Dan Davidson ddavidso@radford.edu is Chairman/Professor of Business Law and Michael D. Chatham mdchatham@radford.edu is an Assistant Professor of Accounting in the Department of Accounting, Finance, and Business Law, College of Business and Economics, Radford University.

Abstract

A recently argued Supreme Court case, *LaRue v. DeWolff, Boberg & Associates, Inc.*, has the potential to change the scope of the Employee Retirement Income Security Act (ERISA), opening up the playing field to more participants and significantly expanding the rights of those employees who participate in defined contribution retirement plans. The courts have, in the past, interpreted the statute in such a manner that relief under ERISA was only available to "plans," and "plans" was interpreted so narrowly that, in effect, relief under ERISA was limited to defined benefit plan participants. Since defined contribution plans have become more popular than the defined benefit approach, the LaRue case may open up the playing field to a whole new set of litigants. In this paper, we discuss the lower court rulings, the role the two most common types of pension plans played in these judgments, and the implications of either a LaRue win or loss. We conclude by offering our prediction of the pending Supreme Court decision.

Introduction

The Employee Retirement Income Security Act (ERISA) was passed in 1974. The primary purpose of the law was an attempt by Congress to provide uniform regulations across the broad spectrum of employee benefit plans. Congress carefully defined the civil remedies that would be available to a litigant seeking relief for alleged violations of the employee's benefit plan and also preempted many, if not most, of the previously available state law causes of action [§1132(a)]. The apparent rationale behind these changes was to make sure that ERISA was the "only game in town" for any persons seeking remedies under these plans. However, several court opinions applying these carefully defined civil remedies have shown that, at least for some litigants, ERISA is indeed seen as the only game in town, and it is a game in which these litigants are not allowed to participate. This is especially true if the litigant is enrolled in a "defined contribution plan."[1] However, a recent Supreme Court case, *LaRue v. DeWolff, Boberg & Associates, Inc.*, may change the interpretation of the scope of ERISA's coverage, opening up the playing field to more participants and significantly expanding the rights of those employees who participate in defined contribution retirement plans.

Background – the LaRue Case

James LaRue, an employee of DeWolff, Boberg & Associates, Incorporated, signed up for the firm's Employee Savings Plan, a 401(k) plan administered by DeWolff, Boberg & Associates. The plan was a "defined contribution" plan, an individual account plan that fell under the coverage and protections provided by ERISA. According to LaRue, the fiduciaries (DeWolff and the administrators of the Plan) each breached their fiduciary duties to him by failing to follow the investment strategy that he elected for his account, and this failure resulted in the diminution of his account by some $150,000. LaRue sued both DeWolff and the administrators of the Plan (DeWolff, Boberg & Associates, Incorporated Employees' Savings Plan, hereafter the Plan) under §1132(a)(3) of ERISA, seeking recovery of this alleged "loss."

The District Court granted summary judgment for DeWolff and the Plan, ruling that the relief LaRue was seeking was not available under §1132(a)(3) of ERISA. LaRue appealed to the Fourth Circuit. In his appeal, LaRue added that he was also seeking relief under §1132(a)(2) of ERISA. Despite this added argument, the Fourth Circuit sustained the lower court's ruling, finding that §1132(a)(2) "provides remedies only for entire plans, not for individuals," and that while §1132(a)(3) does provide some remedies for individuals, the relief sought by LaRue under this section was not available under these circumstances.

Not one to give up too easily, LaRue filed a motion for rehearing/rehearing *en banc* with the Fourth Circuit. The Secretary of Labor of the United States also entered into the fray, filing a motion for leave to submit an *amicus curie* brief in support of LaRue. The court issued its *en banc* Order denying the motion for a rehearing/rehearing *en banc*. In its Order, the court also addressed the issues raised by the Secretary of Labor in his *amicus* brief, albeit not favorably.

LaRue filed a petition for Writ of Certiorari in November of 2006, and the Supreme Court granted certiorari June 18, 2007. The Supreme Court heard arguments in December, 2007, and an opinion is expected in June of 2008.

What is so important about this particular case at this particular time? Why has this case attracted so much attention, especially since it addresses issues that the Fourth Circuit was convinced had already been settled—and settled definitively? To put it as succinctly as possible, if the Supreme Court disagrees with the Fourth Circuit and rules in favor of LaRue, there may well be a tremendous impact on various retirement plans and the administrators of those plans. The pension rights of as many as seventy million employees could be affected (Savage, 2007). Plans controlling billions of dollars will be exposed to potential liability, and the cost—perhaps even the availability—of such retirement plans will be greatly affected.

Before continuing our discussion of the case and the possible repercussions resulting from it, the following section provides a description of the defined contribution plans referred to above, and contrasts those plans with the other commonly found type of retirement arrangement, defined benefit plans. We then detail the Fourth Circuit Court's opinion and discuss LaRue's position, while also speaking to what he must do to prevail at the Supreme Court. The paper concludes by providing some of the implications of either a LaRue win or loss, and offers our prediction on the outcome of the case.

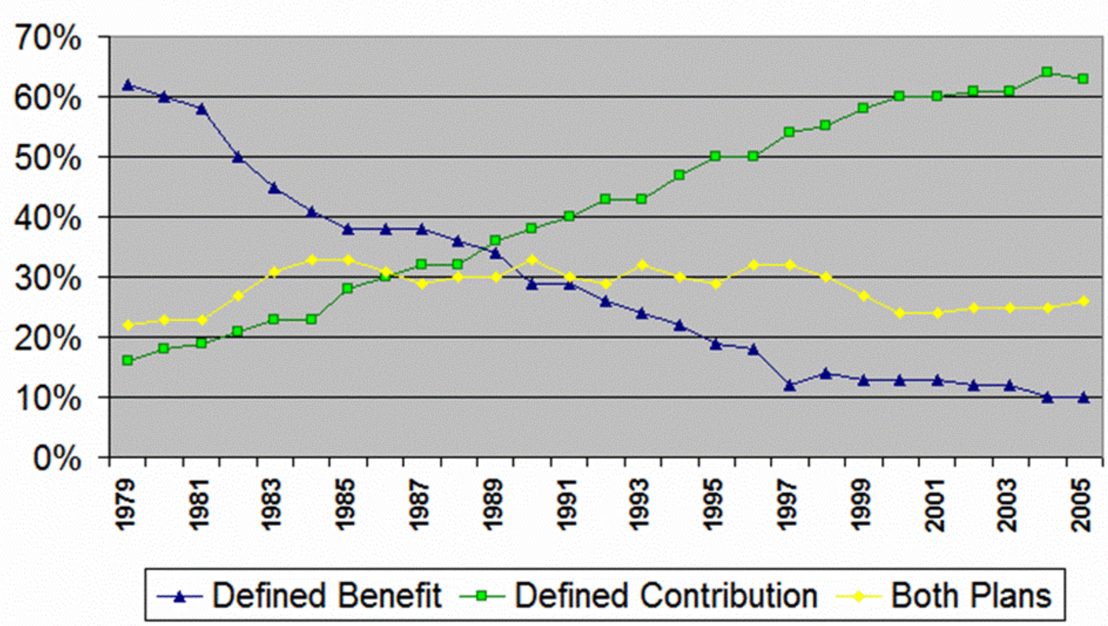
Defined Benefits v. Defined Contributions: A Comparison

Retirement plans typically take on one of two general forms. *Defined benefit* plans, as the name implies, specify how much employees are to receive upon retirement. This amount may be defined as either a fixed monthly amount or, more commonly, as an amount based on some pre-defined formula. Years-of-service, pre-retirement earnings, and age are typically the most important variables contained in these formulae. The defined benefit plans, also known as "traditional" plans, tend to encourage loyalty on the part of the employee, since defined benefit plans in the private sector are funded almost exclusively by employers.[2] *Defined contribution* plans, also appropriately labeled, provide for employees (the plan participants) to contribute as individuals to retirement accounts. Examples of these types of plans include: 401(k), 403(b), profit-sharing, and employee stock ownership plans. In a defined contribution plan the contributions to the plan are specified, but the benefits are not. Rather, the return on these accounts is based on the nature of the investment choices made by plan participants. Some defined contribution plans allow the participant a great deal of discretion in allocating funds (i.e., a wide array of high-risk and low-risk opportunities are available), while others have a limited choice set. In defined contribution plans, employees typically fund the plan by contributing, at their discretion, a portion of their paychecks—an amount that may be matched in part or in its entirety by the employer. ERISA applies to each of the two types of plans described here, though some special rules apply to certain variations of defined contribution plans.

Defined benefit plans are becoming less common, while defined contribution plans are becoming more prevalent. Day (2006) reports that 19 percent of full-time private sector employees currently participate in defined benefit plans, whereas 39 percent did so three decades prior. Day also reports that defined contribution plans are the choice today for 56 percent of full-time employees, a number that has more than tripled since 1978, when only 17 percent participated in defined contribution plans. Fitzpatrick and Chu (2007) posit that two major reform statutes designed to protect employees enrolled in defined benefit plans (ERISA in 1974 and the Pension Protection Act of 2006), may actually have caused employers to search out alternatives—namely defined contribution plans—due to the increased requirements, including the taxing of viable defined benefit plans, placed on plan administrators under these statutes.

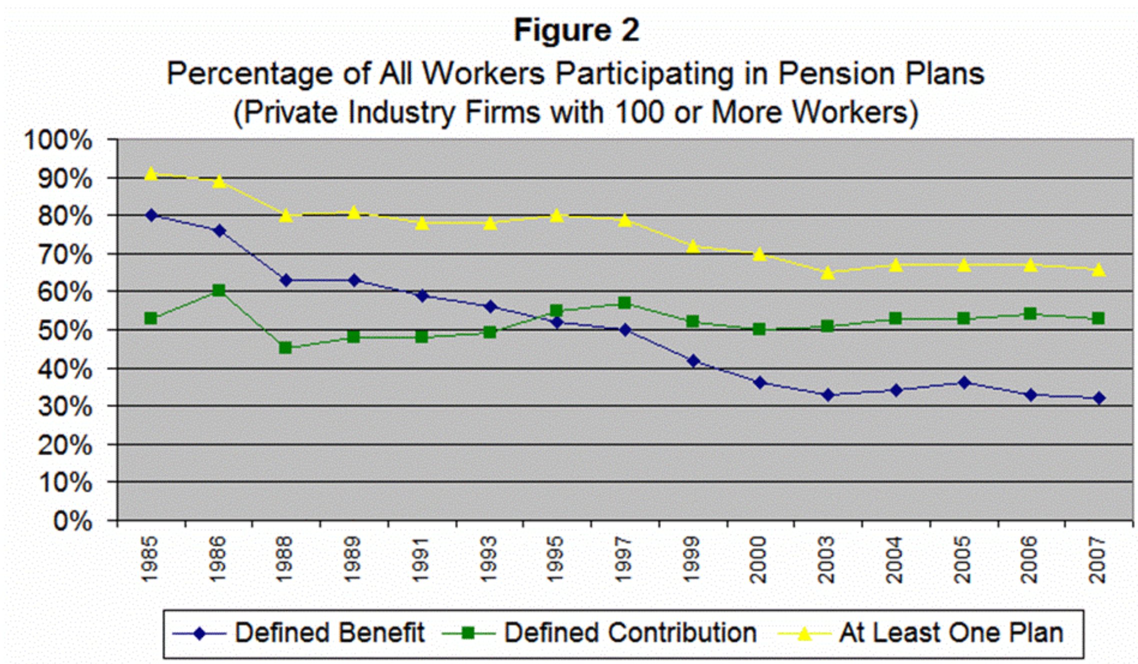
Figure 1 provides strong evidence of the trend from defined benefit plans to defined contribution plans. The percent of active workers mapped as trend lines forms a nearly perfect ‘X’, illustrating that there has been an almost complete reversal—from defined benefit plans being considerably more popular to defined contribution plans being the fashionable choice.[3]

Figure 1
Retirement Trends by Plan Type
(% of Active Worker Participants in Private Sector by Year)



Data from U.S. Department of Labor, *Form 5500 Summary Report* (Summer 2004); Employee Benefits Research Institute estimates for 2002-2005.

Figure 2 provides further confirmation of the trend away from defined benefit plans and to defined contribution plans. Figure 2 employs a somewhat different population of participants (all workers in larger firms), yet continues to portray the 'X' pattern seen in Figure 1. While defined contribution plans have continued to be a fairly stable portion of these plans, defined benefit retirement plans have become considerably less popular (with 80% of the total retirement participants in 1980 versus 32% in 2007).[4]



Data from Bureau of Labor Statistics (2004a, 2004b, 2005) and Employee Benefits Research Institute

The trend toward defined contribution plans and away from defined benefit plans is seen as beneficial by those concerned with the effects underfunded plans and bankruptcies might have on participants' benefits. The increased prominence of defined contribution plans is moving the investment risk to the beneficiary. Conversely, the freedom of making one's own investment decisions and the personal sense of security that comes with beneficiaries managing their funds outweigh this additional risk in the minds of many defined contribution plan participants. One of these advantages of a defined contribution plan—the opportunity to benefit from good investment decisions of the beneficiary – was apparently denied to LaRue when his investment directions were allegedly ignored, leading to his lawsuit.

The Fourth Circuit Court's Opinion

The Fourth Circuit Court affirmed the judgment of the District Court and granted the defendants' motion for judgment on the pleadings. According to the court, "Section 1132(a)(2) provides remedies only for entire plans, not for individuals. And while Section 1132(a)(3) does in some cases furnish individualized remedies, the Supreme Court's decisions…compel the conclusion that it does not supply one here. Plaintiff has alleged no unjust enrichment, unlawful possession, or self-dealing on the part of defendants, and the remedy he seeks falls outside the scope of the 'equitable relief' that §1132(a)(3) authorizes" (LaRue v. DeWolff et. al., 4th Cir., 571).

DeWolff, Boberg & Associates, Incorporated is a management consulting firm. It also administers an ERISA-regulated 401(k) retirement plan in which its current and former employees participate. This plan permits those employees who so desire to manage their own accounts to a certain degree by selecting investments from a menu of options. LaRue's participation in this defined contribution plan began in 1993. LaRue alleged that he directed DeWolff and the Plan to make changes in his investments as permitted by the plan in both 2001 and 2002, but such changes were not made by either DeWolff or the Plan. According to LaRue, the failure of DeWolff and the Plan to make these requested changes resulted in a depletion of the value of his personal plan by $150,000. This failure to follow his instructions amounted to a breach of the fiduciary duty of both DeWolff and the Plan, a breach that entitled LaRue to seek "appropriate 'make whole' or other equitable relief pursuant to [29 U.S.C.S. §1132(a)(3)]" (LaRue v. DeWolff et. al., 4th Cir., 572).

The defendants filed a motion for judgment on the pleadings, asserting that the remedies LaRue was seeking were not available under §1132(a)(3). The district court agreed and granted the motion, dismissing the case with prejudice. LaRue appealed, and the Circuit Court conducted a *de novo* review of the decision to grant a judgment on the pleadings (Burbach Broad Co. of Del. v. Elkins Radio Corp, 405-6).

The Fourth Circuit began its review by examining the intent of Congress in enacting ERISA. As the court noted:

> "In enacting ERISA, Congress sought to uniformly regulate the wide universe of employee benefit plans… A salient feature of this effort was the careful delineation of civil remedies available to litigants seeking to enforce their rights under such plans… Congress broadly preempted available state law causes of action…and set forth in a single section of ERISA the exclusive list of civil actions

> available to parties aggrieved by a statutory violation" (LaRue, 4th Cir., 574).

Of special concern to the court was the fact that ERISA only provides for relief in equity, while the court found that LaRue was seeking relief in the form of damages, a remedy at law rather than a remedy in equity. In reaching this conclusion, the court found that § 1132 (a)(3) authorizes civil actions

> "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" (LaRue, 4th Cir., 574).

LaRue argued that he was seeking an equitable remedy in that he was merely asking that the Plan "make him whole" by allowing him to recover the funds by which his account was depleted when his instructions were not followed, and having these funds deposited into his retirement account. He asserted that this "make whole" argument was a form of the "other equitable relief" called for in § 1132(a)(3), and thus allowed under the provisions of ERISA. The court disagreed.

Referring to the precedent established in *Mertens v. Hewitt Associates* [508 U.S. 248 (1993)], the court noted that the Supreme Court has stressed that the term "equitable" is one of limitation. In its *Mertens* opinion the Court:

> "held that the phrase 'equitable relief' refers only to those categories of relief that were typically available in equity in the days of the divided bench ... The Court reasoned that other sections of ERISA expressly refer to 'equitable or remedial relief' … and 'legal and equitable relief' … thereby demonstrating that 'equitable relief' connotes only a subset of the full palliative spectrum … The Court refused to 'read the statute to render the modifier superfluous, a construction that would undermine Congress's exclusive remedy scheme by opening a back door through which uninvited remedies might enter" (Mertens, 256).

The court followed the principles of statutory construction and applied the maxim *noscitur a sociis* (a word is known by the company it keeps) to define and limit the meaning of "equitable relief" found in § 1132(a)(3). The court examined whether the form of relief LaRue sought was, like an injunction, one that a court of equity rather than a court of law would historically have granted. As the Fourth Circuit pointed out, the Supreme Court has listed mandamus and restitution as other examples of traditional equitable remedies, and "[s]ubsequent decisions of both the Supreme Court and this court have been wary of expanding the list beyond these archetypes and their closely related kin" (LaRue, 4th Cir., 575).[5]

The court concluded that the remedy LaRue was seeking fell outside the scope of § 1132(a)(3). As it stated, "although [LaRue] 'often dance[s] around the word,' what plaintiff in fact seek[s] is nothing other than compensatory damages—monetary relief for all losses…sustained as a breach of fiduciary duties" (LaRue, 4th Cir., 575). Monetary damages are traditionally a form of *legal* relief, and thus are absent from any list of traditional *equitable* remedies that are available under § 1132(a)(3). The list of traditional equitable remedies does include restitution, but restitution is not defined broadly enough to encompass the type of compensatory relief LaRue is seeking. As the Supreme Court explained in another case, "not all relief falling under the rubric of restitution is available in equity" (Great Western Life & Annuity Insurance Co. v. Knudson, 212). In particular, "for restitution to lie in equity the action must seek generally not to impose personal liability on the defendant, but to restore to the plaintiff particular funds or property in the defendant's possession" (Great Western, 214).

The problem facing LaRue in this case is that there are no particular funds in the defendant's possession, and this "precludes plaintiff from recovering under an equitable restitution theory. Plaintiff does not allege that funds owed to him are in defendants' possession, but instead that these funds never materialized at all. He therefore gauges his recovery not by the value of defendants' nonexistent gain, but by the value of his own loss—a measure that is traditionally legal, not equitable…thus, at core, he seeks 'to obtain a judgment imposing a merely personal liability upon the defendant[s] to pay a sum of money' … historically '[s]uch claims were viewed essentially as actions at law,' and they are therefore unavailable under § 1132(a)(3)" (LaRue, 4th Cir., 576). [Equitable restitution theory states that restitution will only lie in equity "[w]here money or property identified as belonging in good conscience to the plaintiff could clearly be traced to particular funds or property in the defendant's possession."[6] Here the funds could not clearly be traced to particular funds in the defendant's possession, thus falling outside the parameters of equitable restitution.]

LaRue also asserted, in an argument supported by the Secretary of Labor, that "remuneration of his plan finds express authorization in the text of 29 U.S.C.S. §1132(a)(2). That subsection allows for a civil action 'by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title" (LaRue, 4th Cir., 573). Section 1109 provides that:

> "Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities or duties imposed on fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from 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…"

The court pointed out that this argument was raised only on appeal, and therefore had been waived by LaRue. However, according to the court, "[e]ven if the argument were not waived … he could not succeed on the merits. Recovery under this subsection must 'inure[] to the benefit of the plan as a whole,' not to particular persons with rights under the plan" (LaRue, 573).[7] The court based its decision on this point on the language from an earlier case: "A fair contextual reading of the statute makes it abundantly clear that its draftsmen were primarily concerned with the possible misuse of plan assets, and with remedies that would protect the entire plan, rather than the rights of an individual beneficiary" (Mass. Mutual v. Russell, 142).

In the court's opinion, LaRue's cause of action could only be seen as personal, and not on behalf of a "plan." He was seeking recovery of $150,000, with the funds to be deposited into *his* retirement plan account, an account that exists solely for *his* benefit. The loss allegedly occurred when the defendants failed to follow *his* instructions regarding the investment of funds, thus breaching a fiduciary duty owed to *him,* and to him *alone.* As a result, the court "was therefore skeptical that plaintiff's individual remedial interest can serve as a legitimate proxy for the plan in its entirety, as §1332(a)(3) requires. To be sure, the recovery plaintiff seeks could be seen as accruing to the plan in the narrow sense that it would be paid into the 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" (LaRue, 4th Cir., 574).

LaRue's Position

In order to prevail, LaRue will have to convince the Supreme Court that the Fourth Circuit was in error on each of two issues. First, he will need to establish that he is seeking a remedy in equity, and that he is not seeking "damages," a traditional remedy at law. Second, he will need to establish that the earlier cases stating that remedies are only available for a "plan" (thus unavailable for an individual) is not a bar to his case. To do so, he will need to show that *his* retirement account is a *plan*, as are all other individual retirement accounts under a defined contributions plan structure. The fact that the plan in question only has one member should not be an impediment to his claim since, by definition, each defined contribution plan is a plan set up by and for an individual. The individual then has the right under the plan to direct how his or her contributions are invested. A primary goal of ERISA is protecting and benefiting employees while also containing pension costs" (LaRue, 4th Cir., 573). This includes provisions for allowing beneficiaries of "the plan" to file suit to prevent misuse or funds of inappropriate actions by the administrators of "the plan," to the benefit of *all*—in these plans *all* means *one*—of the members participating in the plan. One way for ERISA to ensure that this goal is met would be to allow any beneficiary of the plan (the individual in this case) to file suit against the plan's administrators for breach of fiduciary duties.

The more difficult of the two areas for LaRue will be establishing that he is seeking relief in equity. Prior cases such as *Mertens* and *Great-West Life* show quite clearly that the remedies available in equity under ERISA are restricted to "those categories of relief that were typically available in equity (such as injunction, mandamus, and restitution, but not compensatory damages)" (Mertens, 256). The U.S. Secretary of Labor argued in his *amicus* brief that LaRue is seeking a remedy that is traditionally available in equity, specifically *surcharge.*" La Rue has adopted this argument as well. Surcharge, when used in equity, is defined as:

> "The amount with which a court may charge a fiduciary who has breached his trust through intentional or negligent conduct…the imposition of personal liability on a fiduciary for such conduct" (Black's Law Dictionary, 1441).

Should this argument prevail, LaRue can then proceed to a showing that his defined contributions plan is a "plan" within the parameters of ERISA, and that such a plan has, or should have, the same rights as would exist for a plan under a defined benefits system, except that the "class" of investors in the plan is restricted to the single contributor. LaRue could bolster this argument by using data such as that presented in Figures 1 and 2, showing that ERISA was created in a time period in which defined benefit plans were the norm. LaRue may want to point out that the drafters of the ERISA legislation also did not likely set out to exclude protection for all participants in employee retirement plans other than defined benefit plan participants. However, if LaRue cannot prevail on this argument, he will be forced to either find another traditional equitable remedy or he will have to persuade the Supreme Court that the prior cases such as *Mertens* and *Great-West Insurance* were wrongly decided and need to be overturned.

The Court's Quandary

There has been a drastic shift in the number of employee retirement plans from defined benefits plans to defined contribution plans, both of which are governed by ERISA. ERISA requires accountability of plan fiduciaries, whose primary responsibility is to run the plan solely in the interest of participants and beneficiaries. Given that in a defined contribution plan the beneficiary is likely to be the sole member of "the plan," it is undoubtedly time for the Supreme Court to redefine its interpretation of the scope of ERISA's coverage—scope that should include the possibility of recovery by individuals if those individuals happen to be the sole "member" of a defined contribution plan. One problem with such a change by the Supreme Court is that the implications of such a ruling have not yet been fully examined.

There are reports that a finding for LaRue in this case will open the floodgates of fiduciary-duty-inspired lawsuits. There are even concerns that the fear of increased costs due to litigation will cause some employers to discontinue current retirement plans.[8] As Wydeven (2008) states, "the U.S. Chamber of Commerce is backing LaRue's employer, fearing a decision in his favor would open a floodgate of lawsuits by disgruntled investors." However, these critics are not taking into account the fact that plan trustees who would be facing such potential liability will take action to prevent such legal responsibility, and these actions will be neither costly nor complex. The contention in the LaRue case is that instructions on how to invest funds were ignored, though DeWolff, Boberg & Associates dispute this claim. If the defendant in this case, and other plan trustees, would simply create a process whereby all instructions from plan beneficiaries (e.g., to move funds from one account to another, to make changes in who is designated as a beneficiary, etc.) become part of an audit trail, lawsuits of this nature would be unlikely ever see the light of day. For instance, plan trustees could require that some confirmation be provided by beneficiaries when they make any changes to their plans. Online retail websites already have this control built into their systems with the "*By Clicking the Button below You Will Be Making the Purchase*" step a prospective buyer must take before finalizing a purchase. These controls would ensure that a beneficiary's intentions were confirmed at least several times, while also providing the plan administrators an undeniable amount of protection from LaRue-type legal action.

The argument that LaRue is seeking legal remedies when ERISA explicitly limits plaintiffs to remedies traditionally available in equity is a strong argument in favor of DeWolff and the Plan. The Fourth Circuit emphasized this in its opinion, thus allowing itself to avoid ruling on the merits of LaRue's claim. However, the Supreme Court may well decide that LaRue is merely seeking *restitution,* "an equitable remedy under which a person is restored to his or her original position prior to a loss or injury, or placed in the position he or she would have been, had the breach not occurred" (Black's Law Dictionary, 1313). Another alternative for the Court would be to adopt the position asserted by the U.S. Secretary of Labor that LaRue is seeking the equitable remedy of *surcharge,* based on the failure of the fiduciary to carry out its duties, due to either intent or negligence.

The Court will want to look at the dissent in *Mertens* if it decides to overturn the opinion of the Fourth Circuit and rule for LaRue. In the dissent Justice White pointed out that "[t]he majority candidly acknowledges that it is plausible to interpret the phrase 'appropriate equitable relief' as used in … § 1132 (a)(3), at least standing alone, as meaning that relief which was available in the courts of equity for a breach of trust" (Mertens, 256). He went on to assert that "ERISA was grounded in this common-law experience and that 'we are [to be] guided by principles of trust law' in construing the terms of this statute." An examination of trust law shows that the "traditional 'equitable remedies' available to a trust beneficiary included compensatory damages. Equity endeavor[ed] as far as possible to replace the parties in the same situation as they would have been in, if no breach of trust had been committed. … This included, where necessary, the payment of a monetary award to make the victims of the breach whole" (Mertens, 256).[9]

Conclusions and Predictions

Defined contribution plans have become the more common sort of retirement account for employees. Most companies have abandoned the traditional defined benefit retirement plans, choosing instead to *either* provide no plan for their employees *or* to provide defined contribution plans, a form of retirement investment account. "An estimated 50 million private-sector employees have invested $5.5 trillion in retirement plans regulated by the federal government" (Richey, 1). ERISA was enacted to provide safeguards and remedies for employees and their retirement plans, and the change in format of the most common type of plan does not change this fact.

Industry groups and retirement plan administrators laud the Fourth Circuit's opinion in LaRue and warn of the dire consequences if the opinion is overturned. According to critics, including the U.S. Chamber of Commerce, a flood of litigation will result, leading to employers deciding to either avoid establishing such plans, or reducing the benefits provided to employees. While this argument is long on emotion, it is short on facts.

There are also strong arguments in favor of LaRue. As one commentator stated, "Increasingly … the courts are recognizing that it is difficult to determine when the 'plan' definition has been tripped. Is it one participant? Two participants? Three? Fifty percent of participants?" (Whiddon, 2008). Others have commented that "the impact is likely to be minimal despite the dire predictions of doom… [They] don't see this case as opening floodgates of litigation. Instead, it should clarify an important part of the ERISA remedial scheme –which is something that is sorely needed" (Whiddon…quoting Alden Blanchi, an attorney with Mintz Levin in Boston). To minimize the risk of a "litigation flood" a relatively short statute of limitations could be established in which plan participants may file suit. LaRue waited three years to file suit, giving him time to see how the stock market was acting. A shorter period would require a quicker decision, and would likely have lower alleged losses.

As previously stated, defined contribution plans that allow employees to designate how their contributions will be invested can be structured to leave a "paper trail" that would establish when contributors gave instructions, thus avoiding the "he said, he said" situation DeWolff alleges took place in the LaRue case. More importantly, "ERISA's primary purpose is to protect workers and their retirement funds, not employers or account managers who mismanage account funds" (Widdon, 2008). According to the *amicus* brief filed in support of LaRue, U.S. Solicitor General Paul Clement noted that "every other court of appeals that has addressed the issue have all held that ERISA authorizes suits by participants in such instances not withstanding that the recovery will ultimately be allocated to the plan accounts of a limited number of participants." He also stated that "the 4th Circuit's ruling 'threatens to leave many plan participants without any effective redress for breaches of ERISA's fiduciary duties" (Roberts, 3).

The Supreme Court should, and likely will, overturn the Fourth Circuit in the LaRue case. There are solid grounds for finding that LaRue is seeking a traditional remedy in equity, whether in the form of restitution or as a surcharge. There are solid legal bases for finding that traditional trust law guidelines permit this sort of recovery for LaRue, and that such recovery was recognized as lying in equity, as were most trust law issues. But most importantly, the Court should overturn the Fourth Circuit because the original purpose of ERISA was to provide protection for employees in the handling of their retirement accounts. At the time of the enactment, 1974, most plans were defined benefit plans and the employees of any given firm were all likely to belong to the same plan. Today, we are trending toward defined contribution plans whereby each employee may well find himself or herself as the sole member of a plan, and as such would be precluded from seeking recourse under the Fourth Circuit's ruling. Given this movement toward defined contribution plans, we could see a day when ERISA would not provide protection to anyone, since all employees would be participating in defined contribution plans. It is highly unlikely that Congress spent the time and energy needed to develop this statutory protection only to find that no one was protected by the statute.

Addendum

The Supreme Court handed down its opinion in the *LaRue* case much more quickly than expected, issuing its decision on February 20, 2008. The court vacated the Fourth Circuit's judgment and remanded the case for further proceedings consistent with the Court's opinion. The case is reported as a 5-4 decision, with two justices concurring in part and concurring in the judgment and the other two justices concurred in the judgment. Thus, all nine justices concurred in the ultimate judgment.

The court pointed out that "As the case comes to us we must assume that respondents breached fiduciary obligations defined in § 409 (a), and that those breaches had an adverse impact on the value of the plan assets in petitioner's individual account. Whether petition can prove those allegations and whether respondents may have a valid defense to the claims are matters not before us. Although the record does not reveal the relative size of petitioner's account, the legal issues under §502 (a)(2) is the same whether his account includes 1% or 99% of the total assets in the plan" (LaRue, S.Ct., 1024).

The court noted that when ERISA was enacted defined benefit plans were the norm, and ERISA emphasized protection of such plans. Such defined benefit plans do not have individual accounts. Instead, the plans paid a fixed benefit to participants in the plans. Misconduct by administrators of defined benefit plans do not affect a particular individual's rights to the defined benefits unless the misconduct threatens a default of the entire plan. "It was that default risk that prompted Congress to required defined benefit plans (but not defined contribution plans) to satisfy complex funding requirements, and to make premium payments to the Pension Guaranty Corporation for plan termination insurance" (LaRue, S.Ct., 1025).

By contrast, defined contributions plans dominate today. In a defined contribution plan "fiduciary misconduct need not threaten the solvency of the entire plan to reduce benefits below the amount that participants would otherwise receive. Whether a fiduciary breach diminishes the plan assets payable to all participants and beneficiaries, or only persons tied to a particular individual account, it creates the kind of harm that concerned the draftsmen of § 409 in the defined benefit context. 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" (LaRue, S.Ct., 1025).

As a result, the court held that "although § 502 (a)(2) does not provide a remedy for individual injuries distinct from plan injuries, that provision does authorize recovery for fiduciary breaches that impair the value of plan assets in a participant's individual account" (LaRue, S.Ct., 1025).

Chief Justice Roberts, joined by Justice Kennedy, concurred in the judgment. However, they also point out that it is at least arguable that the case might more properly have been brought under § 502 (a)(1)(B) of ERISA rather than § 502 (a)(2). The provisions of § 501 (a)(1)(B) require that a participant must exhaust his or her administrative remedies before filing suit, and also allowing administrators and fiduciaries discretion in determining benefit eligibility of participants and in defining the terms included in a plan. Both of these areas are only reviewable by a court if there is an allegation of abuse of discretion. This concurrence by Roberts and Kennedy seems to provide a subtle guidance to plan administrators and fiduciaries as to how to proceed in a manner that will forestall, if not avoid, litigation in future cases.

Justices Thomas and Scalia eschew the difference between a defined benefits plan and a defined contributions plan, asserting that any losses suffered due to the breach of fiduciary duties is a loss to a plan. "ERISA requires the assets of a defined contributions plan … to be allocated for bookkeeping purposes to individual accounts within the plan for the beneficial interest of the participants, whose benefits in turn depend on the allocated amounts… The allocation of a plan's assets to individual accounts for bookkeeping purposes does not change the fact that all the assets in the plan remain plan assets. A defined contributions plan is not merely a collection of unrelated accounts. Rather, ERISA requires a plan's combined assets to be held in trust and legally owned by the plan trustees" (LaRue, S.Ct., 1029).

References

Black's Law Dictionary, 6th edition, West Group, St. Paul, MN (1990).

Burbach Broad Co. of Del. v. Elkins Radio Corp., 278 F.3d 401, 405-406 (4th Cir. 2002).

Bureau of Labor Statistics. (2004a). *Employee Participation in Defined Benefit and Defined Contribution Plans, 1985-2000.* Available online at <http://www.bls.gov>

____________. (2004b). *National Compensation Survey: Employee Benefits in Private Industry in the United States, March 2004.* Available online at <http://www.bls.gov/ncs/ebs>

____________. (2005). *National Compensation Survey: Employee Benefits in Private Industry in the United States, March 2004.* Available online at <http://www.bls.gov/ncs/ebs>

Coyne & Delaney Co. v. Blue Cross & Blue Shield of VA, Inc., 102 F. 3d 712 (4th Cir. 1996).

Day, K. (2006). Retirement squeezed: As traditional plans decline, workers face a less certain future. *The Washington Post*, F1, Sept. 17.

Employee Benefit Research Institute. *Facts from EBRI.* June 21, 2007: 1-3. <http://www.ebri.org/publications/facts/>

FitzPatrick, R. and H. Chu. (2007). The Rise and Demise of Defined Benefit Pension Plans. *Employee Responsibility Rights Journal,* 19: 223-232.

Furman, J. (2007). Trends in Retirement Security. *Testimony before the House Committee on Ways and Means*, (31 January).

Great Western Life & Annuity Insurance Co. v. Knudson, 534 U.S. 204. (2002).

LaRue v. DeWolff, Boberg & Associates, Incorporated, 450 F.3d 570. (2006).

LaRue v. DeWolff, Boberg & Associates, Incorporated 128 S.Ct. 1020 (2008).

Massachusetts Mutual Life Ins. Co. v. Russell, 473 U.S. 134, 140 (1985).

Mertens v. Hewitt Associates, 508 U.S. 248 (1993).

Richey, W. (2007). "Can you sue if your 401(k) nest egg is mishandled?" *The Christian Science Monitor,* (26 November).

Roberts, S. (2007). "401 (k) case could boost plan fiduciaries' liability; High court to consider if ERISA allows suits over individual losses," *Business Insurance,* p. 3 (25 June).

Savage, David G. (2007). "High court hears case of lost 401(k) money," *Los Angeles Times,* Home Edition, (27 November).

Whiddon, R.L. (2008). "Legal Briefing on *LaRue," Employee Benefit News* (1 January 2008). <http://ebn.benefitnews.com/asset/article/522361/staying-current/legal-briefing-ilaruei.html>

Wydeven, R. (2008). "Employer-sponsored 401(k)s vulnerable only to financial markets," *postcrescent.com, (*12 January 2008). <http://www.postcrescent.com/apps/pbcs.dll/article>

Endnotes

1 A discussion of the nature of various pension plans appears in the third section of the paper.

2 Defined benefit plans are thought to encourage loyalty toward an employer, since the employees' benefits are contingent upon an employer with an ability to meet those obligations. Also, the rights in a defined benefit tend to be less portable than the accumulated funds in defined contribution accounts.

3 The Bureau of Labor Statistics defines "active participants" as those employees with positive account balances with a current employer. This definition excludes other beneficiaries and vested participants no longer employed by that firm.

4 Note that Figure 2 details *participation* in retirement plans. A large number of employees do not take advantage of employers' retirement plans. For instance, Figure 2 indicates that only 66 percent of employees in private industry are participating in a retirement plan (versus 91 percent in 1985).

5 See also, e.g., *Varity Corp. v. Howe,* 516 U.S. 489, 495, 515(1996), *Griggs v. E.I. Dupont de Nemours & Co.,* 385 F.3d. 440, 449 (4th cir. 2004), *Denny's, Inc. v. Cake,* 364 F.3d 521, 526 (4th Cir. 2004).

6 *Great-West Life & Annuity Insurance Company v. Knudson, 534 U.S. 204 (2002).*

7 See also *Mass. Mut. Life Ins. Co. v. Russell,* 473 U.S. 134, 140 (1985) and *Coyne & Delaney Co. v. Blue Cross & Blue Shield of Va., Inc.* 102 F.3d 712 (4th Circ. 1996).

8 Furman (2007) reports that 40 percent of private sector employers in 2006 have already chosen not to offer any pension plan.

9 See also J. Hill, "Trustees Annot., Remedy at Law Available to Beneficiary of Trust as Exclusive of Remedy in Equity," 171 A.L.R. 429, 522 (1947).