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LaRue v. DeWolff, Boberg & Assoc.

Supreme Court Establishes Fiduciary Liability in the Context of Individual Account Plans

Last week, the United States Supreme Court expanded the remedies available for fiduciary breach claims brought under ERISA, the Employee Retirement Income Security Act of 1974, as amended. Under a long-standing decision (*Massachusetts Mutual Life Ins. Co. v. Russell)*, any relief granted for fiduciary breach was required to benefit the entire plan, rather than an individual participant. In the context of investment-related breaches, the "entire plan" rule effectively limited fiduciary claims to defined benefit and similar insurance plans, under which all benefits are funded from a common asset pool.

In *LaRue v. DeWolff, Boberg & Assoc.,* the Supreme Court for the first time acknowledged the current preponderance of defined contribution or individual account plans, such as 401(k) plans. The Court concluded that the "entire plan" rule should not be construed to preclude relief for fiduciary breach when a participant's "plan" is effectively an account balance. Citing ERISA Section 404(c) as support, the Court noted that Congress must have intended fiduciaries of individual account plans to be liable for breach in the investment context.

Mr. LaRue, the plaintiff, participated in a defined contribution, or individual account plan, that included a participant-directed investment arrangement. He alleged that the plan's fiduciaries failed to properly implement his investment instructions over a two-year period and, as a result, that he suffered a loss of investment earnings and gains in the amount of $150,000. Rather than bringing a claim for additional benefits, Mr. LaRue alleged that his loss arose on account of a fiduciary breach: the failure of the plan's fiduciaries to follow his investment instructions. The Supreme Court recognized the existence of his claim and remanded the case for further proceedings on the merits (that is, to determine whether Mr. LaRue actually suffered damage on account of some fiduciary act).

Even after *LaRue,* most claims should continue to advance as benefit claims, rather than fiduciary claims. In many judicial circuits, when a fiduciary breach claim and a benefit claim seek the same relief (i.e., a larger plan benefit or account balance), the matter is treated as a benefit claim and is adjudicated as such. This approach will continue to be advantageous to plan sponsors, since ERISA's administrative review process provides sponsors with an opportunity to review and develop an administrative record and a sponsor's determination of benefits is ordinarily afforded deference, unless it is found to be arbitrary or capricious.

Sponsors should also find comfort in the defense provided under ERISA Section 404(c). To the extent an individual account plan is designed and operated in a manner substantially consistent with existing Department of Labor regulations, plan fiduciaries should not be liable for claims of investment loss arising from a participant's actual exercise of investment control. To the extent participant investment control is not exercised, the new "qualified default investment alternative" can and should be used to obtain the same relief.

As illustrated by *LaRue*, in the context of a participant-directed investment arrangement, fiduciaries retain liability in at least two areas: for selecting and monitoring the investment options made available under an individual account plan and for any loss on account of failure to adhere to the plan's governing documents and disclosures. By far, the critical exposure is the failure to adequately monitor investment alternatives. Fortunately, it is well established that the failure to prudently select and monitor investment options can

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be addressed by the adoption and implementation of appropriate plan governance procedures. These include the designation of an investment committee, the adoption of a committee charter, the adoption of an investment policy, and the periodic measurement of investment options against the benchmarks and standards contained in the policy.

In contrast, failure to adhere to plan provisions and disclosures is more likely to be an ad hoc occurrence, rather than a systemic plan problem (which was apparently the case in *LaRue*). Even though it is difficult to anticipate and protect against individual occurrences, there are some steps that plan sponsors can take to negate a finding of "intent" or "knowledge," which is frequently a condition precedent to an actionable breach. Most importantly, sponsors should ensure that benefit statements are timely delivered and are prepared in accordance with new rules imposed by the Pension Protection Act of 2006. A simple, periodic "investment audit" may also be in order. By comparing actual plan operations and procedures (including a review of the plan's website information and VRU (voice response unit)) to the disclosures made in the summary plan description and other annual notices and investment information, basic inconsistencies can be spotted and corrected by new disclosure or changes in plan operations and procedures.

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