

February 21, 2008

ERISA Update:

U.S. Supreme Court Expands Actions Against Plan Fiduciaries

On February 20, the United States Supreme Court handed down its decision in *LaRue v. DeWolff, Boberg & Assoc., Inc.*, No. 06-856 (U.S. 2008). The case significantly clarifies the right of individual account holders in defined contribution accounts to bring suit against Plan fiduciaries for money damages under ERISA.

In *LaRue*, the plaintiff had brought suit alleging that his former employer, in its capacity as administrator of a 401(k) plan, had breached its fiduciary duties by failing to make certain changes to the investments in LaRue's individual account in accord with his directions. The question presented was whether ERISA provided LaRue with a remedy for such an alleged breach. In the trial court, *LaRue* had suggested that he had a right to "make-whole" relief under Section 502(a)(3) of ERISA, which provides for "appropriate equitable relief." The trial court disagreed and dismissed the case, reasoning that because LaRue was not claiming that either the administrator or the Plan held funds that were rightly his, LaRue was seeking damages. On appeal to the Fourth Circuit, LaRue additionally argued that he could at least bring a claim against the fiduciary under ERISA Section 502(a)(2). Section 502(a)(2) permits suits to enforce the liability-creating provisions of ERISA Section 409 — which allows for a fiduciary to be required, among other things, "to make whole any losses to the plan resulting from [a breach of fiduciary duty]." The Fourth Circuit held, however, that Section 502(a)(2) did not provide a remedy under a prior Supreme Court precedent: *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134 (1985). In *Russell*, the Supreme Court had stated that Section 502(a)(2) "provides remedies only for entire plans, not individuals" such that any recovery under Section 502(a)(2) needed to "inure to the benefit of the plan as a whole." Noting that LaRue was seeking to address a supposed breach that affected only his own account, and not the plan in its entirety, the Fourth Circuit found that LaRue had no basis to recover under Section 502(a)(2).

The Supreme Court reversed the Fourth Circuit, holding Section 502(a)(2) did permit suits against fiduciaries to recover losses to individual accounts. The Court noted that its prior decision in *Russell* reflected "the prior landscape of employee benefit plans" — a time when "the defined benefit plan was the norm of American pension practice," — and recognized, by contrast, that "[d]efined contribution plans dominate the retirement plan scene today." *LaRue*, slip op. at 6. According to the Court, the "plan as a whole" language in *Russell* reflected simply the impact of Section 409 on a defined benefit plan, because administrator misconduct could not affect an individual's entitlement to benefits under such a plan except by increasing the risk of default by the entire plan. *Id.* at 7. The "plan as a whole" language, however, was "beside the point" when the suit involved a defined contribution plan because fiduciary misconduct need not threaten the solvency of the entire plan to "reduce benefits below the amounts that participants would otherwise receive." *Id.* The Court also found that permitting suits under Section 502(a)(2) to address losses to individual defined contribution accounts was consistent with other ERISA provisions. In particular, the Court noted that Section 404(c) of ERISA, which exempts fiduciaries from liability for losses caused by participants' exercises of control over their individual accounts, would be meaningless if Section 502(a)(2) did not itself create the possibility of fiduciary liability for losses in individual accounts. *Id.*

In the wake of *LaRue*, ERISA plan fiduciaries may find themselves at greater risk of suit by disappointed plan beneficiaries. Most obviously, the decision confirms that individual participants in 401(k) and other defined contribution plans do have the right to bring claims for damages, even if the only "plan assets" at issue are those held in individual accounts. Moreover, *LaRue* may expand the categories of participants entitled to bring claims by strongly suggesting that individual beneficiaries can assert a claim under ERISA even *after* they cash out their

accounts. In a footnote, the Court's opinion noted that (while the appeal was pending), LaRue had withdrawn his funds from the plan – leading to an argument that the case should be dismissed as moot. *LaRue*, slip op. at 8 n.6. The Court brushed aside this claim, favorably citing a lower court decision holding that ERISA “participants” entitled to bring suit include former employees with a colorable claim to benefits. *Id.*

By thus expanding both the availability of relief in suits against fiduciaries and the classes of beneficiaries entitled to bring suit, *LaRue* serves to increase the odds of litigation against plan fiduciaries and serves as a potent reminder of the importance of attempting to avoid such suits by careful attention to fiduciary responsibilities in the first instance.

For Further Information

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