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Client Alert

An informational newsletter from Goodwin Procter LLP

U.S. Supreme Court Allows 401(k) Plan Participant to Sue Plan Employer over Loss to Participant's Account

LaRue v. DeWolff, Boberg & Associations, Inc., et al., No. 06-856 (February 20, 2008)

In a unanimous decision, the U.S. Supreme Court held yesterday that the Employee Retirement Income Security Act ("ERISA") authorizes participants of defined contribution pension plans (such as 401(k) plans) to sue ERISA fiduciaries under ERISA § 502(a)(2) to recover losses arising from a breach of ERISA fiduciary duties to their individual plan accounts. The Supreme Court overturned an earlier decision of the Fourth Circuit Court of Appeals, which had held that ERISA permitted individual participants to recover for losses only on behalf of an entire plan, rather than for losses to a participant's individual account. The case arose when petitioner, James LaRue, sued his former employer and plan administrator for breach of ERISA fiduciary duty under § 502(a)(2) arising from the administrator's alleged failure to carry out LaRue's 401(k) plan investment instructions in 2001 and 2002. The alleged failure resulted in a purported loss to LaRue's plan account of approximately $150,000.

Writing for the Court, Justice Stevens limited the Court's ruling to participants of defined contribution plans, drawing a distinction between traditional defined benefit plans and the defined contribution plan at issue in that case. Justice Stevens was joined by Justices Souter, Ginsburg, Breyer and Alito. The majority opinion explained that the "landscape" of employee benefit plans "has changed" in the last 20 years in that defined benefit plans were once prevalent, while today "[d]efined contribution plans dominate the retirement landscape." Misconduct by a defined benefit plan administrator, Justice Stevens noted, would not affect an individual's entitlement to a defined benefit, unless the misconduct was of such a degree as to create a risk of default *by the entire plan*.

In contrast, with today's defined contribution plans, fiduciary misconduct need not threaten the entire plan's solvency to reduce an individual participant's benefits below the amount that he or she would otherwise receive. According to the Court, that reduction in individual benefits is "the kind of harm[ ] that concerned [ERISA's] draftsmen," and, therefore, should be subject to remedy under ERISA § 502(a)(2) if caused by a breach of fiduciary duty. In addition, the majority noted that ERISA § 404(c), which exempts defined contribution plan fiduciaries from liability for losses caused by individual participants' exercise of control over their accounts, would "serve no real purpose" if defined contribution plan fiduciaries could not be liable for losses to an individual account. Thus, the Court found that its prior ruling in *Massachusetts Mut. Life Ins. Co. v. Russell*, 472 U.S. 134 (1985) – which held that ERISA § 502(a)(2) did not provide a remedy for claims arising from the alleged improper processing of a claim for disability benefits because such claim was not with respect to the plan – may continue to be sound with respect to defined benefit plans, but is "beside the point in the defined contribution context."

There were two concurring opinions. Chief Justice Roberts, joined by Justice Kennedy, agreed with the majority's holding, but wrote separately to identify the question as to whether LaRue's claim was more properly construed as a claim for benefits under ERISA § 502(a)(1)(B) as opposed to breach of fiduciary duty. Chief Justice Roberts explained that the question was not "settled," but he noted that the jurisprudence under ERISA § 502(a)(1)(B) provides "safeguards for plan administrators," such as a requirement to exhaust administrative remedies. He expressed concern that a breach of fiduciary duty claim under these facts might "circumvent" such safeguards.

Justice Thomas, joined by Justice Scalia, filed a separate concurrence to argue for the same result reached by the majority, but under a strict textualist approach to ERISA. Justice Thomas indicated that his view was "not contingent on trends in the pension market." This concurrence argued that losses to a defined contribution plan are necessarily reflected in balances of individual plan accounts. The concurrence reasoned that the assets of a defined contribution plan are the sum of all participant accounts. Allowing recovery to the plan for losses to individual accounts in a defined contribution plan is thus consistent with the language of ERISA allowing recovery for "losses to the plan" under ERISA § 409(a), made applicable by ERISA § 502(a)(2).

Goodwin Procter ERISA litigators and practitioners presented a webinar on February 7, 2008 addressing recent trends on ERISA litigation, particularly with the rise of defined contribution plans like that at issue in *LaRue*. The slides and audio of that presentation are available here. Goodwin Procter litigators are involved in cutting edge cases relating to ERISA governed plans. We expect to see further litigation regarding defined contribution plans as a result of *LaRue* and the developing trends in retirement savings plans and investments, such as those discussed in the webinar.

If you would like additional information about the issues addressed in this client alert, please contact:

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