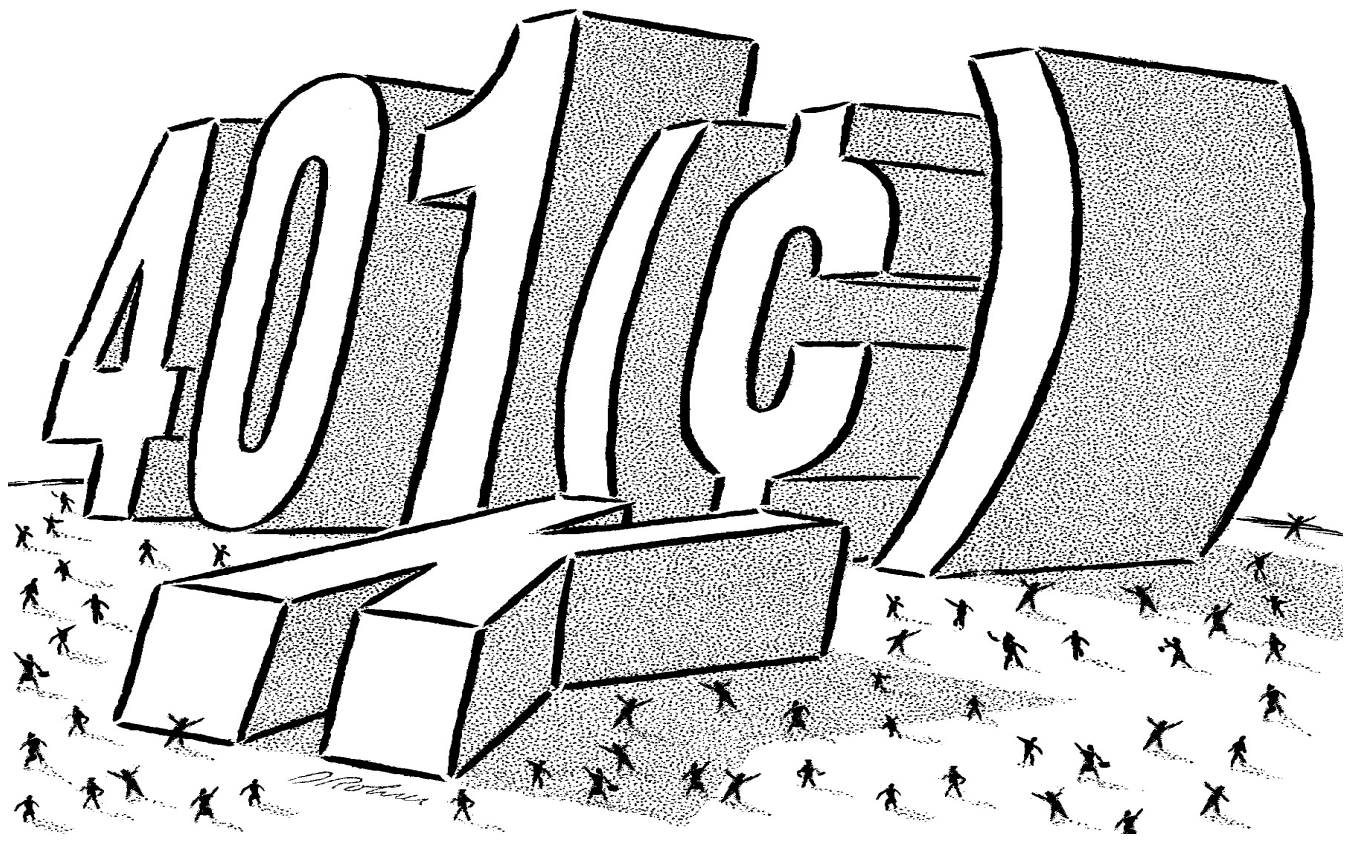
ENSURING RETIREMENT SECURITY



By Tom Gies and Jane Foster

Most lawyers know Murphy's Law. We understand that, if something can go wrong, it will go wrong. Mistakes happen, and the world of employee benefits is no exception. A human resources administrator may give inaccurate information to an employee about her eligibility for one of the company's benefit plans. Or a clerical employee may misplace paperwork concerning an employee's request to change his investment choices in the company's 401(k) plan.

The question of the appropriate legal remedy available in these scenarios is front and center at the Supreme Court. The court heard argument in November in *LaRue v. DeWolff Boberg & Associates,* 06-856. *LaRue* presents the question of whether the court should expand the remedies available in lawsuits brought by plan participants under the Employee Retirement Income Security Act of 1974, claiming damages as a result of such mistakes. For the sake of everyone involved in 401(k) plan administration, including plan participants, the court should decline the invitation.

The complaint in *LaRue* says that, on two occasions, the plaintiff tried unsuccessfully to change the investment allocations in his 401(k) plan account. As a result, his account balance in the plan was depleted by $150,000. The plaintiff sought recovery of this amount in an action brought under Section 502(a)(3) of ERISA, which permits a plan participant to recover "appropriate equitable relief." Because this provision precludes the recovery of compensatory damages, the defendants moved to dismiss.

The district court's decision granting the motion was affirmed by the Fourth U.S. Circuit Court of Appeals. *LaRue*, 450 F.3d 570 (4th Cir. 2006). That decision was affirmed again, in response to a petition for rehearing in which the U.S. Department of Labor weighed in on behalf of the plaintiff by advancing the new argument that the plaintiff could invoke Section 502(a)(2) of ERISA, which permits a participant to bring an action for breach of fiduciary duty to recover "losses to the plan." In June, the Supreme Court agreed to hear the case.

Where the court comes out on the questions presented in *LaRue* may have significant consequences. A decision to invent a new compensatory-damages remedy under ERISA would spawn an outbreak of litigation against plan sponsors and service providers, the financial services and insurance industries, and others involved in the administration of 401(k) plans. The costs of this litigation would be absorbed by employers, making continued sponsorship of such plans less attractive. The resulting financial impact on millions of American workers would not present a pretty picture.

This next wave of litigation is easy to imagine. Consider an individual who begins work for a company that sponsors a 401(k) plan. Four years after she is hired, she files a lawsuit against the company seeking compensatory damages in the amount of $5 million. Her lawyer claims she was not given the necessary plan enrollment forms when she was hired, resulting in no employee contributions made for this period.

The complaint asserts that, had the contributions been made, she would have invested in Google the day after its initial public offering and sold it at the top of the market. The complaint holds the plan fiduciaries personally liable for the damages caused by the mistake, which violates ERISA's fiduciary-duty rules. The clerical employee responsible for such things at the company has a vague recollection that the employee took the paperwork, said she'd "think about" whether she wanted to enroll in the plan but never said anything more about it.

Under the logic of the theories advanced by the plaintiff in *LaRue*, countless claims like this, involving a variety of alleged mistakes, likely would go to trial to resolve the credibility issues presented and to determine the appropriate measure of damages.

Congress never intended such litigation. Twenty years ago, in *Pilot Life v. Dedeaux,* 481 U.S. 41 (1987), the Supreme Court acknowledged the intent of Congress to encourage employers to continue to sponsor employee benefit plans and cautioned against authorizing species of litigation that would make it more expensive to do so.

As the court observed in *Mertens v. Hewitt,* 508 U.S. 248 (1993), ERISA embodies a number of policy judgments, not all of which were resolved in favor of plan participants. The court's decisions reflect the sensible understanding that ERISA does not provide a damages remedy to every plan participant in all circumstances. Every firm involved in 401(k) plan administration, from plan sponsors to insurance companies providing fiduciary insurance, has made significant investment decisions relying on this expectation.

This expectation stems in large part from the court's landmark decision in *Massachusetts Mutual Life Insurance Co. v. Russell,* 473 U.S. 134 (1985), which concluded that claims brought under Section 502(a)(2) must seek a recovery that would "inure to benefit of the plan as a whole."

Since *Russell*, the courts have uniformly concluded that individual claims for damages are not available under that section. Instead, Section 502(a)(2) is widely understood to provide a remedy for retirement plan participants complaining about systemic fiduciary misconduct affecting the financial integrity of the plan, through conduct such as the imprudent selection of plan investments and various types of self-dealing.

The retirement-plan world has undergone a massive shift in recent years, with employers opting to offer 401(k) plans instead of traditional defined-benefit plans. Forty million Americans participate in such plans, which contain $2 trillion in assets. One of the reasons many employers have abandoned defined benefits is to avoid the investment risk associated with running those plans.

Experts agree that one response to the looming deficit in the Social Security system is to take steps to encourage workers to save more for retirement. A robust system of employer-sponsored retirement savings plans is critical to providing many workers with adequate money for a comfortable retirement. Congress recognizes this. Last year, it passed the Pension Protection Act, which includes a number of such incentives, including measures making it easier for employers to encourage automatic enrollment in 401(k) plans.

In this environment, a decision to open the door to a torrent of damages litigation by 401(k) plan participants complaining about honest mistakes would be ill-advised. Benefit plan sponsorship by employers is voluntary. Employers will continue to provide 401(k) plans only if doing so continues to make good business sense. If offering plans becomes too expensive because of litigation expenses, increased costs of fiduciary insurance or other factors, the 401(k) plan likely will suffer the same fate as the defined-benefit plan.

As written, ERISA provides adequate equitable remedies for 401(k) plan participants. Most honest mistakes can be resolved without litigation. LaRue's situation probably could have been resolved with a telephone call. The question of whether ERISA should be extended to provide damages remedies in cases of simple mistakes is a policy judgment properly left to Congress.

For the sake of everyone involved in 401(k) plan administration, particularly the millions of plan participants whose comfortable retirement will depend largely on such plans, the Supreme Court should leave well enough alone.

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Complaints About Jury Instructions Mask Attempt to Avoid Liability

By Paul C. Cook and Michael B. Gurien

In a recent column ("Guiding Juries," Nov. 8), Michael L. Fox outlined defense objections to existing CACI causation instructions in asbestos-related cancer cases and proposed revisions to those instructions. He claimed that neither the current instructions, nor the proposed revisions, "reflect the law."

Since his article, the California Judicial Council has approved the proposed revisions. Contrary to Fox's position, the now-approved revisions to CACI 430 and 435 provide added clarity and more closely align the instructions to the causation standard for asbestos-related cases announced by the California Supreme Court in *Rutherford v. Owens-Illinois, Inc.,* 16 Cal. 4th 953 (Cal. 1997).

Under *Rutherford,* the standard for proving causation in an asbestos case takes into account two important principles: (1) a plaintiff need not prove that fibers from a particular defendant's product were the ones, or among the ones, that "actually" caused the plaintiff's disease; (2) the plaintiff is free to prove that exposure to asbestos from a product was a substantial factor by showing that it contributed to the aggregate dose of the plaintiff's exposure, increasing his risk of contracting asbestos-related disease. This is proven by the testimony of medical experts based on reasonable medical probability.

Revisions to CACI 430 and 435 were necessary because of confusion created when combining the instruction specific to asbestos cases (CACI 435) and the generally applicable instruction on substantial factor causation (CACI 430), a combination that was recommended by the use notes. CACI 430 contains language that is contrary to the *Rutherford* causation standard and that has led to jury confusion.

For example, CACI 430 states that "[a] substantial factor in causing harm … must be more than a remote or trivial factor." This language is problematic and confusing as an instruction in an asbestos-related cancer case, because medical and scientific literature has shown that even relatively brief and intermittent exposures to asbestos can satisfy the *Rutherford* standard.

Asbestos fibers are microscopic and invisible, and low-dose exposures have been shown to contribute to the aggregate dose and hence to increase risk. Nevertheless, a juror may be confused and find a low dose or intermittent exposure to be "trivial," even though competent medical evidence shows in reasonable medical probability that it contributed to the aggregate dose and increased the plaintiff's risk. The language of CACI 430 thus invited confusion and could lead to a failure to apply the *Rutherford* standard.

Also problematic has been the optional bracketed language in CACI 430, which states: "Conduct is not a substantial factor in causing harm if the same harm would have occurred without that conduct." Based on this language, defendants have argued that the plaintiff's exposure to asbestos from its product was not a substantial factor in causing his or her asbestos-related cancer because the plaintiff was exposed to asbestos from other products and those other exposures were sufficient, on their own, to cause the plaintiff's disease.

This is directly contrary to *Rutherford*. Under *Rutherford*, a plaintiff is only required to show that his exposure was a substantial factor in contributing to the aggregate dose of asbestos, and hence to the risk of cancer. If the plaintiff does so, then causation is established, regardless of whether there were other contributing exposures or whether those other exposures were sufficient, on their own, to cause the plaintiff's disease. Allowing a defendant to use the bracketed language in CACI 430 to defeat causation by arguing that other exposures were independently sufficient to cause the plaintiff's disease destroys the *Rutherford* causation standard.

CACI 430's bracketed language was derived from *Viner v. Sweet*, 30 Cal. 4th 1232 (2003). *Viner* was a case alleging legal malpractice in a transactional setting, in which the California Supreme Court ruled "the actor's negligent conduct is not a substantial factor in bringing about harm to another if the harm would have been sustained even if the actor had not been negligent."

In *Jones v. John Crane, Inc.*, 132 Cal. App. 990 (2005), the defendant in an asbestos-related cancer case argued that *Viner* required the plaintiffs to show that he would not have contracted cancer "but for" the exposure to that particular defendant's asbestos product. The appellate court rejected the defendant's argument, holding that *Viner* did not address *Rutherford* and "did not alter the causation requirement in asbestos-related cases."

Fox criticizes both the former and revised versions of CACI 435 because they "leav[e] the jury completely in the dark about what 'substantial factor' means." Yet, CACI 435 is taken directly from *Rutherford* and the revision includes the language from CACI 430 that "[a] substantial factor in causing harm is a factor that a reasonable person would consider to have contributed to the harm" and "does not have to be the only cause of the harm."

Moreover, in *Rutherford*, the Supreme Court recognized that "substantial factor" has not been judicially defined with specificity, and it is "neither possible not desirable to reduce it to any lower terms.'" The Supreme Court cautioned that "[u]ndue emphasis should not be placed on the term 'substantial,'" that the standard is a "relatively broad one," and that the contribution has to be more than "negligible or theoretical." See also *Bockrath v. Aldrich Chemical Co.*, 21 Cal. 4th 71, 79 (1999) ("a very minor force that does cause harm is a substantial factor").

Fox views CACI 435 as an invitation to "meritless and inadmissible expert testimony" on behalf of plaintiffs. He disagrees with the plaintiffs' expert testimony that "any exposure above background levels" is a substantial factor in causing the plaintiff's disease, and claims the testimony showing relatively brief and intermittent exposures as substantial is "unsupported by any published scientific literature." The science, however, is overwhelmingly supportive of the plaintiffs' experts.

Asbestos-related cancers are dose response diseases, meaning that each exposure to asbestos contributes to the disease's causation by contributing to the total or aggregate dose. A relationship between increasing amounts of asbestos exposure and the development of asbestos-related diseases has been understood as scientific fact for over 70 years. Each exposure to asbestos contributes to the total dose and shortens the period for the disease to develop.

Peer-reviewed medical and scientific literature agree that there is no accepted threshold of exposure to asbestos above background that is incapable of causing asbestos-related cancers, including malignant mesothelioma. It is well settled that even brief and short-term exposures to asbestos have resulted in this fatal disease.

Moreover, while defendants often complain about expert testimony offered by plaintiffs in asbestos-related disease cases, in practice, defendants rarely present their own expert testimony in opposition. Instead, they rely on cross-examination and argument.

Those that disagree with the CACI instructions and their revisions are simply arguing against the state of the law in California as announced by the California Supreme Court. The Judicial Council cleared up unnecessary confusion created by the pre-revision iterations of CACI 430 and 435, and faithfully followed the *Rutherford* standard in approving the revisions.

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