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Employee Benefits

Alert

LaRue in Perspective

BY BRYDON M. DEWITT

On February 20, the United States Supreme Court unanimously held that the Employee Retirement Income Security Act (ERISA) permits a 401(k) plan participant to sue for losses caused by a breach of fiduciary duty. Chief Justice Roberts' concurring opinion, however, may provide employers with a defense to the very type of claim permitted by the Court.

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In *LaRue v. Dewolff, Boberg & Associates*, a 401(k) plan participant claimed that his account was depleted by approximately $150,000 when the plan administrator failed to execute the participant's investment instructions. The participant sued under ERISA section 502(a)(2) which enforces ERISA fiduciary duty requirements.

Relying on a 1985 Supreme Court case, lower courts dismissed the participant's claim holding that ERISA section 502(a)(2) only provides relief for plans as a whole and not for individual participants.

Reversing the lower court rulings, the Supreme Court reasoned that a fiduciary breach affecting a defined contribution plan need not affect all plan participants to warrant ERISA section 502(a)(2) relief. The Court contrasted defined benefit plans with defined contribution plans, such as 401(k) plans. In a defined benefit plan, participants are entitled to fixed benefits. Each participant's benefit depends on the solvency of the plan as a whole. A fiduciary breach that affects an individual participant's entitlement to a benefit necessarily increases the risk of default by the entire plan. Section 502(a)(2) is, therefore, naturally available only for fiduciary breaches that affect an entire defined benefit plan. Under a defined contribution plan, however, each participant's benefit is equal to the value of his or her individual account. A fiduciary breach affecting an individual account defined contribution plan may impact one participant without having any bearing on any other participant's benefit. Consequently, the Court held that ERISA section 502(a)(2) authorizes recovery for fiduciary breaches that diminish a single participant's defined contribution plan account.

LaRue, therefore, exposes plan fiduciaries to a greater risk of personal liability for fiduciary breaches that affect some, but not all, defined contribution plan participants. ERISA holds fiduciaries "personally liable to make good to ... [a] plan any losses to the plan resulting from each [fiduciary] breach and to restore to such plan any profits of such fiduciary which have been made through the use of assets of the plan by the fiduciary."

The majority opinion would have brought clarity to the availability of section 502(a)(2) relief but for the Chief Justice's concurring opinion. In his concurrence, Chief Justice Roberts agreed that a fiduciary breach in a defined contribution plan need not affect all participants in order for section 502(a)(2) relief to be available. Roberts proceeded,

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however, to suggest that the participant's claim should have been filed as an ERISA section 502(a)(1)(B) denial of benefits claim. The plan terms granted the participant the right to direct investments and the participant was seeking the benefit he would have received had the administrator complied with his instructions. Accordingly, Roberts concluded that the participant's claim was a section 502(a)(1)(B) "claim for benefits that turns on the application and interpretation of the plan terms."

Section 502(a)(1)(B) provides employers with safeguards that are not available under section 502(a)(2). Unlike section 502(a)(2) claims, benefit denial claims under section 502(a)(1)(B) may not be brought until after the participant has exhausted the plan's administrative remedies. Additionally, when an ERISA plan grants administrators and fiduciaries discretionary authority, courts must review only for an abuse of discretion. A section 502(a)(1)(B) claim also would not expose plan fiduciaries to personal liability. Roberts expressed concern that the majority opinion could permit plaintiffs to circumvent the section 502(a)(1)(B) safeguards.

The Chief Justice further indicated that if a participant can bring a claim for denial of benefits under section 502(a)(1)(B), he or she would be barred from also asserting a claim under section 502(a)(2) for a breach of fiduciary duty.

Because the section 502(a)(1)(B) issue was not raised before the lower courts, Roberts merely "highlighted" the fact that the Court's decision was made without consideration of whether section 502(a)(1)(B) would alter its conclusion. Robert's concurrence implies that if the section 502(a)(1)(B) issue had been raised by the defense, the outcome in *LaRue* would have been different.

Plan sponsors and fiduciaries of defined contribution plans, therefore, should be aware that there is now a greater risk of litigation following a fiduciary breach affecting a single participant occurs. It would be prudent to carefully review plan procedures, investment policies, service provider performance, indemnification provisions in service provider agreements, compliance with ERISA section 404(c), and whether fiduciaries have adequate insurance protection. If a *LaRue* claim is made, however, the Chief Justice's concurring opinion may provide an outline for a successful defense.

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