

# Employee Benefits Briefing

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A bulletin designed to keep clients and other friends informed on employee benefits law matters

February 25, 2008

## SUPREME COURT ALLOWS INDIVIDUAL FIDUCIARY CLAIM FOR 401(k) LOSSES

The Supreme Court has unanimously ruled (although in three separate opinions) that a participant in a 401(k) plan may sue for recovery arising from a breach of fiduciary duty, reversing lower court rulings that dismissed the participant's lawsuit.

In *LaRue v. DeWolff, Boberg & Associates, Inc.*, the participant contended that his employer (presumably acting as plan administrator) breached its fiduciary duty to him by failing to implement his direction to change the investments in his 401(k) account, costing him \$150,000. It was not clear whether this was an actual loss in his account or whether it was lost profits; the Court said it did not matter. The lower courts had dismissed the suit, relying on a 1985 Supreme Court decision (*Massachusetts Mut. Life Ins. Co. v. Russell*) that limited a breach of fiduciary duty claim to a plan-wide loss. Justice Stevens (also the author of the earlier decision) held that the *Russell* decision was not controlling since it did not involve an individual account, defined contribution plan, and that the fiduciary's liability created by Section 409 of ERISA must be interpreted in light of the current environment, in which most plans are individual account plans. (In his concurring opinion, Justice Thomas held simply that a loss in an individual account is a loss to the plan.) Justice Stevens also agreed with the participant that fiduciaries would not need the relief from fiduciary liability provided by Section 404(c) of ERISA for participant-directed investments if they had no liability under Section 409 of ERISA in the first place.

As usual, the decision leaves many questions yet to be answered, particularly in light of the concurring opinion of Chief Justice Roberts. He stated that the lower courts must, on remand, determine whether this is really a claim for benefits, and if so, whether this will require the dismissal of the breach of fiduciary duty claim. A claim for benefits is clearly subject to the plan's claims procedures, and the administrator's decision is entitled to a deferential standard of review. The majority decision expressly avoided taking a position on whether a breach of fiduciary duty claim is subject to these conditions. If the issues raised by Roberts are resolved against participants, the impact of this decision could be significantly limited.

Unless its import is limited, the *LaRue* decision is likely to lead to increased litigation over plan losses, particularly if participants can go straight to court without first filing a claim with the plan administrator. To minimize exposure to such claims, plan sponsors and administrators should take the following steps:

- (1) carefully review their compliance with the conditions for fiduciary relief under Section 404(c) of ERISA;
- (2) review and perhaps strengthen their procedures for forwarding and implementing participant directions;

(3) review any limitations on liability that may be contained in any service agreements with third-party administrators; and

(4) confirm that they have adequate fiduciary liability insurance in place.

Please contact any Vedder Price benefits attorney to discuss the implications of the *LaRue* decision for your benefits plans.

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