



Bulletin

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RECENT OPINIONS CHANGE LANDSCAPE OF ERISA LITIGATION

By Edward W. Ciolko, Esquire and Mark K. Gyandoh, Esquire

Two recent decisions, published within a day of each other, will dramatically affect future litigation concerning fiduciary responsibility under ERISA.¹ Both decisions shed light on issues previously prone to contradictory and conflicting opinions. The first case, *In re Syncor ERISA Litigation, Pilkington v. Cardinal Health, Inc., et al.*, No. 06-55265, ---F.3d---, 2008 WL 427763 (9th Cir. Feb. 19, 2008) (“*Syncor*”), is an appellate court decision in which SBTK is co-lead counsel for plaintiffs. *Syncor* confirms a district court’s strict obligation to review a proposed class action settlement once the parties’ intent to settle is clearly manifest. More importantly, *Syncor* defines the circumstances and facts needed to create triable issues of fact as to whether a fiduciary has committed a breach of fiduciary duty.

The second case, *LaRue v. DeWolff, Boberg & Associates, Inc. et al.*, No. 06-856, --- S.Ct. ---, 2008

WL 440748 (Feb. 20, 2008) (“*LaRue*”), is a landmark Supreme Court decision that puts to rest the question of who may file a suit against retirement plan fiduciaries. *LaRue* also comments on former participant standing to bring a suit against fiduciaries of a retirement plan, resolving a split at the Circuit Court level and finding in favor of plaintiffs’ rights to seek redress for fiduciary failures.

Syncor involved a suit brought by a certified class against *Syncor International Corp.* (“*Syncor*”), a health care services company that merged with Cardinal Health, Inc. (“*Cardinal*”) on January 1, 2003. *Syncor* was the administrator and a named fiduciary of the *Syncor* Employees’ Savings and Stock Ownership Plan (“the *Syncor* Plan”), a retirement plan governed by ERISA. Individual Defendants named in the suit included members of *Syncor*’s board of directors, which had final decision-making authority regarding all

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¹ The Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 et seq.

FOUNDING PARTNER RICHARD S. SCHIFFRIN ANNOUNCES HIS RETIREMENT

With a great deal of both professional pride and personal sadness, SBTK announces that our founding partner, Richard S. Schiffrin, has decided to retire from the firm, effective at the end of February. Richard is leaving the practice of law to begin a new chapter in his life, focusing on education, writing and continuing his involvement in political and charitable causes.

Upon graduating from DePaul Law School and attending graduate school at the University of Chicago, Richard began his legal career in the public defender’s office in Chicago, Illinois. After protecting the civil rights of individuals for several years, Richard made the transition into private practice and began representing consumers and individual investors in actions brought against public companies, founding SBTK’s predecessor, Schiffrin & Craig, Ltd, in 1987.



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SOVEREIGN WEALTH FUNDS TARGET OF U.S. AND EUROPEAN SCRUTINY

By: Darren J. Check, Esquire

The last several months have seen Sovereign Wealth Funds (“SWF”) gain a prominence never before seen for these large pools of investment dollars under the control of governments from throughout the Middle-East, Asia, Europe, and even the United States. These funds are the result of governments putting aside cash for future generations and a majority of them derive their income from either (a) energy exports, or (b) export taxes. Recent report places their collective value at approximately US \$3 trillion and growing rapidly, with the Abu Dhabi Investment Authority being the largest at around \$800 billion. With the price of crude oil and gas reaching record highs and Asian exports booming, the funds have recently grown at a breakneck pace. Indeed, funds in Norway, Kuwait, Dubai, the United Arab Emirates, China, Singapore, and others, have seen their assets under management grow exponentially.

However, these funds are not only receiving attention as a result of their ever-growing wealth, but have now become the subject of scrutiny in the United States and Europe because of where they are investing their money. Just this past January, Sovereign Wealth Funds from Singapore, Kuwait, South Korea, Dubai, and others, supplied approximately \$67 billion in investments that rescued, among others, Citigroup, Merrill Lynch, and Morgan Stanley, three prominent U.S. victims of the credit crisis. While the investments were certainly welcomed by the suffering banks and may have seemed innocuous enough, flags were raised for many who believe that the Sovereign Wealth Funds may have a political agenda behind investments in some of the United States’ most prominent financial institutions and were not comfortable with the opacity of the funds’ investments and operations. Similarly, many in Europe voiced the same fears, calling for protection of companies seen as national institutions and demanding a clearer window into the investments and structure of Sovereign Wealth Funds investing in their respective countries. (Norway is a notable exception here, as it makes full disclosure of its investments, investment guidelines, and investment objectives. In fact, the Norwegian Government Pension Fund-

Global, a beneficiary of Norway’s oil production in the North Sea, is often touted as the gold standard for Sovereign Wealth Funds, and has had representatives invited to many nations to discuss how it has structured itself.)

Calls have now come from both sides of the Atlantic for voluntary codes of conduct for Sovereign Wealth Funds, and in some cases, for mandatory legislation that would set certain requirements to make investments in certain countries. The United States recently formed a congressional task force to discuss the establishment of investment and transparency parameters for Sovereign Wealth Funds seeking to make investments in U.S. companies. The task force has not developed a time frame for coming up with recommendations, and the exact terminology and requirements of any regulations are still very unclear. At the same time, the European Commission has requested, and may soon require, that Sovereign Wealth Funds declare their investment policies, outline the domestic regulations governing them, disclose their actual investments, and disclose their assets under management. Making a finer point, European Commissioner for the Internal Market and Services, Charlie McCreevy, recently pointed to Russia and China as countries with large and growing Sovereign Wealth Funds that have major strategic and political interests that could guide the type and size of their investments.

While there is undoubtedly a level of protectionism and fear present in the desire to impose certain rules and restrictions on Sovereign Wealth Funds, the reality is, that one needs only to look to Norway to see that the transparency and disclosures that are being sought are already in place at one of the largest and most successful Sovereign Wealth Funds in the world, and have certainly not proven detrimental.

The *SBTK Bulletin* will continue to cover this issue and also looks forward to having a guest column on the topic in the near future.

THE ECONOMICS OF CLASS ACTIONS

By: Peter Kraneveld



Peter Kraneveld serves as an advisor to SBTk on issues such as corporate governance, shareholder rights and activism and how these fit into the interests of the firm's large international client base of pension funds and other institutional investors. An economist by training, Peter has a long history of working with pension funds and other institutional shareholders. He recently completed an eight year stint working with Dutch pension fund PGGM, a public pension fund for the healthcare sector in the Netherlands, and one of the largest pension funds in Europe. Prior to his work with PGGM, Mr. Kraneveld worked with the Organisation for Economic Co-operation and Development (OECD) and the Dutch Ministry of Economic Affairs.

Let's assume everyone picks up what's due to them after a class action settlement. What does that mean in economic terms? If you believe in efficient markets, very little. The value of the settlement results in a lower share price. Of course, not all markets are efficient. In addition, current shareholders, who take the hit of the settlement, may not be exactly the same or in for the same amount as the class, who took the hit of the fraud, but these effects are marginal for institutional investors.

An interesting side effect occurs on the level of directors. If the settlement includes a payment on their part, the amounts may be smaller, but the economic effect is larger: there is a transfer of wealth from the individuals concerned, whether they contribute to the settlement or reimburse the enterprise (resulting in a rise in the share price on efficient markets).

But maybe not. Directors are often insured against personal responsibility. Market forces will dictate a premium for the insurance that covers the risk, cost and profit margin of the insurer. The premium is usually paid by the enterprise, lowering the share price. Over a large number of enterprises and a long term, the part of the premium paid for risk will cover the amount paid by the directors, the insurance company makes a profit; the shareholders suffer a (very small) loss. Economics isn't called the dismal science for nothing. Yet, the conclusion that going after the directors is efficient, remains true. For one thing, the insurance made it possible to attract better quality directors over a large number of enterprises and a long term: individuals who are good at coldly calculating risks would feel unhappy when they are so exposed in the field of personal liability that a wrong decision could mean their financial ruin. Yet these are exactly the kind

of people who make good directors. For another, the insurance has a cap. Anything above that cap is a pure transfer of wealth.

If the effects are so marginal, why bother with class actions in the first place? The answer lies in the field of risk. Consider the position of a perfectly rational individual fraudster without a conscience. The net proceeds of the fraud must be larger than the present

The class action is very important to discourage fraud in other enterprises, benefiting investors and financial markets. However, the effects go further. They are a benefit to the whole society.

value of the salary stream during any prison time plus income lost thereafter times the chance of being caught. Otherwise, crime just doesn't pay. This means that the decision to defraud depends on (1) the size of the bribe; (2) the discount rate; (3) salary expectations; (4) length of any prison time; and (5) the chance of getting caught. Class actions are a way to increase the chance of getting caught. A simple economic analysis would show that it is even the most important factor. The class action is very important to discourage fraud in other enterprises, benefiting investors and financial markets. However, the effects go further. They are a benefit to the whole society.



NEWS BRIEFS

By: Darren J. Check, Esquire

Investors Continue to Leave Settlement Funds on the Table

A recent study by Global Operations & Administration, a U.K.-based withholding tax reclamation and class-action services specialist, claims that approximately \$8.4 billion has been left unclaimed by U.S. investors, while approximately \$3.6 billion were left unclaimed by European investors. This study was for class action settlements between 2000 and 2007, and claims that over 25% of potential claims go un-filed. While several studies have been conducted over the past years with widely ranging estimates on the amount of money left unclaimed, it is clear that there are still significant sums that investors around the globe are failing to collect. While this issue is one that has received a great deal of attention and discussion in various publications and at numerous conferences, it is still an issue that many investors need to address and put in place systems to insure recovery of all settlement funds owed to them.

“Say on Pay” Focus of Growing Number of Proxy Resolutions

As reported in previous SBTK Bulletin articles, several European countries now require companies to have advisory votes for shareholders to decide if executive compensation is fair. While these votes are not binding, certain negative votes have caused some to reconsider executive pay packages. While last year saw an increase in the number of “say on pay” resolutions on proxies in the United States, 2008 is shaping up to be a record year with approximately 100 companies’ proxy statements calling for advisory votes on executive compensation. Resolutions will appear on the proxies of such high profile companies as Citigroup, Wal-Mart, Merck, Occidental Petroleum, and others. With many such resolutions garnering record support in 2007, it is quite possible that many companies will be faced with the opinion of their shareholders in 2008.

Funding of U.S. Defined Benefit Funds Down

A recent study conducted by the U.S. government General Accounting Office (“GAO”) found that U.S. based State and Local Government Defined Benefit plans are moving towards better financial health. The study, entitled “Retiree Benefits: Current Funded Status of Pension and Health Benefits” and dated January 29, 2008, states that many experts consider a funded ratio of about 80% or better to be adequate for government pensions. The GAO determined that 58% of the 65 large pension plans surveyed met that funding in 2006, a decreased percentage since 2000 when only about 10% of the funds surveyed did not meet the 80% benchmark. Much of this decrease is attributed to stock market investments that have declined in value and thus reduced the value of the fund’s assets. While there is little cause for alarm in the short-term, the GAO did warn that the problem must be solved by either increasing contributions by the government or pensioners or by cutting spending.

SBTK SECURES \$50 MILLION SETTLEMENT FROM TRANSKARYOTIC THERAPIES

By: Michael K. Yarnoff, Esquire

After five years of hard-fought, contentious litigation, SBTK as lead counsel on behalf of the Class, has entered into one of largest settlements ever against a biotech company with regard to non-approval of one of its drugs by the U.S. Food and Drug Administration ("FDA"). Specifically, the Plaintiffs alleged that Transkaryotic Therapies, Inc. ("TKT") and its CEO, Richard Selden, engaged in a fraudulent scheme to artificially inflate the price of TKT common stock and to deceive Class Members by making misrepresentations and nondisclosures of material facts concerning TKT's prospects for FDA approval of Replagal, TKT's experimental enzyme replacement therapy for Fabry disease.

In July of 2003, SBTK filed the Consolidated and Amended Class Action Complaint ("Complaint") and Defendants responded by filing a motion to dismiss the Complaint which vigorously denied the allegations in the Complaint. On May 26, 2004, the Honorable Rya W. Zobel issued an opinion and order upholding the claims under sections 10(b), 20(a) and Rule 10b-5 of the

Exchange Act against TKT and Richard Selden. SBTK thereafter moved to have the Class certified, and on November 28, 2005, the Court granted the motion for class certification. After completion of class certification, SBTK embarked on a long and difficult formal discovery path. The path was filled with many potholes, but ultimately SBTK, with the assistance of other Plaintiffs' counsel, reviewed over 500,000 pages of documents produced by Defendants and third-parties, either reviewed or took approximately 30 depositions of TKT-affiliated personnel and attorneys from the Company's outside corporate counsel, and responded to multiple sets of discovery requests and motions to compel from Defendants.

After nearly completing merits discovery, and with the parties unwilling to concede on any issues, the parties entered into a complex and arduous mediation process conducted by an experienced mediator, the Honorable Daniel Weinstein, a retired state court judge from California, in an attempt to break the stalemate. Over the

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FOUNDING PARTNER RICHARD S. SCHIFFRIN ANNOUNCES HIS RETIREMENT *(Continued from page 1)*

Richard has led SBTK since its inception, overseeing and guiding our tremendous growth from a small boutique litigation firm with only three attorneys to our current status as one of the largest and most successful law firms prosecuting securities and consumer class actions on behalf of institutional and individual investors and consumers worldwide.

Mr. Schiffrin's accomplishments and successes at SBTK over these past 21 years are too numerous to mention, but some cases truly epitomize the dedication and strategic advocacy that Mr. Schiffrin has employed throughout his career such as *In re AramisSoft Corp. Securities Litigation*, C.A. No. 01-CV-2486 (D.N.J. 2002), *Henry v. Sears, et al.*, Case No. 98 C 4110 (N.D. Ill. 1999), *In re Tenet Healthcare Corp.*, 02-CV-8462 (C.D. Cal.), and perhaps most noteworthy, *In re Tyco International Ltd. Securities Litigation*, MDL Docket No. 02-1335-PB, wherein Richard negotiated a record \$3.2 billion settlement with Tyco International, Ltd. and their auditor

PricewaterhouseCoopers. The \$2.975 billion payment by Tyco represents the single largest securities class action recovery from a single corporate defendant in history, while the \$225 million settlement with PwC represents the largest payment PwC has ever paid to resolve a securities class action and is the second-largest auditor settlement in securities class action history.

In announcing his retirement to the firm, Mr. Schiffrin stated, "I am very proud of the work we have done here, the causes we have supported, and the culture we have created at the firm. I take great pride in having founded this firm and participating in its growth over the past 21 years, but recognize that it was only through the combined efforts of everyone who works at the firm that we have achieved so much. Our success was truly a team effort."

While Richard will be sorely missed, we wish him nothing but success in all of his future endeavors.



SBTK SECURES \$50 MILLION SETTLEMENT FROM TRANSKARYOTIC THERAPIES *(Continued from page 5)*

course of approximately ten months, SBTK engaged in two formal in-person mediation sessions in New York and California, exchanged expert reports and rebuttal reports on the issue of damages, retained a neutral damage expert to assist Judge Weinstein in evaluating each sides' damage methodologies, prepared expert power point presentations for the mediation sessions and engaged in multiple telephonic settlement negotiations. Finally, after participating in this exhaustive mediation process, SBTK secured a \$50 million settlement from the Defendants.

The \$50 million settlement is an excellent result for the Class and represents three times the maximum damages the Class would have recovered had a jury found Defendants' expert more persuasive as to the monetary consequences of the fraud.

Judge Zobel has preliminarily approved the settlement and has set a final fairness hearing for June 5, 2008. SBTK looks forward to presenting this outstanding settlement to Court for final approval.

RECENT OPINIONS CHANGE LANDSCAPE OF ERISA LITIGATION *(Continued from page 1)*

aspects of the *Syncor* Plan's administration.

Attendant to the merger of *Syncor* and Cardinal, Cardinal conducted a due diligence review of *Syncor's* operations. In October 2002, after conducting the review, Cardinal notified *Syncor* that certain payments made by *Syncor's* Taiwanese subsidiary, *Syncor Taiwan, Inc.*, may have violated the Foreign Corrupt Practices Act ("FCPA"), 15 U.S.C. § 78dd-1 et seq. More specifically, Cardinal discovered that two *Syncor* executives (and plan fiduciaries) made cash bribes to doctors at Taiwanese government-operated hospitals in order to increase sales and grow *Syncor's* business. *Syncor* also systematically encouraged the managers of its other foreign operations to use bribes in the countries in which they did business. Despite these illegal practices, the Plan's fiduciaries allowed the Plan to hold and acquire *Syncor* stock when they knew or had reason to know of *Syncor's* foreign bribery scheme.

In late 2005, *Syncor* and the Individual Defendants filed motions for summary judgment based, in part, on the argument that *Syncor* stock — when compared with the S&P index — performed well during the Class Period and was therefore a prudent investment. Before these motions were ruled upon, the parties executed a term sheet purporting to settle the litigation. Pursuant to Central District of California Local Rule 16-15.7, which instructs litigants on how to report a settlement, the parties immediately left a message for the district court's clerk regarding the term sheet.

The day after the term sheet was signed, despite having been notified of the settlement by the parties, the Court entered an Order granting Defendants' motions for summary judgment and entered judgment against the plaintiffs. Defendants then tried to renege on the settlement

and, after subsequent attempts to revive the settlement (including motions under Rules 59 and 60) failed, plaintiffs appealed to the Ninth Circuit contending that (i) the district court erred in failing to enforce the parties' written agreement to resolve the case, and (ii) judgment was nevertheless improper because plaintiffs raised numerous issues of fact as to the prudence of investing in *Syncor* stock.

The Ninth Circuit found that when parties (1) enter into a binding class action settlement agreement, which requires court approval pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, and (2) provide the required notice of the settlement *prior* to the district court's entry of judgment, the district court should enforce the settlement and proceed to hold a hearing for purposes of determining whether the settlement agreement is fair, reasonable and adequate. Failure to do so — even where the district court drafted a summary judgment order — is an abuse of discretion.

Further, in reviewing the facts before it, the Court found that there were genuine issues of material fact for trial rendering summary judgment adjudication inappropriate. The Court rejected the Defendants' contention that because the *Syncor* stock was outperforming certain market indexes, the *Syncor* Plan did not breach their fiduciary duty by continuing to invest in *Syncor* stock.

In moving for summary dismissal, Defendants relied on the so-called "*Moench* presumption," derived from the case *Moench v. Robertson*, 62 F.3d 553, 571 (3d Cir.1995), which states that fiduciaries of ESOPs are presumed to have acted consistently with ERISA in their decisions to invest assets in employer stock. In order to rebut the presumption, a plaintiff must allege sufficient facts showing

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2008 UPCOMING EVENTS

Council of Institutional Investors 2008 Spring Meeting

APRIL 9 – 11, 2008

The Capital Hilton Hotel – Washington, D.C.

The annual spring meeting, entitled *Thinking Globally*, will bring together investors from around the world to discuss issues relevant to all shareholders.

National Conference on Public Employee Retirement Systems

Annual Conference & Exhibition

MAY 18 – 22, 2008

Hilton New Orleans Riverside — New Orleans, Louisiana

Attendees benefit from the wide selection of superior educational programs and dynamic speakers, and the opportunity to network with money managers, investment service providers and public fund colleagues from across the nation.

Australia Investment Management Summit

MAY 21 – 22, 2008

Park Hyatt Hotel — Melbourne, Australia

Over the course of one and a half days, participants in The Australia Investment Management Summit will hear representatives of the Government, Institutional Investors (Superannuation, Insurance, Corporate Treasury, Sovereign, Endowment, Foundation, etc.) as well as Asset Management Companies explain their strategies, approaches and outlooks on a variety of issues vital to institutional investors and money managers.

National Association of Public Pension Attorneys 2008 Spring Conference

JUNE 25 – 27, 2008

Westin Hotel — Boston, Massachusetts

The meeting will address a variety of issues important to attorneys serving public pension funds and also feature a new attorney session on Tuesday, June 24.

European Investment Roundtable

SEPTEMBER 17 – 19, 2008

Grand Hotel — Florence, Italy

The theme of the Roundtable, "Optimal Investing in a Brave New World," indicates the focus of the 2008 program. This consists of identifying and exploring relevant issues including the magnitude of investment skills among Europe's institutional funds, the new challenges facing investment officers, and the outlook for important investment vehicles and instruments.

Council of Institutional Investors 2008 Fall Meeting

OCTOBER 5 – 7, 2008

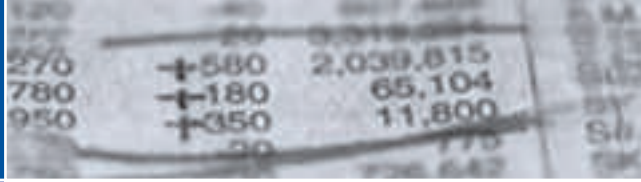
Hilton Chicago — Chicago, Illinois

International Foundation 54th Annual Employee Benefits Conference

NOVEMBER 16 – 19, 2008

Henry B. Gonzalez Convention Center — San Antonio, Texas

This conference is designed to meet the specific needs of multiemployer and public sector plan trustees and administrators, attorneys, accountants, actuaries, investment managers and others who provide services or who are involved in the overall management and administration of benefit trust funds.



that a prudent investor under similar circumstances would not have followed the plan's requirement to invest in employer securities.

The Ninth Circuit found that the prudent man standard based only upon a company's alleged financial viability (or historical stock price performance) fails to take into account the myriad of circumstances that could violate the standard. For instance, a violation may occur where a company's stock did not trend downward over time, but was artificially inflated during a period of time by an illegal scheme about which the fiduciaries knew or should have known and which resulted in a sudden decline in share price when ultimately exposed — such as happened in *Syncor*. As such, the Ninth Circuit's decision undercuts recent arguments by defendants that as long as a company's stock is performing well, retirement plan fiduciaries are insulated from liability.

In *LaRue*, a participant in his Company's 401(k) plan sued his employer/administrator under ERISA, alleging that his account sustained losses when his employer failed to follow his directions. Specifically, Plaintiff James *LaRue* alleged that the plan administrator's failure to follow his investment directions "depleted" his interest in the plan by approximately \$150,000.00 and amounted to a breach of fiduciary duty under ERISA.

The lawsuit was brought pursuant to ERISA § 502(a)(2) which provides for suits to enforce the liability-creating provisions of § 409, concerning breaches of fiduciary duties that harm plans.² The Honorable David C. Norton of the United States District Court for the District of South Carolina, granted the employer's motion for judgment on the pleadings, and the Plaintiff appealed.

The Fourth Circuit affirmed. Relying on *Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134, 105 S.Ct. 3085, 87 L.Ed.2d 96 (1985), the Circuit Court held that ERISA § 502(a)(2) provides remedies only for entire plans, not for individuals.

LaRue reversed this decision. The opinion, authored by Justice Stevens, held that the Plaintiff's claim was cognizable pursuant to § 502(a)(2) and noted that the principal statutory duties imposed by ERISA § 409 relate to the proper management, administration, and investment of plan assets (with an eye toward ensuring that the benefits authorized by the plan are ultimately paid to plan participants). The Court found that although this section does not provide a remedy for individual injuries distinct from plan injuries, it does authorize recovery for fiduciary breaches that impair the value of plan assets in a participant's individual account. The misconduct that the Plaintiff alleged fell squarely within that category.

Of possibly greater consequence was the Court's discussion in footnote 6 noting that 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." Although set forth in a footnote, it may be argued that this statement is not simply dicta because the Court would not have retained jurisdiction if it believed former participants lacked standing. The Court stated: "[a]fter 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."

This finding is particularly significant given that Circuit Courts have been divided as to whether former retirement plan participants have standing to bring suits pursuant to ERISA § 502(a)(2) for breaches of fiduciary duty. *LaRue* has implicitly, if not expressly, resolved the debate.

² Plaintiff also brought his suit pursuant to ERISA § 502(a)(3) for equitable relief; however, the Supreme Court did not consider this aspect of the appeal as it found the Court of Appeals had misread ERISA § 502(a)(2).



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