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CLASS ACTIONS

The Continuing Applicability of Rule 23(b)(1) to ERISA Actions for Breach of Fiduciary Duty

By Derek W. Loeser and Benjamin Gould

Introduction

Class actions under the Employee Retirement Income Security Act of 1974 (ERISA) are common because ERISA is designed to encourage them. As we will explain, the inherently representative nature of a breach of fiduciary duty claim under ERISA, and the sort of duties that fiduciaries owe participants and beneficiaries, mean that class certification under Fed. R. Civ. P. 23(b)(1) should be—and generally is—a matter of course when a claim for fiduciary breach is asserted.

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Recently, however, there have been suggestions that Rule 23(b)(1) does not apply to breach of duty actions under ERISA. One must ignore a good deal of law, and an even larger deal of logic, to come to this conclusion. It seems worthwhile, though, to take the time to show its flaws—for if accepted, it would needlessly and nonsensically interfere with the ability of aggrieved plan participants to pursue relief efficiently and economically in a class action. This article, then, has two purposes. The first is simply to point out why breach of duty actions under ERISA are so well suited to Rule 23(b)(1). The second is to discuss the implausibility of recent arguments to the contrary.

ERISA Section 502(a)(2): Remedy for Breaches of Fiduciary Duty

Before we can begin the discussion of Rule 23(b)(1), we must understand how ERISA allows participants and beneficiaries to enforce fiduciary duties owed to them. Section 409(a) of ERISA imposes liability on fiduciaries for breaches of their duties and provides for relief.[1] A separate remedial section, ERISA section 502(a)(2),[2] creates a cause of action to enforce section 409(a) by authorizing participants and beneficiaries to sue for relief under section 409(a). But when a partici-

[1] ERISA § 409(a), 29 U.S.C. § 1109(a).
[2] ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2).

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pant or beneficiary invokes section 502(a)(2), he or she is not suing as an individual. Rather, section 409(a), which is enforced by section 502(a)(2), provides that a breaching fiduciary must ''make good to [the] *plan* any losses'' and ''restore to [the] *plan* any profits.''[3] Thus, the relief that section authorizes, and which section 502(a)(2) enforces, inures solely to the plan, not to any individual participant therein.[4] The structure of these provisions also means that the action authorized by section 502(a)(2) is *inherently representative*: it allows a plan participant or beneficiary to sue a fiduciary on *behalf* of a plan for recovery *to* the plan.[5] This, as we shall see, is the reason Rule 23(b)(1) fits breach of duty actions under ERISA so well.

Rule 23(b)(1): The Right Vehicle for Breach of Duty Claims

Rule 23(b)(1), of course, lays out one of the three kinds of class actions that may be maintained in federal court, providing for class treatment if prosecuting separate actions by or against individual class members 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'' (Rule 23(b)(1)(A)); or
- ''adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests . . . .'' (Rule 23(b)(1)(B))

The typical breach of fiduciary duty action will qualify for class treatment under both 23(b)(1)(A) and 23(b)(1)(B).[6]

Rule 23(b)(1)(A): A Risk of Inconsistent Adjudications and Incompatible Standards of Conduct for the Fiduciary. The classic case for Rule 23(b)(1)(A) is where the party opposing the class ''is obliged by law to treat the members of the class alike.''[7] ERISA presents such a situation, for like common law trustees, ERISA fiduciaries are under the duty of impartiality—the duty to treat similarly situated participants and beneficiaries alike.[8] 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.

It is sometimes said that actions seeking monetary relief cannot be certified under Rule 23(b)(1)(A),[9] but that is a vast oversimplification. Courts have recognized that certification under Rule 23(b)(1)(A) is appropriate where a participant sues under ERISA section 502(a)(2), even when the relief sought is monetary.

This is true for two independent reasons. First, of course, the fiduciary duty to treat similarly situated participants alike means that two conflicting monetary judgments will avoidably set up two conflicting standards of duty for a fiduciary.[10]

Second, a suit under ERISA section 502(a)(2) is inherently representative in nature. Plaintiffs suing under section 502(a)(2) seek to remedy injury *to the plan* and enforce fiduciary duties owed *to the plan*.[11] Any judgment obtained under section 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.[12]

Rule 23(b)(1)(A), then, is well suited to a class action under ERISA section 502(a)(2).

Rule 23(b)(1)(B): A Risk of Adjudications That Would Dispose of, or Substantially Impair, the Interests of Other Participants and Beneficiaries. While Rule 23(b)(1)(A) considers possible prejudice to a defendant from individual legal actions, Rule 23(b)(1)(B) considers possible prejudice to the class members.[13] This rule is also well suited to class actions under ERISA section 502(a)(2). Because of the inherently representative character of litigation under section 502(a)(2)—because, in other

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[3] ERISA § 409(a), 29 U.S.C. § 1109(a) (emphasis added).

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

[5] *LaRue v. DeWolff, Boberg & Assocs., Inc.*, 128 S. Ct. 1020, 1026, 42 EBC 2857 (''[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, 19 EBC 1969 (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'').

[6] See 2 Alba Conte & Herbert Newberg, Newberg on Class Actions § 4:8 (4th ed. 2002) (''A common occurrence is that a proposed class that qualifies under subdivision (b)(1)(A) will also qualify under subdivision (b)(1)(B) . . . .''); 7AA Charles Alan Wright et al., Federal Practice and Procedure § 1772 (3d ed. 2005) (noting that ''it is quite common for suits brought under subdivision (b)(1) to meet both the test for clause (A) and for clause (B) of that provision,'' and citing cases).

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

[8] See *Morse v. Stanley*, 732 F.2d 1139, 1145, 5 EBC 1602 (2d Cir. 1984); *Struble v. N.J. Brewery Employees' Welfare Trust Fund*, 732 F.2d 325, 333, 5 EBC 1676 (3d Cir. 1984), abrogated on other grounds by *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 10 EBC 1873 (1989); *Jackson v. Truck Drivers' Union Local 42 Health & Welfare Fund*, 933 F. Supp. 1124, 1145 (D. Mass. 1996); cf. also Restatement (Second) of Trusts § 232 (1959).

[9] See Mark A. Perry & Paul Blankenstein, ''The Inapplicability of Rule 23(b)(1) to ERISA Class Actions,'' 234 PBD, 12/8/08, 35 BPR 2764, 12/9/08, n. 37 (citing *McDonnell Douglas Corp. v. U.S. Dist. Court for the Cent. Dist. of Cal.*, 523 F.2d 1083, 1086 (9th Cir. 1975)).

[10] See *Baker v. Comprehensive Employee Solutions*, 227 F.R.D. 354, 360 (D. Utah 2005) (''The fiduciary duty at issue is owed to the entire class . . . .''); *Westman v. Textron, Inc.*, 151 F.R.D. 229, 231 (D. Conn. 1993) (''[W]hether defendant breached its fiduciary duty is a question common to all potential cases and could, if tried in separate actions, result in wholly inconsistent adjudications.'').

[11] See *supra* note 5.

[12] See, e.g., *Piazza v. Ebsco Indus., Inc.*, 273 F.3d 1341, 1352-53, 27 EBC 1021 (11th Cir. 2001); *Jones v. NovaStar Fin.*, Inc., 257 F.R.D. 181, 193-94, 46 EBC 2032 (W.D. Mo. 2009); *In re Merck & Co. Sec., Derivative & ERISA Litig.*, MDL No. 1658, 2009 WL 331426, at *12, 46 EBC 1102 (D.N.J. Feb. 10, 2009); *In re Enron Corp.*, No. MDL 1446, 2006 WL 1662596, at *15, 39 EBC 1194 (S.D. Tex. June 7, 2006); *Rankin v. Rots*, 220 F.R.D. 511, 522-23, 32 EBC 2124 (E.D. Mich. 2004).

[13] See, e.g., *Kanawi*, 254 F.R.D. at 111; *In re IKON Office Solutions, Inc. Sec. Litig.*, 191 F.R.D. 457, 466, 24 EBC 2008 (E.D. Pa. 2000).

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words, fiduciary breach litigation is made on behalf of the plan—deciding one plan participant's claim would likely dispose of others' claims as well.[14] Numerous courts' rulings have established that Rule 23(b)(1)(B) is a perfect vehicle for cases where individual adjudications would create a preclusive effect.[15] For that reason, Rule 23(b)(1)(B) certification is appropriate in fiduciary breach actions by participants in individual account plans.

Thus, an action under ERISA section 502(a)(2) is brought on behalf of the plan, binds the plan, and compels the fiduciaries to act in the same way toward similarly situated plan participants and beneficiaries. This, as many different courts have noted, means that ''ERISA litigation of this nature presents a paradigmatic example of a [Rule 23(b)(1)] class.''[16] It is for that reason that so many courts have had no trouble certifying for class treatment section 502(a)(2) actions against the fiduciaries of individual account plans for breaches of fiduciary duty causing losses to the plans.[17]

The LaRue Decision Confirms the Appropriateness of Rule 23(b)(1) Certification

Despite all the precedential and common sense reasons in favor of certification under Rule 23(b)(1), the suggestion has been made that a recent Supreme Court decision forecloses (b)(1) certification of class actions that are brought under ERISA section 502(a)(2).[18] Before discussing the merits of this argument, though, a little history shows how strange it is that fiduciary defendants should now be making it.

At one time most litigation under ERISA arose from defined benefit plans. The increasing shift to defined contribution plans means that the typical ERISA case today arises from an individual account plan of one kind or another. But in 1985, defined benefit plans were more common than they are now. That year, the Supreme Court decided *Massachusetts Mutual Life Insurance Co. v. Russell*.[19] There, a participant in a defined benefit plan filed an action under ERISA section 502(a)(2), which authorizes plan participants to sue fiduciaries who have breached their duties and to recover from those fiduciaries on behalf of the plan.[20] The participant argued that she was entitled to extracontractual damages that she had sustained because of a fiduciary's breach of duty. The Court held that section 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.[21]

The years that followed, though, saw many fiduciaries of individual account plans seize upon the ''plan as a whole'' phrase. These fiduciaries often argued that if a fiduciary 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 ERISA section 502(a)(2). Under *Russell*, they said, section 502(a)(2) only authorizes fiduciary breach actions when a breach affects an entire plan—which means, in the case of an individual account plan, every individual account. If accepted, this argument threatened any effort to recover for losses to 401(k) plans caused by fiduciary breaches since participants generally enter and leave a plan at different times and invest their contributions to the plan differently.

But from the time this argument began to be made in the early to mid-1990s, almost every lower court to confront this argument rejected it.[22] The only unretracted appellate decision to accept the argument was the Fourth Circuit's 2006 opinion in *LaRue v. DeWolff, Boberg & Associates, Inc.*, in which a single participant sued for a breach of fiduciary duty that had affected only his account.[23]

The Supreme Court promptly granted certiorari to review the Fourth Circuit's decision, and—agreeing with almost every lower court to consider the issue—nailed the door shut on the argument that ERISA section 502(a)(2) could only remedy a fiduciary breach that affected every individual account. The Court held that section 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. And it clarified that *Russell's* ''references to the 'entire plan' . . . are beside the point in the defined contribution context.''[24] It is true, the Court said, that section 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 sub-

[14] See, e.g., *In re Tyco Int'l, Ltd.*, No. MD-02-1335, 2006 WL 2349338, at *7-8, 38 EBC 2790 (D.N.H. Aug. 15, 2006); *In re Enron Corp. Sec., Derivative & ERISA Litig.*, No. MDL-1446, 2006 WL 1662596, at *13-15, 39 EBC 1194 (S.D. Tex. June 7, 2006); *Rogers v. Baxter Int'l, Inc.*, No. 04-6476, 2006 WL 794734, at *11, 37 EBC 2523 (N.D. Ill. Mar. 22, 2006); *In re Williams Cos. ERISA Litig.*, 231 F.R.D. 416, 425, 35 EBC 2173 (N.D. Okla. 2005); *In re WorldCom, Inc. ERISA Litig.*, 2004 WL 2211664, at *3, 33 EBC 2281 (S.D.N.Y. Oct. 4, 2004); *Rankin v. Rots*, 220 F.R.D. 511, 523, 32 EBC 2124 (E.D. Mich. 2004).

[15] *In re Integra Realty Res., Inc.*, 345 F.3d 1246, 1264 (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, 1294 (D.S.C. 1993)); *In re Phar-Mor, Inc. Sec. Litig.*, 875 F. Supp. 277, 280 (W.D. Pa. 1994).

[16] *In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 453 (S.D.N.Y. 2004) (quoting *Kolar v. Rite Aid Corp.*, No. 01-1229, 2003 WL 1257272, at *3, 30 EBC 1993 (E.D. Pa. Mar. 11, 2003)).

[17] See the Appendix, infra, for a comprehensive list of such cases.

[18] Perry & Blankenstein, *supra* note 9.

[19] 473 U.S. 134, 140, 142 n.9, 6 EBC 1733 (1985).

[20] ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2).

[21] *Id.* at 140.

[22] See, e.g., *In re Schering-Plough Corp. ERISA Litig.*, 420 F.3d 231, 240, 35 EBC 1801 (3d Cir. 2005) (rejecting the argument); *Milofsky v. Am. Airlines, Inc.*, 404 F.3d 338, 344-45, 34 EBC 1801 (5th Cir. 2005) (accepting it), rev'd en banc, 442 F.3d 311, 36 EBC 2825 (5th Cir. 2006); *Kuper v. Iovenko*, 66 F.3d 1447, 1452-53, 19 EBC 1969 (6th Cir. 1995) (rejecting it); *In re Xerox Corp. ERISA Litig.*, 483 F. Supp. 2d 206, 220-21, 41 EBC 1259 (D. Conn. 2007) (rejecting it); *Rogers v. Baxter Int'l, Inc.* , 417 F. Supp. 2d 974, 981-82, 37 EBC 2523 (N.D. Ill. 2006); *In re Mut. Fund Investment Litig.*, 403 F. Supp. 2d 434, 444 , 36 EBC 1711 (D. Md. 2005) (rejecting it); *Woods v. S. Co.*, 396 F. Supp. 2d 1351, 1361-62, 35 EBC 2793 (N.D. Ga. 2005) (rejecting it); *Kling v. Fid. Mgmt. Trust Co.*, 270 F. Supp. 2d 121, 126-27, 30 EBC 2446 (D. Mass. 2003) (rejecting it).

[23] 450 F.3d 570, 38 EBC 1001 (4th Cir. 2006), rev'd, 128 S. Ct. 1020, 42 EBC 2857 (2008).

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

set of *plan* accounts, is therefore authorized under section 502(a)(2).

To informed observers, *LaRue* was not a surprising decision. It merely corrected an outlier among the lower courts. But the way in which parties opposing class certification of section 502(a)(2) actions have used *LaRue* has indeed been surprising. For according to many fiduciary defendants and to some prominent members of the ERISA defense bar, *LaRue* makes clear that plaintiffs who seek relief on behalf of fewer than all individual accounts cannot be certified as class actions under Rule 23(b)(1), but ''must meet the more demanding requirements of Rule 23(b)(3) if they are to be certified at all.'' [25] That is a noble effort at turning lemons into lemonade, but has no support in *LaRue* itself.

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 section 502(a)(2) for losses to his account and to others similarly situated (which is the general practice in ERISA class actions), but the holding actually emphasizes that any distinction between individual accounts and the plan itself is illusory. In a 401(k) plan, all assets of the plan are held by the plan in trust, and so a claim on behalf of even one participant is a claim on behalf of the plan. *A fortiori*, a claim on behalf of most or many of the participants is also a claim on behalf of the plan. 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.[26]

***LaRue* Does Not Preclude 23(b)(1) Certification of ERISA Breach of Fiduciary Duty Claims.** The usual argument by defendant fiduciaries is syllogistic in form. It is 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. But this syllogism is flawed at each step.

***LaRue* Does Not Authorize ''Individualized'' Relief.** The defense argument goes off the rails at the outset. According to the argument, 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 losses to their plan accounts. As a claim for individual relief, the argument goes, there is no risk of inconsistent adjudications, or prejudice to other plan participants—and thus Rule 23(b)(1) has no application.

The first 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.''[27] Quite the opposite: the holding of *LaRue* is that the distinction between individual accounts and ''the plan as a whole'' is illusory. The Court was at pains to make this clear, saying that ERISA section 502(a)(2) ''does not provide a remedy for individual injuries distinct from plan injuries.''[28] 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.[29]

Justice Thomas's concurrence makes this point explicitly by rejecting 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.''[30] As such, when an individual brings a claim for breach of fiduciary duty under ERISA section 502(a)(2)—and whether or not the breach affects just his plan account, multiple plan accounts, or every plan account—the claim is pursued on behalf of the plan and not on behalf of an individual. The fact that any recovery will be allocated to the accounts of the persons affected by the breach, be it one, many, or all participants, does not change the nature of the claim from a plan claim to an individual claim.[31] Indeed, even in the defined benefit context, recovery on behalf of the plan is eventually allocated differently to each participant, based on years of service, salary, or other factors. Thus, the fact that defined contribution plans contain individual accounts for plan participants (which in truth are merely notional) is a distinction without a difference.

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 language of ERISA demands. Section 502(a)(2) creates a cause of action to enforce the liability created by section 409(a), and section 409(a) provides that fiduciaries are liable ''to make good to [the] plan any losses'' resulting from a breach of duty.[32] Section 502(a)(2), therefore, ensures that recovery, even in the defined contribution context, goes only to the plan 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.

[25] Perry & Blankenstein, *supra* note 9.

[26] Only a few district courts have dealt with the argument that *LaRue* prevents Rule 23(b)(1) certification, but of the decisions that have been published or are available by electronic database, the majority have rejected it. *Jones v. NovaStar Fin., Inc.*, 257 F.R.D. 181, 189-90, 46 EBC 2032 (W.D. Mo. 2009); *Kanawi v. Bechtel Corp.*, 254 F.R.D. 102, 108- 09, 45 EBC 1470 (N.D. Cal. 2008); *Alvidres v. Countrywide Fin. Corp.*, No. 07-5810, 2008 WL 1766927, at *3 (C.D. Cal. Apr. 16, 2008). But see *Turner v. Talbert*, No. 04-450, 2009 WL 2356662, at *3 & n.27 (M.D. La. July 30, 2009); *In re First Am. Corp. ERISA Litig.*, No. 07-1357, 2009 WL 1851308, at *8 (C.D. Cal. June 10, 2009). Both *Turner* and *First American* are based on the misapprehension that section 502(a)(2) is an individual remedy. As we explain in the text, this is an understanding that *LaRue* itself shows to be erroneous.

[27] *Id.*

[28] 128 S. Ct. at 1026.

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

[30] *Id.* (quoted in Perry & Blankenstein, *supra* note 9).

[31] 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).

[32] ERISA § 409(a) (emphasis added), 29 U.S.C. § 1109(a).

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The inherently representative nature of actions under section 502(a)(2), as noted above, disposes of the argument that *LaRue* creates a right to pursue individual as opposed to plan relief. If the right of recovery under section 502(a)(2), even for defined contribution plans, is not ''individualized''—if, as is clearly the case under *LaRue*, the right of recovery inures not to the individual but to the plan—then the contention that Rule 23(b)(1) is inapplicable to section 502(a)(2) fiduciary breach claims cannot get off the ground.

Certification Under Rule 23(b)(1) Does Not Require a ''Limited Fund'' Situation. It has recently been argued, however, 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.[33] 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*.[34]

What such a heavy emphasis on *Ortiz* ignores, 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.''[35] In the same breath, though, the Court stresses that Rule 23(b)(1)(B) ''covers more historical antecedents than the limited fund.''[36] 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.''[37] A *LaRue*-type class action for losses to a plan caused by breaches of fiduciary duty fits squarely within this historical antecedent.

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.''[38] 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: it is the potentially preclusive effect of individual litigation on the claims of other plan participants.

Certification of Breach of Fiduciary Duty Claims Under 23(b)(1)(A) Is Perfectly Appropriate. Even if the *Ortiz* argument were right, and Rule 23(b)(1)(B) were unavailable to a plaintiff class suing under ERISA section 502(a)(2), it still would not t follow that Rule 23(b)(1) is inapplicable to *LaRue*-type class actions, since Rule 23(b)(1)'s other half, 23(b)(1)(A), would still apply. As we have seen, courts routinely conclude that the inherently representative nature of section 502(a)(2) actions makes certification under Rule 23(b)(1)(A) entirely appropriate.[39]

Common Sense About ERISA Class Certification

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.[40] 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.[41]

Indeed, allowing class members to opt out would create the precise mischief that Rule 23(b)(1) is designed to prevent: it would enable inconsistent adjudications of the same claim brought by participants in the same plan. One participant who pursued his own claim could fail to persuade a court that his loss was not caused by a breach, whereas another could persuade another court that it was indeed—even where the claim is against the same fiduciary, for the same alleged misconduct, causing the same loss to the trust. Moreover, any suggestion that an adjudication of one such claim would not as a practical matter be dispositive of the rights of other plan participants is nonsensical. Can it really be doubted that, if a single participant brought a section 502(a)(2) claim on behalf of a plan for losses to his plan account, and the fiduciaries prevailed, those same fiduciaries would not hold out that judgment as a bar to claims by other participants in the same plan for the same alleged breach of fiduciary duty?

Creative defense arguments aside, the truth is that Rule 23(b)(1) is the most effective and efficient way to litigate claims by participants for plan losses. It protects the defendants from inconsistent standards from varying adjudications, and plan participants from having their rights adjudicated in an action in which they are not directly involved.

Conclusion

Actions against individual account plan fiduciaries under ERISA section 502(a)(2) are perfectly suited to certification under Rule 23(b)(1). 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 in-

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[33] Perry & Blankenstein, *supra* note 9, at 2767.

[34] Perry & Blankenstein, *supra* note 9, at 2769.

[35] 527 U.S. at 842.

[36] *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, 467, 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'').

[37] *Id.* at 834 (quoting Fed. R. Civ. P. 23 advisory comm. notes).

[38] Fed. R. Civ. P. 23(b)(1)(B).

[39] *See supra* notes 10 and 12 and accompanying text.

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

[41] 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.'').

dividual participant—certification under Rule 23(b)(1)(A) and (B) remains appropriate in ERISA class actions. Nor does *LaRue* change this fact. Indeed, 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.

Appendix of Cases

The following is a non-exhaustive list of decisions granting class certification of ERISA section 502(a)(2) claims under Rule 23(b)(1).

- Piazza v. Ebsco Industries, Inc., 273 F.3d 1341, 27 EBC 1021 (11th Cir. 2001)
- Jones v. NovaStar Financial, Inc., 257 F.R.D. 181, 46 EBC 2032 (W.D. Mo. 2009)
- Abbott v. Lockheed Martin Corp., No. 06-701, 2009 WL 969713, 46 EBC 1925 (S.D. Ill. Apr. 3, 2009)
- Beane v. Bank of N.Y. Mellon, No. 07-9444, 2009 WL 874046, 47 EBC 1027 (S.D.N.Y. Mar. 31, 2009)
- In re Merck & Co., Inc. Securities, Derivative & ERISA Litigation, MDL No. 1658, 2009 WL 331426 (D.N.J. Feb. 10, 2009)
- Lyell v. Farmers Group Inc. Employees' Pension Plan, No. 07-1576, 2008 WL 5111113 (D. Ariz. Dec. 3, 2008)
- Kanawi v. Bechtel Corp., 254 F.R.D. 102, 45 EBC 1470 (N.D. Cal. 2008)
- Shirk v. Fifth Third Bancorp, No. 05-049, 2008 WL 4425535, 44 EBC 2936 (S.D. Ohio Sept. 30, 2008)
- Beesley v. Int'l Paper Co., No. 06-703, 2008 WL 4450319, 44 EBC 2837 (S.D. Ill. Sept. 30, 2008)
- Zhu v. Schering Plough Corp., No. 03-1204, 2008 WL 4510039, 44 EBC 2855 (D.N.J. Sept. 30, 2008)
- Tatum v. R.J. Reynolds Tobacco Co., 254 F.R.D. 59, 44 EBC 2859 (M.D.N.C. 2008)
- Spano v. Boeing Co., No. 06-743, 2008 WL 4449516, 44 EBC 2844 (S.D. Ill. Sept. 29, 2008)
- George v. Kraft Foods Global, Inc., 251 F.R.D. 338, 44 EBC 2300 (N.D. Ill. 2008)
- Taylor v. United Techs. Corp., No. 06-1494, 2008 WL 2333120, 43 EBC 2825 (D. Conn. June 3, 2008)
- Alvidres v. Countrywide Fin. Corp., No. 07-5810, 2008 WL 1766927 (C.D. Cal. Apr. 16, 2008)
- In re Winn-Dixie Stores, Inc. ERISA Litig., No. 04-194, 2008 WL 815724 (M.D. Fla. Mar. 20, 2008)
- In re Schering-Plough Corp. Erisa Litig., No. 03-1204, 2008 WL 4510255 (D.N.J. Jan. 31, 2008)
- In re Delphi Corp. Sec., Derivative & ERISA Litig., 248 F.R.D. 483, 43 EBC 1156 (E.D. Mich. 2008)
- Tussey v. ABB, Inc., No. 06-4305, 2007 WL 4289694, 42 EBC 1616 (W.D. Mo. Dec. 3, 2007)
- Mehling v. N.Y. Life Ins. Co., 246 F.R.D. 467, 42 EBC 2359 (E.D. Pa. 2007)
- Brieger v. Tellabs, Inc., 245 F.R.D. 345, 41 EBC 2581 (N.D. Ill. 2007)
- Eslava v. Gulf Tele. Co., No 04-297, 2007 WL 2298222, 42 EBC 1993 (S.D. Ala. Aug. 7, 2007)
- Loomis v. Exelon Corp., No. 06-4900, 2007 WL 2981951, 41 EBC 1150 (N.D. Ill. June 26, 2007)
- Baker v. Kingsley, No. 03-1750, 2007 WL 1597654, 41 EBC 1316 (N.D. Ill. May 31, 2007)
- Thompson v. Linvatec Corp., No. 06-404, 2007 WL 1526418, 41 EBC 2061 (N.D.N.Y. May 22, 2007)
- Lively v. Dynegy, Inc., No. 05-00063, 2007 WL 685861, 40 EBC 2333 (S.D. Ill. Mar. 2, 2007)
- Aguilar v. Melkonian Enters., Inc., No. 05-00032, 2007 WL 201180 (E.D. Cal. Jan. 24, 2007)
- Smith v. Aon Corp., 238 F.R.D. 609, 39 EBC 1715 (N.D. Ill. 2006)
- Richards v. FleetBoston Financial Corp., 238 F.R.D. 345, 38 EBC 2915 (D. Conn. 2006)
- In re Broadwing, Inc. ERISA Litig., 252 F.R.D. 369, 39 EBC 1735 (S.D. Ohio 2006)
- Stoffels v. SBC Commc'ns, Inc., 238 F.R.D. 446, 40 EBC 1747 (W.D. Tex. 2006)
- In re Polaroid ERISA Litig., 240 F.R.D. 65, 39 EBC 1974 (S.D.N.Y. 2006)
- In re AOL Time Warner ERISA Litigation, No. 02-8853, 2006 WL 2789862, 39 EBC 1031 (S.D.N.Y. Sept. 27, 2006)
- In re Tyco Int'l, Ltd., No. MD-02-1335, 2006 WL 2349338, 38 EBC 2790 (D.N.H. Aug. 15, 2006)
- In re Aquila ERISA Litig., 237 F.R.D. 202, 38 EBC 1838 (W.D. Mo. 2006)
- Rankin v. Rots, No. 02-71045, 2006 WL 1876538, 38 EBC 1501 (E.D. Mich. June 27, 2006)
- In re Enron Corp., No. MDL-1446, 2006 WL 1662596, 39 EBC 1194 (S.D. Tex. June 7, 2006)
- DiFelice v. U.S. Airways, Inc., 235 F.R.D. 70, 37 EBC 1620 (E.D. Va. 2006)
- Rogers v. Baxter Int'l Inc., No. 04-6476, 2006 WL 794734, 37 EBC 2523 (N.D. Ill. Mar. 22, 2006)
- Kirse v. McCullough, No. 04-1067, 2005 WL 3302008, 37 EBC 1059 (W.D. Mo. Dec. 5, 2005)
- Zielinski v. Pabst Brewing Co., Inc., No. 04-385, 2005 WL 3240590, 34 EBC 2233 (E.D. Wis. Nov. 30, 2005)
- In re Williams Cos. ERISA Litig., 231 F.R.D. 416, 35 EBC 2173 (N.D. Okla. 2005)
- Baker v. Comprehensive Employee Solutions, 227 F.R.D. 354 (D. Utah 2005)
- In re Xcel Energy, Inc., 364 F. Supp. 2d 1013 (D. Minn. 2005)
- In re Syncor ERISA Litig., 227 F.R.D. 338 (C.D. Cal. 2005)
- In re CMS Energy ERISA Litig., 225 F.R.D. 539, 32 EBC 2613 (E.D. Mich. 2004)
- Godshall v. Franklin Mint Co., No. 01-6539, 2004 WL 2745890, 34 EBC 2357 (E.D. Pa. Dec. 1, 2004)
- In re Global Crossing Securities and ERISA Litig., 225 F.R.D. 436 (S.D.N.Y. 2004)
- In re Worldcom, Inc. ERISA Litigation, No. 02-4816, 2004 WL 2283814, 33 EBC 2284 (S.D.N.Y. Oct. 12, 2004)
- Furstenau v. AT & T Corp., No. 02-5409, 2004 WL 5582592 (D.N.J. Sept. 3, 2004)
- In re Providian Fin. Corp., No. 02-1001, 2003 WL 22005019 (N.D. Cal. June 30, 2003)
- Babcock v. Computer Assocs. Int'l, Inc., 212 F.R.D. 126, 29 EBC 2505 (E.D.N.Y. 2003)
- Kennedy v. United Healthcare of Ohio, Inc., 206 F.R.D. 191, 27 EBC 2791 (S.D. Ohio 2002)
- Banyai v. Mazur, 205 F.R.D. 160, 27 EBC 1444 (S.D.N.Y. 2002)
- Thomas v. SmithKline Beecham Corp., 201 F.R.D. 386, 26 EBC 1789 (E.D. Pa. 2001)
- Koch v. Dwyer, No. 98-5519, 2001 WL 289972, 26 EBC 1688 (S.D.N.Y. Mar. 23, 2001)

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- Clauser v. Newell Rubbermaid, Inc., No. 99-5753, 2000 WL 1053395 (E.D. Pa. July 31, 2000)
- In re IKON Office Solutions, Inc., 191 F.R.D. 457, 24 EBC 2008 (E.D. Pa. 2000)
- Bunnion v. Consol. Rail Corp., No. 97-4877, 1998 WL 372644 (E.D. Pa. May 14, 1998)
- Kane v. United Indep. Union Welfare Fund, No. 97-1505, 1998 WL 78985 (E.D. Pa. Feb. 24, 1998)
- Montgomery v. Aetna Plywood, Inc., No. 95-3193, 1996 WL 189347 (N.D. Ill. Apr. 16, 1996)
- Gruby v. Brady, 838 F. Supp. 820 (S.D.N.Y. 1993)
- Westman v. Textron, Inc., 151 F.R.D. 229 (D. Conn. 1993)
- Specialty Cabinets & Fixtures, Inc. v. Am. Equitable Life Ins. Co., 140 F.R.D. 474, 14 EBC 1757 (S.D. Ga. 1991)
- Walsh v. Great Atl. & Pac. Tea Co., 96 F.R.D. 632, 4 EBC 1055 (D.N.J. 1983)