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ERISA Hotline Special Bulletin

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THE SUPREME COURT SPEAKS!!

But is it the Law or Reality that is Speaking?

LaRue v. DeWolff, Boberg & Assoc., Inc., --S.Ct.--, Case No. 06-856, 2008 WL 440748 (Feb. 20, 2008).

Holding

The U.S. Supreme Court reversed the Fourth Circuit Court of Appeals and held that Section 502(a)(2) of ERISA provides a remedy for plan participants who bring suit for fiduciary breaches, even if those breaches only affect the individual retirement accounts of certain participants rather than the plan as a whole.

Facts

James LaRue filed this action in 2004 against his former employer, DeWolff, Boberg & Associates, and the 401(k) retirement savings plan sponsored by DeWolff. The Plan permitted participants to direct the investment of their contributions in accordance with specified procedures and requirements. LaRue alleged that in 2001 and 2002, he directed DeWolff to make certain changes to the investments in his individual account, but DeWolff never carried out these directions. LaRue claims that as a result of DeWolff's failure to follow his directions, this omission depleted his interest in the Plan by approximately $150,000, which constituted a breach of fiduciary duty under ERISA. The complaint, however, only sought make-whole or other equitable relief as allowed by Section 502(a)(3).

The district court granted the motion to dismiss because a claim for monetary relief is not recoverable under Section 502(a)(3). The district court concluded that because respondents did not possess any disputed funds that rightly belonged to LaRue, he was seeking damages, rather than traditional equitable relief available under Section 502(a)(3).

On appeal, LaRue argued that he had a cognizable claim for relief under *both* Section 502(a)(2) and 502(a)(3). The Fourth Circuit stated that even though LaRue raised the Section 502(a)(2) argument for the first time on appeal, the court decided to address the argument. Nevertheless, the court rejected the argument on the merits.

The Fourth Circuit noted that Section 502(a)(2) provides for suits to enforce violations of Section 409, which concern breaches of fiduciary duties that harm plans. The court cited language from *Massachusetts Mutual Life Insurance Co. v. Russell*, 473 U.S. 134, 105 S.Ct. 3085, 87 L.Ed.2d 96 (1985), suggesting that these provisions "protect the entire plan, rather than the rights of an individual beneficiary." The court then characterized the remedy sought by LaRue as "personal" because he "desires recovery to be paid into his plan account, an instrument that exists specifically for his benefit," and concluded,

> [w]e are therefore skeptical that [LaRue's] individual remedial interest can serve as a legitimate proxy for the plan in its entirety, as [Section 502(a)(2)] requires. To be sure, the recovery [LaRue] seeks

> could be seen as accruing to the plan in the narrow sense that it would be paid into [LaRue's] plan *account*, which is part of the plan. But such a view finds no license in the statutory text, and threatens to undermine the careful limitations Congress has placed on the scope of ERISA relief.

LaRue then filed an appeal to the Supreme Court.

Analysis

The Court, in an opinion written by Justice Stevens, began its analysis with the *Russell* case. In *Russell*, the Court held that a participant in a disability plan that paid a fixed level of benefits could not bring suit under Section 502(a)(2) to recover consequential damages arising from delay in processing the claim. Then, the Court noted that the misconduct alleged in *Russell* fell outside the categories typically seen under Section 409 concerning proper management, administration and investment of fund assets. In *Russell*, there was clearly nothing to be given to the *plan* by the alleged delay.

With that as a background, the Court went on to discuss that at the time of *Russell*, the reference to the *entire plan* merely reflected the usual landscape. Most pension plans at that time were of the defined benefit variety where participants did not have individual accounts, but were instead entitled to a payment for life upon retirement or disability (based on age and service and salary) from an undefined pool of assets.

By contrast, it is the defined contribution plan that dominates the ERISA pension landscape today. The Court found that whether there is a pool of assets or individual accounts, fiduciary harms are still the same harms to pension plans as discussed in Section 409. The Court concluded that although Section 502(a)(2) does not create a remedy for individual injuries, it does authorize recovery for fiduciary breaches that impair the value of *plan assets*.

Chief Justice Roberts and Justice Kennedy issued a concurrence. Although these justices agreed with the result, they questioned whether the claim was really a claim for benefits under Section 502(a)(1)(B) of ERISA. However, because this was never pressed or argued, the concurring judges merely left the question open.

Justices Thomas and Scalia also wrote a concurring opinion. Although these Justices also agreed with the result of the majority, they preferred to reach that result by examining the text of ERISA. They concluded that Section 409 merely uses the word *plan* as the entity that can recover, not "entire plan." They then went on to look to the definition of "defined contribution" under Section 3(34), which simply provides that it is a *plan* with individual accounts. They concluded that just because ERISA has individual accounts for booking and gains or losses does not mean that each individual account is not part of the plan. This was also supported by Section 403(a), which requires plan assets to be held in trust. In other words, a plan is essentially the sum of its parts, and thus, a loss to one individual account is still a loss to the plan, as defined under Section 409. Thus, a claim can be pursued under Section 502(a)(2).

TSM&P Comments

Although not the majority opinion, we believe the concurrence of Justices Thomas and Scalia does the best job of explaining and reasoning this case. According to Justice Thomas, the text of ERISA is clear that the plan is the "sum of its parts." Thus, an individual account loss by a fiduciary is still a loss to the plan. Although contrary to the interest of plans, this appears reasonable. Justice Stevens, on the other hand, hinted at the reality of the situation that the majority of pension assets today are of the individual type. One wonders if Justice Stevens recognized that a contrary ruling would have likely had the result of insulating fiduciaries for virtually all mismanagement for individual accounts, *i.e.* 401(k) plans. Finally, it is interesting to note the Court also dodged another critical issue that has plagued the lower courts--that is, to what extent Section 502(a)(3) can be used to seek monetary relief against individual fiduciaries. That, unfortunately, will have to wait for another day.

Tressler, Soderstrom, Maloney & Priess, LLP

If you have any questions concerning this bulletin or TSM&P's ERISA Practice Group, please contact:

Kathleen Sweitzer 312/627-4130 ksweitzer@tsmp.com
Craig Penrose 312/627-4073 cpenrose@tsmp.com

OFFICE LOCATIONS
233 South Wacker Drive
Sears Tower, 22nd Floor
Chicago, IL 60606

305 West Briarcliff Road
P.O. Box 1158
Bolingbrook, IL 60440
630/759-0800
Fax 630/759-8504

744 Broad Street
Suite 1510
Newark, NJ 07102
973/848-2900
Fax 973/623-0405

3070 Bristol Street
Suite 450
Costa Mesa, CA 92626
714/429-2900
Fax 714/429-2901

22 Cortlandt Street,
17th Floor
New York, NY 10007
212/971-6250
Fax 212/971-6263

1901 Avenue of the Stars
Suite 450
Los Angeles, CA 90067
310/203/4800
310/203-4850

2100 Manchester Road
Suite 950
Wheaton, IL 60187
630/668-2800
Fax 630/668-3003