The *LaRue* Perplex: Nine Justices in Search of a Rationale

by E. Thomas Veal[1]

The Supreme Court does not render a great many opinions on issues arising under the Employee Retirement Income Security Act of 1974, and it is fair to say that the ERISA bar awaits each one nervously. Many, of course, usefully resolve statutory conflicts and confusions, but others seem themselves confused or generate more conflict than they resolve.

LaRue v. DeWolff, Boberg & Associates, Inc.[2], the "big" ERISA case of the Court's 2007/8 term, settles a narrow, though not unimportant, question, yet it leaves in doubt the basis on which the Justices reached their answer. The five-vote majority opinion is not a model of clarity, while two concurring opinions approached the case from radically different directions.

Background

The case's fact pattern shows up not uncommonly in plans that allow participant direction of investments. According to Mr. LaRue's allegations, which we, like the courts, will accept as true, his employer, DeWolff, Boberg & Associates, Inc., maintained a section 401(k) individual account plan that allowed participants to decide how their accounts would be invested. He instructed the plan administrator to change his account's investment allocation. Nothing happened. After what apparently was a considerable lapse of time, he became aware that the account's holdings were the same as before and were now worth about $150,000 less than would have been the case if his directions had been followed.

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[2] __ U.S. ___, 128 S.Ct. 1020, 42 Employee Benefits Cas. (BNA) 2857 (Feb. 20, 2008), *reversing* 450 F.3d 570, 38 Employee Benefits Cas. (BNA) 1001, *rehearing denied*, 458 F.3d 359, 38 Employee Benefits Cas. (BNA) 1806 (4th Cir., 2006).

One of the duties of a plan fiduciary is to act "in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this title [Title I] and Title IV'[3]. The documents and instruments in this instance apparently required that participants' accounts be invested in accordance with their instructions. The courts took it as given that the plan administrator's failure to do so transgressed its fiduciary duty, leaving as the only question whether and how the breach was to be redressed. ERISA offers three possibilities. The first is found in section 502(a)(1)(B),[4] under which a participant may sue –

> to recover benefits due him under the terms of the plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan.

This provision, which is not predicated on any fiduciary breach, played only a tangential role in *LaRue* before the case reached the Supreme Court.

The second avenue for relief, on which the plaintiff relied in the district court, is section 502(a)(3),[5] which authorizes a participant to bring a civil action –

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[3] ERISA, §404(a)(1)(D); 29 U.S.C., §1104(a)(1)(D)..

[4] 29 U.S.C., §1132(a)(1)(B).

[5] 29 U.S.C., §1132(a)(3).

> (A) to enjoin any act or practice which violates any provision of this title or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provision of this title or the terms of the plan.

The district court, in an unreported decision whose tenor is clear from the discussion by the higher courts, granted summary judgment to the defendants on the ground that the plaintiff sought no relief except money damages (the restoration of the losses suffered by his account). The Supreme Court has held that "appropriate equitable relief" does not include money damages that could have been granted by a court of law before the merger of law and equity.[6] The plaintiff offered ingenious theories as to why his claim should be characterized as equitable rather than legal. Whether he was right need not concern us. The Court of Appeals rejected his section 502(a)(3) arguments, and the Supreme Court found it unnecessary to consider them.

Instead, the pivot of the case was section 502(a)(2),[7] raised only on appeal but addressed by the appellate court despite its doubtful timeliness. That section laconically authorizes actions "for appropriate relief under §409". The pertinent portion of the latter section reads:

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[6] *Mertens v. Hewitt Associates*, 508 U.S. 248, 113 S. Ct. 2063, 124 L. Ed. 2d 161 (1993),

[7] 29 U.S.C., §1132(a)(2).

> 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.[8]

Section 409 and by extension 502(a)(2) opened a clear path for restoring Mr. LaRue's losses, with no need to split hairs about what relief the chancery courts could have granted in Charles Dickens' time. The obstacle, which the Fourth Circuit found to be insuperable, lay in the phrase "losses to the plan". In the appellate judges' view,

> It is difficult to characterize the remedy plaintiff seeks as anything other than personal. 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.
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> We are therefore skeptical that plaintiff's individual remedial interest can serve as a legitimate proxy for the plan in its entirety, as §1132(a)(2) requires. To be sure, the recovery plaintiff seeks could be seen as accruing to the plan in the

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

narrow sense that it would be paid into plaintiff's personal plan *account*, which is part of the plan. But such a view finds no license in the statutory text, and threatens to undermine the careful limitations Congress has placed on the scope of ERISA relief.[9]

[9] 450 F.3d at 574 [emphasis in original].

The foundation of this analysis was *Massachusetts Mutual Life Ins. Co. v. Russell*,[10] a case whose facts were very different from *LaRue*'s but that also dealt with the breach of "a duty owed solely to" the plaintiff. The teaching of *Russell*, in the eyes of the Fourth Circuit, was that section 502(a)(2) "provides remedies only for entire plans, not for individuals. . . . Recovery under this subsection must 'inure[ ] to the benefit of the plan as a whole,' not to particular persons with rights under the plan."[11] Applying that principle, Mr. LaRue's claim for a recovery that would inure to himself alone could not succeed.

The Russell Precedent

[10] 473 U.S. 134, 6 Employee Benefits Cas. (BNA) 1733 (1985).

[11] 450 F.3d at 572–3, quoting 473 U.S. at 140.

In *Russell*, a participant in a long-term disability plan applied for benefits. After initially granting her claim, the plan administrator determined that she was ineligible and cut off payments. She sought reconsideration under the plan's claims procedure, and, after what she asserted was an unreasonable delay, her benefits were restored retroactively. Unsatisfied, she sued under section 502(a)(2), seeking damages for the financial and psychological hardship that she had suffered during the hiatus in payments.[12] Her argument was that the plan fiduciaries had not acted as promptly as mandated by the documents and instruments governing the plan and hence were personally liable to "compensate the injured party for all losses and injuries sustained as a direct and proximate cause of the breach of fiduciary duty"[13]. The Ninth Circuit agreed, and the Supreme Court, following a familiar pattern, unanimously reversed.

The Court identified the issue in *Russell* as "whether, under the Employee Retirement Income Security Act of 1974 (ERISA), a fiduciary to an employee benefit plan may be held personally liable to a plan participant or beneficiary for extracontractual compensatory or punitive damages caused by improper or untimely processing of benefit claims"[14]. In holding that no such liability existed, the Court emphasized that the draftsmen of section 409 "were primarily concerned with the possible misuse of plan assets, and with remedies that would

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[12] "The interruption of benefit payments allegedly forced respondent's disabled husband to cash out his retirement savings which, in turn, aggravated the psychological condition that caused respondent's back ailment." 473 U.S. at 137.

[13] *Russell v. Massachusetts Mutual Ins. Co.*, 722 F.2d 483, 490 (9th Cir., 1983), *cert. granted*, 469 U.S. 816 (1984).

[14] 473 U.S. at 134.

protect the entire plan, rather than with the rights of an individual beneficiary"[15] and that "Congress did not intend that section to authorize any relief except for the plan itself"[16].

The opinion's discussion did not focus on how many participants had to be compensated in order for relief to be regarded as flowing to the plan rather than to individuals. Instead, it looked at the statutory provisions governing participants' claims for benefits and found that –

> Nothing in the regulations or in the statute, however, expressly provides for a recovery from either the plan itself or from its administrators if greater time [than allowed by the Department of Labor's regulations on claims procedures] is required to determine the merits of an application for benefits. . . .

[15] 473 U.S. at 142.

[16] 473 U.S. at 144.

> Significantly, the statutory provision explicitly authorizing a beneficiary to bring an action to enforce his rights under the plan . . . says nothing about the recovery of extracontractual damages, or about the possible consequences of delay in the plan administrators' processing of a disputed claim. Thus, there really is nothing at all in the statutory text to support the conclusion that such a delay gives rise to a private right of action for compensatory or punitive relief.[17]

To rephrase the argument, ERISA authorizes a participant to bring an action "to recover benefits due to him under the terms of the plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the plan"[18]. That section does not explicitly provide for any relief beyond the benefits or rights sought, and the Court concluded that, under the test adumbrated in *Cort v. Ash*[19], no additional, nonstatutory remedy should be implied.[20] Further, if the provision dealing directly with the enforcement of participants' rights does not contemplate extracontractual damages, they cannot be obtained by substituting an invocation of

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[17] *Id.*

[18] ERISA, §501(a)(1)(B); 29 U.S.C., §1132(a)(1)(B).

[19] 422 U.S. 66, 78 (1975).

[20] 473 U.S. at 144–48.

sections 409 and 502(a)(2).

An illustration of the distinction between fiduciary misconduct that affects the plan as a whole and that which affects only individual participants is found in *Horan v. Kaiser Steel Retirement Plan*.[21] A defined benefit plan's investment committee had historically purchased an annuity contract for each participant when he became entitled to benefits. It discontinued that practice when the number of retirements sharply increased, since the cost of the annuities would have depleted the plan's assets. Subsequently, the plan terminated and was taken over by the Pension Benefit Guaranty Corporation. Benefits for annuitized retirees were unaffected, but the PBGC cut back all other benefits to its guaranteed level. Participants who had lost benefits brought an action against the investment committee, based on sections 409 and 502(a)(2).

The Ninth Circuit, duly chastised by its reversal in *Russell*, held that these claims were made on behalf of the individual participants rather than the plan and thus could not be brought under section 502(a)(2). The decision to pay benefits month-by-month from plan assets instead of purchasing annuities did not diminish the plan's funds. It affected only the comparative funding of particular participants' benefits. Annuities would fully secure the pensions of the annuitants but left less money to provide for everyone else. That the plan lacked the wherewithal to cover all of its liabilities was unfortunate, but the investment committee's decisions concerning how to make use of inadequate resources did render its members personally

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[21] 947 F.2d 1412, 14 Employee Benefits Cas. (BNA) 1968 (9th Cir., 1991).

liable under section 409 to participants who were disadvantaged. The court concluded,

> The remedies sought by the plaintiffs are for their own benefit, and not for the benefit of the Plan. The objective of the plaintiffs' suit is to recover an annuity for each individual plaintiff. The plaintiffs' third amended complaint focuses largely on requesting a declaratory judgment that the plaintiffs are entitled to an annuity and an injunction requiring the defendants to purchase annuities for the plaintiffs. . . . If the individual defendants were required to purchase an annuity for the plaintiffs, this remedy would only benefit the plaintiffs and not the Plan. This remedy would further deplete a financially unstable plan.[22]

Another illustration is *Matassarin ex rel. The Great Empire Broadcasting Employee Stock Ownership Plan v. Lynch*,[23] in which the Fifth Circuit held that plan fiduciaries could not be held liable under section 409 for allegedly misvaluing employer stock held in participants' accounts. The plan owned the stock; the determination of what it was worth, even if erroneous, neither added to nor subtracted from its assets. Hence, participants who believed that the valuation was too low were seeking redress only for themselves, not for the plan.

One may contrast cases in which participants have alleged that fiduciaries imprudently invested in stock of the employer. Even though only a subset of participants may have been affected, the Third, the Sixth and (perhaps) the Seventh Circuits have held that potential liability

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[22] 947 F.2d at 1418.

[23] 174 F.3d 549 (5th Cir., 1999).

exists under section 409.[24] The alleged breaches deprived the *plan* of assets, since the funds used to purchase employer stock could have been used to acquire better performing investments.

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[24] *Kuper v. Iovenko*, 66 F.3d 1447 (6th Cir., 1995); *Steinman v. Hicks*, 352 F.3d 1101 (7th Cir., 2003) (decided on other grounds, though the opinion suggests that the plaintiffs had a valid section 409 claim); *In re Schering-Plough Corp. ERISA Litigation*, 420 F.3d 231 (3d Cir., 2005).

In none of these cases was the number of affected participants the key to deciding whether a claim was on behalf of the plan as a whole. Lower court have treated that factor as dispositive,[25] but that is a rare position with no real support in *Russell*'s text or reasoning.

<u>LaRue</u> *in the Fourth Circuit*

With that background, we return to the Fourth Circuit's rejection of Mr. LaRue's claim. The court mulled over the issue twice, first and at no great length in its main opinion,[26] then in its denial of the plaintiff's petition for rehearing. Neither discussion gave close attention to the precise nature of the claim. The court characterized it as "personal", because, as the previous quotation for its opinion indicates, his "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."[27]

The opinion does not expound on the distinction between duties owed to participants and duties owed to the plan. One can infer that the court saw close parallels between the *LaRue* and *Russell* claims. In each instance, liability and damages depended on the specific facts

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[25] *E. g.*, *Fisher v. J. P. Morgan Chase & Co.*, 230 F.R.D. 370, 35 Employee Benefits Cas. (BNA) 2232 (S.D.N.Y., 2005).

[26] The bulk of the opinion analyzed the section 502(a)(3) claim, holding that the plaintiff could not obtain the money damages that he sought under that provision. He had invoked section 502(a)(2) for the first time at the appellate level. The section devoted to it begins, "Plaintiff's argument regarding the applicability of §1132(a)(2) is made for the first time on appeal. *Even if the argument were not therefore waived*, [citations omitted] he could not succeed on the merits." 450 F.3d at 573 [emphasis added]. The court obviously had little incentive to explore a "waived" argument in depth.

[27] 450 F.3d at 574.

concerning a single participant's application to the plan administrator, the processing of that application and the consequences of delay. If the fiduciaries erred, the effects on participants other than the plaintiff were nil.

Also influencing the judges was the lack of Congressional intent to provide a remedy for every misfortune that might afflict a plan participant. "ERISA's fiduciary duty provisions are primarily concerned with protecting the integrity of the plan, which in turn protects all beneficiaries, rather than remedying individual wrongs."[28]

> Though Congress may one day take the remedial step plaintiff desires, it has not yet done so. It is not difficult to imagine why. In crafting ERISA, Congress sought a careful balance between the goals of "ensuring fair and prompt enforcement of rights under a plan" on the one hand and "encourag[ing] . . . the creation of such plans" on the other [citation omitted]. It would certainly be reasonable for Congress to have concluded that imposing personal financial liability on fiduciaries under circumstances such as this – where there was no unjust enrichment, unlawful possession, or self-dealing – would seriously deter plan formation and the service of qualified individuals and institutions as fiduciaries. Compare, *e.g.*, *Mertens* [*v. Hewitt Associates*], 508 U.S. 248 at 262 at 262-63, 124 L. Ed. 2d 161 [(1993)] (discussing negative effects of expansive

[28] 458 F.3d at 362.

> ERISA liability).
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> Congress's decision to omit such liability hardly leaves a plan participant or beneficiary in plaintiff's position without recourse. He could, for example, seek an injunction compelling compliance with his investment instructions, *see* 29 U.S.C. § 1132(a)(3), or, under appropriate circumstances, bring suit on the plan's behalf to remove the fiduciary, *see* 29 U.S.C. § 1109(a). In Congress's view, such alternative remedies are sufficient to keep fiduciaries from breaches of fiduciary duty that result in no benefit whatsoever to themselves. We possess no authority "to adjust the balance . . . that the text adopted by Congress has struck." *Mertens*, 508 U.S. at 263.[29]

A pertinent consideration is that section 409 establishes a harsh rule of liability: Once a fiduciary has breached his duties under section 404, he becomes, in effect, an insurer against all of the plan's loss that flow therefrom, regardless of the degree of his culpability and whether the losses were reasonably foreseeable. That is a strict, but not draconian, rule for cases of imprudent investment decisions, self-dealing and the like. Its merits are less clear when applied to administrative deviation from the terms of the plan.

While the facts of Mr. LaRue's situation are not fully disclosed in the judicial opinions, there was a gap of two or three years between his alleged instructions to the plan administrator (in 2001 and 2002) and the initiation of his lawsuit (2004).[30] We don't know whether he worked

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[29] 450 F.3d at 577–78.

[30] 450 F.3d at 572.

diligently during that interval to persuade the plan to honor his investment directions or simply sat back and waited. Passivity had much to recommend it: He could compare his actual asset allocation to the one that he had elected, see which one performed better, and decide on that basis whether to leave matters as they stood or sue for damages. ERISA is tough on fiduciaries, but does it put them in so greatly asymmetrical a position *vis-à-vis* opportunistic participants?

In the Supreme Court

The Fourth Circuit's opinion teed up what looked like a straightforward issue: Was the plan administrator's duty to honor Mr. LaRue's investment election merely a personal duty to him as a plan participant, or was the duty owed to the plan as a whole?

The Justices all agreed that the claim should not have been dismissed. They diverged widely as to why.

The author of the majority opinion was Justice Stevens, who had also written *Russell*. He began by conceding that "language in our *Russell* opinion is consistent with [the Fourth Circuit's] conclusion". Nonetheless, "the rationale for *Russell*'s holding supports the opposite result in this case".[31] The opinion then proceeded to explicate how the genuine *Russell* rationale should be applied to the case at bar:

> The principal statutory duties imposed on fiduciaries by that section [409] "relate to the proper management, administration, and investment of fund assets," with an eye toward ensuring that "the benefits authorized by the plan" are ultimately

[31] 128 S.Ct. at 1022.

> paid to participants and beneficiaries. *Russell*, 473 U. S., at 142. . . . The misconduct alleged by the petitioner in this case falls squarely within that category.
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> The misconduct alleged in *Russell*, by contrast, fell outside this category. The plaintiff in *Russell* received all of the benefits to which she was contractually entitled, but sought consequential damages arising from a delay in the processing of her claim.[32]

Why, then, did the *Russell* opinion state unequivocally that a recovery under section 502(a)(2) must be for "the benefit of the plan as a whole"?[33] The reason, we are told, is a matter of historical happenstance:

> *Russell*'s emphasis on protecting the "entire plan" from fiduciary misconduct reflects the former landscape of employee benefit plans. That landscape has changed.
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> Defined contribution plans dominate the retirement plan scene today. In contrast, when ERISA was enacted, and when *Russell* was decided, "the [defined benefit] plan was the norm of American pension practice." . . . Unlike the defined contribution plan in this case, the disability plan at issue in *Russell* did not have individual accounts; it paid a fixed benefit based on a percentage of the employee's salary. . . .

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[32] 128 S.Ct. at 1024.

[33] *See* footnote 11.

> The "entire plan" language in Russell speaks to the impact of §409 on plans that pay defined benefits. Misconduct 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. . . .
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> For defined contribution plans, however, fiduciary misconduct need not threaten the solvency of the entire plan to reduce benefits below the amount that participants would otherwise receive. . . . Consequently, our references to the "entire plan" in Russell, which accurately reflect the operation of §409 in the defined benefit context, are beside the point in the defined contribution context.[34]

As history, this exposition is a little odd. Individual account (defined contribution) plans were far from insignificant at the time of ERISA's enactment. By 1985 the loss of ground by defined benefit pension plans to individual account plans was well under weigh.[35] Section 401(k) had been effective for two years and was the hottest product in plan design. To write that "the [defined benefit] plan was the norm of American pension practice" at that time is not untrue, but it was far from so dominant a norm that any reasonable observer could be unaware of the individual account alternative or could dismiss it as marginal.

The implication of Justice Stevens's history lesson is that sections 409 and 502(a)(2) are

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[34] 128 S.Ct. at 1025 [footnote and internal citations omitted].

[35] In 1985, the assets of single employer pension plans totaled $1.136 trillion, of which $420 billion, or 37 percent, was held by individual account plans. U.S. Department of Labor Employee Benefits Security Administration, *Private Pension Plan Historical Tables*, Table E11 (Feb. 2008). It is true that funded individual account welfare plans were rare back then, as they are now, but that fact doesn't seem pertinent to Justice Stevens's point.

not limited to actions to recover for "the plan as a whole". The limitation, rather, is that they must "'relate to the proper management, administration, and investment of fund assets,' with an eye toward ensuring that 'the benefits authorized by the plan' are ultimately paid to participants and beneficiaries."[36] Mr. LaRue's complaint passed muster, because the alleged violation – failure to honor his investment election – related to "the proper management . . . of fund assets".

The practical consequences of that standard are murky and will be explored, a little bit, hereafter. As statutory construction, it is highly dubious. Section 409's "shall be personally liable to make good to such plan any losses to the plan resulting from each such breach" does not readily translate to "shall be personally liable to make good to [such plan or any participant in] such plan any losses to the plan [or the participant] resulting from each such breach [so long as the breach relates to the proper management, administration, and investment of plan assets]".

Possibly, however, the majority did not intend to imply that section 502(a)(2) allows actions relating solely to non-plan-wide rights, but merely to explain how an action could benefit a single participant while still vindicating the rights of the plan as a whole. If so, their view would be nearly indistinguishable from that put forward in Justice Thomas's concurring opinion (joined by Justice Scalia). Most of this concurrence is devoted to objecting to the majority's use of legislative and other history. Justice Thomas regarded resort to materials beyond the bounds of the statute as unnecessary:

[36] *See* footnote 32.

> Although I agree with the majority's holding, I write separately because my reading of §§409 and 502(a)(2) is not contingent on trends in the pension plan market. Nor does it depend on the ostensible "concerns" of ERISA's drafters. Rather, my conclusion that petitioner has stated a cognizable claim flows from the unambiguous text of §§409 and 502(a)(2) as applied to defined contribution plans.[37]

The concurrence reasons that the assets held in plan participants' accounts, though individually allocated for recordkeeping purposes, are *plan* assets. If a fiduciary breach reduces the value of those assets, there is a loss to the plan for which the errant party may be held liable. Whatever he pays the plan must be allocated among the plan accounts, as that is the nature of an individual account plan, but the way in which the recovery is applied cannot, in Justice Thomas's view, derogate from its status as a recovery for the plan as a whole.

[37] 128 S.Ct. at 1028.

That is certainly the clearest and simplest of the three rationales. The Chief Justice's concurrence (joined by Justice Kennedy) drags an additional ERISA section into the fray. It argues that the plaintiff's claim falls squarely within section 501(a)(1)(B) – alluded to in oral argument but otherwise neglected by the litigants – because he seeks "to enforce his rights under the terms of the plan", *viz.*, his right to determine how his account will be invested. "It is difficult to imagine a more accurate description of LaRue's claim."[38]

[38] 128 S.Ct. at 1026.

Putting the claim into this particular slot is not a mere matter of form. Actions brought under section 502(a)(1)(B) follow different rules from those under section 502(a)(2) or (3): The claimant must exhaust his administrative remedies;[39] he may sue in state as well as federal court;[40] and, most important, a plan may grant the plan administrator discretionary decision making authority, which the courts will override only if its exercise is "arbitrary and capricious" or the administrator is burdened by a conflict of interest.[41] While these distinctions are not unambiguously favorable to defendants, they do tend to mitigate the severity of ERISA's enforcement scheme and thus reduce the risk of disproportionate sanctions for administrative errors.

The opinion also argues, somewhat tentatively, that sections 501(a)(1)(B) and 502(a)(2) are mutually exclusive:

> If LaRue may bring his claim under §502(a)(1)(B), it is not clear that he may do so under §502(a)(2) as well. Section 502(a)(2) provides for "appropriate" relief. Construing the same term in a parallel ERISA provision, we have held that relief is not "appropriate" under §502(a)(3) if another provision, such as §502(a)(1)(B), offers an adequate remedy. *See Varity Corp. v. Howe*, 516 U. S.

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[39] The concurrence cites *Fallick v. Nationwide Mutual Insurance Co.*, 162 F.3d 410, 418 n. 4 (6th Cir., 1998), which offers an impressive string citation of cases from ten Circuits.

[40] ERISA, §502(e)(1); 29 U.S.C., §1132(e)(1).

[41] *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 115 (1989); *Metropolitan Life Insurance Co. v. Glenn*, ___ U.S. ___, 128 S. Ct. 2343, 43 Employee Benefits Cas. (BNA) 2921 (June 19, 2008).

> 489, 515 (1996). Applying the same rationale to an interpretation of "appropriate" in §502(a)(2) would accord with our usual preference for construing the "same terms [to] have the same meaning in different sections of the same statute," . . . and with the view that ERISA in particular is a "'comprehensive and reticulated statute'" with "carefully integrated civil enforcement provisions". . . .[42]

[42] 128 S.Ct. at 1026–27.

An objection to this reasoning is that sections 502(a)(2) and 502(a)(3) are not alike: The latter is a residual provision designed to sweep up misconduct not actionable under some other section.[43] Hence, relief that is available elsewhere cannot also be found there; any other construction would render the rest of section 502(a) superfluous, as "to enforce any provision of this title or the terms of the plan", taken literally and out of context, covers everything within the purview of ERISA. There is no reason, though, to think that section 502(a)(2) covers the residuum of section 502(a)(1)(B); the two sections on their face address completely distinct rights and remedies.

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[43] *Varity Corp. v. Howe*, 516 U.S. 489, 511–12 (1996).

Had Mr. LaRue chosen section 502(a)(1)(B) as his avenue for redress, he would have faced a substantial roadblock: Since accounts can't be reinvested retroactively,[44] he would have a remedy only if either (i) "to enforce his rights under the terms of the plan" implies a right to damages for the past neglect of those rights[45] or (ii) the "benefits" that he can "recover" include gains that would have accrued if his account had been invested differently. Either option would be surprising in light of the Court's consistent reluctance to create new ERISA remedies through imaginative statutory construction. Moreover, the second seems to be ruled out by the very definition of "individual account plan", under which benefits are based "solely" on the value of the account.[46] If an account's actual value can be augmented by hypothetical gains, then every garden variety action against an investment manager for imprudent performance falls under section 502(a)(1)(B), which would be surprising, to say the least.

Comparisons and Consequences

LaRue answered the precise question presented to the Court: Can a participant whose investment directions are ignored and whose choices turn out to be better than actual plan performance recover the difference? That he can should startle no one. The holding does, however, have one wrinkle that deserves attention.

Without saying so, all of the courts that dealt with *LaRue* took it for granted that the

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[44] Not easily, at least. *Cf.* Ted Chiang, *The Merchant and the Alchemist's Gate* (2007).

[45] *Contra*, *Kerr v. Charles F. Vatterot & Co.*, 184 F.2d 938, 942, 23 Employee Benefits Cas. (BNA) 1328 (8th Cir., 1999).

[46] ERISA, §3(34); 29 U.S.C., §1002(34).

defendants' plan complied with section 404(c) of ERISA.[47] Because that section immunizes plan fiduciaries from liability "for any loss, or by reason of any breach, which results from such participant's or beneficiary's exercise of control" over the investment of his account,[48] their sole pertinent duty is to act in accordance with the documents and instruments governing the plan by giving effect to participants' directions.

But what if the plan sponsor has not, intentionally or otherwise, jumped through all of the hoops essential to section 404(c) compliance? In that case, the investment of plan assets is arguably subject to nothing other than the normal fiduciary standards of section 404(a), so that the participant's recommendation is entitled to no special deference. The alternative to that interpretation is to require plan fiduciaries to comply with both the prudent man rule of section 404(a)(1)(B) and the "documents and instruments" rule of section 404(a)(1)(D). Since the latter is subordinate to consistency "with the other provisions of this title", it would be essential to evaluate each investment direction, on a case-by-case basis, to determine its prudence. That would obviously be an unreasonable burden. It follows that the plan fiduciaries have no duty under section 404(a)(1)(D) and that a participant whose instructions are not heeded cannot assert the existence of a fiduciary breach, the essential predicate to an action under section 502(a)(2) founded on section 409.

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[47] 29 U.S.C., §1104(c).

[48] ERISA, §404(c)(1)(B); 29 U.S.C., §1104(c)(1)(B).

Problems with participants' investment elections arise fairly frequently. Situations in which participants can credibly charge that plan assets have been invested imprudently are very rare. If, by deliberate noncompliance with section 404(c), exposure to liability for disregarding elections can be eliminated in return for running the risk of lawsuits by participants whose elections are honored but later prove disappointing, the bargain may strike many employers as pretty appealing.

The broader implications of *LaRue* depend on how future judges interpret the majority opinion. Let us take a concrete example to illustrate the judicial work ahead.

In *Helfrich v. PNC Bank, Kentucky, Inc.*,[49] a participant instructed the plan administrator to effect a direct rollover of most of his account balance to an individual retirement account and distribute the rest. At about the same time, the plan was changing trustees. Through inadvertence, the portion that should have been rolled over was transferred to the successor trustee and held in a money market fund, which substantially underperformed the participant's intended IRA investments. He sued under section 502(a)(3) and predictably lost. His claim, the court decided, was for money damages only and thus not cognizable under that section.

Post-*LaRue*, could a participant with similar facts bring an action under section 502(a)(2)? The majority opinion could be read as favorable. One might say that the failure to distribute the participant's account "relate[s] to the proper management, administration, and investment of fund assets". Does it matter that, if the rollover had gone properly, the investment

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[49] 267 F.3d 477, 26 Employee Benefits Cas. (BNA) 2281 (6th Cir., 2001), *cert. den.*, 535 U.S. 928, 27 Employee Benefits Cas. (BNA) 2088 (2002).

gains would have accrued in the participant's IRA rather than in the plan? Justice Thomas's concurrence would say that it does; the majority's position is not so evident.

Because section 502(a)(2) offers the prospect of money damages, we can anticipate straining to fit claims involving individual account plans to its specifications, quibbling over what actions "relate" to asset management, administration and investment, and debate over the boundaries of section 409. In the end, it all probably won't greatly alter the world of ERISA, but connoisseurs of litigation should have a good time.