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***LaRue* v. *DeWolff, Boberg & Associates, Inc.*, No. 05-1756 (4th Cir. June 19, 2006)**

On June 19, 2006, the U.S. Court of Appeals for the Fourth Circuit decided *LaRue v. DeWolff, Boberg & Associates, Inc.*,[1] denying an individual savings plan participant's claims under the Employee Retirement Income Security Act of 1974 (ERISA)[2] for amounts his plan account failed to earn by reason of the plan administrator's failure to follow his investment instructions. The court held that § 1132(a)(2) of ERISA does not create a cause of action for an individual plan participant to recover damages for a plan administrator's breach of fiduciary duty, and that the equitable remedies provided in § 1132(a)(3) of ERISA are the traditional equitable remedies and do not include an award of money damages.

I. BACKGROUND

Congress enacted ERISA to provide a uniform federal regulatory regime that governs employee benefit plans.[3] That regime includes a comprehensive set of civil enforcement mechanisms, which is set out in 29 U.S.C. § 1132(a). The Fourth Circuit's decision in *LaRue* concerns two of those mechanisms: (A) one that provides a remedy for injury to the plan itself, and (B) another that allows equitable relief for injuries to individual plan participants.

A. Recovery for Injuries to the Plan as a Whole: 29 U.S.C. § 1132(a)(2)

The first ERISA civil enforcement provision at issue in *LaRue* — 29 U.S.C. § 1132(a)(2) — authorizes any civil action by "a participant, beneficiary or fiduciary [of an ERISA-covered plan] for appropriate relief under section 1109 of this title." Section 1109 provides that "[a]ny person who is a fiduciary *with respect to a plan* who breaches any of the responsibilities, obligations, or duties imposed upon fidu-

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1 No. 05-409, slip op. (4th Cir. June 19, 2006).

2 29 U.S.C. 1001 *et seq*.

3 *See LaRue* v. *DeWolff, Boberg*, No. 05-409, slip op. at 3, citing *Aetna Health Inc.* v. *Davila*, 542 U.S. 200, 208 (2004).

ciaries by this subchapter shall be personally liable to make good *to such plan* any losses *to the plan* resulting from each such breach."[4] In *Massachusetts Mutual Life Insurance Co.* v. *Russell*, the Supreme Court interpreted this language to require that remedies granted under § 1132(a)(2) address injuries to the entire plan and not individual plan participants.[5]

Since *Russell*, the lower courts have been split as to whether a plaintiff may invoke § 1132(a)(2) to redress injuries sustained by less than the entire plan. Most courts have held that § 1132(a)(2) will be available to plaintiffs even though they allege injuries to less than every participant in a particular plan.[6] Others hold that § 1132(a)(2) relief is unavailable where plaintiff represents only a sub-class of injured participants and not the entire plan.[7]

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4 29 U.S.C. § 1109(a) (emphasis supplied).

5 473 U.S. 134 (1985); *see Varity Corp.* v. *Howe*, 516 U.S. 489, 509 (1996) (paraphrasing *Russell* as holding that § 1132(a)(2) "does not authorize any relief except for the plan itself"). The *Russell* Court held that an individual plaintiff could not state a cause of action under § 1132(a)(2) for punitive damages associated with plan administrators' failure to pay her benefits in a timely fashion. Consequently, at least one court has argued that *Russell* does not address the specific question whether § 1132(a)(2) plaintiffs may constitute less than all of the plan participants. *See In re Schering-Plough Corp. ERISA Litigation*, 420 F.3d 231, 235 n.4 (3d Cir. 2005).

6 *See In re Schering-Plough Corp. ERISA Litigation*, 420 F.3d at 235-36 (holding that sub-class of plan participants could state cause of action under 29 U.S.C. § 1132(a)(2) because losses to their individual accounts were also losses to the entire plan, which held all contributions in trust); *Kuper* v. *Iovenko*, 66 F.3d 1447, 1452-53 (6th Cir. 1995) (holding that sub-class of plan participants could invoke cause of action created by 29 U.S.C. § 1132(a)(2), and observing that holding otherwise would "contravene ERISA's imposition of a fiduciary duty"); *Roth* v. *Sawyer-Cleator Lumber Co.*, 61 F.3d 599605 (8th Cir. 1995) (holding that injuries to sub-class of plan participants was injury to entire plan because plan itself was obligated party on the promissory notes associated with the individuals' worthless stock); *In re Honeywell International ERISA Litigation*, Civ. No. 03-1214, 2004 WL 3245931 (D.N.J. June 14, 2004) (allowing § 1132(a)(2) action where plaintiffs represented only the sub-class of all plan participants whose plan accounts held Honeywell stock because the plan held the stock as trustee and thus incurred its own injury); *In re CMS Energy ERISA Litigation*, 312 F. Supp.2d 898, 912-23 (E.D. Mich. 2004) (allowing § 1132(a)(2) claims by sub-class of plan participants).

7 *See Milofsky* v. *American Airlines*, 404 F.3d 338, 343 (5th Cir. 2005) (holding that sub-class of plan participants could not invoke § 1132(a)(2) for redress of injuries to sub-class), *rev'd en banc*, 442 F.3d 311 (5th Cir. 2006); *Lee* v. *Burkhart*, 991 F.2d 1004, 1009 (2d Cir. 1993) (denying individual claims under § 1132(a)(2) for unpaid funds due to individual under plan because "plaintiffs are seeking damages on their own behalf, not on behalf of the plan"); *Fisher* v. *J.P. Morgan*

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B. Recovery for Injuries to Individual Plan Participants: 29 U.S.C. § 1132(a)(3)

The second ERISA civil enforcement provision at issue in *LaRue* — 29 U.S.C. § 1132(a)(3) — authorizes any action by "a participant, beneficiary, or fiduciary (A) to *enjoin* any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate *equitable* relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan."[8]

The Supreme Court has circumscribed the types of equitable relief authorized by § 1132(a)(3). In *Mertens* v. *Hewitt Associates*, for instance, individual plan beneficiaries invoked § 1132(a)(3) to recover money damages for the alleged malfeasance of the plan's actuary.[9] That remedy, the Court noted, was classically legal and did not fall within the ambit of the traditional equitable relief authorized by § 1132(a)(3), such as injunction or restitution.[10] The Court has also made clear that not all restitution qualifies as equitable relief for the purposes of § 1132(a)(3). In *Great-West Life & Annuity Insurance Co.* v. *Knudson*, the Court indicated that restitution would only lie in equity where a plaintiff seeks to "restore to [herself] particular funds or property in the defendant's possession."[11] The Court reiterated this principle recently in *Sereboff* v. *Mid-Atlantic Medical Services, Inc.*, where it described unjust possession as the crucial element of equitable restitution for the purposes of § 1132(a)(3).[12]

II. FACTS AND PROCEDURAL HISTORY OF *LARUE*

DeWolff, Boberg & Associates, Inc., is a management consulting firm that administers an ERISA-covered 401(k) retirement savings plan for its employees. The plan allows participating employees to select from a menu of investment options in which to invest their own plan accounts. Plaintiff

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Chase, 230 F.R.D. 370, 374-76 (S.D.N.Y. 2005) (holding that § 1132(a)(2) does not authorize suit by sub-class of plan participants who held employer's stock); *Ramsey* v. *Formica*, 2004 WL 1146334, at *4 (S.D. Ohio April 6, 2004) (holding that § 1132(a)(2) does not authorize suit by sub-class of plan participants offered early buy-out of company's defined benefit plan).

8 29 U.S.C. § 1132(a)(3) (emphasis supplied).

9 *See* 508 U.S. 248, 250-51 (1993).

10 *See id.* at 255.

11 *See* 534 U.S. 204, 214 (2002).

12 *See* No. 05-260, slip op. at 5 (U.S. May 15, 2006) (unjust possession necessary to support equitable restitution under § 1132(a)(3)).

James LaRue, who participated in the DeWolff savings plan since 1993, alleges that the plan administrators failed to effect his particular choice of investments and that their failure depleted his interest in the savings plan by approximately $150,000.

LaRue filed his complaint in the U.S. District Court for South Carolina, seeking equitable and such other relief as may be appropriate under § 1132(a)(3). The district court granted defendants' Fed. R. Civ. P. 12(c) motion to dismiss on the pleadings. On appeal, plaintiff argued that both § 1132(a)(3) and § 1132(a)(2) authorize his suit against the plan administrators. The Court of Appeals disagreed.

III. RATIONALE OF THE COURT

The Court of Appeals first rejected LaRue's argument that § 1132(a)(2) authorizes his suit against the plan administrators. Assuming LaRue had not waived the argument, the Court of Appeals reiterated that § 1132(a)(2) does not create a cause of action for the vindication of personal injuries.[13] The court expressed its skepticism that LaRue's "individual remedial interest can serve as a legitimate proxy for the plan in its entirety, as § 1132(a)(2) requires."[14] It also rejected the argument that injury to an individual participant's account amounts to an injury of the plan itself, stating that the argument "finds no license in the statutory text, and threatens to undermine the careful limitations Congress has placed on the scope of ERISA relief."[15] The court distinguished LaRue's claims from those where a "plaintiff sues on behalf of the plan itself or on behalf of a class of similarly situated participants," in which cases a remedy under § 1132(a)(2) would not benefit solely the plaintiff.[16]

The court next rejected LaRue's attempt to characterize his relief as equitable relief authorized by § 1132(a)(3). The court observed that "what plaintiff in fact seek[s] is nothing other than compensatory *damages*,"[17] a classic form of legal relief "conspicuously absent from the list of traditional equitable remedies available under § 1132(a)(3)."[18] The court also refused to characterize LaRue's relief as equitable restitution, finding no allegation that defendant possessed funds owed to LaRue as required by

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13 *See* No. 05-409, slip op. at 5 (4th Cir. June 19, 2006), citing *Mass. Mutual Life Ins. Co.* v. *Russell,* 473 U.S. 134, 142 (1985).

14 *Id.*

15 *Id.*

16 *Id.* at 5-6, citing, among others, *In re Schering-Plough Corp. ERISA Litig.*, 420 F.3d 231, 233, 235 (3d Cir. 2005); *Kuper* v. *Iovenko*, 66 F.3d 1447, 1452-53 (6th Cir. 1995).

17 *Id.* at 7 (emphasis in original).

18 *Id.* at 7-8.

Knudson.[19] Finally, the court declined to distinguish *Knudson*, *Mertens*, and *Sereboff* and extend the scope of equitable remedies available under § 1132(a)(3) in suits by beneficiaries against plan fiduciaries. Instead, the court read those decisions as describing a limited conception of equitable relief available under § 1132(a)(3).[20]

IV. SIGNIFICANCE OF DECISION

There appears to a conflict among the circuits regarding the scope of the cause of action created by § 1132(a)(2). While the *LaRue* court avoids that controversy by concluding that no single plan participant may invoke § 1132(a)(2) for redress of individual injuries, the decision nonetheless includes language indicating that the Fourth Circuit will permit § 1132(a)(2) suits by plaintiffs who represent a subclass of similarly situated participants but less than all plan participants. On the other hand, the *LaRue* decision places the Fourth Circuit squarely in the majority of circuits that limit the availability of compensatory relief under § 1132(a)(3).

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If you have any questions about the issues addressed in this memorandum or if you would like a copy of any of the materials mentioned, please do not hesitate to call or e-mail Michael Macris at (212) 701-3409 or mmacris@cahill.com; Glenn J. Waldrip, Jr. at (212) 701-3110 or gwaldrip@cahill.com; Jonathan I. Mark at (212) 701-3100 or jmark@cahill.com; or John Schuster at (212) 701-3323 or jschuster@cahill.com.

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19 *Id.* at 8-9.

20 *See id.* at 9-11, citing *Pereira* v. *Farace*, 413 F.3d 330, 340 (2d Cir. 2005); *Calhoon* v. *Trans World Airlines, Inc.*, 400 F.3d 593, 598 (8th Cir. 2005); *Callery* v. *U.S. Life Ins. Co. in the City of N.Y.*, 392 F.3d 401, 409 (10th Cir. 2004); *McLeod* v. *Oregon Lithoprint Inc.*, 102 F.3d 376, 378 (9th Cir. 1996); *Armstrong* v. *Jefferson Smurfit Corp.*, 30 F.3d 11, 13 (1st Cir. 1994).