf of only their account, or indeed on behalf of anything less than all individual accounts, could not recover under ERISA § 502(a)(2). Most courts rejected the argument.[72]

Finally, in *LaRue*, the Supreme Court nailed the door shut on the argument. It clarified that *Russell*'s "references to the 'entire plan' . . . are beside the point in the defined contribution context."[73] It is true, the Court said, that ERISA § 502(a)(2) authorizes recovery only on behalf of the plan and not on behalf of individuals, but recovery to individual accounts simply *is* recovery to the plan. Pursuing relief on behalf of one's own *plan* account, or on behalf of a subset of *plan* accounts, is therefore authorized under ERISA § 502(a)(2).

That is what *LaRue* held. There is no suggestion in the decision that when a breach of duty affects less than the entirety of an individual account plan, relief under ERISA § 502(a)(2) is somehow individualized in nature—let alone any suggestion that Rule 23(b)(1) class certification is no longer available in such situations. That, however, is the argument that Perry and Blankenstein make. They argue that (1) *LaRue* authorizes only individual relief, (2) class certification under Rule 23(b)(1)(B) requires that the entire plan be affected by the putative class action, and (3) therefore *LaRue* precludes certification under Rule 23(b)(1) for most claims involving defined contribution plans. In our view, the law supports none of these propositions.

[71] *Russell*, 473 U.S. at 140.

[72] *See, e.g.*, *In re Schering-Plough Corp. ERISA Litig.*, 420 F.3d 231, 35 EBC 1801 (3d Cir. 2005) (rejecting the argument); *Milofsky v. Am. Airlines, Inc.*, 404 F.3d 338, 34 EBC 1801 (5th Cir. 2005) (accepting it), *rev'd en banc*, 442 F.3d 311 (5th Cir. 2006); *Kuper v. Iovenko*, 66 F.3d 1447, 19 EBC 1969 (6th Cir. 1995) (rejecting it); *Kling v. Fidelity Mgmt. Trust Co.*, 270 F. Supp. 2d 121, 32 EBC 1510 (D. Mass. 2003) (rejecting it); *see also Woods v. Southern Co.*, 396 F. Supp. 2d 1351, 35 EBC 2793 (N.D. Ga. 2005) (rejecting argument and citing cases).

[73] *LaRue*, 128 S. Ct. at 1025.

LaRue Does Not Authorize "Individualized" Relief

One of Perry and Blankenstein's main contentions is that *LaRue* authorizes only a particular kind of recovery for individual account plans under § 502(a)(2). The authors assert that where a breach of fiduciary duty does not affect all individual accounts in the same way, *LaRue* makes it clear that participants necessarily seek recovery on behalf of their individual accounts, and not the plan. And this means that there is "an individualized right to bring suit to recover for . . . losses" resulting from fiduciary breaches.[74]

The problem with this argument is that *LaRue* never speaks of "the individual nature of the relief" for participants in individual account plans, or of their "individualized right to bring suit." Quite the opposite: the holding of *LaRue* is that the distinction between individual accounts and "the plan as a whole" is illusory. The Court took pains to make this clear, saying that § 502(a)(2) "does not provide a remedy for individual injuries distinct from plan injuries."[75] In fact, it is a solecism even to speak of "individual injuries" or a corresponding "individualized right to bring suit." For defined contribution plans, individual accounts *are* the plan, and vice versa. The difference between individual accounts and the plan as a whole is a difference in degree, not in kind.[76]

Indeed, Perry and Blankenstein at some level seem to realize this, but slip from speaking of "losses to the plan" to speaking of individual loss. They quote Justice Thomas's concurrence, which quite explicitly rejects any distinction between a plan and the individual accounts therein: "Because a defined contribution plan is essentially the sum of its parts, losses attributable to the account of an individual participant are necessarily 'losses to the plan.' "[77] But immediately thereafter, the slippage occurs. In response to Justice Thomas, Perry and Blankenstein assert, "Loss recovered is not distributed to the plan generally and indiscriminately, however; recovery is allocated to each individual account according to the amount of loss within that account."[78]

That seems an inadequate response. The authors recognize that losses to individual accounts are losses to the plan, but maintain that it makes a difference that recovery is allocated to individual accounts based on the loss each account suffered. But if recovery is to the plan, it is unclear what difference the task of allocating recovery to each account is supposed to make.[79] Even in the defined benefit context, recovery on behalf of the plan is eventually allocated differently to each partici-

[74] Perry and Blankenstein, *supra*.

[75] 128 S. Ct. at 1026.

[76] *See id.* at 1029 (Thomas, J., concurring).

[77] *Id.* (quoted in Perry and Blankenstein, *supra*).

[78] Perry and Blankenstein, *supra*.

[79] *See, e.g.*, *Berman v. Narragansett Racing Ass'n*, 48 F.R.D. 333 (D.R.I. 1969) (class certified under Rule 23(b)(1); contract with defendant race tracks was the same among the plaintiff class, but amounts of recovery would be different for each, depending on how much each had wagered) (*cited* in 7AA Charles Alan Wright et al., Federal Practice and Procedure § 1774).

pant, based on years of service, salary, or other factors. Saying that the existence of individual accounts somehow makes defined contribution plans different is a bald conclusion, not an answer.

More importantly, in both the defined benefit and the defined contribution contexts, no matter how much the amount of recovery is subdivided, all of it is recovered on behalf of the plan. That is what the text of ERISA demands. ERISA § 502(a)(2) creates a cause of action to enforce the liability created by ERISA § 409(a), and § 409(a) provides that fiduciaries are liable "to make good *to [the] plan* any losses" resulting from a breach of duty.[80] Section 502(a)(2), therefore, ensures that recovery, even in the defined contribution context, goes only to the plan itself. Neither the plain language of the statute nor *LaRue* speaks of recovery on behalf of individual accounts as distinct from recovery on behalf of the plan. If recovery, as a matter of law, is made on behalf of the plan, the right of recovery cannot be an individual right.

Certification Under Rule 23(b)(1)(B) Does Not Require That the Entire Plan Be Affected by a Breach

The inherently representative nature of actions under ERISA § 502(a)(2), as we have just noted, disposes of Perry and Blankenstein's argument, even if they are right about everything else. If the right of recovery under § 502(a)(2), even for defined contribution plans, is not "individualized"—if, in other words, the right of recovery inures not to the individual but to the plan—then the contention that Rule 23(b)(1) is inapplicable can't get off the ground. Unfortunately, though, some of the other things the authors have to say about Rule 23(b)(1) are not accurate.

Perry and Blankenstein argue that *Ortiz v. Fibreboard Corp.*, 527 U.S. 805 (1999), which held that a fund limited only by the parties' agreement was not a "limited fund" under Rule 23(b)(1)(B), forecloses certification of *LaRue*-type class actions under that rule. When a class action asks for relief to less than the "plan as a whole," the authors argue, the action is "not analogous to the historical antecedents to Rule 23(b)(1)," and is therefore forbidden under *Ortiz*.[81]

What their heavy emphasis on *Ortiz* disregards, though, is that "limited fund" cases represent only one species of class action that can be certified under Rule 23(b)(1)(B). To be sure, *Ortiz* cautions that "when [Rule 23(b)(1)(B)] was devised to cover limited fund actions, the object was to stay close to the historical model."[82] In the same breath, though, the Court stresses that Rule 23(b)(1)(B) "covers more historical antecedents than the limited fund."[83] Indeed, one of these historical antecedents was a class action alleging " 'a breach of trust' " by a fiduciary that affects " 'the members of a large class' of beneficiaries."[84] A *LaRue*-type class action for losses to a plan caused by breaches of fiduciary duty fits squarely within this historical antecedent, and Perry and Blankenstein provide no reason (or historical evidence) to think otherwise.

The other problem with analogizing *LaRue*-type class actions to limited fund cases is that the two kinds of cases present two different kinds of "impair[ment]" of absent class members' "ability to protect their interests."[85] In limited fund cases, the impairment comes from the possibility that the fund may not be sufficient to satisfy all class members' injuries. In *LaRue*-type class actions, the impairment is legal in nature. The plaintiffs in such cases allege that the same defendants breached the same fiduciary duties by actions that damaged the plaintiffs in the same way, though in differing amounts. Adjudication of one plaintiff's claim, therefore, will have a potentially preclusive effect on the claims of others.[86] It is agreed that Rule 23(b)(1)(B) is a perfect vehicle for cases where individual adjudications would create a preclusive effect.[87] And for that reason, Rule 23(b)(1)(B) certification is appropriate in fiduciary breach actions by participants in individual account plans, whether the breach affected every participant to the same extent or not.

Certification Under Rule 23(b)(1)(A) Is Wholly Appropriate in ERISA Fiduciary Breach Class Actions

There is a final problem with Perry and Blankenstein's treatment of ERISA class actions. The authors spend a great deal of time contending that Rule 23(b)(1)(B) is inapplicable to *LaRue*-type class actions, and as we have seen, that contention is mistaken. Yet even if 23(b)(1)(B) were unavailable to plaintiffs, it still would not follow that Rule 23(b)(1) is inapplicable to *LaRue*-type class actions, as Perry and Blankenstein

[80] ERISA § 409(a) (emphasis added), 29 U.S.C. § 1109(a).
[81] Perry and Blankenstein, *supra*.
[82] 527 U.S. at 842.
[83] *Id.*; *see also Hilton v. Wright*, 235 F.R.D. 40, 53 (N.D.N.Y. 2006) ("Certification under Rule 23(b)(1)(B) is not reserved only for those bringing 'limited fund' claims."); *Ingles v. City of New York*, No. 01-8279, 2003 WL 402565, at *8 (S.D.N.Y. Feb. 20, 2003) (stating that "defendants' contention that Rule 23(b)(1)(B) applies only in 'limited fund' situations where 'claims are made by numerous persons against a fund insufficient to satisfy all claims' is incorrect," and citing cases); *In re Ikon Office Solutions, Inc.*, 191 F.R.D. 457, 24 EBC 2008 (E.D. Pa. 2000) (certifying ERISA class action under Rule 23(b)(1)(A) and (b)(1)(B) and noting that "Rule 23(b)(1) is not exclusively applied in limited fund classes").
[84] *Id.* at 834 (quoting Fed. R. Civ. P. 23 advisory comm. notes).
[85] Fed. R. Civ. P. 23(b)(1)(B).
[86] *See, e.g.*, *In re Tyco Int'l, Ltd.*, 38 EBC 2790 (D.N.H. 2006); *In re Enron Corp. Sec., Derivative & ERISA Litig.*, No. MDL-1446, 2006 WL 1662596, at *13-15 (S.D. Tex. June 7, 2006); *Rogers v. Baxter Int'l, Inc.*, 37 EBC 2523 (N.D. Ill. 2006); *In re Williams Cos. ERISA Litig.*, 231 F.R.D. 416, 35 EBC 2173 (N.D. Okla. 2005); *In re WorldCom, Inc. ERISA Litig.*, 33 EBC 2291 (S.D.N.Y. 2004); *Rankin v. Rots*, 220 F.R.D. 511, 32 EBC 2124 (E.D. Mich. 2004).
[87] *In re Integra Realty Res., Inc.*, 345 F.3d 1246 (10th Cir. 2004); *Tilley v. TJX Cos.*, 345 F.3d 34, 43 n.7 (1st Cir. 2003) (citing *Washington v. Aircap Indus.*, 831 F. Supp. 1292 (D.S.C. 1993)); *In re Phar-Mor, Inc. Sec. Litig.*, 875 F. Supp. 277 (W.D. Pa. 1994).

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claim,[88] since Rule 23(b)(1)'s other half, 23(b)(1)(A), would still apply. That part of Rule 23(b)(1) provides that a class action is maintainable if individual actions would create a risk of "inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class."[89] While Rule 23(b)(1)(B) "looks to possible prejudice to the putative class members," Rule 23(b)(1)(A) "considers possible prejudice to the defendants."[90]

The authors try to dispose of Rule 23(b)(1)(A) in a footnote, but their effort strikes us as thoroughly unconvincing. They say the rule is unavailable "because there is 'no risk of inconsistent judgments' in actions for damages.' "[91] Under ERISA, however, awards of damages do in fact risk "establish[ing] incompatible standards of conduct for the party opposing the class."

For one thing, ERISA fiduciaries have a duty to treat similarly situated participants and beneficiaries alike.[92] Thus, a series of individual actions by participants wronged by the same breach of duty would indeed establish incompatible standards of conduct. Recompensing one wronged participant but not another is simply not an option under ERISA. Since ERISA fiduciaries "are obliged by law to treat the members of the class alike," *LaRue*-type actions are perfectly suited for certification under Rule 23(b)(1)(A).[93]

Second, as *LaRue* confirms, plaintiffs suing under § 502(a)(2) seek to remedy injury *to the plan* and enforce fiduciary duties owed *to the plan*.[94] Any judgment obtained under § 502(a)(2), therefore, necessarily binds the fiduciary in his dealings with the *plan*, rather than merely in his dealings with individual participants. Two conflicting judgments that arise out of the same breach of duty to the plan, therefore, would indeed establish incompatible standards of conduct for the fiduciary.

It is also helpful to look at this question from a common sense perspective. Rule 23(b)(3) provides class members with an absolute right to notice and to opt out—while Rule 23(b)(1) and (b)(2) do not—because 23(b)(3) classes lack the "cohesiveness and homogeneity of interests" that 23(b)(1) and (b)(2) classes possess.[95] But when an ERISA fiduciary breach class seeks relief to the plan for a breach that entitles every affected participant to a remedy, the class by definition is cohesive and homogeneous. It makes little sense to apply 23(b)(3)'s right to notice and to opt out—or to suppose that it was intended to apply—to such cases.[96]

Finally and perhaps most importantly, the law simply does not support the position that Perry and Blankenstein urge. Courts routinely certify ERISA fiduciary breach class actions under Rule 23(b)(1)(A) and for sound reason—ERISA expressly authorizes a participant to bring a breach of fiduciary duty claim on behalf of the plan, and nothing in *LaRue* restricts a participant to seeking relief solely on behalf of his plan own account where the conduct about which he complains caused injury to other participants as well.[97] In this regard, Perry and Blankenstein's argument is clever but not supported by the actual holding of *LaRue*.

Conclusion

LaRue confirms that, in the defined contribution setting, there is no distinction between relief to an individual account and relief to the plan. Because a fiduciary breach action under ERISA is inherently representative—because it is always brought on behalf of the plan and seeks relief to the plan, and not to an individual participant—certification under Rule 23(b)(1)(A) and (B) remains appropriate in ERISA class actions.

In fact, after *LaRue*, the need and logic for such certification is even clearer. The Supreme Court, by confining *Russell*'s "plan as a whole" language to the defined benefit plans in which it was born, has rejected the efforts of those who would erect formalistic barriers between the victims of fiduciary breaches and the relief Congress designed for them in ERISA.

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[88] *See* Perry and Blankenstein, *supra*: "[S]uch claims must meet the more demanding requirements of Rule 23(b)(3) if they are to be certified at all."

[89] Fed. R. Civ. P. 23(b)(1)(A).

[90] *In re Ikon Office Solutions, Inc.*, 191 F.R.D. 457, 466 (E.D. Pa. 2000).

[91] Perry and Blankenstein, *supra* (*citing McDonnell Douglas Corp. v. U.S. Dist. Court for the Cent. Dist. of Cal.*, 523 F.2d 1083, 1086 (9th Cir. 1975)).

[92] This is referred to as the "duty of impartiality," a term taken from the common law of trusts. *See Morse v. Stanley*, 732 F.2d 1139, 5 EBC 1602 (2d Cir. 1984); *Struble v. N.J. Brewery Employees' Welfare Trust Fund*, 732 F.2d 325, 5 EBC 1676 (3d Cir. 1984), *abrogated on other grounds by Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989); *Jackson v. Truck Drivers' Union Local 42 Health & Welfare Fund*, 933 F. Supp. 1124 (D. Mass. 1996); *see also* Restatement (Second) of Trusts § 232 (1959).

[93] *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 614 (1997) (citation and internal quotation marks omitted).

[94] *Larue*, 128 S. Ct. 1020, 1026 ("[Section] 502(a)(2) does not provide a remedy for individual injuries distinct from plan injuries . . . ."); *Kuper v. Iovenko*, 66 F.3d 1447, 1452-53 (6th Cir. 1995) (holding that ERISA "contemplates that breaches of fiduciary duty injure the plan, and, therefore, any recovery under such a theory must go to the plan").

[95] Allison v. Citgo Petroleum Corp., 151 F.3d 402, 412 (5th Cir. 1998).

[96] *See* Fed. R. Civ. P. 23 advisory comm. notes ("In the degree there is cohesiveness or unity in the class and the representation is effective, the need for notice to the class will tend toward a minimum.").

[97] *See, e.g.*, *Piazza v. Ebsco Indus., Inc.*, 273 F.3d 1341, 27 EBC 1021 (11th Cir. 2001); *Alvidres v. Countrywide Fin. Corp.*, No. 07-5810, 2008 WL 1766927, at *3 (C.D. Cal. Apr. 16, 2008); *In re Polaroid ERISA Litig.*, 240 F.R.D. 65, 39 EBC 1974 (S.D.N.Y. 2006); *In re Williams Cos. ERISA Litig.*, 231 F.R.D. 416, 35 EBC 2173 (N.D. Okla. 2005); *In re CMS Energy ERISA Litig.*, 225 F.R.D. 539, 32 EBC 2613 (E.D. Mich. 2004).