

“A 401(k) Plan Fiduciary’s Nightmare” --- U.S. Supreme Court Opens the Litigation Flood Gate with Employee Retirement Benefit Plans

On February 20, 2008, the U.S. Supreme Court handed down a decision that will affect all employers that sponsor a defined contribution plan. The case is *LaRue v. DeWolff, Boberg & Associates, Inc* and in its ruling **the Supreme Court held that an employee can now sue his or her employer by asserting a claim of breach of fiduciary duty under §502(a)(2) of ERISA.**

In *LaRue v. De Wolff*, the Plaintiff was a participant in his employer’s 401(k) plan. The Plan permitted participants to direct the investment of their contributions. Plaintiff alleged that in 2001 and 2002 he directed DeWolff, his employer, to make certain changes to his 401(k) investments but those changes were not executed by his employer. Because those changes were not executed, Plaintiff alleged that he lost approximately \$150,000 worth of interest. He claimed that his employer breached its fiduciary duty under ERISA.

The Court framed the legal question as whether a participant in a defined contribution plan can sue a fiduciary, under §502(a)(2) of ERISA, because that fiduciary’s alleged misconduct impaired the value of the plan assets in the participant’s individual account. Previously, in *Massachusetts Mutual Life Insurance Company v. Russell*, the Court held that §502(a)(2) of ERISA provided a remedy only for entire plans, not for an individual’s account.

However, the Court distinguished *Russell* on several grounds. First the Court stated that §502(a)(2) of ERISA identifies six types of civil actions that may be brought by parties, and the alleged misconduct in the *Russell* case did not fall into any of these six categories. Next, the Court stated that at the time *Russell* was decided, the defined benefit plan was the mainstay in the pension plan world and as such, individual accounts were not prevalent. If a fiduciary breached his or her duty to the plan, the entire plan was affected. Contrary to defined benefit plans, fiduciary misconduct in a defined contribution plan (i.e. a 401(k) plan) can affect a particular individual and his or her particular account.

Therefore, the Court ultimately held that §502(a)(2) of ERISA does provide a remedy for the recovery of fiduciary breaches that impair the value of plan assets in a participant’s individual account.

What does this mean? There are still a number of outstanding questions the Court did not address. In the meantime, however, this case represents a significant change in the law and it could lead to an increase in lawsuits involving plan account losses that are relatively minor but nonetheless expensive and problematic for any employer to defend.

Employers need to act immediately as the risk in handling a variety of routine 401(k) administrative actions has now increased exponentially in light of the Court’s ruling. Every employer should examine the processes they have in place for administering individual 401(k) accounts to determine whether those processes can be changed to reduce this increased risk.

With the foregoing in mind, please feel free to contact Attorneys Lisa A. Baiocchi (libaiocchi@milw.w-p.com) or Rebecca Dobbs (redobbs@stch.w-p.com) at Wessels & Pautsch, P.C. if you wish to discuss this significant change in the law or would like guidance on practical ways to try and avoid such lawsuits.