THOMPSON HINE

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ERISA LITIGATION UPDATE

Increasing the likelihood of litigation involving 401(k) plans, the U.S. Supreme Court in *LaRue v. DeWolff, Boberg & Assocs., Inc.*, yesterday reversed the Fourth Circuit in holding that ERISA § 502(a)(2) authorizes an individual participant to bring a federal court action for "recovery for fiduciary breaches that impair the value of plan assets in a participant's individual account." Prior Supreme Court precedent, including *Massachusetts Mutual Life Ins. Co. v. Russell*, had held that individual participants could not bring an ERISA claim "to recover consequential damages." *Russell* held that ERISA §§ 409 and 502(a)(2), read together, authorize recovery only by "the plan as an entity." *LaRue* renders that precedent largely irrelevant in the 401(k) litigation context. Under *LaRue*, so long as the participant seeks to remedy the "adverse impact on the value of the plan assets in [an] individual account" resulting from a claimed fiduciary breach, relief exists under ERISA §§ 409 and 502(a)(2). More fundamentally, *LaRue* permits a plan participant to pursue "damages" to the plan, even where measured solely by the injury to plan participants' individual accounts.

James LaRue sued his employer and its 401(k) plan to recover $150,000 in investment losses in his individual plan account that resulted from the fiduciary's failure to follow LaRue's investment directions. The district court dismissed LaRue's claims on the ground that ERISA did not provide individual relief for such a loss. Quoting *Russell*'s admonition that recoveries under ERISA § 502(a)(2) must "inure[ ] to the benefit of the plan as a whole," the Fourth Circuit rejected LaRue's claim that the 401(k) plan fiduciary, in ignoring his investment directions regarding his account, caused losses of $150,000. The Fourth Circuit reasoned that because ERISA § 502(a)(2) "provides remedies only for entire plans, not for individuals," LaRue could not maintain a claim for the losses incurred in his individual account inasmuch as he was not seeking to remedy injury suffered by the plan "as a whole."

In reversing, Justice Stevens' majority opinion held that LaRue could maintain his claim under ERISA § 502(a)(2) as a claim for damages to the plan because "[w]hether a fiduciary breach diminishes plan assets payable to all participants and beneficiaries, or only to persons tied to particular individual accounts, it creates the kind of harms that concerned the draftsmen of § 409." *LaRue* does not address how recoveries for losses to 401(k) plans are to be allocated to participants. We expect plaintiffs to contend that the so-called "plan recoveries" should be allocated to those individual accounts adversely affected by the fiduciary breach, effectively acting as a substitute for damages.

LaRue exposes fiduciaries to personal liability under ERISA § 409(a), which provides that "[a]ny person who is a fiduciary with respect to a plan ... shall be personally liable to make good to such plan any losses to the plan resulting from each [fiduciary] breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary." 29 U.S.C. § 1109(a). Accordingly, *LaRue* means that a claim for breach of fiduciary duties adversely affecting only one or a subset of participants in a plan that individually tracks benefits, such as a 401(k) plan, can be brought to recover "damages" under ERISA § 502(a)(2). In short, *LaRue* provides a significant incentive for plaintiffs (and their counsel) to initiate actions claiming losses in their 401(k) plans.

In its analysis, *LaRue* emphasizes ERISA § 404(c)'s "safe harbor" in recognizing that a plan's compliance with the provisions of ERISA § 404(c) "exempts fiduciaries from liability for losses caused by participants' exercise of control over assets in their individual accounts. *See also* 29 CFR § 2550.404c-1 (2007)." In light of the preamble to 29 CFR § 2550.404c-1, plans must strictly, rather than just substantially, comply with all ERISA § 404(c) statutory and regulatory provisions to insulate fiduciaries from liability. Due to the plan's failure to follow LaRue's investment directions, ERISA § 404(c)'s "safe harbor" was unavailable as a defense.

Finally, the Supreme Court did not reach the question of whether "make-whole relief" is equitable relief available under ERISA § 502(a)(3). Such a holding would open the flood gates for ERISA litigation. Of some concern for future ERISA litigation, however, is that articles advocating such a conclusion were cited with approval in the *LaRue* majority decision.

In light of *LaRue*, 401(k) plans and their fiduciaries should engage their counsel and consultants to limit or address potential liability by:
(1) reviewing the plans' ERISA § 404(c) compliance (particularly because some plans may be only partially compliant);
(2) reviewing the plans' procedures for discharging participant directions and ensuring that proper controls are in place to reduce the potential for error;
(3) reviewing the adequacy of fiduciary liability insurance coverage;
(4) reviewing the plans' investment policies and procedures designed to ensure that the plans' investments options are prudent;
(5) reviewing service provider agreements to ensure an appropriate allocation of liability and indemnification rights;
(6) considering provision of access for plan participants to investment advisers who can advise participants on investment in company stock; and,
(7) analyzing (and documenting the analysis of) fees charged by service providers, including consultants and counsel, to the plans.

Thompson Hine's ERISA Litigation and Employee Benefits & Executive Compensation teams are available to assist you in advance of any claim. Please contact your benefits lawyer or any member of Thompson Hine's ERISA Litigation team.

FOR MORE INFORMATION

If you have questions or would like more information about this topic, please contact any of the team members listed below or your primary Thompson Hine lawyer.

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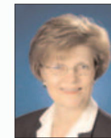

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