SEPTEMBER 2008

A CONSTANT STATE OF EXHAUSTION? *LaRUE v. DeWOLFF* REVISITED

Perhaps 100 years from now, our great-great-grandchildren will laugh out loud when they find out that lawyers at the turn of the previous century waited to receive the truth from nine voting humans in black robes. Seems odd that people who have devoted their lives to critical thinking would not devise a better way to determine right from wrong. A well-bred computer, no doubt, will replace us all in the years ahead. Until then, we must revel in our vast imperfections, knowing that an ocean of *stare decisis* anchors our collective belief in certainty and in the cumulative nature of knowledge.

Let us now turn to 2008's *stare decisis*. Most ERISA practitioners did not shout "Quel shock!" when the Supreme Court announced in February that an individual 401(k) plan participant whose account had been trashed by an administrative error could sue to recover his losses. The new rule that emerged seems grounded in common sense—when something bad happens to an employee's 401(k) account, a fiduciary breach claim can be brought by the individual ERISA participant to recover money damages. In enacting ERISA, Congress's objectives were to:

> [P]rotect interstate commerce and the interests of participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions and ready access to the Federal courts.

29 U.S.C. § 1001(b). With these objectives in mind, it is evident that a unanimous Supreme Court determined that betraying Mr. LaRue and leaving him without a remedy made no sense.

We learned in ERISA 101 that a plan participant could file a claim for benefits to recover money damages. We thought we had learned in ERISA 202 that the

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Supreme Court's emphasis on injury to the "entire plan," as described in *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134 (1986), meant fiduciary duty claims seeking money damages were derivative claims—they were being brought on behalf of all the plan's participants. Apparently, we failed to parse the words "entire plan" closely enough.

The real surprise in the U.S. Supreme Court's decision in *LaRue v. DeWolff, Boberg & Associates, Inc*., 552 U.S. _____, 128 S. Ct. 1020 (2008) ("*LaRue*"), was its purposeful suggestion that plan participants may be required to exhaust their administrative remedies before filing breach of fiduciary duty lawsuits. Both the five-member majority opinion, as well as the Chief Justice's concurring opinion (joined by Justice Kennedy), made this same point. While Mr. LaRue may have revived his own lawsuit by persuading the Supreme Court that ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2), allows individuals to recover money damages for fiduciary breaches impairing the value of their own 401(k) plan assets, he may have also scuttled the ability of any ERISA plaintiff to file suit without first filing a claim with the plan administrator.

A SHORT HISTORY OF MR. LARUE'S CLAIMS

Mr. LaRue's lawsuit began because he believed his 401(k) plan account had been harmed by a plan fiduciary's mistake. *Id*. at 1022. He claimed that the failure by the DeWolff 401(k) plan fiduciaries to follow his investment directions caused his plan account to lose $150,000. *Id*. at 1023. To remedy this wrong, a fiduciary breach claim under ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3), was filed by Mr. LaRue against the DeWolff 401(k) plan fiduciary seeking "make whole" or other equitable relief as permitted by that section. *Id*. The Supreme Court had explained earlier in *Varity Corp. v. Howe*, 516 U.S. 489, 508-12 (1996), that participants like Mr. LaRue could file a fiduciary breach lawsuit under ERISA's "catchall" remedial provision, section 502(a)(3), where "they could not proceed under the second subsection (502(a)(2)) because that provision, tied to section 409, does not provide a remedy for individual beneficiaries. *Russell*, *supra*, at 144." 516 U.S. at 512.

The nub of the problem for Mr. LaRue was that he filed suit under ERISA § 502(a)(3). The things a plaintiff can recover under section 502(a)(3) are quite limited. While "equitable" forms of relief can be obtained, monetary relief is unavailable. *Mertens v. Hewitt Assoc.*, 508 U.S. 248, 113 S. Ct. 2063 (1993). In *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 122 S. Ct. 708 (2002), the Supreme Court explained that section 502(a)(3) only authorizes the use of "traditional" forms of equitable relief, *i.e.*, "those categories of relief that were typically available in equity (such as injunction, mandamus, and restitution, but not compensatory damages)." *Great-West*, 534 U.S. at 204; *Mertens*, 508 U.S. at 256. "[M]oney damages…, the classic form of legal relief," is unavailable under section 502(a)(3). *Mertens*, 508 U.S. at 255.

As the Supreme Court oft reminds us, the parsimony in ERISA remedies is no accident:

> The six carefully integrated civil enforcement provisions found in § 502(a) of the statute as finally enacted, however, provide strong evidence that Congress did not intend to authorize other remedies that it simply forgot to incorporate expressly.

Mass. Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 146, 105 S. Ct. 3085, 3092 (1985).

ERISA's private enforcement provisions (set forth in ERISA §§ 502(a)(1)(B), 502(a)(2) and 502(a)(3)) are specific. Plaintiffs who want additional plan benefits can file suit under ERISA § 502(a)(1)(B). A participant who believes the plan's fiduciaries are liars, crooks, or incompetent can sue the plan's fiduciaries to make the plan whole for losses under section 502(a)(2). Finally, there is a "catchall" provision under ERISA § 502(a)(3). This "kitchen sink" remedy allows claims by participants, beneficiaries, or fiduciaries: "(A) to enjoin any act or practice which violates any provision of [ERISA] 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 [ERISA] or the terms of the plan." In *Great-West*, the Supreme Court ruled that medical plan fiduciaries seeking to enforce a medical plan's repayment clause against plan participants or beneficiaries were not entitled to recover money damages under ERISA's catchall remedial provision, section 502(a)(3), which only provides "appropriate equitable relief."

Both the *LaRue* district court, as well as the Fourth Circuit, following these Supreme Court precedents, ruled that ERISA § 502(a)(3) does not allow for monetary damages and dismissed Mr. LaRue's lawsuit. On appeal, Mr. LaRue argued he also had

a fiduciary breach claim under ERISA § 502(a)(2). The Circuit Court of Appeal rejected Mr. LaRue's section 502(a)(2) claim on the ground that the U.S. Supreme Court's opinion in *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134 (1985), permitted section 502(a)(2) claims only on behalf of the "entire plan" rather than on behalf of a particular plan participant. In reversing the Fourth Circuit, the Supreme Court ruled that while ERISA § 502(a)(2) does not provide a remedy for individual injuries that are distinct from plan injuries, it does authorize recovery for fiduciary breaches that impair the value of plan assets in a participant's individual account.

Distinguishing the old-fashioned defined benefit pension plans from the new order of defined contribution plans (most commonly a 401(k) plan), the Supreme Court explained that its emphasis on injury to the "entire plan" in *Russell* was "beside the point." 128 S. Ct. at 1025. Because an individual's fixed retirement payment under a defined benefit plan is not affected by misconduct unless it affects the potential for default of the entire plan, the focus in *Russell* was on injury to the entire plan. For Mr. LaRue's defined contribution plan account, however, "fiduciary misconduct need not threaten the solvency of the entire plan to reduce benefits below the amount participants would otherwise receive." *Id*. According to the Court in *LaRue*, such misconduct falls squarely within the duties imposed on plan administrators by ERISA, and whether a fiduciary breach diminishes plan assets payable to all participants or only to particular individuals, it still creates the kind of harm contemplated by the remedial provisions of ERISA. The Supreme Court concluded that a "participant" in a defined contribution pension plan may sue a fiduciary whose alleged misconduct impaired the value of "plan assets" in the participant's individual account under section 502(a)(2). The Supreme Court also ruled that the fact that Mr. LaRue cashed out his 401(k) Plan account balance while the case was pending did not deprive him of participant status. 128 S. Ct. at 1026 n.6.

Despite numerous articles suggesting otherwise, the Supreme Court did not conclude that the employer in *LaRue* engaged in a fiduciary breach by failing to follow Mr. LaRue's investment instructions. In fact, the Court noted that a number of issues could affect the ultimate disposition of the case when reviewed by the lower court on remand, such as whether Mr. LaRue was required to exhaust administrative remedies before filing suit and whether his investment directions were made in accordance with plan requirements. The majority opinion did note, however, that there may be a pot of gold at the end of the litigation rainbow. The damages Mr. LaRue may ultimately recover are not simply his investment losses plus interest, but are to include his "lost profits." 128 S. Ct. at 1024 n.4.

The five justices in the majority decision flatly stated they did not know how Mr. LaRue's claim on the merits would turn out and suggested Mr. LaRue may have been required to exhaust the plan's claims review procedure before filing suit:

> Whether petitioner can prove those allegations and whether respondents may have valid defenses to the claim are matters not before us. n.3. For example, we do not decide whether petitioner made the alleged investment directions in accordance with the requirements specified by the Plan, **whether he was required to exhaust remedies set forth in Plan before seeking relief in federal court pursuant to section 502(a)(2)**, or whether he asserted his rights in a timely fashion.

128 S. Ct. 1020, 1024 n.3 (2008). (Emphasis added.)

Chief Justice Roberts, in his concurring opinion, questioned whether Mr. LaRue's claim was even a fiduciary breach claim:

> LaRue's right to direct the investment of his contributions was a right granted and governed by the plan. *See ante*, at 1022-1023. In this action, he seeks the benefits that would otherwise be due if, as alleged, the plan carried out his investment instruction. LaRue's claim is therefore 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. . . .
>
> The significance of the distinction between a section 502(a)(1)(B) claim and one under section 502(a)(2) is not merely a matter of picking the right provision to cite in the complaint. Allowing a section 502(a)(1)(B) action to be recast as one under section 502(a)(2) might permit plaintiffs to circumvent safeguards for plan administrators that have developed under section 502(a)(1)(B). Among those safeguards is the requirement, recognized by almost all of the Courts of Appeals, see *Fallick v. Nationwide Mutual Ins. Co*., 162 F.3d 410, 418 n.4 (6th Cir.

1998) (citing cases), that a participant exhaust the administrative remedies mandated by ERISA section 503, 29 U.S.C. section 1133, before filing suit under section 502(a)(1)(B). n. **Sensibly, the Court leaves open the question whether exhaustion may be required of a claimant who seeks recovery for breach of fiduciary duty under section 502(a)(2)**. *See ante* at 4 n.3.

Id. at 1026-27.

WHY EXHAUSTION MAKES SENSE

The idea that exhaustion of administrative remedies was required for any claims arising in an ERISA plan began with the Ninth Circuit's decision in *Amato v. Bernard*, 618 F.2d 559, 567-68 (9th Cir. 1980). In *Amato*, the Ninth Circuit found the exhaustion requirement embedded in ERISA's legislative history and in the text of the statute:

> We note first that in enacting ERISA, Congress "intended that a body of Federal substantive law will be developed by the courts to deal with issues involving rights and obligations under private welfare and pension plans." 120 Cong. Record 29942 (1974) (remarks of Senator Javits). Second, the legislative history of ERISA forges an explicit link between suits under ERISA and suits under section 301 of the LMRA. House Conference Report No. 93-1280, the Joint Explanatory Statement of the Committee of Conference on ERISA, reprinted in 1974 U.S. Code Cong. & Admin. News, pages 5038, 5107, says that all actions under ERISA to enforce benefit rights under a covered plan or to recover benefits under the plan, whether brought in federal or state courts, "are to be regarded as arising under the laws of the United States in similar fashion to those brought under section 301 of the Labor-Management Relations Act of 1947.…
>
> Third, ERISA itself requires covered benefit plans to provide administrative remedies for persons whose claims for benefits have been denied. See section 503, 29 U.S.C. § 1133.

Id. at 567.

ERISA § 503 further requires every employee benefit plan to: (1) provide adequate notice in writing to any participant or beneficiary whose claim for benefits under the plan has been denied, setting forth the reasons for denial in a manner calculated to be understood by the participant; and (2) afford participants whose claims for benefits have been denied with a reasonable opportunity for a full and fair review of the decision denying the claim by the appropriate named fiduciary. The Ninth Circuit concluded in *Amato* that:

> The institution of such administrative claim-resolution procedures was apparently intended by Congress to help reduce the number of frivolous lawsuits under ERISA; to promote the consistent treatment of claims for benefits; to provide a non-adversarial method of claim settlement; and to minimize the cost of claim settlement for all concerned. It would certainly be anomalous if the same good reasons that presumably led Congress and the Secretary to require covered plans to provide administrative remedies for aggrieved claimants did not lead the courts to see that those remedies are regularly used. Moreover, the trustees of covered benefit plans are granted broad fiduciary rights and responsibilities under ERISA sections 401 through 414, 29 U.S.C. §§ 1101-1114, and implementation of the exhaustion requirement will enhance their ability to expertly and efficiently manage their funds by preventing premature judicial intervention in their decision-making processes. The text of ERISA and the policies underlying that text, far from suggesting that Congress intended to abrogate the exhaustion requirement in the case of suits under ERISA or that sound policy would counsel its abrogation by the courts, suggests the opposite.
>
> Finally, a primary reason for the exhaustion requirement, here as elsewhere, is that prior fully considered actions by pension plan trustees interpreting new plans and perhaps also further requiring and defining the problem in given cases, may well assist the courts when they are called upon to resolve the controversies.

618 F.2d at 567-68. The Ninth Circuit's devotion to developing a federal common law of exhaustion came undone just four years later. *Amaro v. Cont'l Can Corp*., 124 F.2d 747 (9th Cir. 1984) involved the question of whether 17 members of

the United Steel Workers of America Union were required to post grievances before filing an ERISA lawsuit. Plaintiffs chose not to pursue the collective bargaining agreement's grievance procedure (as they had already been laid off) and instead filed suit alleging that Continental Can had laid them off to cheat them out of promised pension benefits. *Id*. at 748. The Ninth Circuit ruled no exhaustion was required because plaintiffs' lawsuit was "to enforce statutory rights designed to protect the employee from actions which interfere with their attainment of eligibility for certain benefits [citing 29 U.S.C. § 1140]." *Id*. at 749. In enacting ERISA § 510, 29 U.S.C. § 1140, Congress created a statutory right independent of any collective bargaining rights. *Id*. The circuit court's analysis was based on the United States Supreme Court's decision in *Alexander v. Gardener-Denver Co*., 415 U.S. 36 (1974) and *Barrentine v. Arkansas-Best Freight System, Inc*., 450 U.S. 728 (1981), where the Supreme Court ruled that a prior arbitration decision did not prevent a subsequent Title VII lawsuit. *Alexander*, 415 U.S. at 57-58. In *Barrentine*, the *Alexander* holding was extended to a case involving the Fair Labor Standards Act. 450 U.S. at 745. "Arbitrators very often are powerless to grant the aggrieved employees as broad a range of relief as is available under ERISA." *Amaro* at 752.

The rule that developed at the Supreme Court subsequent to *Amaro,* however, was directly to the contrary. Nothing prevents contracting parties from including a provision in an employment agreement referring statutory claims to arbitration. *Gilmer v. Interstate/Johnson Lane Corp*., 500 U.S. 20, 25-26 (6th Cir. 1991). *See also Mitsubishi Motors v. Soler Chrysler-Plymouth, Inc*., 473 U.S. 614, 626-27 (1985). A circuit split has emerged. The Third, Fourth, Fifth, Sixth, Ninth, and Tenth Circuits do not require exhaustion of statutory claims. *Berger v. Edgewater Steel Co*., 911 F.2d 911, 916 (3rd Cir. 1990); *Smith v. Sydnor*, 184 F.3d 356, 364 (4th Cir. 1999), *cert. denied*, 528 U.S. 1116, (2000); *Milofsky v. American Airlines, Inc.*, 404 F.3d 338, 352 (5th Cir. 2005); *Richards v. General Motors Corp.*, 991 F.2d 1227, 1235 (6th Cir. 1993); *Amaro*, *supra*, at 750-52; and *Held v. Mfgs. Hanover Leasing Corp*., 912 F.2d 1197, 1205 (10th Cir. 1990). Plaintiffs in the Seventh and Eleventh Circuits, on the other hand, must exhaust the plan's claims review procedure for all claims, including statutory claims, before filing suit. *Lindeman v. Mobil Oil Corp*., 79 F.3d 647, 650 (7th Cir. 1996); *Bickley v. Caremark*, 461 F.3d 1325, 1328 (11th Cir. 2006).

RELEVANT FEDERAL LABOR POLICIES SUPPORT THE EXHAUSTION RULE

The Labor-Management Relations Act ("LMRA"), section 301, states that aggrieved individuals may file suit in federal court to redress violations of "contracts between an employer and a labor organization." 29 U.S.C. § 185(a). Employees who seek to sue for breach of a collective bargaining agreement under the LMRA must first exhaust the grievance and arbitration procedures set forth by the collective bargaining agreement. The Supreme Court established this exhaustion requirement in *Republic Steel Corp. v. Maddox*, 379 U.S. 650, 652-57 (1965), explaining that an employee alleging a breach of the collective bargaining agreement between his union and employer must first attempt to exhaust administrative remedies provided by the agreement. *Id*. at 656-57. Mr. Maddox had sued Republic Steel Corporation in Alabama state court for severance pay. *Id*. at 650. The Alabama courts ruled in favor of Mr. Maddox. Republic Steel's petition for certiorari to the Supreme Court was granted. The Supreme Court ruled that Mr. Maddox must allow the union to pursue his grievance for severance benefits under the established grievance procedure before filing suit in federal court under the LMRA. *Id*. at 653.

In 1960, the Supreme Court issued its rulings in the "Steelworkers' Trilogy." *United Steelworkers v. American Mfg. Co*., 363 U.S. 564 (1960); *United Steelworkers v. Warrior & Gulf Navigating Co*., 363 U.S. 574 (1960); and *United Steelworkers v. Enterprise Wheel & Car Corp*., 363 U.S. 593 (1960). The Supreme Court established in these three cases a presumption in favor of exhausting the claims review process in collective bargaining agreements and in favor of arbitration. For example, in *American Mfg. Co*., the Supreme Court recited section 203(d) of the LMRA, which favors settling the disputes over the terms of a collective bargaining agreement "by a method agreed upon by the parties." 29 U.S.C. § 173(d), *American Mfg*., 363 U.S. at 566, 569. The Court had previously ruled that parties could rely upon section 301 of the LMRA to enforce grievance provisions contained in collective bargaining agreements. *See Textile Workers v. Lincoln Mills*, 353 U.S. 448 (1957). In light of the policy contained in the LMRA favoring a resolution of disputes by the method agreed upon by the parties, the Supreme Court cautioned that the "function of the Court is very limited when the parties have agreed to

submit all questions of contract interpretation to the arbitrator." *American Mfg*., 363 U.S. at 567-68.

THE FEDERAL ARBITRATION ACT ALSO SUPPORTS EXHAUSTION

Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991), involved a dispute over the arbitrability of a claim brought pursuant to the Age Discrimination in Employment Act ("ADEA"). 500 U.S. at 21. Mr. Gilmer was a financial services manager who had signed a securities registration application that contained a clause mandating arbitration of any dispute "that is required to be arbitrated under the rules, constitutions or by-laws of the organizations with which I register." *Id*. at 23. Later, when Mr. Gilmer filed his discrimination lawsuit against Interstate, the company sought to compel arbitration of the claim, citing a New York Stock Exchange ("NYSE") rule requiring arbitration of controversies between registered representatives and any NYSE member. *Id*. The district court refused to enforce the arbitration agreement. However, the Fourth Circuit reversed, and the Supreme Court affirmed.

Federal statutory claims may be the subject of an arbitration agreement in accordance with the Federal Arbitration Act. *Id*. at 25 n.2. The Supreme Court adopted a general presumption of arbitrability, placing the burden on the party opposing arbitration to demonstrate that Congress intended to preclude individuals from waiving judicial remedies for the statutory rights at issue. *Id*. at 25-26. In the *Gilmer* Court, there was no inconsistency between the purposes of the ADEA and the arbitration process agreed to by the parties. Four objections to arbitration raised by the plaintiff were rejected by the Court.

1. Arbitrators might be biased (rejected by the Supreme Court because the NYSE's rules contained various protections against arbitrator bias, and the Federal Arbitration Act allows a biased award to be set aside).

2. The limited disclosure available in arbitration was inadequate (rejected because there was no showing that the discovery authorized by the rules and the relaxation of the rules of evidence in arbitration proceedings, together, would deprive an ADEA claimant of a fair opportunity to present her case).

3. No written opinion was required (rejected because the rules required that the arbitrator prepare a written summary of the issues and a description of the award).

4. There is no provision for the maintenance of class actions or for the granting of equitable relief (rejected because an arbitrator has the power to fashion equitable relief, and the agency charged with enforcing the underlying federal statute can still seek classwide and equitable relief).

500 U.S. at 30-32.

The Supreme Court's fondness for arbitrating statutory claims can be traced back to *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc*., 473 U.S. 614 (1985). *Mitsubishi Motors* presented the question of whether antitrust claims encompassed in an arbitration clause contained in an international business agreement must be arbitrated. The *Mitsubishi* court, in answering "yes," developed a two-part test for determining whether a statutory claim is arbitrable.

1. Did the parties agree to arbitrate the statutory issues?

2. Did the statutory text or the legislative history evince a Congressional intent that courts be the exclusive adjudicatory forum for the rights in question?

Id. at 628.

The Supreme Court subsequently reaffirmed the *Mitsubishi Motors* test, explaining there was no longer any judicial bias against arbitrating statutory claims. *Rodriguez v. Shearson/American Express, Inc*., 490 U.S. 477, 480 (1989). *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220, 226 (1987). Both *Rodriguez* and *McMahon* called into question the validity of *Alexander* and *Barrentine*, which had assumed arbitration was inferior to the judicial resolution of statutory claims. *Gilmer*, 500 U.S. at 33-34 n.5.

A WRITTEN AGREEMENT TO ARBITRATE AN ERISA STATUTORY CLAIM MAY BE ENFORCED

The ERISA statute does not expressly require a claimant to exhaust the plan's claim review procedure before filing suit nor does it state, one way or the other, whether statutory claims can be arbitrated. After the Supreme Court's decision in *Rodriguez*, the Second Circuit Court of Appeals reversed an earlier decision where it had held an agreement to arbitrate investment disputes was invalid with respect to ERISA claims. *Bird v. Shearson Lehman/American Express, Inc*., 926 F.2d 116. Bird was a trustee of an ERISA-regulated retirement plan who alleged that the defendants breached their fiduciary duties by investing plan assets in high-risk investments. *Id*. at 117. Defendant moved to compel arbitration in accordance with the Federal Arbitration Act because its standard customer contract contained an arbitration clause that the plaintiff had signed prior to opening his account. *Id*. The agreement stated that the signer agreed to arbitrate any dispute related to his account unless state or federal law held the arbitration clause unenforceable. The arbitration agreement was dissected by the Second Circuit, which initially ruled the arbitration agreement valid as to securities law claims but invalid as to ERISA claims, *Bird I*, 871 F.2d at 292.

Shortly after deciding *Rodriguez*, the Supreme Court vacated and remanded the Second Circuit's original decision in *Bird*. *Bird v. Shearson Lehman/American Express, Inc*., 493 U.S. 84 (1989). The Second Circuit noted on remand that its original decision in *Bird* was motivated by "an outmoded presumption of disfavoring arbitration proceedings," which was no longer correct in light of the Supreme Court's decision in *Rodriguez*. 926 F.2d at 118-19 (quoting *Rodriguez*, 490 U.S. at 480). The Second Circuit found that when it applied the *Mitsubishi Motors* test, it could find neither an express nor an implied indicia of a Congressional intent to preclude individuals from waiving their right to litigate their ERISA claims in a judicial forum. 926 F.2d at 119. Congress's provision of access to the federal courts according to the Second Circuit neither demonstrated that Congress intended to require statutory claimants to use the federal forum, nor showed that Congress intended ERISA to trump the Federal Arbitration Act. 926 F.2d at 120. *See also Pritzker v. Merrill Lynch*, 7 F.3d 1110 (3d Cir. 1993) (overruling *Barrowcoough v. Kidder Peabody & Co*., 752 F.2d 923 (3d Cir. 1985), which held that statutory ERISA claims could not be arbitrated).

WHAT DOES ERISA'S LANGUAGE TELL US ABOUT EXHAUSTION?

The word "exhaustion" never appears in the text of ERISA. A detached and disinterested review of ERISA's legislative history strongly suggests that Congress intentionally left the issue of exhaustion unanswered so that courts could fashion an exhaustion rule that comported with evolving federal policy. In ERISA § 503, Congress mandated all employee benefit plans establish internal claims review procedures. 29 U.S.C. § 1133. It should be noted that grievance procedures mandated by collective bargaining agreements are deemed to satisfy ERISA § 503's requirements. 29 C.F.R. § 2560.503-1(b)(2)(i). Obviously, Congress would not have established a claims review procedure if claimants could simply ignore them. *Mason v. Continental Group, Inc*., 763 F.2d 1219, 1227 (11th Cir. 1985) (noting that in ERISA § 503, Congress intended all ERISA claims to be subject to exhaustion, *cert. denied*, 474 U.S. 1087 (1986)).

Those who oppose requiring exhaustion for statutory claims assert that because Congress explicitly provided for administrative review of contractual claims but did not provide similar review for statutory claims, it could not have intended statutory claimants to exhaust the plan's claims review procedure before going to court. *Grywczynski v. Shasta Beverages, Inc*., 606 F. Supp. 61 (N.D. Cal. 1984). Other courts have noted that in mandating exhaustion of all claims for benefits, Congress did not in any way prohibit plans from using the same claims review procedure for reviewing statutory violations. *Kross v. Western Electric Co*., 701 F.2d 1238, 1245 (7th Cir. 1983).

A careful review of other ERISA provisions supports this reasoning. Throughout ERISA, when Congress wanted to protect the interests of statutory claimants or if it wished to provide them with special treatment, it clearly said so in the text of the statute. *See, e.g.*, 29 U.S.C. § 1132(a)(3) (providing for private enforcement of statutory rights), § 1132(a)(5) (authorizing

the Secretary of Labor to redress statutory violations but failing to provide a similar right for the Secretary to intervene in or to initiate contractual claims). The federal courts have noted that these provisions do not show a Congressional intent to ban agreements waiving an individual's right to adjudicate ERISA claims in federal court. *See, e.g., Bird*, 926 F.2d at 120. More importantly, ERISA's "crowning achievement," its preemption provision, ERISA § 514, indicates that while Congress intended ERISA to supplant state regulation of employee benefit plans, it did not create ERISA to "amend, modify, invalidate, impair, or supersede any law of the United States." 29 U.S.C. § 1144(d). At the time ERISA was passed, existing federal law evidenced a policy of great judicial deference to the arbitration resolution of labor disputes. Both the legislative history of ERISA and the text of ERISA § 514(d) suggest that statutory claims are subject to that long-standing policy.

The absence of any implicit or express prohibition of exhaustion in the ERISA statute suggests that Congress wanted the federal courts to develop a federal common law concerning exhaustion. This result comports with the desires described in ERISA's legislative history stating that Congress wanted the federal courts to craft a "federal common law" for ERISA. *See, e.g., Leonelli v. Pennwalt Corp*., 887 F.2d 1195, 1199 (2d Cir. 1989); *Makar v. Healthcare Corp*., 872 F.2d 80, 83 (4th Cir. 1989).

As Justice Roberts pointed out in *LaRue*, existing ERISA case law requires exhaustion of ERISA claims for benefits masquerading as fiduciary breach claims. 128 S.Ct. at 1026-27. Recognizing this possibility, some courts require claimants alleging a statutory violation to exhaust the plan's claims review procedures before filing suit. *Bickley v. Caremark*, 461 F.3d at 1328. Requiring statutory claimants to exhaust the plan's claims review procedure logically flows from ERISA's statutory text, its legislative history, and the well-settled view that ERISA claimants must exhaust nontraditional remedies before heading to court.

Although the Supreme Court did not discuss exhaustion in *Gilmer*, the principles articulated by the Court indicate that lower courts should have the discretion to require exhaustion of all ERISA statutory claims. *Gilmer* caps a line of cases in which the Supreme Court rejected the idea that arbitrators lack the capacity to decide statutory claims.

The Supreme Court's decision in *Republic Steel Corp. v. Maddox*, 379 U.S. 650 (1965), established a general rule requiring exhaustion of a grievance procedure in the collective bargaining context. *Republic Steel* was intended to allow district courts to develop a federal common law of exhaustion allowing plan administrators to review all plan claims simultaneously, which furthers the modern federal policy favoring alternative dispute resolution and also serves to protect ERISA plan participants from abuses. The developing federal common law of exhaustion permits courts to excuse exhaustion where it would be futile or where claimant has no meaningful access to a claims review procedure. *Smith v. Blue Cross & Blue Shield United*, 959 F.2d 655, 658-59 (7th Cir. 1992).

Requiring a plan participant to exhaust an ERISA plan's administrative remedies before filing suit recently derailed a 401(k) "stock drop" class action. In *Spivey v. Southern Co*., 427 F. Supp. 2d 1144 (N.D. Ga. 2006), plan participants held stock in Southern Company's defunct subsidiary—Mirant Corporation—whose stock value dropped from $47 to $0.25 per share. The plaintiffs filed suit, claiming that the defendants should have been aware of "scandalous and unlawful activities taking place within the former Southern Company subsidiary" and should have divested the Southern Company Plan of that stock. The named plaintiff, however, had failed to file a claim concerning the drop in price of his Mirant shares with the Southern Company Plan Administrator. As a result, the defendants successfully filed a motion for summary judgment seeking dismissal of the case for failure to file a claim with the Plan Administrator before filing suit.

The plaintiffs argued that the administrative remedies provided by the plan only applied to claims for benefits under ERISA § 502(a)(1)(B), not claims for breach of fiduciary duty under ERISA § 502(a)(2) or (a)(3). The Court rejected this argument:

> The Eleventh Circuit … 'appl[ies] the exhaustion requirement to both ERISA claims arising from the substantive provisions of the statute, and ERISA claims arising

> from an employment and/or pension plan agreement.' What is more, in at last two reported cases, the Circuit either enforced or acknowledged a participant's duty to exhaust prior to bringing 'statutory' claims where the language of the relevant plan, like here, could be read as limiting the administrative process to claims for benefits.

Id. at 1151, *citing Mason v. Cont'l Group, Inc*., 763 F.2d 1219, 1226-27 (11th Cir. 1985); *Curry v. Contract Fabricators Inc. Profit Sharing Plan*, 891 F.2d 842, 845 n.3 (11th Cir. 1990).

CONCLUSION

The question of whether one must exhaust administrative remedies when bringing an action to assert rights granted by ERISA itself remains unsettled. The circuits are split as to whether exhaustion is required for a fiduciary breach. Some circuits require exhaustion of all claims. *See, e.g., Lindemann v. Mobil Oil Corp*., 79 F.3d 647 (7th Cir. 1996); *Communications Workers of Am. v. AT&T Co*., 40 F.3d 426, 432 (D.C. Cir. 1994); *Dale v. Chicago Tribune Co*., 797 F.2d 458 (7th Cir. 1986); *Mason v. Cont'l Group, Inc*., 763 F.2d 1219 (11th Cir. 1985). Other circuits do not, reasoning that plan fiduciaries have no expertise in interpreting statutory rights. *See, e.g., Milofsky v. American Airlines, Inc*., 442 F.3d 311, 313 (5th Cir. 2006); *Richards v. General Motors Corp*., 991 F.2d 1227 (6th Cir. 1993); *Gavalik v. Cont'l Can Co*., 812 F.2d 834, 849-50 (3d Cir. 1987); *Fujikawa v. Gushiken*, 823 F.2d 1341 (9th Cir. 1987).

The U.S. Supreme Court's decision in *LaRue* calls into question whether the Circuit Courts of Appeals that refuse to permit exhaustion of ERISA statutory claims are correct. Federal jurisprudence under the Federal Arbitration Act makes it evident that statutory claims of all stripes may be arbitrated. The same policy reasons articulated by the Circuit Courts of Appeals for not permitting exhaustion of ERISA's statutory claims were rejected by the Supreme Court in the Federal Arbitration Act cases described above. Nothing in the ERISA statute precludes the exhaustion of statutory claims. Indeed, ERISA's statutory history points to the Labor-Management Relations Act as its role model for exhaustion. The LMRA requires the exhaustion of all claims, including statutory claims, before they are litigated.

If the language of an ERISA claims review procedure unequivocally states that "all disputes, controversies or differences which may arise between Plan, a Plan participant, or a Plan fiduciary must be submitted to the Plan Administrator," would the federal courts enforce this requirement? They should. An agreement to exhaust an ERISA claims review procedure is, after all, a part of the natural tradeoff that a Plan participant makes in exchange for Plan benefits. Given ERISA's legislative history, the absence of any ERISA statutory language barring the exhaustion of statutory claims, as well as the bounty of federal case law enforcing the arbitration of statutory claims in myriad areas, the observation by seven Supreme Justices that Mr. LaRue might have to exhaust his fiduciary claim appears to be prescient.

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