

This **Compliance Alert** discusses how the Supreme Court decision in *LaRue* expands the liability for 401(k) plan fiduciaries.



Supreme Court Allows Individual 401(k) Plan Participants to Sue

In a unanimous decision on February 20, 2008, the U.S. Supreme Court ruled that individual participants in defined contribution plans can bring suit for fiduciary breaches under ERISA to recover losses in an individual account. The long-anticipated decision in *LaRue v. DeWolff, Boberg & Associates, Inc.*, will affect plan fiduciaries and participants of all 401(k) and other defined contribution plans.

The LaRue Decision

James LaRue sued his employer and its 401(k) plan to recover \$150,000 in investment losses in his individual plan account that resulted from the fiduciary's alleged failure to follow LaRue's investment directions. The case was dismissed by the district and appellate courts that, relying on an earlier Supreme Court precedent, determined that ERISA did not permit individual participants to bring suit on behalf of their own interests, only on behalf of the plan as a whole.

In reversing the appellate court's ruling, the Court explained that a statement in the prior opinion - *Massachusetts Mutual Life Ins. CO. v. Russell (1985)* - that ERISA only allowed recovery for losses to the plan "as a whole," was made in the context of a defined benefit plan in which plan assets were not allocated to participant accounts but rather belonged to the plan as a whole. In the defined contribution context, however, assets are allocated to specific accounts and accordingly, the Court explained, any loss to any account was a loss "to the plan." Thus, the Supreme Court held that ERISA §502(c)(2) provided an individual participant a remedy in the defined contribution plan context.

Issues Still to Resolve

Although the Court's decision was unanimous, the LaRue case leaves open several issues that will determine the ultimate impact on ERISA litigation. Specifically, the majority made clear in a footnote to its opinion, that it had not decided whether ERISA §502(a)(2) claimants are required to exhaust administrative plan remedies before seeking relief in federal court. If a plan participant is required to prosecute claims and appeals before the plan administrator, as opposed to immediate entry into court alleging fiduciary breach, the administrator is potentially given the opportunity to correct errors and build an administrative record which could prevent liability in a subsequent case.

Further, Chief Justice Roberts, joined by Justice Kennedy, expressed his opinion that LaRue's claim was more properly a claim for benefits under ERISA §502(a)(1)(B) not a fiduciary breach claim under ERISA §502(a)(2). If lower courts adopt this suggestion, potential fiduciary liability would likely be significantly reduced because the former provides fewer remedies and a requirement that participants first exhaust the remedies administratively available under the plan before seeking relief in federal court.

What the Decision Means for Plan Sponsors

The LaRue decision is another wake-up call to plan sponsors - already in the spotlight with respect to participant suits and DOL regulations related to fee disclosures - regarding their ERISA fiduciary responsibilities. Plan fiduciaries will thus more than ever want to know that they are doing things properly *as there is no insurance policy or service agreement that can protect a plan fiduciary from failing to comply with plan provisions and related administrative procedures.*

The good news is that nothing in the LaRue decision changes the scope of ERISA plan fiduciary responsibilities. The same "best practices" for mitigating fiduciary risk that existed before apply now: A formalized and effective fiduciary governance system.

Consider the fact that in LaRue, the plan allegedly failed to satisfy the requirements of ERISA §404(c) in carrying out the participant's instructions, thereby losing the 'safe harbor' protection that §404(c) affords. What procedures should have been in place to prevent this occurrence? If they were "in place," why did they fail? What, in fact, are best practices for implementing participant investment elections?

Contact Elinor Merl, ERISA Compliance Associates, LLC, at 619-233-3054, if you have questions regarding the LaRue decision or to discuss how we can assist you to manage plan fiduciary risks.

This Compliance Alert is not intended as legal advice or as an opinion on specific facts.

© 2008, ERISA Compliance Associates, LLC - proprietary and confidential