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SUPREME COURT DECISION INCREASES RISK TO FIDUCIARIES OF 401(K) PLANS

Divided as to rationale but unanimous as to result, the Supreme Court surprisingly held in a recent decision that a participant in a defined contribution plan (*e.g.*, a 401(k) plan) can bring an action against the plan's fiduciary to recover losses incurred by the participant's individual plan account due to a breach of fiduciary duty, even if the breach did not otherwise adversely affect the plan as a whole. *LaRue v. DeWolff, Boberg & Associates,* No. 06-856. To reach this result, the majority had to distinguish this case from *Massachusetts Met Life Ins. Co. v. Russell,* a 1985 decision, which seemed to provide that a plaintiff could not recover under Section 502(a)(2) of the Employee Retirement Income Security Act of 1974 ("ERISA") unless a breach of fiduciary duty harmed the plan as a whole. The majority's reasoning in *LaRue*, which was primarily grounded on the inherent differences between defined benefit and defined contribution plans, essentially held that losses to a single account could be considered plan losses. While the full impact of the decision is difficult to predict, it clearly creates a fertile new ground for suits against fiduciaries of 401(k) plans.

LaRue involved a 401(k) plan that provided participants with the right to direct the investment of assets held in their individual accounts. The plaintiff claimed that the plan administrator had failed to carry out his directions, resulting in a personal loss of $150,000. There was no allegation that any other participant suffered a similar loss. The plaintiff brought suit under ERISA § 502(a)(2), which provides participants in plans covered by ERISA with the right to bring an action for "appropriate relief" for a breach of ERISA § 409 (which makes a fiduciary personally liable to a plan for losses caused by a breach of duty). The district court dismissed the plaintiff's claim, relying on *Russell,* and the Court of Appeals for the Fourth Circuit affirmed.

Writing for the five-justice majority, Justice Stevens noted that, while the language of *Russell* supported the lower courts' decision, in that case the alleged breach did not cause the plaintiff to lose any part of her benefit, but did diminish the plan's assets and thus, potentially, its ability to pay benefits. According to the majority, the holding in *Russell* remains appropriate for defined benefit plans or other plans where losses affect only the plan. It is not, however, appropriate for defined contribution plans where a loss of assets held in a participant's plan account results in a direct loss to the participant. Accordingly, the majority held that "although section 502(a)(2) does not provide a remedy for individual injuries distinct from plan injuries, the provision does authorize recovery for fiduciary breaches that impair the value of plan assets in a participant's individual account."

Justices Roberts and Kennedy concurred in the result while raising a technical issue as to whether the action properly should have been brought as a claim for lost benefits pursuant to ERISA § 502(a)(1)(B) (which would have required the plaintiff to have exhausted all administrative remedies before bringing an action). Justices Thomas and Scalia also concurred, but on the basis that, read together, the plain language of §§ 409 and 502(a)(2) authorized a suit of this kind against *any* form of plan (*i.e.*, they would not distinguish between defined benefit and defined contribution plans).

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LaRue means that 401(k) plan fiduciaries are now open to suit whenever a participant believes that the fiduciary's action (or inaction) led to losses in his or her account. Given the proliferation of self-directed 401(k) plans and of class action suits against the fiduciaries of such plans in the wake of Enron (especially so-called "stock-drop" cases), the decision clearly increases at least the litigation risk for fiduciaries. It is, however, too early to speculate whether this decision and the trend towards litigation will affect the popularity of 401(k) plans in general, or will cause sponsors and fiduciaries to rethink the use of self-directed accounts.