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CURRENT ISSUES IN ERISA FIDUCIARY BREACH
AND BENEFIT CLAIMS LITIGATION

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BIOGRAPHICAL INFORMATION

Thomas P. Gies is a founding partner of Crowell & Moring LLP's Labor and Employment practice group, based in Washington D.C., and leader of the firm's ERISA litigation team. In addition to employee benefits matters, Tom's practice concentrates on complex litigation of a variety of labor and employment law matters, including class action litigation.

Tom's ERISA experience has encompassed a variety of issues involving retirement and 401(k) plans. He is respondents in *LaRue v. DeWolff Boberg & Associates, et al.* Tom also has significant experience in litigating a variety of issues involving ERISA welfare plans, including: retiree medical plan disputes; benefit claims litigation; and ERISA preemption of common law claims against employers, plan sponsors and fiduciaries. Tom's practice also involves the impact of corporate reorganizations and transactions on ERISA plans; prohibited transaction issues; ERISA Section 510 retaliation claims; and MEPPA withdrawal liability disputes. Tom's experience includes counseling numerous companies regarding employment law and ERISA issues presented in corporate transactions.

Tom is a member of the American Bar Association Sections of Labor and Employment Law and Litigation, and is a frequent seminar speaker on a variety of employment topics. Tom has authored numerous articles on employee benefits topics, including *The Maryland Wal-Mart Bill, Is It Preempted by ERISA?*, 32 *Employee Rel. L. J.* 3 (2006).

Tom is a 1976 graduate of the George Washington Law School, where he graduated with honors and was a member of the Law Review. In 1972, Tom received his undergraduate degree with honors from the University of Notre Dame. He is a member of the bars of Illinois, Florida and the District of Columbia. Tom is married and has an nineteen-year-old daughter.

CURRENT ISSUES IN ERISA FIDUCIARY BREACH AND BENEFIT CLAIMS LITIGATION

I. INTRODUCTION

Recent judicial decisions have helped make 2008 a busy year for ERISA lawyers. Two decisions issued by the Supreme Court, *LaRue v. DeWolff Boberg & Associates et al*, 128 S.Ct. 1020 (2008) and *Metropolitan Life Insurance v. Glenn*, 128 S.Ct. 2343 (2008), will bring significant changes to ERISA litigation affecting private sector employers. A third decision, *Kentucky Retirement System, v. EEOC*, 128 S.Ct. 2361 (2008), has broad ramifications for the funding of public employer retirement plans. This outline addresses *LaRue* and *Glenn* and summarizes significant case law development in the lower courts on important issues in ERISA litigation.

II. LARUE v. DEWOLFF BOBERG & ASSOCIATES *et al.*

A. Background -- the District Court's decision

The plaintiff in *LaRue* was a participant in his employer's 401(k) plan. Plaintiff brought suit in the United States District Court in South Carolina in 2004, alleging that the plan administrators breached their fiduciary duties by failing to follow his investment instructions. Plaintiff claimed that, on two occasions in 2000 and 2001, he tried to change his investment allocations from mutual funds invested in common stocks to other mutual funds invested in cash equivalents. The complaint alleged that, as a result of defendants' failure to follow his directions, his account was "depleted" by \$150,000. The complaint alleged a fiduciary breach in violation of ERISA Section 409 and invoked Section 502(a)(3), seeking "make whole" relief. Both the employer and the plan were named defendants. The complaint also sought penalties, pursuant to Section 502(c) of ERISA, for the alleged failure to provide plan documents requested by plaintiff. That issue was abandoned in the district court.

Defendants moved for judgment on the pleadings pursuant to Rule 12(c) of the Federal Rules of Civil Procedure, arguing that Section 502(a)(3) does not permit the recovery of monetary damages. Defendants relied on the Supreme Court's decisions in *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002) and *Mertens v. Hewitt Associates*, 508 U.S. 248 (1993) for the proposition that monetary damages do not constitute "appropriate equitable relief" and is thus not an available remedy in an action brought under Section 502(a)(3). The district court granted the motion.

B. The Fourth Circuit's Decisions

The Fourth Circuit affirmed the district court. *LaRue v. DeWolff Boberg & Associates, et al.* 450 F.3d 570 (4th Cir. 2006). Judge Wilkinson began by addressing the issue of whether the complaint could proceed as a claim under Section 502(a)(2), an argument he noted had been made for the first time on appeal. The court concluded that this claim could not succeed on the merits, even if it had not been waived. Following *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134 (1985), the Fourth Circuit concluded that an individual plan participant's claim for losses to his/her plan account could not be maintained under Section 502(a)(2) because that provision is limited to claims brought for "the benefit of the plan as a whole." 450 F.3d at 570. Judge Wilkinson concluded that *LaRue's* claim was a personal one, seeking

recovery of “a loss suffered by him alone,” and that Section 502(a)(2) was “not a proper avenue” for him to obtain monetary relief. *Id.*

The Fourth Circuit affirmed the district court’s conclusion with respect to the claim actually raised by plaintiff, pursuant to Section 502(a)(3). The court applied *Great-West* and *Mertens* and concluded that the relief sought by plaintiff was not “typically” available in equity and thus not appropriate equitable relief within the meaning of Section 502(a)(3). The court observed that “[m]oney damages are, of course, the classic form of *legal* relief, and have therefore remained conspicuously absent from the list of traditional equitable remedies available under” Section 502(a)(3). 450 F.3d at 575 (emphasis in original). In reaching this result the Fourth Circuit distinguished equitable from legal restitution. Citing *Sereboff v. Mid Atl. Med. Servs., Inc.* 126 S.Ct. 1869 (2006), the court concluded that equitable restitution was not available to plaintiff because there was no allegation that the funds allegedly owed to plaintiff were in defendants’ possession. Instead, consistent with the classic claim for money damages, plaintiff’s recovery is measured “not by the value of defendants’ non-existent gain, but by the value of his own loss – a measure that is traditionally legal, not equitable.” *Id.* at 576.

The Fourth Circuit subsequently denied a petition for rehearing. *LaRue v. DeWolff Boberg & Associates et al.* 458 F.3d 359 (4th Cir. 2006). In that opinion, the court admonished the Department of Labor (“DOL”) for filing an untimely *amicus* brief in support of plaintiff. Judge Wilkinson again addressed the 502(a)(2) issue, which had been raised on rehearing by both DOL and plaintiff. The court concluded that *Russell* compelled the conclusion that Section 502(a)(2) only authorized claims that would provide relief “*for the plan itself.*” 458 F.3d at 362. (emphasis in original)(quoting *Mass. Mutual Life Ins. Co. v. Russell*).

C. The Supreme Court’s Decision

1. The Majority Opinion.

The Supreme Court vacated the Fourth Circuit’s decision. The majority opinion, authored by Justice Stevens, holds that individual plan participants in a defined contribution plan may sue for losses to their individual plan accounts irrespective of whether a recovery for such losses would benefit the plan as a whole. 128 S.Ct. at 1026.

Justice Stevens’ opinion began with the acknowledgement that the lower courts had correctly read the operative language in *Massachusetts v. Russell*, before concluding that the “rationale for *Russell’s holding* supports the opposite result in this case.” 128 S.Ct. at 1022. The majority recounted the various types of claims historically cognizable under Section 502. The Court concluded that plaintiff was complaining about mismanagement of plan assets and distinguished *Russell* on that basis. *Id.* at 1023. Justice Stevens then observed that *Russell’s* “emphasis on protecting the ‘entire plan’ from fiduciary misconduct reflects the former landscape of employee benefit plans. That landscape has changed.” *Id.* at 1025.

The majority opinion documented the significant increased in defined contribution plans over the last twenty years. Justice Stevens noted some of the differences between the defined benefit and defined contribution plans, and concluded that *Russell’s* limitations on the scope of relief available under Section 502(a)(2) are “beside the point in the defined contribution context.” *Id.* Justice Stevens buttressed his conclusion by reference to other provisions in ERISA that, in his view, support the conclusion that the “entire plan” language from *Russell* does not apply to defined contribution plans. *Id.* at 1025-26.

Although *certiorari* was granted on the question, the Court’s opinion explicitly disclaimed any intention to address the question of whether plaintiff sought appropriate equitable relief within the meaning of Section 502(a)(3). *Id.* at 1023.

The Court cautioned that its opinion did not necessarily presage a victory for plaintiff on the merits. The Court observed that it was *not* deciding whether plaintiff had made his investment requests consistent with the requirements specified in the plan or whether he had “asserted his rights in a timely fashion.” 128 S.Ct. at 1024 , n. 3. The Court also stated that it was not deciding whether plaintiff “was required to exhaust remedies set forth in the Plan before seeking relief in federal court” pursuant to Section 502(a)(2). *Id.*

2. The Chief Justice’s Concurring Opinion

Chief Justice Roberts issued an opinion joined by Justice Kennedy. The Chief Justice observed that because plaintiff’s right to direct his investment allocations was a right “granted and governed by the plan,” his claim was properly viewed as a claim for benefits that turns on the “application and interpretation of the plan terms, specifically those governing investment options and how to exercise them.” 128 S.Ct. at 1026. He then wrote that it is “at least arguable” that Section 502(a)(1)(B) provides the only proper remedy for such claims. *Id.* The Chief Justice then observed that it “not clear” that plaintiff could also bring a claim under Section 502(a)(2). Because ERISA is a “comprehensive and reticulated statute,” and relying on *Varity Corp. v. Howe*, 516 U.S. 489 (1996), the Roberts opinion argues that the sort of claim brought by plaintiff might not be “appropriate” under Section 502(a)(2). The Chief Justice thus suggested that a claim under 502(a)(1)(B) might be the only appropriate vehicle to address these kinds of disputes. He noted with approval the decisions of lower courts refusing to permit plaintiffs “from recasting” benefit claims as actions for breach of fiduciary duty under Section 502(a)(2). *Id.* at 1027.

The Chief Justice concluded by noting that these were unsettled questions not properly presented in *LaRue*, suggesting both that they could be taken up on remand and that “other courts in other cases remain free to consider what we have not – what effect the availability of relief under § 502(a)(1)(B) may have on a plan participant’s ability to proceed under § 502(a)(2). *Id.* at 1028.

3. Justice Thomas’ Concurrence

Justice Thomas, in an opinion joined by Justice Scalia, agreed with the majority’s holding for different reasons. Stating that his conclusion was required by the “plain text” of Section 409(a) rather than “trends in the pension plan market,” Justice Thomas concluded that the natural reading of the statutory term “any losses to the plan” encompassed an individual plan participant’s claim. 128 S.Ct. at 1028. Justice Thomas reached this result because of his conclusion that the assets in plaintiff’s 401k account were “plan assets” for purposes of ERISA. He noted that any recovery awarded to a plaintiff proceeding on this theory “must be paid to the plan” rather than to the plaintiff personally. *Id.* at 1029.

D. Proceedings on Remand

The case was remanded to the district court where the parties initiated discovery. After the conclusion of plaintiff’s deposition, plaintiff’s counsel filed, on October 9, 2008, a proposed consent order to dismiss the case with prejudice pursuant to Rule 41(a)(2) of the Federal Rules of Civil Procedure. We expect the order to be granted.

III. THE IMPLICATIONS OF *LARUE* – TEMPEST IN A TEAPOT OR A FLOOD OF NEW CLAIMS?

A. Types of Claims

The Court's decision in *LaRue* expands the kinds of cases available under Section 502(a)(2). The universe of such claims now includes individual claims for losses to a participant's plan account, irrespective of whether any other plan participant, let alone a class of participants, can allege the same type of loss. While the scope of claims authorized by *LaRue* remains to be developed in the lower courts, it is clear that claims may now be brought by individuals alleging any sort of mishandling of their plan accounts, including clerical errors and other innocent mistakes made by plan fiduciaries that allegedly caused a "depletion" in the value of an individual's 401k account balance. And, because of the reach of Section 409, plan fiduciaries are potentially personally liable for damages caused to plan participants in such circumstances. Permitting individual plan participants to recover monetary damages in such cases is a significant change from prior law.

Plaintiffs' lawyers have already begun to use *LaRue* in cases involving alleged mishandling of plan administration not involving investment allocation disputes. *See, e.g., Dunn v. Harris Corp.*, 560 F. Supp. 2d 1260 (M.D. Fl. 2008)(plaintiff alleged a breach of fiduciary duty by both the employer/plan sponsor and its third party administrator in mishandling a plan participant's beneficiary designation form).

One can envision *LaRue* type claims being brought in a variety of circumstances in which a plan participant alleges that her 401k plan account was mishandled. One that comes to mind could be called the Yahoo hypothetical. In this scenario, an employee alleges that she intended to sign up for the company's 401k plan when she began employment, and that the company's HR department failed to forward the paperwork necessary to enroll her in the plan. Her lawyer would claim that, had the paperwork been processed properly, she would have used plan contributions to buy shares of Yahoo at the lowest price available, and that she would have sold those shares at the highest prices at which Yahoo traded during whatever period is open under the statute of limitations. Her complaint, filed 3 years after the events in question, seeks to make fiduciaries personally liable for this loss in the value of the account. The employer's defense in such a case that the plaintiff told someone in HR that she would "think about" whether she wanted to sign up for the plan, and that she never completed the paperwork. Because there would be disputed issues of fact, it is likely such a claim would go to trial.

While the Yahoo hypothetical assumes the plan permits participants to invest in individual stocks, the same principle applies to other types of self-directed individual account plans. The Court's decision in *LaRue* fundamentally changes the stakes in such disputes. Some courts have awarded "instatement" in a plan as a remedy in a fiduciary breach case. *See Atwood v. Swire Coca-Cola, USA*, 482 F. Supp. 2d 1305 (D. Utah 2007) (district court held that plaintiff was entitled to the equitable remedy of instatement into the employer's disability plan where the plan administrator breached its fiduciary duty to competently administer the plan by failing to properly handle plaintiff's incomplete enrollment card). *LaRue* permits plaintiffs alleging plan administration errors to pursue monetary damages in such situations.

The Yahoo hypothetical also suggests there may be a significant number of claims involving comments made by individuals involved in plan administration that unhappy plaintiffs (concerned about losses in their 401k plan accounts) will allege as improper investment advice.

There is nothing in the Court's opinion to limit *LaRue* type actions to 401k plans; the Court's opinion suggests that the cause of action now authorized under Section 502(a)(2) would extend to any ERISA-regulated plan, including welfare plans. One can imagine *LaRue* type claims brought by participants in plans, e.g., Health Savings Accounts, that also contain individual account features. More broadly, because ERISA's fiduciary duty rules apply to welfare plans to the same extent they regulate retirement plans, one can imagine a wide range of claims brought against plan sponsors and their party service providers focusing on whether losses sustained can be argued as constituting a plan "benefit." The characterization of what constitutes a plan "benefit," in light of consequential damages principles, will be increasingly important. See, e.g., *Phaler v. National Latex*, 2007 WL 4395155 (6th Cir. 2007)(plaintiffs claims included a demand for unpaid medical claims submitted to providers, on a "make whole" relief theory).

The Court's decision in *LaRue* is likely to have the most immediate impact on 401k plan "stock drop" litigation. See, e.g., *Rogers v. Baxter Int'l Inc.*, 521 F.3d 702 (7th Cir. 2008). There the court held, based on *LaRue*, a group plan participants suing in their individual capacities who chose to invest in company stock (the value of which was allegedly inflated by misleading statements made by company executives) could bring a claim under Sect. 502(a)(2) even if other participants of the plan were uninjured by the breach. There is no reason to believe there will be a different outcome in the 401k plan "excessive fee" cases.

LaRue is properly limited to claims arising under defined contribution plans; nothing in the Court's opinion suggests any basis for a further modification of *Russell* and its progeny as it applies to defined benefit plans. Lower courts will continue to wrestle with the proper characterization of ERISA plans in particular cases. See, e.g., *Austin v. First Citizens Bank & Trust Co.*, 2008 WL 2944766 (E.D.N.C. July 29, 2008)(refusing to dismiss claim brought by participant in employer's disability benefit plan who alleged that, as a result of false and misleading statement made by defendants in connection with her claim for benefits under the plan, she was forced to refinance her home and take an early distribution from her 401k plan in order to support herself; plaintiff's damages claim included a claim for the "greatly diminished value of her 401k funds;" motion to dismiss denied because of a disagreement as to whether the plan was a defined benefit plan or a defined contribution plan).

The fact that *LaRue* ended up with no recovery and dismissed the case with prejudice on remand will likely have little bearing on the scope of the Court's decision. As summarized below, cases brought on a *LaRue* theory will present several issues that will be sorted out by other courts.

B. Who Can Bring the Claim – the "Standing" of "Former" Participants

One of the several reasons *LaRue* has attracted so much interest is the fact that plaintiff "cashed out" of the plan while the litigation was pending. *LaRue* terminated his employment in 2001 but kept his funds in his account in the plan. While the case was pending on appeal, defendants learned that *LaRue* had withdrawn all his funds from his account in the plan. Defendants moved to dismiss the writ of *certiorari* prior to briefing on the merits. Defendants argued that plaintiff's decision to cash out from the plan made the case moot. Defendants argued that a court could not award plaintiff monetary relief under Section 502(a)(2) because any recovery would have to go to him personally rather than to the plan, meaning that plaintiff no longer had a "legally cognizable interest in the outcome" of the litigation under the theory asserted in the Supreme Court. See, e.g., *City News & Novelty, Inc. v. City of Waukesha*, 531 U.S. 278 (2001). The motion was denied without opinion prior to oral argument.

LaRue's decision to "cash out" from the plan presented a fact pattern that is common in several types of ERISA litigation, including "stock drop" and "excessive fee" cases. Many of these cases involve former employees who cash out from the plan in order to roll-over their plan accounts to an IRA. The question often arises whether such individuals are "participants" with standing to sue either under Section 502(a)(2) or Section 502(a)(3).

This issue is governed by *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989). Among other things, *Firestone v. Bruch* stands for the proposition that the term participant includes any "former employees who 'have' . . . 'a colorable claim' to vested benefits." 489 U.S. at 117-18. For a claimant to establish that he or she "'may become eligible' for benefits, a claimant must have a colorable claim that (1) he or she will prevail in a suit for benefits, or that (2) eligibility requirements will be fulfilled in the future." *Id.* Lower courts have taken divergent approaches to the issue of what can be called "former participant" standing. Compare: *Sommers Drug Stores Co. Employee Profit Sharing Trust v. Corrigan Enters., Inc.*, 793 F.2d 1456 (5th Cir. 1986)(recognizing the distinction between "benefits" v. "damages" in claims brought by former employees); *Kuntz v. Reese*, 785 F.2d 1410 (9th Cir. 1986); *Harzewski v. Guidant Corp.*, 489 F.3d 799 (7th Cir. 2007); *Graden v. Conexant Systems, Inc.*, 496 F.3d 291 (3d Cir. 2007).

In *LaRue*, Defendants' motion to dismiss the writ argued mootness rather than Article III standing. The Court addressed the issue in the majority opinion:

After our grant of certiorari respondents filed a motion to dismiss the writ, contending that the case is moot because petitioner is no longer a participant in the Plan. While his withdrawal of funds from the Plan may have relevance to the proceedings on remand, we denied their motion because the case is not moot. A plan "participant," as defined by § 3(7) of ERISA, 29 U. S. C. §1002(7), may include a former employee with a colorable claim for benefits. *See, e.g., Harzewski v. Guidant Corp.*, 489 F. 3d 799 (CA7 2007).

128 S.Ct. 1026 n.6.

Many observers have interpreted this passage, with its favorable citation to *Harzewski*, as resolving the "former participant" standing issue. Those observations may be premature. The Court was not asked to decide, and clearly did not decide, whether plaintiff in *LaRue* had Article III standing to bring the claim. In the ERISA context, courts have recognized the difference between Article III standing and what can be called "statutory standing." *See, e.g., Graden v. Conexant Systems, Inc.*, 496 F.3d 291, 295 (3d Cir. 2007), *cert. denied*, 128 S.Ct. 1473 (2008)("the question presented is one of statutory standing"). And, of course, mootness is an analytically separate concept from that of standing. To be sure, most courts have continued to hold, irrespective of nomenclature, that former employees may bring a *Firestone v. Bruch* claim for benefits after having "cashed out" from the plan. *See, e.g., In re Mutual Funds Investment Litigation*, 520 F.3d 207 (4th Cir. 2008); *Lanfeer v. Home Depot*, 2008 WL 2916390 (11th Cir. 2008). *Cf. In re Patterson Cos. Inc. Securities, Derivative & ERISA Litig.*, 479 F. Supp. 2d. 21014 (D. Minn. 2007)(holing that plaintiff divested herself of standing to pursue litigation on behalf of the plan when she ceased being an employee of the company and withdrew all funds from her ESOP account; court determined that she was seeking only a claim for damages rather than one for "vested benefits" within the meaning of *Firestone v. Bruch*).

Yet the Article III standing issues implicated by cases such as *LaRue* have yet to be resolved. A recent, carefully written decision from a district court judge in Massachusetts is illustrative. In *Bendaoud v. Hodgson, et al.*, 2008 WL 4335884 (D. Mass., September 24, 2008) plaintiff invoked Section 502(a)(2) in a complaint alleging ERISA violations in connection with an alleged stock option backdating dispute. Allegations of backdating affected the value of the company stock, which was the sole investment option available to participants in an ERISA plan sponsored by the employer. Plaintiff was a former employee who cashed out of the plan prior to the alleged backdating scheme, and, as it happened, the value of his account in the plan had increased during the time he was a plan participant. Defendants filed a motion to dismiss the complaint pursuant to Rule 12(b)(6). Among other things, defendants claimed that plaintiff lacked Article III standing under to bring the suit. Plaintiff's response included an argument, based on *LaRue*, to the effect that the loss of value in the account values of other plan participants was sufficient to give plaintiff Article III standing to pursue the claim under Section 502(a)(2), because the claim was brought "for the benefit" of some plan participants. *Bendaoud* thus involved what might be called the converse of *LaRue*. In any case, the court rejected the argument. The court summarized the critical distinctions between defined benefit and defined contribution plans, observing that "if an asset in a defined contribution plan is harmed, the loss is not spread. It is visited entirely on the participant or participants who hold the impaired asset." Slip op. at 10. The court carefully analyzed the Supreme Court's decision in *LaRue*, observing, among other things, that *LaRue* "does not involve standing per se." *Id.* at 14. The court concluded that the plaintiff "cannot seek recovery on behalf of another plan participant's financial loss." *Id.* at 16. The court also concluded that plaintiff's lack of standing also barred him from representing a class of other plan participants. *Id.* at 17. The court ultimately denied defendants' motion to dismiss because it concluded that plaintiff's alternative theory – that he pled a cognizable harm because the stock fund was an imprudent investment – *did* state a claim under ERISA Section 502(a)(2).

Bendaoud illustrates how the timing of an employee's decision to cash out of a plan may have a significant impact on the success of the individual's subsequent claim, even *LaRue*. See, e.g., *Caltagirone v. NY Community Bancorp, Inc.*, 2007 WL 4467655 (2d Cir., filed Dec. 20, 2007)(no standing for participant who took a total distribution prior to the alleged fiduciary breaches); *Graden v. Conexant, supra*, 496 F.3d at 296 n.7 (discussing authority under § 502(a)(1)(A) that participant status is determined "at the time of the breach," but not reaching the issue under § 502(a)(2) due to waiver). See also *Loren v. Blue Cross & Blue Shield of Mich.*, 505 F.3d 598 (6th Cir. 2007)(court held that plaintiffs lacked Article III standing to bring a claim under Section 502(a)(2) because the alleged injury was too speculative; appellate court determined that plaintiffs did have standing, under Section 502(a)(3), to seek injunctive and/or other "appropriate" equitable relief).

Even if the question of "standing" is resolved, difficult questions remain in cases brought by individuals who are no longer participating in the plan. Justice Thomas' concurrence illustrates one such issue. Justice Thomas correctly states that any recovery in a Section 502(a)(2) action must be made to the plan and cannot be paid directly to the individual. Depending on the language of the plan, including expense allocation rules, current law would seem to permit the plan, in the event of a recovery in a *LaRue* type action, to direct that a certain percentage of the recovery would be allocated to plan expenses before remittance of the remainder to the successful plaintiff.

C. Identifying the Proper Defendants

The plaintiff in *LaRue* filed a bare-bones complaint. At the time the dispute arose, investment allocation requests under the plan at issue were first communicated to a plan trustee who was employed

by a third party bookkeeping and accounting firm. Once approved by the trustee, the election forms were forwarded to a third party administrator for review and subsequent transmission to a mutual fund management firm. The complaint contained no specifics as to who actually refused to execute plaintiff's investment directions, by whom they were employed, their relationship to the company and/or the plan, or their motive. For example, there was no "failure to monitor" allegation; the complaint simply pled that the defendants were fiduciaries and that they had failed to act on the plaintiff's investment allocation requests. The sufficiency of the complaint allegations, and the identity of the proper defendant(s) (if any), was an issue that would have been litigated on remand, had plaintiff not dismissed the case.

Whether a party is an ERISA fiduciary in a particular dispute is often a fact-intensive question, given the statute's functional definition of fiduciary status. *See* 29 U.S.C. § 1002 (21)(A). For entities that are not named fiduciaries, the question of fiduciary status often turns on whether the entity manages plan assets, and/or has discretionary authority or control over plan administration with respect to disputed events. One's status as a corporate officer, employee, or member of a Board of Directors, by itself, is often insufficient to convey fiduciary status. *See, e.g., Confer v. Custom Engineering Co.*, 952 F.2d 34 (3d Cir. 1991); *In re WorldCom, Inc., ERISA Litigation*, 263 F. Supp. 2d 745, 760-61 (S.D.N.Y. 2003). Case law recognizes that corporate plan sponsors, and their employees, often wear "two hats" and that the question of fiduciary status in a particular dispute will often depend on the particular steps taken by the individual at issue. *See also Pegram v. Herdrich*, 530 U.S. 211(2000) (distinguishing between fiduciary status and the exercise of medical judgment by an HMO making mixed eligibility/medical treatment decisions).

Corporate officers and employees can, of course, become fiduciaries when they engage in conduct within the ambit of Section 409. *Varity Corp. v. Howe et al.*, 516 U.S. 489 (1996)(corporate executives were acting as plan fiduciaries by, *inter alia*, making misleading communications to plan participants). Third party administrators who undertake, by contract or otherwise, to make other discretionary decisions regarding plan administration are fiduciaries. *See, e.g., Reich v. Lancaster et al*, 55 F.3d 1034 (5th Cir. 1995)(insurance agent and related entities held to be fiduciaries because of their role in claims administration). Courts treat the determination of fiduciary status as a mixed question of law and fact. *E.g., Briscoe v. Fine*, 444 F.3d 478, 486 (6th Cir. 2006), insuring that the question of fiduciary status will be a fact-intensive inquiry often not amenable to summary judgment.

Not every action taken by an entity that might otherwise be characterized as a plan fiduciary is actionable as a violation of Section 409. As an example, purely ministerial conduct engaged in by employees of a corporate plan sponsor is typically not actionable under Section 409. *See, e.g., Livick v. The Gillette Co.*, 524 F.3d 24 (1st Cir. 2008)(inaccurate estimate of plaintiff's benefit not actionable as breach of fiduciary duty); *Kannapien v. Quaker Oats Co.*, 507 F.3d 629 (7th Cir. 2007), *reh. en banc denied*, (7th Cir. Dec. 21, 2007)(neither plant manager nor human resources manager acted as a fiduciary when they discussed pension benefits with plan participants).

Ministerial errors made by a third party administrator likewise will often not rise to the level of a breach of fiduciary duty. *See, e.g., Moekel v. Carermark, Inc.*, 2007 WL 3377831 (M.D. Tenn. Nov. 13 2007 (pharmaceutical claims processing is a ministerial act); *Kyle Rys. V. Pacific Admin. Serv. Inc.*, 990 F.2d 513, 516 (9th Cir. 1993); *Landwehr v. DuPre*, 72 F.3d 7826, 738 (9th Cir. 1995); *Baxter v. C.A. Muer Corp.*, 941 F.2d 451 (6th Cir. 1991). Third party administrators are often contractually insulated from being sued for breach of fiduciary duty. *See e.g., Thorn v. Northside Hospital*, 2008 WL 2559291 (W.D. Mich., June 23, 2008)(defendant third party administrator's motion for summary judgment granted;

record showed that defendant health plan reserved the discretionary authority to make benefit eligibility determinations).

On the other hand, there are often factual questions about the specific role of a third party service provider that will preclude a motion for summary judgment. *See, e.g., Minnesota Power and Affiliated Companies Retirement Plan v. Capital Guardian Trust Co.* 2008 WL 2891057 (D. Minn., July 22, 2008). There, an investment firm was held to be a fiduciary and thus properly named as a defendant in a lawsuit filed in connection with the alleged liquidation of plan assets one day prior to a contractual schedule, resulting in losses to the value of the plan. *See also Tussey v. ABB, Inc.*, 2008 WL 379666 (W.D. Mo., Feb. 11, 2008)(motion to dismiss denied in excessive fee case).

Many fact patterns in cases arising after *LaRue* will present close questions of which entity is allegedly responsible for the losses to the plaintiff's plan account. The identity of the proper defendant(s) in a particular case will not always be apparent, even in today's world of computerized access to large brokerage firms that manage 401k plan assets for employers. Counsel on all sides of these issues should pay close attention to this issue.

D. Impact on Section 502(a)(3) Cases – the Scope of “Appropriate Equitable Relief”

Nothing in the Supreme Court's decision changes existing law regarding the scope of relief available under Section 502(a)(3). The majority's opinion is clear that the Court did not address the issue. *See* 128 S.Ct. at 1023. The Supreme Court's treatment thus seems to leave intact the Fourth Circuit's reading of the scope of the term “appropriate equitable relief” after *Sereboff* and *Great-West*. In any case, Judge Wilkinson's decision on this point was consistent with the general treatment of claims for money damages.

There was substantial briefing on various aspects of this issue in the Supreme Court, including the historical role of the claim of surcharge in common law England, the scope of the “clean-up” doctrine in the equity courts, the differences between equitable and legal restitution, and the extent to which ERISA modifies traditional trust law concepts. It appears a majority of the current Justices are unwilling to undertake another examination of these issues, perhaps because a majority believe that *Great-West* and *Mertens* provide adequate guidance for lower courts trying to decide what kind of remedies were “traditionally available” in the days of the divided bench. This assumption is confirmed by the Court's subsequent refusal to grant *certiorari* in *Amschwand v. Spherion Corp.* 505 F.3d 342 (5th Cir. 2007), *cert. denied*, 128 S. Ct. 2995 (2008), notwithstanding the fact that the Solicitor General, at the invitation of the Court, recommended, as it did in *LaRue*, that the Court accept the case.

If this prediction hold true, it will confirm the results of cases such as *Alexander v. Bosch Automotive Systems, Inc.*, 232 Fed. Appx. 491 (6th Cir. 2007), *cert. denied* (2008), where the court held that, in a Section 510 case arising out of a plant closure, plaintiffs could not recover additional severance and other plant closure benefits in an action brought under Section 502(a)(3).

E. Nature of the Claim – Availability of Jury Trials

The *LaRue* Court's decision may further complicate the question of the proper characterization of a Section 502(a)(2) claim. Since the Supreme Court's decision in *Great-West v. Knudson*, parties have argued that ERISA authorizes a jury trial in any case seeking a monetary award.

Lower courts have split on the question of whether a claim for breach of fiduciary duty brought under Section 502(a)(2), to the extent it can be characterized as seeking legal as opposed to equitable relief, will support a jury demand. *See, e.g., Ellis v. Rycenga Homes, Inc.*, 2007 WL 1032367 (W.D. Mich. 2007)(citing *Great-West* and concluding that plaintiff's breach of fiduciary claim, seeking monetary damages, involved claims for legal relief); *Minnesota Power and Affiliated Companies Retirement Plan v. Capital Guardian Trust Co.*, *supra* (court authorized plaintiff to proceed on a jury trial in claim against financial manager). *See also Chao v. Meixner*, 2007 WL 4225069 (N.D. Ga., Nov. 27, 2007)(court allows defendant, over the objection of DOL, to proceed to a jury trial in a case involving allegedly improper payments made by plan fiduciaries; court explicitly distinguishes Section 502(a)(2) from Section 502(a)(3); court notes that 502(a)(2) claims may arise "at law" and not in equity). Other courts have rejected similar arguments. *See, e.g., Abbott v. Lockheed Martin Corp.*, 2007 WL 2316481 (S.D. Ill. 2007); *Yolton v. El Paso Tennessee Pipeline Co.*, 2008 WL 275685 (E.D. Mich., Jan. 31, 2008)(court grants defendant's motion to strike jury trial demand in a "hybrid" action protesting the unilateral modification of retiree medical benefits as violative of ERISA Section 502(a)(1)(B) and Section 301 of the LMRA).

F. The Measure of Damages

The Supreme Court's opinion suggests that an individual plan participant can recover "lost profits" in an action brought under Section 502(a)(2). The Court commented on the plaintiff's damages theory:

The record does not reveal whether the alleged \$150,000 injury represents a decline in the value of assets that DeWolff should have sold or an increase in the value of assets that DeWolff should have purchased. Contrary to respondents' argument, however, §502(a)(2) encompasses appropriate claims for "lost profits." See Brief for Respondents 12–13. Under the common law of trusts, which informs our interpretation of ERISA's fiduciary duties, see *Varity*, 516 U. S., at 496–497, trustees are "chargeable with . . . any profit which would have accrued to the trust estate if there had been no breach of trust," including profits forgone because the trustee "fails to purchase specific property which it is his duty to purchase." 1 Restatement (Second) Trusts §205, and Comment i, §211 (1957); see also 3 A. Scott, Law on Trusts §§205, 211 (3d ed. 1967).

128 S.Ct. at 1024 n. 4.

The Court has thus opened the door for individual plaintiffs to use their imagination in making claims for damages in cases authorized by *LaRue*. This promises to make damages calculations an important issue in individual fiduciary breach claims. Several circuits measure a "loss" by comparing what the plan actually earned on the investment at issue with what would have been earned if the assets had been invested in other alternatives available under the plan. *E.g., Donovan v. Bierwirth*, 754 F.2d 1049 (2d Cir. 1985); *GIW Indus. v. Trevor, Stewart, Burton & Jacobsen, Inc.*, 895 F.2d, 729, 733 (11th Cir. 1990); *Dardaganis v. Grace Capital, Inc.*, 889 F.2d 1237, 1243-4 (2d Cir. 1989). Some courts have compared the loss on the investment at issue with other measures of investment return as surrogates, such as prevailing interest rates or the return originally anticipated on the investment. *E.g., Katsaros v. Cody*, 744 F.2d 270, 281 (2d Cir. 1984); *Donovan v. Mazzola*, 716 F.2d 1226, 1232-33 (9th Cir. 1983).

One can easily imagine the plaintiff in the Yahoo hypothetical arguing for the maximum allowable measure of “lost profits” damages her expert can conjure up. In other contexts involving claims under Section 409, courts have given a liberal reading to the kind of losses that can be characterized as “lost profits” to be recovered from a fiduciary. *See, e.g., La Scala v. Scruferi*, 479 F.3d 213 (2d Cir. 2007). Creative plaintiffs’ lawyers seeking to increase the settlement value of their cases (and/or their appeal to a jury if the law develops in their favor on that issue) can be expected to become increasingly aggressive with damages claims. This prospect, in turn, suggests that this corner of ERISA litigation may represent a new frontier in the application of *Daubert-based* expert witness challenges.

G. Implications of the Roberts’ Concurrence -- Relationship to Section 502(a)(1)(B)

The Chief Justice’s concurring opinion may be the most durable feature of the Court’s opinion in *LaRue*. The Chief Justice’s opinion is good news (at least for plan sponsors and their third party service providers) in its appreciation of the consequences, intended and otherwise, of the Court’s holding. Roberts’ opinion seems to recognize the practical problems associated with permitting individual claims for breach of fiduciary duty in disputes that are, in the end, hard to distinguish from traditional benefit claims. The Chief Justice’s opinion reflects an understanding of the importance, to employers and other plan sponsors, of being able to require exhaustion of benefit claims and eligibility disputes through procedures established in the plan. Among other things, exhaustion of claims procedures permits the plan sponsor to take advantage of the more deferential standard of review authorized by *Firestone v. Bruch*, recently reaffirmed in *Met Life v. Glenn*. The Chief Justice is surely correct in observing that these safeguards “encourage employers and others to undertake the voluntary step of providing plans.” 128 S.Ct. at 1027.

Justice Roberts is clearly correct in noting that the majority opinion likewise suggest that exhaustion of plan remedies may be appropriate before seeking relief under Section 502(a)(2). 128 S.Ct. at 1024, n.3. The two opinions suggest there will be additional litigation over the meaning of plan language written in response to *LaRue*. There will also be litigation with respect to the full range of exhaustion issues present in traditional benefit claims litigation.

Although not stated explicitly, it seems that the Chief Justice was concerned about the negative consequences to plan sponsors of permitting plaintiffs to mimic the tactic used by *LaRue*: waiting three years after the alleged failure to act on his investment instruction to bring an action seeking monetary damages. Most plans will, of course, require exhaustion on much more prompt terms, and the Chief Justice’s suggestion that such claims may be best seen as claims for benefits may have the salutary effect of minimizing costly litigation against plan sponsors and third party service providers.

To be sure, language in the Roberts concurrence is likely to engender additional debate. For instance, the Chief Justice was not specific in suggesting which subsection of Section 502(a)(1)(B) would apply in a case of this sort. In some fact patterns, there may be significant outcome-determinative differences in the treatment of claims seeking enforcement of rights under the terms of the plan, or clarification of rights to future benefits, compared to a claim for “recovery of benefits.” His opinion does not address the question of how one would measure “benefits” in a claim for benefits brought under Section 502(a)(1)(B) against “lost profits” that appear to be recoverable under Section 502(a)(2), at least according to the majority opinion. And the Roberts concurrence does not address the growing body of ERISA benefits claims cases in which employees who are not plan participants are held unable to bring an action under Section 502(a)(1)(B) seeking to recover benefits under the terms of the plan. *See, e.g., Todisco v. Verizon Communications, Inc.* 497 F.3d 95 (1st Cir. 2007).

Lower courts have begun to explore some of the issues suggested by the Roberts concurrence. In *Crider v. Life Ins. Co of North America*, 2008 WL 2782871 (W.D. Ky. July 15, 2008) the court denied plaintiff's motion to amend her complaints to include a Section 502(a)(2) claim in addition to her original claims under 502(a)(1)(B). The plaintiff claimed the losses to the plan were the attorneys' fees the plan accrued in bringing the claim as a result of the fiduciary duty. The court noted that while neither that court, nor the Supreme Court, "has directly addressed whether the availability of a complete remedy for a plaintiff under Sect. 502(a)(1)(B) precludes him or her from proceeding with a claim on behalf of the Plan under Sect. 502(a)(2) for attorneys fees and equitable relief," Crider could not pursue the 502(a)(2) claim. *Id.* at *2. The court explained that plaintiff had not demonstrated a "systematic-plan-wide" defect or a claim that was "distinct and unrelated" from the 502(a)(1)(B) claim. Citing the Roberts' concurrence, the court explained that allowing plaintiff to pursue both claims "would run completely counter to ERISA's enforcement scheme." *Id.* at *3. The court held that allowing amendment of the complaint would be "futile." *Id.* See also *Dunn v. Harris Corp.*, *supra* (district court rejected plaintiff's attempt to amend the complaint; court stated that a claim cannot be both a claim for benefits under the terms of a plan and a claim for breach of fiduciary duty).

IV. METROPOLITAN LIFE V. GLENN

A. Background

Since *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989), courts have struggled with the issue of how much deference is properly given to a fiduciary's claims denial decision, when that fiduciary has an actual or arguable financial incentive to deny the claim thus creating the potential for a conflict of interest. The circuit courts have differed not only on the methodology to be employed in weighing the effect of such conflicts, but also on the extent to which conflicts exist at all.

The Supreme Court has once again entered this field in *Metropolitan Life Ins. Co. v. Glenn*, *supra*. The Court's opinion purports to adopt a broad view of situations involving a conflict of interest, requiring courts to take such conflicts into account on a case-by-case basis. While technically preserving the deferential standard originally set forth in *Firestone*, the Court's decision in *Glenn* will likely subject fiduciary claims decisions to greater judicial scrutiny under ERISA.

B. The Litigation

In *Glenn*, the Court addressed a situation in which Metropolitan Life, acting as both plan administrator and insurer of a disability plan maintained by Sears, Roebuck & Company, processed a claim for disability benefits by a Sears employee with a heart condition. Metropolitan initially approved short term disability benefits for the employee on the basis of opinions from a number of doctors that the employee was incapable of performing any kind of work. Like many disability plans, the Sears plan provided for an offset of benefits if a participant also received Social Security disability payments, and Metropolitan specifically encouraged the employee to file an application under the Social Security disability insurance program. The Social Security Administration granted her application, finding her totally unable to work, and Metropolitan thereupon deducted the amount of her Social Security payments from the short term disability payments she received from the plan. At the end of the employee's short term disability coverage period, Metropolitan re-examined her status to determine her eligibility for long-term disability payments. Despite both the findings of a majority of physicians and the decision of the Social Security Administration, Metropolitan concluded that the employee was able to perform other jobs, and therefore was not entitled to long-term disability benefits.

Plaintiff responded by challenging the determination in an action brought under Section 502. Evidence produced in the District Court indicated that, in denying this claim, Metropolitan ignored medical opinions contrary to its conclusion and failed to provide complete information of the employee's medical status to its internal medical experts.

Despite the shortcomings of Metropolitan's claims appeal process, the district court upheld the claims denial. In doing so, it relied on the Supreme Court's conclusion in *Firestone v. Bruch* that courts must defer to claims decisions by fiduciaries possessing interpretive discretion over plan terms unless such decisions are found to be arbitrary and capricious. On appeal, the Sixth Circuit reversed. *Met Life v. Glenn*, 461 F.3d 660 (6th Cir. 2006). The appellate court focused on other language in *Firestone* stating that the presence of a conflict of interest is a factor a court can consider in determining whether to defer to a fiduciary's claims decision. The Sixth Circuit found that Metropolitan, as both administrator and insurer, operated under such a conflict, that Metropolitan's decision was not as a result entitled to deference, and that in any event, Metropolitan had abused its discretion in denying the employee's claim.

C. The Majority Opinion

Writing on behalf of himself and Justices Stevens, Souter, Ginsburg and Alito, Justice Breyer affirmed the Sixth Circuit. 128 S.Ct. at 2352. The majority confirmed that, under *Firestone*, courts should continue to be guided by trust law in determining the appropriate standard of review for reviewing denials of benefits. Under the Restatement of Trusts, according to Justice Breyer, a benefit plan that is operated under a conflict of interest requires that "that conflict must be weighed as a 'factor in determining whether there is an abuse of discretion.'" 128 S.Ct. at 2346 (*quoting Firestone*, at 115). What *Firestone* left unclear, however, was when such a conflict arises and the manner in which courts must take such conflicts into account.

Justice Breyer attempted to address both questions. He was more successful with the first. The majority decision is very clear on the issue of when a conflict arises – it occurs whenever the claims decision maker has an interest at odds with the interest of plan participants and beneficiaries. All nine justices agreed that an insurance company that both administers and insures a plan operates under such a conflict. Seven of the justices concluded that an employer that both administers and self-funds a plan also operates under such a conflict (with Justices Scalia and Thomas stating that this issue did not need to be decided based on the facts of the case).

The majority opinion is decidedly less clear on the more important practical question of how courts should take the presence of a conflict into account. Essentially, the majority adopted a totality of the circumstances test to be used in reviewing denial of benefits. In giving weight to the conflict of interest factor, a reviewing court should take into account the circumstances particular to each case. 128 S.Ct. at 2351. Thus, courts should give more weight to the conflict of interest when the circumstances demonstrate that the conflict affected the decision to deny benefits, and give less weight to the conflict if "the administrator has taken active steps to reduce potential bias and to promote accuracy." *Id.* The majority noted, for example, that the effect of a conflict (although not the existence of the conflict itself) could be reduced if an insurance company could show that it has adopted structures or practices to wall off the claims processing function from those portions of its operations concerned with finances. *Id.* In the majority's view, this case-by-case approach is consistent with the trust law concepts that undergird ERISA, and would not result in diminishing the deferential standard originally announced in *Firestone v. Bruch*. Applying this new standard, the Court found that that Sixth Circuit correctly took the conflict of

interest into account, along with other factors, in determining that the insurance company abused its discretion in denying benefits to the employee.

D. The Other Opinions

The concurring and dissenting opinions issued by the remaining Justices highlight some of the difficulties that the majority's approach may cause. Justice Kennedy agreed with the review framework presented in the majority's opinion but recognized that the majority had effectively established a new standard of review. He therefore dissented from the judgment, arguing that the case should be remanded so that Metropolitan would have the opportunity to demonstrate, for example, that it had adopted the types of "walling off" structures mentioned in the majority opinion.

Chief Justice Roberts, concurring in the judgment (because he believed that Metropolitan had acted arbitrarily regardless of the standard of review), also agreed that, under trust law, there must be some evidence that the conflict played a role in the claims denial before subjecting the claims denial to a less deferential standard of review.

Justice Scalia, dissented in an opinion joined Justice Thomas. He disagreed with most of the Court's analysis, beginning with the assumption that employers that sponsor plans necessarily have a conflict of interest in the disposition of benefit claims. Justice Scalia then stated that, under the law of trusts supposedly relied upon by the majority, a conflict of interest should be relevant only for determining if the administrator abused his discretion by acting with an improper motive. Justice Scalia strongly rejected the majority's totality of the circumstances test as unworkable. 128 S.Ct. at 2357. Because the majority's approach does not require such an inquiry, Justice Scalia observed all decisions made by administrators playing a dual role would subject to review without full deference; in his words, the majority opinion has dictated "nothing but *de novo* review in sheep's clothing." *Id.* at 2358. Justice Scalia also dismissed an alternative standard urged by the Solicitor General as "an equally gobbledygook standard." *Id.* at 2358 n.3.

E. Initial Reactions

In *Glenn*, the Court adopted the same analytical approach used in *LaRue*. In *Glenn*, the Court (through same five justice majority that issued the main opinion in *LaRue*) conducted a re-evaluation of the rules of engagement in benefit claims litigation that is similar to the reassessment in *LaRue* of remedies available in fiduciary breach claims. Justice Breyer's comments notwithstanding, one believes that Justice Scalia's assessment is closer to the mark and that the net effect of *Glenn* will be to subject more claims decisions to a greater frequency of judicial review and a higher level of judicial scrutiny. Courts in several circuits will have to reassess the analytical approach used in claims review cases since *Firestone*.

Further, because the types of conflicts identified by the majority decision occur as a structural matter in the case of almost every plan, there may also be a premium placed on identifying and implementing the types of "conflicts walls" described by the Court. The Court's focus on issues such as a history of biased claims processing, and the steps taken by the plan fiduciary to minimize inaccurate claims determination, almost guarantee an increase in the amount of discovery to be taken in benefit claims disputes. Apart from the resource burdens imposed by increased discovery, by adopting an expansive view of practices constituting a conflict of interest, and requiring courts to consider the effect

of such conflicts on a case-by-case basis, the Court has effectively reduced the extent to which courts will defer to fiduciary claims decisions going forward.

Cases decided since *Glenn* have begun to address the many issues implicated by the Court's opinions. A recurring issue is likely to be the scope of discovery in claims denial cases. *See, e.g., Hogan-Cross v. Metropolitan Life Insurance Co.*, 568 F. Supp. 2d 410 (S.D.N.Y. 2008). There, the district court categorically rejected arguments made by Met Life opposing discovery propounded by the plaintiff in a disability benefits case, observing that: "Blunderbuss attempts to cut off discovery on the ground that it never or rarely should be permitted in these cases, whatever their merits before *Glenn*, no longer have merit." *Id.* at p. 5. *See also Copus v. Life Ins. Co. of N.A.*, 2008 WL 2794807 (N.D. Tex. 2008)(discovery intended to show a history of biased decision-making presumptively relevant; court allowed discovery as to: 1) the selection of the claims reviewer, 2) the steps taken by the administrator to reduce the conflict, 3) the compensation system of claims reviewers, and 4) any claims procedures or manuals. Both courts rejected outright the notion that discovery should be limited to the administrative record.

Of particular interest in *Hogan-Cross* was the plaintiff's request for discovery as to the amount of compensation paid to outside consultants involved in claims administration. The court concluded that this information was relevant as that it could help to determine bias on the part of the consultant, particularly if all or most of the consultant's revenue was derived from the insurance company. That bias, of course, could be relevant in arguing that the defendants had an irreconcilable conflict of interest under the standards of *Firestone v. Bruch* and *Glenn*.