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U.S. SUPREME COURT PERMITS INDIVIDUAL LAWSUITS FOR RETIREMENT PLAN FIDUCIARY BREACH

In a unanimous decision handed down February 20, 2008, the U.S. Supreme Court ruled that a participant in a 401(k) or other defined contribution plan may sue a plan fiduciary to recover losses for a breach of fiduciary duty even if he or she was the only participant affected by the alleged breach. *LaRue v. DeWolff, Boberg and Associates, Inc.* Previously, most courts had permitted recovery for a fiduciary breach only for losses to the plan as a whole, not just for losses to an individual participant or a subset of plan participants. This decision should serve as a wake-up call to plan sponsors and fiduciaries alike of the importance of administering retirement plans consistent with their obligations as a fiduciary, which have been described by many courts as "the highest obligation known under law."

The Court's Holding

The *LaRue* case involved a participant in a 401(k) plan who contended that the plan fiduciary failed to implement his requested investment election changes and that this failure reduced the value of his interest in the plan by approximately $150,000. The plan fiduciary responded that the participant was essentially making a claim for money damages, which was not a permitted remedy for a fiduciary breach under the Employee Retirement Income Security Act of 1974 ("ERISA"), the federal law governing retirement plans. The participant countered that he was not asking the court to award him money damages but rather he simply wanted his plan account to reflect the balance it would have reflected absent the fiduciary breach. The Supreme Court agreed with the participant, holding that the size of the participant's account relative to the plan as a whole did not matter. The Court was also not concerned that the participant had received a distribution of his benefits during the pendency of the litigation. To the contrary, the Court noted that one remains a participant with "standing" to bring a claim for breach of fiduciary duty so long as he or she has a colorable claim to benefits.[1]

Fiduciary Status and the Potential for Personal Liability

Generally speaking, a person is a fiduciary with respect to a retirement plan to the extent he or she exercises discretionary authority or control over the management or administration of the plan or renders investment advice for a fee. Some positions are, by their very nature, fiduciary positions. These include the plan

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trustee, the plan administrator, and individual members of the plan administrative committee. But fiduciary status is not determined solely by title as courts frequently describe the test as one of function -- that is, does the person exercise any of fiduciary functions described in the statute. Accordingly, a person may be considered a fiduciary even if he or she holds no official plan position but exercises de facto control over a fiduciary function. This means that officers, directors, and employees of the plan sponsor may be considered a fiduciary under ERISA, depending upon the facts and circumstances.

A plan fiduciary is personally liable to the plan to make good any losses arising from a breach of fiduciary duty even if the fiduciary did not personally benefit. In some circumstances, a fiduciary can be personally liable for a breach committed by a co-fiduciary. The plan benefit of a fiduciary who is a participant may be at risk to satisfy this obligation. This risk of liability is relevant not just to plan fiduciaries but also to plan sponsors as well -- because plan sponsors may themselves be fiduciaries or, as is often the case, the sponsor may be obligated to indemnify the plan's fiduciaries.

Minimizing the Risk of Personal Liability

With the decline of defined benefit plans and the proliferation of 401(k) and other defined contribution plans in which the investment risk is on the participant, the *LaRue* decision will likely go down as one of the most significant court cases since ERISA's enactment in 1974. The decision underscores the importance of administering retirement plans in accordance with their terms and having appropriate policies and procedures in place. It likewise highlights the importance of periodic internal reviews or self-audits to assure proper administration and that the applicable fiduciary obligations are being satisfied, including assuring that the plan fiduciaries understand their duties; reviewing the plan's investments to assure that they continue to be prudent and are consistent with the plan's investment policy; reviewing the reasonableness of fees and expenses charged by service providers to the plan; reviewing agreements with service providers, with particular emphasis on the allocation of responsibilities and exculpatory, limitation of liability, and indemnification provisions; monitoring the plan's compliance with ERISA 404(c) (dealing with limitation on fiduciary liability in participant-directed plans); and reviewing the adequacy of fiduciary insurance.

Fortunately, a fiduciary is not expected to be an expert in all matters. But with fiduciary status comes the obligation to engage competent, knowledgeable advisors if the fiduciary lacks the necessary training, skill or knowledge. Further, a fiduciary must assure that he or she is receiving advice from an independent advisor, so that the advice received is not tainted by the advisor's personal bias or financial interests. This means, for example, that a fiduciary who is not knowledgeable in investment matters must engage competent, independent investment counsel to assist the fiduciary in the selection and monitoring of plan investment alternatives.

It should also be borne in mind that ERISA is essentially a procedural statute; under ERISA, the reasonableness of a fiduciary's conduct will be judged by whether he or she engaged in a careful, thoughtful course of action based on the information then available and not whether there was a successful outcome. Needless to say, contemporaneous documentation of the decisions made and actions taken by the fiduciaries is imperative in establishing the requisite procedural due diligence.

Concluding Thoughts

There is a general consensus among benefit professionals that there will be more employee benefits litigation in the future. Numerous recent studies have shown that a significant percentage of retirement plan participants have unrealistic expectations as to their needs in retirement and are woefully under-funded to meet those needs. In the litigious times in which we live, a fiduciary desiring to avoid being the "low hanging fruit" when disgruntled participants begin to look around to find someone to be held accountable should re-evaluate the adequacy of his or her actions and those of his or her fellow fiduciaries. The failure to do so, the *LaRue* decision tells us, could be a costly omission.

[1] The Court remanded the case back to the U.S. District court for a review on the merits. The Court left open the issue of whether the participant had to exhaust the administrative remedies in the plan before bringing his lawsuit.

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