Ogletree Deakins

Ruling Allows Individuals To Recover Individual 401(k) Losses

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The U.S. Supreme Court recently disagreed with the Fourth Circuit Court of Appeals' decision that a participant in a 401(k) plan is prohibited from using Section 502(a)(2) of the Employee Retirement Income Security Act (ERISA) to recover losses allegedly caused by his employer's failure to carry out his investment instructions. "Although [Section] 502(a)(2) does not provide a remedy for individual injuries distinct from plan injuries," the majority wrote, "that provision does authorize recovery for fiduciary breaches that impair the value of plan assets in a participant's individual account."

Justices Hold ERISA Provision Authorizes Recovery For Certain Fiduciary Breaches

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Factual/Legal Background

James LaRue is a participant in the 401(k) plan sponsored and administered by his employer, DeWolff, Boberg & Associates. The plan allows participants to choose from several investment options and to allocate certain percentages to selected options. LaRue alleged that, in 2001 and 2002, DeWolff failed to follow his investment directions, resulting in a loss to his account of $150,000.

Section 502(a)(2) of ERISA provides that a "civil action may be brought . . . by a participant . . . for appropriate relief under section 1109 of this title." Section 1109 states that "a fiduciary with respect to a plan who breaches any . . . duties imposed upon fiduciaries . . . shall be personally liable to make good to such plan any losses to the plan resulting from each such breach." This provision had been previously construed to limit the right to bring claims under Section 502(a)(2) to those alleging a loss to the plan as a whole, rather than to redress individual losses.

Relying on the Supreme Court's language in *Massachusetts Mut. Life Ins. Co. v. Russell*, the Fourth Circuit held that Section 502(a)(2) does not permit a 401(k) plan participant to sue for plan losses caused by a breach of fiduciary duty when the losses affected only the individual participant's account balance. The Fourth Circuit also held that Section 502(a)(3) does not permit a plan participant to recover such losses because they do not constitute "equitable relief."

Legal Analysis

Although the Supreme Court granted review on both the 502(a)(2) and 502(a)(3) arguments, its decision was limited to the 502(a)(2) issue, on which it reversed the Fourth Circuit. The Court began by noting that the retirement plan landscape has changed since its decision in *Russell*, from one in which defined benefit plans were the norm to one in which defined contribution plans (such as the one at issue in *LaRue*) dominate. Thus, the Court was willing to revisit whether the "entire plan" language of *Russell* precludes a participant from bringing a claim under Section 502(a)(2) for an alleged fiduciary breach resulting in a loss that is confined to the account of a single participant in a defined contribution plan.

The Court observed the distinction between fiduciary misconduct with respect to defined benefit plans (in which a loss to the plan may have no adverse effect on an individual's benefits unless the plan becomes insolvent) and misconduct with respect to defined contribution plans (in which the effects may impact an individual's benefits without affecting the benefits of other participants). The Court also noted that other provisions of ERISA and related De-partment of Labor regulations would be rendered meaningless if the "whole plan" language of *Russell* is applied to defined contribution plans.

Accordingly, the Court held that Section 502(a)(2) permits claims by individual participants to recover losses alleged to arise from a breach of fiduciary duty, even if those losses are limited to (and the relief would inure to the benefit of) the individuals' accounts in the plan. Thus, LaRue's suit against his employer was reinstated.

Practical Impact

According to Brian Black, a shareholder in Ogletree Deakins' Greenville, South Carolina office: "The Court's decision in the *LaRue* case opens the doors for participants who claim to have been harmed by fiduciary impropriety, even if the alleged harm is limited to the account of a single individual. As more and more plan sponsors attempt to shift responsibility for investment decisions to participants, the LaRue decision makes clear that fiduciaries may be held liable for failing to implement those decisions in a timely fashion."

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