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ALERT

SUPREME COURT RECOGNIZES INDIVIDUAL PARTICIPANT RIGHT TO SUE UNDER ERISA: *LARUE V. DEWOLFF*

On February 20, 2008, the United States Supreme Court issued its anxiously awaited opinion in *LaRue v. DeWolff, Boberg & Associates, Inc.* The critical issue in this case was whether a participant can sue plan administrators for breach of fiduciary duty and recover monetary damages solely for his individual account.

The civil enforcement provisions of ERISA generally permit participants in a retirement plan to assert claims against trustees or plan administrators for breach of fiduciary duty. However, these enforcement provisions have been construed to permit only claims for recovery on behalf the plan as a whole. This case challenged that limitation, and Court's opinion, delivered by Justice Stevens, with concurrence from Justices Thomas and Roberts, confirms that an individual participant may assert a claim in his own right. "Fiduciary misconduct need not threaten the solvency of the entire plan to reduce benefits below the amount that participants would otherwise receive" in order for a claimant to obtain relief under ERISA, Justice Stevens said.

In *LaRue*, the individual participant claimed that delay by his employer, acting as plan administrator, in implementing his investment directives for his 401(k) account resulted in the loss of approximately $150,000. The participant's complaint sought relief to make his individual account whole for this alleged loss. The District Court dismissed his claim, finding that the relief he sought, namely, specific monetary relief, was not available. The Fourth Circuit affirmed, relying on the 1985 Supreme Court decision in *Massachusetts Mutual v. Russell*, in which the Court held that the relief available for alleged breaches of fiduciary duty under ERISA was limited to remedies for the entire plan, not for individual participants.

In reviewing its decision in *Russell*, as well as its 1996 decision in *Variety Corp. v. Howe*, the Supreme Court considered the impact a breach of fiduciary duty has on "individual account" plans such as 401(k) plans. The Court acknowledged that in the context of defined contribution plans, unlike traditional defined benefit pension plans, breaches of fiduciary duty may adversely impact the status of a particular individual's account and not the plan as a whole. However, because individual account balances represent value in the plan as a whole, losses to an individual account cause damage to the entire plan.

In the end, the Court reasoned that, although ERISA does not provide a remedy for individual injuries, separate and distinct from plan injuries, the civil enforcement provision does authorize recovery for breaches of fiduciary duty that "impair the value of plan assets in a participant's individual account." Therefore, a plan participant may maintain an action for breach of fiduciary duty when the only damage alleged is to his individual account.

This decision opens the door to claims against trustees, plan administrators and other fiduciaries for breach of fiduciary duty even when loss is suffered by only one participant. Further, errors and omissions associated with the administration of individual participant accounts now will be considered in the context of the impact to an individual account, rather than to the plan as a whole. Consequently, the exposure of plan fiduciaries to claims for breach of duty may be broadened, and the number of claims asserted against fiduciaries of defined contribution plans likely will escalate. In light of this decision, plan administrators and other fiduciaries must exercise even greater caution and diligence.

Plan administrators and fiduciaries, particularly of 401(k) and other defined contribution plans which permit participants to direct the investment of their individual accounts, should consider taking affirmative action to reduce exposure to liability by establishing definite investment procedures, communicating those procedures to participants, and expressly limiting fiduciary responsibility. This is especially critical in situations in which participants have ready internet and/or telephone access to their accounts and are authorized to transmit investment instructions directly to the investment advisor or custodian.

By written agreement, for example, the participant may be obligated to monitor investment activity in his account, to notify the fiduciary or custodian on a timely basis of any discrepancy, and to assume full responsibility for failure to do so. Further, through such an agreement, the plan fiduciary may be relieved of responsibility for any change in the value or cost of any investment which might occur between the date of a participant's investment directive and the date of timely implementation. By educating each plan participant as to the terms and conditions of self-direction, and by compelling each participant to acknowledge his own responsibility in the investment process, fiduciaries can reduce their exposure to personal liability and establish a solid basis for defense against claims filed by disgruntled participants.

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