

CLIENT ACTION BULLETIN

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CAB 08-06

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

SUMMARY In a decision that has significant implications for employers that sponsor 401(k) and other defined contribution plans, the U.S. Supreme Court unanimously ruled that an individual participant may bring suit for fiduciary breaches under the Employee Retirement Income Security Act (ERISA) to recover losses in an individual account (*LaRue v. DeWolff, Boberg & Associates, Inc.* (No. 06-856, Feb. 20, 2008)). In so ruling, the Court rejected an appellate court's holding that suits alleging fiduciary misconduct must be brought to recover benefits for a plan as a whole rather than for an individual participant.

DISCUSSION **Background**

Prior to the *LaRue* decision, defendants in ERISA fiduciary breach actions generally relied upon the Court's 1985 decision in *Massachusetts Mutual Life Insurance Co. v. Russell*, which concluded that ERISA section 502(a)(2) authorizes recovery only by the "entire plan" and which generally does not permit individuals to file suits seeking damages for losses in the value of their respective plan accounts. Under this reasoning, defined contribution plan participants could only sue plan fiduciaries for losses to their individual accounts through a class-action lawsuit; they could not sue individually.

The *Russell* decision emphasized protecting the "entire plan," a disability plan that promised participants a fixed benefit, similar to that provided under a defined benefit pension plan. The Court said that misconduct by administrators of such "fixed benefit" plans does not directly affect an individual's future benefit unless it jeopardizes the ability of the entire plan to meet its obligations.

The *LaRue* Decision

In the current case, James LaRue alleged that the failure of his employer, in its capacity as plan administrator, to follow his investment directions "depleted" his interest in his 401(k) account by about \$150,000 and amounted to a breach of fiduciary duty under ERISA. The U.S. Court of Appeals for the Fourth Circuit had ruled in favor of the employer, relying on the Supreme Court's *Russell* decision that ERISA section 502(a)(2) provides remedies only for entire plans, not for individuals.

In reversing the lower court, the justices distinguished defined benefit plans from defined contribution plans, noting also the changed landscape with the latter type of plans dominating "the retirement plan scene today." In the *LaRue* decision, the Court held that the alleged employer misconduct falls squarely within the enforcement mechanism of ERISA section 409, which relates to the proper management, administration, and investment of plan assets. Fiduciary misconduct in defined contribution plans does not necessarily threaten the entire plan's solvency so as to reduce participants' benefits, the Court said, and thus, *Russell's* "entire plan" references do not apply in the defined contribution context.

Left Unresolved

Although the Court's decision was unanimous, there was disagreement about the breadth of the ruling and whether LaRue should be allowed to recover damages for the losses to his account.

- Chief Justice John G. Roberts Jr. (joined by Justice Anthony M. Kennedy) questioned whether LaRue's claim is more properly a claim for benefits under ERISA section 502(a)(1)(B) rather than a claim for fiduciary breach under section 502(a)(2). 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, such a determination could ultimately limit the impact of the *LaRue* decision.

- Justice Clarence Thomas (joined by Justice Antonin Scalia) asserted that the main opinion did not have to distinguish the case from *Russell* because ERISA clearly allowed plan participants to bring claims under section 502(a)(2) and is not contingent on trends in the pension plan market.

ACTION

Plan sponsors should always be mindful of their fiduciary responsibilities and take whatever steps are necessary to limit potential problems from arising. Administrative audits and other processes should be reviewed, for example, to ensure that participants' investment directions are carried out. A compliance audit may be helpful in this regard. In addition, contracts and service agreements should clearly delegate ministerial duties and responsibility.

For additional information about the U.S. Supreme Court's decision or its implications, please contact your Milliman consultant.

[A white paper on fiduciary issues is available at: www.milliman.com.]