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Individuals in Defined Contribution Pension Plans Can Sue for Breach of Fiduciary Duty

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On February 20, 2008, the United States Supreme Court held in *LaRue v. Dewolff* that an individual plan participant in a defined contribution pension plan may sue for breach of fiduciary duty against a plan fiduciary under Section 502(a)(2) of the Employee Retirement Income Security Act of 1974 (ERISA) to recover losses that only affect an individual account rather than the entire plan.

In the case, James LaRue participated in a defined contribution pension plan. Mr. LaRue alleged that the plan administrator's failure to follow his direction to change investments in his individual account reduced the value of his interest in the plan by $150,000. He argued that the administrator's failure to carry out his investment directions amounted to a breach of fiduciary duty. While the Court did not address whether Mr. LaRue was harmed by the plan administrator's inaction, it held that he could sue for relief under ERISA and vacated the Fourth Circuit Court of Appeals decision that Section 502(a)(2) does not permit a plan participant to recover losses that affect an individual participant's account as opposed to the plan as a whole.

Section 502(a)(2) of ERISA allows the Secretary of Labor, a participant, a beneficiary, or a plan fiduciary to bring actions on behalf of a plan to recover for a breach of fiduciary duty under Section 409 of ERISA. Section 409(a) holds a plan fiduciary personally liable to make good to such plan any losses to the plan resulting from each breach of fiduciary duty and to restore to the plan any profits made from using the assets of the plan improperly. A breaching fiduciary is also subject to other equitable and remedial relief as the court may deem appropriate, including removal of such fiduciary.

While the Court acknowledged that Section 502(a)(2) does not provide a remedy for individual injuries distinct from plan injuries, it does provide recovery for fiduciary breaches that impair the value of plan assets in a participant's individual account. Therefore, Section 502(a)(2) permits plan participants to sue to enforce Section 409.

Not Like the *Russell* Case

The Court distinguished its opinion in *Massachusetts Mutual Life Ins. v. Russell*, 473 U.S. 134 (1985) where the beneficiary received all of the benefits to which she was contractually entitled from a defined benefit plan but sought consequential damages arising from a delay in the processing of her disability benefits claim. In *Russell*, the Court held that a fiduciary to an employee benefit plan could not be held personally liable to a plan participant or (*cont'd* ➔)

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beneficiary for extra contractual compensatory or punitive damages caused by improper or untimely processing of claims. The Court explained that Section 409(a) repeatedly refers to the plan and not an individual as the victim of a fiduciary breach. In other words, if Section 409(a) was designed to protect the entire plan and not the rights of an individual beneficiary, then Section 502(a)(2) permitted a plan participant to sue for breach of fiduciary duty only where the breach caused a loss to the entire plan. That being said, if the entire plan language of *Russell* was applied to Mr. LaRue, he would lack a remedy under ERISA because he sought the payment of funds to make whole his own individual account and not to benefit the entire plan.

By limiting the entire plan language of *Russell* to the impact of Section 409 in the defined benefit context, the Court in *LaRue* unequivocally gave a participant in a defined contribution plan the right to sue under 502(a)(2) to recover losses caused by a breach of fiduciary duty to the participant's individual account.

So what does the *LaRue* case do? To put it into perspective, there are 70 million people holding about $3 trillion in 401(k) investments. *LaRue* permits participants in defined contribution plans, such as a 401(k) plan, to sue for relief under Section 409 and 502(a)(2) of ERISA, where the participant seeks to recover losses to his or her individual account and not on behalf of the entire plan. A likely effect of the *LaRue* decision will be an increase in litigation of claims against 401(k) plan administrators and other fiduciaries. Plan fiduciaries relieved of liability for losses caused by a participants' exercise of control over assets in individual accounts according to Section 404(c) will now be exposed to allegations of causing investment losses. The Court noted that Section 404(c) would serve no real purpose if fiduciaries never had any liability for losses in an individual account.

Plan Administrators Should Protect Themselves

Employers, acting as plan administrators, should proactively protect themselves by doing the following:

1) reviewing the language of administrative services agreements and the extent of the liability such agreements create for administrative service providers (i.e.-whether service provider liability is limited to gross negligence); and
2) reviewing whether the service provider will indemnify or defend the plan sponsor in litigation where the service provider was at fault in failing to follow an investment directive (i.e.- whether the language of the service agreement prevents plan sponsor from bringing in a service provider as a third-party defendant).
3) ensuring that safeguards are in place so that participant's investment directives are implemented in a timely and accurate manner and that competent service providers are selected and monitored.

LaRue also left open some issues that will need to be addressed in future cases. The first issue is whether relief available under Section 502(a)(1)(B) prevents a participant from bringing a claim under Section 502(a)(2) as well. In Chief Justice Roberts' concurring opinion, he noted that Mr. LaRue's claim is really a claim for benefits brought under Section 502(a)(1)(B) of ERISA and not a breach of fiduciary duty claim. Section 502(a)(1)(B) authorizes a participant or beneficiary to bring an action against the plan to recover benefits under the terms of the plan and to clarify future benefits under the terms of the plan. The second issue is whether a participant who brings a 502(a)(2) claim is required to exhaust administrative remedies before filing suit.

The third issue is what role will trends in the pension market play in deciding future ERISA cases. In Justice Thomas' concurring opinion he rejected the majority's reliance in reaching its conclusion on changes in the pension industry from defined benefit plans, which were prevalent when *Russell* was decided, to defined contribution plans. Focusing on the plain language of Section 409 and Section 502(a)(2), he explained that when a participant sustains losses to his individual account as a result of a fiduciary breach, the combined assets of the plan, which equal the sum of all assets of individual accounts, are likewise diminished by the same amount and Section 502(a)(2) permits the participant to recover such losses.

The information provided here is necessarily general and is not intended as legal advice or a substitute for legal advice. If you have any questions regarding this Alert, please contact James K. Estabrook of the Employee Benefits Practice Group, jestabrook@lindabury.com.

Before making your choice of attorney, you should give this matter careful thought. The selection of an attorney is an important decision.

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