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Federal courts have seen a significant increase in the number of putative class actions filed against retirement plan fiduciaries under the Employee Retirement Income Security Act. In this article, two attorneys with Gibson, Dunn & Crutcher examine the requirements for class certification in ERISA cases and point out that the Supreme Court's recognition that some plan participants may sue to recover losses in their individual accounts may affect plaintiffs' ability to obtain mandatory class certification under the Federal Rules of Civil Procedure.

The Inapplicability of Rule 23(b)(1) to ERISA Class Actions

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The past several years have seen a dramatic increase in the number of putative class actions filed against retirement plan fiduciaries under the Employee Retirement Income Security Act of 1974 (ERISA).

Courts and litigants frequently assume that fiduciary-breach cases under ERISA warrant ''automatic'' class certification under Federal Rule of Civil Procedure 23(b)(1)(B), which applies to certain claims against trusts and other entities with limited assets and multiple potential claimants. This assumption is largely based on the Supreme Court's observation in the *Russell* case, which involved a defined benefit plan, that a suit under

ERISA ordinarily proceeds on behalf of ''the plan as a whole.''[1]

Most modern ERISA pension plans, however, are not defined benefit plans; rather, they are defined contribution plans—such as 401(k) plans—in which participants' individual investments are accounted for separately. In its recent *LaRue* decision, the Supreme Court confined *Russell*'s ''plan as a whole'' dictum to the defined benefit pension context from which it arose, while holding that participants in a defined contribution plan may sue for individualized relief.[2]

The *LaRue* decision has profound, if largely unrecognized, ramifications for the certification of ERISA cases as class actions. In particular, *LaRue* now makes clear that most fiduciary-breach claims by participants in defined contribution plans cannot be certified as a class under Rule 23(b)(1)(B) as that provision has been construed by the Supreme Court in *Ortiz*.[3] Rather, such claims must meet the more demanding requirements of Rule 23(b)(3) if they are to be certified at all.

Background ERISA is, of course, the principal federal law governing employee benefit plans, including pension and other retirement savings plans.[4] Section 502(a) of ERISA authorizes civil suits by plan participants and others; the most common civil suits proceed under Section 502(a)(2) and seek monetary recovery for an alleged breach of fiduciary duty under Section 409.[5]

The current wave of big-ticket ERISA civil litigation can generally be divided into one of two broad categories: ''stock drop'' suits in which ERISA plan participants complain of the availability of employer stock as an investment option, and ''plan administration'' suits in which participants challenge excessive advisory fees or other mechanics of how the plan is run. These lawsuits have been filed against plan sponsors (employers), plan fiduciaries, and service providers such as investment advisers.

The stock drop cases set off the recent upswing in ERISA civil litigation after the accounting scandals of the 1990s. A large drop in the value of a publicly traded company's stock often draws a suit alleging violations of the federal securities laws.[6] Participants in 401(k) plans who held company stock in their accounts also began to file suit under ERISA Section 502(a), alleging that the plan fiduciaries had breached their duties by imprudently allowing plan participants to invest (or continue to invest) in the company's stock.[7] Through 2007, approximately 150 ERISA stock drop cases have been filed in the federal courts.[8]

Starting in 2006, plan administration suits became a new instrument of choice for ERISA plaintiffs, with more than 30 such cases currently pending in the federal trial and appellate courts.[9] Although the specific claims in these suits are not as uniform as in the stock drop cases, plan administration suits generally allege a breach of fiduciary duty due to excessive fees, revenue sharing, imprudence of offering actively managed funds, and related misrepresentations.[10] In these suits, which generally involve 401(k) retirement plans, the plaintiffs typically seek to obtain monetary relief that would ultimately flow to each participant's individual account.

A little-remarked, but indisputable, feature of this new wave of ERISA litigation is that most of the cases have been filed as class actions—the named plaintiffs seek to represent a class of all (or most) other participants in the plan at issue. Whether or not such claims can proceed as class actions can have enormous consequences for the litigants and the court system. Alleged misconduct with only minimal financial impact on any particular participant can become major litigation when magnified across tens or even hundreds of thousands of accounts.[11] Accordingly, a recurring issue in these cases is whether and how they can be certified as class actions.

The federal courts have exclusive jurisdiction over ERISA fiduciary-breach claims,[12] and in federal court every class action must fit within one of the three subsections of Federal Rule of Civil Procedure 23(b). The class (or collective) action was originally developed by the courts of equity,[13] but the federal rules—as substantially amended in 1966 and 2003—now provide the procedure for all class actions. As the Supreme Court has explained, ''courts must be mindful that [Rule 23] as now composed sets the requirements they are bound to enforce;'' Rule 23 ''limits judicial inventiveness,'' and ''[c]ourts are not free to amend a rule outside the process Congress ordered.''[14]

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[1] *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 140-42 (1985).

[2] *LaRue v. DeWolff, Boberg & Assocs.*, 128 S. Ct. 1020, 1025-26 (2008).

[3] *Ortiz v. Fibreboard Corp.*, 527 U.S. 805, 832-47 (1999).

[4] *See, e.g., Egelhoff v. Egelhoff*, 532 U.S. 141, 150 (2001)

[5] Section 502(a)(2) provides that ''[a] civil action may be brought by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under'' Section 409. 29 U.S. C. § 1132(a)(2). Section 409 requires a fiduciary who has breached a fiduciary duty to ''make good to such plan any losses to the plan resulting from each such breach'' and to ''restore . . . profits . . . made through use of plan assets.'' 29 U.S.C. § 1109.

[6] *See* Craig C. Martin, Matthew J. Renaud & Omar R. Akbar, *What's up on Stock Drops?* Moench *Revisited*, 39 J. Marshall L. Rev. 605, 605 (2005-2006).

[7] *Id.* at 615-16. These ERISA claims often accused the plan fiduciaries of failing to disclose adverse information, raising interesting questions about the interplay between ERISA's fiduciary standards and the disclosure requirements of the federal securities laws. *See Harzewski v. Guidant Corp*, 489 F.3d 799, 805 (7th Cir. 2007).

[8] Practicing Law Institute, *Securities Litigation: A Practitioner's Guide* 16:1 (Jonathan C. Dickey ed., 2008).

[9] Only a few of these have reached the courts of appeals. *See, e.g., Grabek v. Northrop Grumman Corp. ERISA Litig.*, No. 07-80129, slip op. (9th Cir. Oct. 11, 2007) (accepting appeal from denial of class certification); *Ruppert v. Principle Life Ins. Co.*, No. 08-8013, slip op. (8th Cir. Oct. 28, 2008) (denying motion for immediate appeal under Rule 23(f)); *Spano v. Boeing Co.*, No. 08-8032 (7th Cir.) (application for immediate appeal from grant of class certification pending); *Hecker v. Deere & Co.*, No. 07-3605 (7th Cir.) (on appeal from dismissal on the merits) (argued Sept. 5, 2008).

[10] *See, e.g., Abbott v. Lockheed Martin Corp.*, No. 06-00701 (S.D. Ill.); *Beesely v. Int'l Paper Co.*, No. 06-00703 (S.D. Ill.); *Brown v. Medtronic, Inc.*, No. 08-04904 (D. Minn.); *Tibble v. Edison Int'l*, No. 07-05359 (C.D. Cal.).

[11] *See, e.g., In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995).

[12] 29 U.S.C. § 1132(e)(1).

[13] *See Supreme Tribe of Ben-Hur v. Caudle*, 255 U.S. 356, 366 (1921).

[14] *Amchem Prod., Inc. v. Windsor*, 521 U.S. 591, 620 (1997).

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Rule 23(b)(1) allows class certification when prosecution of individual lawsuits would impede the legal interest of absent class members, or the threat of multiple suits may subject the other party to incompatible standards of conduct.[15] Subsection (b)(2) is available for classes seeking injunctive or corresponding declaratory relief.[16] These classes are described as mandatory, because absent class members need not be given notice and have no ability to opt-out of the class.[17] Rule 23(b)(3) is the ''catch-all'' of class certification. In order to fit within subsection (b)(3), the court must find that ''questions of law or fact common to class members predominate over'' individual questions, and that class action is the superior method of adjudication.[18] Unlike under subsections (b)(1) and (2), under (b)(3) notice must be sent to absent class members, who have a right to opt-out of (and not be bound by) the litigation.[19]

Until recently, a frequently recurring view among courts and litigants has been that ERISA cases are amenable to mandatory class treatment under Rule 23(b)(1)(B).[20] The Supreme Court has said that a suit on behalf of a large class of beneficiaries to ''restore the subject of the trust'' is a classic example of a situation in which individual adjudication by a class member ''disposes of, or substantially affects'' the interests of absent class members, thus warranting Rule 23(b)(1)(B) certification.[21] The theory advanced by the plaintiffs in the plan administration cases is that, like a traditional action by beneficiaries to restore the subject of a trust, an ERISA claim proceeds on behalf of the ''plan as a whole,'' and thus any recovery must encompass all plan participants through a mandatory class certification.

The ''plan as a whole'' language on which most ERISA claimants rely in seeking certification is found in the Supreme Court's *Russell* decision, in which a participant in a defined benefit plan sought to recover extra-contractual damages due to the plan fiduciaries' denial of benefits.[22] Defined benefit plans consist of a general pool of assets, rather than individual dedicated accounts like in defined contribution plans.[23] A defined benefits plan, ''as its name implies, is one where the employee, upon retirement, is entitled to a fixed periodic payment.''[24] The *Russell* Court held that the claim was not authorized under ERISA Section 502(a)(2) because ''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 with the rights of an individual beneficiary.''[25] This statement makes sense in the context of a defined benefit plan where each participant is guaranteed a specific retirement income, and therefore has no individualized interest in the plan assets.[26]

The Supreme Court's *LaRue* decision was viewed by many—including many lawyers who represent plaintiffs—as a significant expansion of potential ERISA liability.

Most employer-sponsored ERISA plans today are not defined benefit plans, but rather are ''defined contribution'' plans such as those established under Section 401(k) of the Internal Revenue Code. In a defined contribution plan, each participant contributes to their own individual account, and determines which mix of investment options best suits their needs from those available within the plan. Each participant is entitled to the value of their individual account, which varies depending on the amount contributed and the performance of their investment choices.

In the February 2008 *LaRue* decision, the Supreme Court held that the difference between defined benefit and defined contribution plans has significant consequences for ERISA claimants.[27] Mr. LaRue was a participant in an employer-sponsored defined contribution plan. He claimed that the fiduciary of the plan failed to make directed changes to his investments, resulting in an investment loss. He sought to recover that loss under the fiduciary-breach provisions of ERISA Sections 409 and 502(a)(2).[28]

The Fourth Circuit, relying on *Russell*, found that LaRue could not bring the claim under ERISA Section 502(a)(2), because he only sought recovery for the impairment of his individual account.[29] The court was ''skeptical that [LaRue's] individual remedial interest can serve as a legitimate proxy for the plan in its entirety,'' as required under *Russell*.[30]

In a subsequent opinion, the Fourth Circuit reiterated its holding that ERISA Section 502(a)(2) does not provide recovery for ''individual, rather than plan, losses.''[31] Emphasizing *Russell*'s holding that ERISA was designed to ''protect the integrity of the plan,'' the court affirmed that ''a § 502(a)(2) claim must 'be brought in a representative capacity on behalf of the plan as a whole.' ''[32] Because LaRue sought to recover ''money damages to which he believes he is individually

[15] Fed. R. Civ. P. 23(b)(1).
[16] Fed. R. Civ. P. 23(b)(2).
[17] Fed. R. Civ. P. 23(c)(2)(A).
[18] Fed. R. Civ. P. 23(b)(3).
[19] Fed. R. Civ. P. 23(c)
[20] *See, e.g.*, *Loomis v. Exelon Corp.*, No. 06-04900, slip op. at 7-8 (N.D. Ill. June 26, 2007) (granting class certification under Rule 23(b)(1)(B)); *Beesely*, No. 06-703, slip op. at 17-18 (S.D. Ill. Sept. 26, 2008) (same); *Tussey v. ABB, Inc.*, No. 06-04305, slip op. at 18-19 (W.D. Mo. Dec. 3, 2007) (same); *Taylor v. United Technologies Corp.*, No. 06-01494, slip op. at 10-11 (D. Conn. June 3, 2008) (same).
[21] *Ortiz*, 527 U.S. at 834.
[22] 473 U.S. at 136-37.
[23] *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 439 (1999).
[24] *Id.*
[25] *Russell*, 473 U.S. at 136-37.
[26] *Hughes Aircraft*, 525 U.S. at 439.
[27] 128 S. Ct. at 1026.
[28] *Id.* at 1022-23.
[29] *LaRue v. DeWolff, Boberg & Associates, Inc.*, 450 F.3d 570, 573-74 (4th Cir. 2006).
[30] *Id.* at 574.
[31] *LaRue v. DeWolff, Boberg & Associates, Inc.*, 458 F.3d 359, 361 (4th Cir. 2006) (opinion on denial of rehearing en banc).
[32] *Id.* at 362 (*quoting Russell*, 472 U.S. at 141 n.9).

entitled,'' the action was ''in no sense 'representative.' ''[33]

The Supreme Court reversed the Fourth Circuit, stressing the difference between a defined benefits plan and a defined contribution plan. The court held the ''references to the 'entire plan' . . . are besides the point in the defined contribution context.''[34] In defined contribution plans, ''fiduciary misconduct need not threaten the solvency of the entire plan to reduce benefits below the amount that participants would otherwise receive.''[35] Therefore, participants in defined contribution plans can bring suit ''for fiduciary breaches that impair the value of plan assets in [their] individual account.''[36]

The Supreme Court's *LaRue* decision was viewed by many—including many lawyers who represent plaintiffs—as a significant expansion of potential ERISA liability. The consequences of *LaRue* for the certification of ERISA fiduciary-breach claims as class actions, however, has received much less attention. In our view, that should change.

Discussion In many ERISA cases that are filed as ostensible class actions, the plaintiffs seek certification under Rule 23(b)(1)(B). This reflects a strategic decision to avoid Rule 23(b)(3), which contains prerequisites to certification (*i.e.*, the predominance and superiority inquiries) and additional safeguards for absent class members (mandatory notice and opt-out rights) not found in other provisions of the Rule. It also reflects the reality that the other ''mandatory'' provisions of Rule 23(b)—which apply to cases raising the risk of inconsistent judgments (Rule 23(b)(1)(A)) or for injunctive relief (Rule 23(b)(2))—generally are not available to ERISA claimants seeking monetary relief for alleged breaches of fiduciary duty.[37]

The Supreme Court construed the scope of Rule 23(b)(1)(B) in its seminal *Ortiz* decision. The parties in *Ortiz* sought to certify a class of asbestos plaintiffs under Rule 23(b)(1) on a limited fund theory.[38] The parties—the asbestos manufacturer, its insurance companies, and the named plaintiffs—agreed to establish a trust to process and pay class members' personal injury claims.[39] The Supreme Court held that the class of personal injury plaintiffs could not be certified under Rule 23(b)(1)(B) because mass tort actions aggregated for settlement purposes do not fit the historical limited fund rationale.[40]

Ortiz makes clear that Rule 23(b)(1)(B) was written ''to capture the 'standard' class actions recognized in pre-Rule practice.''[41] Unlike Rule 23(b)(3), which is ''forward looking,'' subsection (b)(1)(B) is confined to its historical antecedents: suits that may ''dispose[] of , or substantially affect[], the interests of absent class members.''[42] The court described the classic ''risk of impairment'' cases, listing limited fund cases, suits for reorganization of fraternal-benefit societies, suits by beneficiaries to ''restore the subject of the trust,'' and shareholder suits to declare dividends.[43] Placing a limiting construction on Rule 23(b)(1)(B) was considered ''prudent'' in order to ''minimize[] potential conflict with the Rules Enabling Act, and avoid[] serious constitutional concerns raised by the mandatory class resolution of individual legal claims.''[44]

Under *Ortiz*, some ERISA suits brought on behalf of a plan ''as a whole'' may be amenable to certification under Rule 23(b)(1)(B), because they are equivalent to traditional suits by beneficiaries to recover the subject of the trust. Such suits would include many claims involving traditional defined benefit plans, as well as a few claims involving defined contribution plans.

But suits that do not fit squarely into the historical antecedents described in *Ortiz*—including most suits for monetary relief by participants in defined contribution plans—cannot proceed under Rule 23(b)(1)(B) unless the plaintiffs can meet the three-part test set forth by the Supreme Court. That test requires that (1) the fund be insufficient to pay the total of the aggregated liquidated claims, (2) the whole fund be devoted to the claims, and (3) claimants must be treated equitably among themselves.[45]

LaRue has undeniable consequences for class certification in the defined contribution context, because it destroyed the earlier notion that a suit brought under ERISA Section 502(a)(2) is always on behalf of the plan ''as a whole.'' The Supreme Court made clear that the type of plan makes a material difference to the scope of relief available under ERISA, and thus to the type of claim that a participant may pursue.

Although participants in a defined benefit plan must proceed on behalf of the plan as a whole, participants in a defined contribution plan may bring suit for ''fiduciary breaches that impair the value of plan assets in [their] individual account.''[46] The very fact that participants may sue to recover the losses in their individual accounts takes these cases out of the traditional domain of Rule 23(b)(1)(B). An adjudication as to one participant no longer determines or impedes the rights of other participants.

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[33] *Id.*
[34] *LaRue*, 128 S. Ct. at 1025.
[35] *Id.*
[36] *Id.* at 1026.
[37] Rule 23(b)(1)(A) is not available because there is no ''risk of inconsistent judgments'' in actions for damages. *See McDonnell Douglas Corp. v. U.S. District Court for the Central District of Cal.*, 523 F.2d 1083, 1086 (9th Cir. 1975). Rule 23(b)(2), by its terms, applies only to claims for injunctive or corresponding declaratory relief, and is generally not applicable to claims for damages or other monetary relief. *In re Allstate Ins. Co.*, 400 F.3d 505, 507 (7th Cir. 2005). ERISA § 502(a)(3) authorizes civil suits limited to ''enjoin[ing] any act or practice which violates [ERISA]'' or ''obtain[ing] other appropriate equitable relief,'' but the scope of monetary relief available under that section is extremely limited. *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002).
[38] 527 U.S. at 825.
[39] *Id.* at 827.
[40] *Id.* at 842.
[41] *Id.*
[42] *Id.*
[43] *Id.* at 833-34.
[44] *Id.* at 842.
[45] *Id.* at 838-39.
[46] *LaRue*, 128 S. Ct. at 1026.

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''Because a defined contribution plan is essentially the sum of its parts, losses attributable to the account of an individual participant are necessarily 'losses to the plan.' ''[47] Loss recovered is not distributed to the plan generally and indiscriminately, however; recovery is allocated to each individual account according to the amount of loss within that account.[48] Many courts of appeals have already recognized the individual nature of the relief authorized in *LaRue*.[49]

The very nature of the plaintiffs' claims in stock drop and plan administration cases shows that the suits are not brought on behalf of the plan ''as a whole.'' Rather than alleging an injury that harms all participants generally and indiscriminately, plaintiffs in these suits allege breaches that injure some participants, but do not affect others; breaches that injure participants in varying amounts depending upon their individual investment choices; and breaches that injure some participants while benefiting others.

LaRue's recognition of an individualized right to bring suit to recover for such losses also has due process implications. Mandatory certification under Rule 23(b)(1)(B) would prohibit absent participants from later bringing individual claims for losses in their own accounts—the absent class members' claims would fall or rise with those of the named class plaintiffs. ''The legal rights of absent class members . . . . are resolved regardless of their consent, or, in a class with objectors, their express wish to the contrary.''[50] ''[T]he Rules Enabling Act and the general doctrine of constitutional avoidance would jointly sound a warning of the serious constitutional concerns that come with any attempt to aggregate individual'' damages claims under Rule 23(b)(1)(B).[51]

Two real-world lawsuits will serve to illustrate the issue addressed in this article. Both are from California; both ultimately may be decided by the Ninth Circuit; and both involve the question whether an ERISA class action can be certified under Rule 23(b)(1)(B).

In *Kanawi v. Bechtel Corp.*,[52] a former Bechtel employee and participant in Bechtel's defined contribution plan brought suit under ERISA Section 502(a)(2) for breach of fiduciary duty due to excessive fees, prohibited transactions, inclusion of imprudent investment options, and failure to disclose revenue sharing. Plaintiffs moved for class certification under Rule 23(b)(1), (2), and (3). Discussing commonality under Rule 23(a), the court noted that ''[b]efore *LaRue*, recovery under ERISA § 502(a)(2) was recognized to be on behalf of a plan—individuals could not recover for their own losses.''[53] The court determined that common issues of law predominated because ''*LaRue* did not overrule that widely-accepted tenet of ERISA law.''[54] After determining that the subsection (a) requirements were met, the court certified the class under Rule 23(b)(1) because there were ''more than 17,000 individuals [who] are or have been members of the Plan.''[55] The court recognized that each participant ''could individually file suit for damages arising from the same conduct,'' but found ''[t]his would create a risk of 'inconsistent and varying' adjudications, resulting in 'incompatible standards of conduct' for Defendants.''[56]

In re Computer Sciences Corp.[57] also involved a participant in an employer's defined contribution plan bringing a claim for breach of fiduciary duty under ERISA Section 502(a)(2). The participant alleged that Computer Sciences, as fiduciary, made negligent misrepresentations, imprudently offered company stock as an investment option, and failed to monitor the stock fund.[58] The plaintiffs moved to certify the class under either Rule 23(b)(1) or (2), but the court denied the motion because the class did not meet the requirements of either subsection. The court concluded that subsection (b)(1)(A) was not implicated because there was little chance of ''diametrically opposed injunctive orders.''[59] Even if a court were to enter an order enjoining defendants from further violations of ERISA, it is unlikely ''another court will order Defendants to violate their ERISA fiduciary obligations.''[60] After noting that *LaRue* allowed participants in a defined contribution plan to ''bring ERISA 502(a)(2) claims on their own behalf,'' the court ruled certification under Rule 23(b)(1)(B) improper because ''putative class members have an individual remedy.''[61]

Although the court in *Kanawi* recognized that *LaRue* gives defined contribution plan participants the right to bring individual suits, the court failed to recognize the implication of that change for the class certification decision. After *LaRue*, a suit under ERISA Section 502(a)(2) may still be brought ''on behalf of the plan,'' but is not necessarily on behalf of the plan ''as a whole.'' As the *Computer Sciences* decision illustrates, this is a critical distinction that, if implemented at the class-certification stage, may be outcome-determinative on the question of class certification.

The Supreme Court has unambiguously warned against an expansive reading of Rule 23(b)(1).[62] Because of the mandatory nature of Rule 23(b)(1), its use must be confined to cases in which individual adjudica-

[47] *LaRue*, 128 S. Ct. at 1028 (Thomas, J., concurring).
[48] *In re Mut. Funds Inv. Litig.*, 529 F.3d 207, 218 (4th Cir. 2008).
[49] *See Rogers v. Baxter Int'l, Inc.*, 521 F.3d 702, 704-05 (7th Cir. 2008); *Evans v. Akers*, 534 F.3d 65, 73 (1st Cir. 2008); *In re Mut. Funds Inv. Litig.*, 529 F.3d at 218 n.4; *Nichols v. Alcatel USA, Inc.*, 532 F.3d 364, 376 n.12 (5th Cir. 2008).
[50] *Ortiz*, 527 U.S. at 847.
[51] *Id.*
[52] No. 06-05566, slip op. (N.D. Cal. Oct. 10, 2008).
[53] *Id.* at 7.
[54] *Id.*
[55] *Id.* at 12.
[56] *Id.*
[57] No. 08-02398, slip op. (C.D. Cal. Sept. 2, 2008).
[58] *Id.* at 1-2.
[59] *Id.* at 3.
[60] *Id.*
[61] *Id.* at 4.
[62] *Ortiz*, 527 U.S. at 842.

tions ''would be dispositive of the interests of the other members not parties'' to the adjudication.[63] Actions seeking monetary relief that will flow into an individual's account are simply not dispositive of other parties interests and are not analogous to the historical antecedents to Rule 23(b)(1). Because the stock drop and plan administration cases brought under ERISA generally cannot meet the Supreme Court's test, they cannot be certified under Rule 23(b)(1).

This is not to say that ERISA claims can never be certified as class actions. The Supreme Court has made clear that Rule 23's ''growing edge . . . would be the opt-out class authorized by subdivision (b)(3), not the mandatory class under subdivision (b)(1)(B).''[64] Since the stock drop and plan administration cases represent the growing edge of ERISA litigation, it is fitting that they should be certified, if at all, under Rule 23(b)(3). Although this creates additional hurdles to class certification, it also affords additional—and necessary—protections to defendants and absent class members.

Conclusion *LaRue* confirms that most claims for breach of fiduciary duty under ERISA, brought by participants in 401(k) and other defined contribution plans seeking monetary relief, cannot be certified as mandatory class actions under Rule 23(b)(1)(B). Rather, such claimants must satisfy the more rigorous requirements, and the more robust protections, of Rule 23(b)(3) before their claims can proceed on a class basis.

[63] Fed. R. Civ. P. 23(b)(1)(B).
[64] *Ortiz*, 527 U.S. at 862.

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