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A legal update from Dechert's Labor and Employment and Employee Benefits and Executive Compensation Groups

Supreme Court Decision Authorizing Suits by Individual 401(k) Plan Participants Based on "Impaired Value" of Plan Accounts Confirms Yet Another Risk for Plan Fiduciaries

In *LaRue v. DeWolff, Boberg & Associates, Inc.*, No. 06-856, 552 U.S. ____ (February 20, 2008), the U.S. Supreme Court unanimously held that ERISA "authorizes a participant in a defined contribution pension plan to sue a fiduciary whose alleged misconduct impaired the value of plan assets in the participant's individual account." While most federal courts of appeals had reached a similar conclusion, the Fourth Circuit had determined that because ERISA § 502(a)(2) only permits relief on behalf of a plan "in its entirety," any relief to be paid to individual plan accounts was "personal," and therefore inappropriate. Interestingly, while all of the Justices agreed that the Fourth Circuit's conclusion was erroneous, there was some disagreement about which of ERISA's remedial provisions properly governs claims such as LaRue's.

In 2004, James LaRue sued his employer, DeWolff, Boberg & Associates, Inc., claiming that DeWolff breached its fiduciary duties under ERISA when it failed to follow LaRue's instructions regarding the investment of contributions to his individual account under the company's 401(k) retirement plan. According to LaRue, DeWolff's conduct caused the value of his plan account to be "depleted" by approximately $150,000. LaRue's claim against the company sought "make whole" relief in the form of restoration of LaRue's plan account balance to the proper level. The district court rejected the claim, holding that it did not seek "appropriate equitable relief" under § 502(a)(3) of ERISA. On appeal, LaRue claimed not only that the relief he sought was appropriate under § 502(a)(3), but that it was also permissible under § 502(a)(2) as relief "to the plan" itself. As noted, the Fourth Circuit rejected these arguments.

Writing for the Court, Justice Stevens noted that the ERISA's overriding purpose is to ensure that "the benefits authorized by the plan are ultimately paid to participants and beneficiaries." Accordingly, Justice Stevens concluded that because LaRue sought only to recover the benefits that would allegedly have been due to him absent a fiduciary duty breach, the Court's decision in *Massachusetts Mutual Life Insurance Company v. Russell*, 473 U.S. 134 (1985), which held that ERISA does not permit a defined benefit plan participant to recover "consequential damages" arising from a breach of fiduciary duty, did not preclude the relief he sought. Justice Stevens went on to discuss briefly the role that defined contribution plans such as 401(k) plans play in "the retirement plan scene," and concluded that:

> whether 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. Consequently, our references to the "entire plan" in *Russell*, which accurately reflect the operation of § 409 in the defined benefit context, are beside the point in the defined contribution context.

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Thus, the Court held, the relief sought by LaRue constituted appropriate relief under § 409, and his action pursuant to § 502(a)(2) was permissible.

While, as noted, the decision to reverse the Fourth Circuit's ruling was unanimous, the rationale was not. Justice Thomas, writing for himself and Justice Scalia, agreed that LaRue's claim was cognizable under § 502(a)(2), but wrote separately to emphasize that his conclusion "is not contingent on trends in the pension plan market . . . [n]or does it depend on the ostensible "concerns of ERISA's drafters." Rather, Thomas wrote, LaRue's claim was permissible because "a defined contribution plan is essentially the sum of its parts [and] losses attributable to the account of an individual participant are necessarily losses 'to the plan' for purposes of § 409(a)."

Chief Justice Roberts, joined by Justice Kennedy, stated that it was "not clear" to him that the relief sought was "appropriate" under § 502(a)(2). He would have reserved that issue for another day, however, on the basis that the claim brought by LaRue was really just a claim for "benefits due . . . under the terms of the plan" under § 502(a)(1)(B), and was thus permissible. Roberts noted that allowing a claim such as LaRue's to be "recast as one under § 502(a)(2) might permit plaintiffs to circumvent safeguards for plan administrators that have developed under § 502(a)(1)(B) [such as] the requirement . . . that a participant exhaust the administrative remedies mandated by ERISA. . . ."

In conclusion, the Court's decision, although obviously detrimental to plan sponsors and fiduciaries, is not a surprising one. What will be important to monitor going forward is the extent to which Chief Justice Roberts' comments regarding the impermissibility of recasting claims for benefits as claims for breach of fiduciary duty will be emphasized by lower courts. Plaintiffs frequently do attempt to characterize their claims as ones for breach of fiduciary duty in order to avoid issues such as the administrative exhaustion requirement, the deferential standard of review afforded on issues of plan interpretation, and the strict application of statutes of limitations. Should courts begin to scrutinize more closely the propriety of plaintiffs' self-serving characterizations of the nature of their claims, employers and plan fiduciaries will undoubtedly benefit. Certainly, employers and plan fiduciaries should look to employ Roberts' reasoning to constrain plaintiffs' attempts to transform simple benefits disputes into broad breach of fiduciary duty claims.

Practice group contacts

If you have questions regarding the information in this legal update, please contact the Dechert attorney with whom you regularly work, or any of the attorneys listed. Visit us at www.dechert.com/employment or www.dechert.com/employeebenefits.

Alan D. Berkowitz
Philadelphia
+1 215 994 2170
alan.berkowitz@dechert.com

Ian Downes
Philadelphia
+1 215 994 2346
ian.downes@dechert.com

Jerome A. Hoffman
Philadelphia
+1 215 994 2578
jerome.hoffman@dechert.com

David F. Jones
Philadelphia
+1 215 994 2822
david.jones@dechert.com

Paul S. Kimbol
Philadelphia
+1 215 994 2603
paul.kimbol@dechert.com

Dechert LLP

www.dechert.com

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