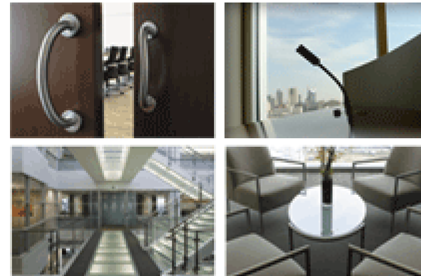
send this to a friend



Employer Beware: Supreme Court Opens the Door to Damages Claims Under ERISA

by B. David Joffe and Andrew Elbon

The United States Supreme Court recently issued a decision holding that Section 502(a)(2) of the Employee Retirement Income Security Act ("ERISA") provides a remedy to an individual participant in an individual account plan (such as a 401(k) plan) who suffers an investment loss due to a breach of fiduciary duty. Following the decision in *LaRue v. DeWolff Boberg & Assocs. Inc.*, employers and other plan fiduciaries need to be very concerned about individual claims for losses attributable to a fiduciary breach because they may be liable to make up those losses.

In this case, Mr. LaRue argued that DeWolff, his former employer, failed to follow his investment directions as a participant in a 401(k) plan. He claimed this resulted in a loss of $150,000 to his account. Mr. LaRue brought a claim to obtain "appropriate equitable relief" under Section 502(a)(3) of ERISA. The district court held that Mr. LaRue had no remedy under such section. On appeal, Mr. LaRue raised a claim under a different provision, Section 502(a)(2) of ERISA, which provides for "appropriate relief" to address violations of Section 409 of ERISA. Section 409 generally provides that a fiduciary who breaches the duties imposed under ERISA is *personally liable* for the losses resulting from the breach. The United States Court of Appeals for the Fourth Circuit rejected Mr. LaRue's claim under Section 502(a)(2) noting that such section requires any recovery to inure to the benefit of the plan "as a whole" and not a particular plan participant. The Fourth Circuit also viewed Mr. LaRue's claim as one for compensatory damages, which it held were not available under ERISA, and not equitable relief provided for under Section 502(a)(3).

The Supreme Court disagreed. Justice Stevens, writing for the majority, wrote that, in a defined contribution plan, "fiduciary misconduct need not threaten the solvency of the entire plan to reduce benefits below the amount that participants would otherwise receive." Therefore, the Court took the position that an individual claim would be permissible. If not, fiduciaries would never have liability for losses in an individual account, which is what some courts had been holding. Therefore, participants, like Mr. LaRue, may maintain a claim under Section 502(a)(2) of ERISA to recover losses to their individual accounts resulting from a breach of fiduciary duty. The Court did not address Mr. LaRue's separate claim under ERISA Section 502(a)(3).

While the Court's opinion is relatively straightforward on the matter of whether a claim may be brought under Section 502(a)(2) of ERISA, two of the justices issued concurring opinions that muddy the water. Justice Thomas wrote a concurring opinion that rejects the relevance of the distinction between types of plans (defined benefit versus defined contribution) by more simply acknowledging that a loss to a participant is a loss to the plan because the plan is no more than the sum of its parts. Chief Justice Roberts, however, raised the issue of whether the claim should have been brought as one for benefits under an entirely different section of ERISA--Section 502(a)(1)(B). This is important because claims under Section 502(a)(1)(B) generally require exhaustion of administrative remedies that give plan administrators more control over the process and a highly deferential standard of review. With Chief Justice Roberts' concurrence, defense attorneys will no doubt argue that claims should be brought under Section 502(a)(1)(B) and not "recast" as a claim under Section 502(a)(2).

Although the concurring opinions have left room for debate, the majority opinion remains extremely significant and a cautionary one for plan fiduciaries. Until now, it was not clear that fiduciaries could be held liable for losses to participants' individual accounts. With *LaRue*, the door has opened to participants to claim damages for a breach of fiduciary duty. For those employers who administer their own plans, it will be important to review the procedures they have in place for processing participant directions. For employers who utilize a third-party administrator, it will be critical to make sure that the third-party administrator has appropriate procedures in place; if not, the employer could ultimately be held liable.

If you have any questions about the *LaRue* decision, please contact one of the Employee Benefits and Executive Compensation attorneys at Boult, Cummings, Conners & Berry PLC:

Martha L. Boyd
615.252.2357
mboyd@boultcummings.com

Charles M. Cain II
615.252.2330
ccain@boultcummings.com

Andrew Elbon
615.252.2378
aelbon@boultcummings.com

B. David Joffe
615.252.2368
djoffe@boultcummings.com

Gordon Earle Nichols
615.252.2387
gnichols@boultcummings.com

John M. Scannapieco
615.252.2352
jscannapieco@boultcummings.com

Boult Cummings eNews is published solely for the interest of clients and friends of Boult, Cummings, Conners & Berry, PLC and should in no way be relied upon or construed as legal advice. If you need specific information on legal issues or want to address specific factual situations please seek the opinion of legal counsel.

Boult Cummings eNews is designed to update our clients on legal issues that may impact their business. If this information is not relevant to your position, please forward to the appropriate person in your organization. If this topic is not pertinent to your company, please provide topic suggestions as to the types of legal updates and topics that are relevant to your business. Please email cbillingslea@boultcummings.com your feedback or suggestions.

2008 Boult, Cummings, Conners & Berry, PLC. All rights reserved

Roundabout Plaza, 1600 Division Street, Suite 700 Nashville, TN 37203
615.244.2582 www.boultcummings.com

This email was sent to [email]. To ensure that you continue receiving our emails, please add us to your address book or safe list.

manage your preferences | **opt out** using **TrueRemove™**
Got this as a forward? **Sign up** to receive our future emails.

powered by