

## PENSION LOSS RECOVERABLE UNDER ERISA, SUPREME COURT RULES

A unanimous Supreme Court rules that a participant in a defined contribution pension plan does have a remedy under Section 502(a)(2) of the Employee Retirement Income Security Act (ERISA) for losses to plan assets in an individual account due to a breach of fiduciary duty. Although all nine justices joined in the ruling overturning a decision of the Court of Appeals for the Fourth Circuit in favor of DeWolff Boberg & Associates, there was disagreement regarding the breadth of the ruling and whether James LaRue should be allowed to recover damages for losses to his Section 401(k) retirement savings plan.

Writing for the court, Justice John Paul Stevens states that “although §502(a)(2) does not provide a remedy for individual injuries distinct from plan injuries, that provision does authorize recovery for fiduciary breaches that impair the value of plan assets in a participant’s individual account.”

Section 502(a)(2) of ERISA permits a “participant” to bring suit for appropriate relief under ERISA Section 409. That section, in turn, imposes personal liability for breaches by any plan fiduciary. The justices distinguish the case from *Massachusetts Mutual Life Insurance Co. v. Russell*, 473 U.S. 134 (1985), which held that a participant in a disability plan that paid a fixed level of benefits could not bring suit under Section 502(a)(2). Saying that “the landscape has changed” when it comes to employee benefit plans, Stevens explains that the definition of an “entire plan” in a defined benefit plan is different from one in a defined contribution plan; therefore, *Russell’s* reasoning regarding the contours of a “plan” was not applicable in the context of 401(k) plans.

At issue in the case is LaRue’s allegation that management consulting firm DeWolff, Boberg failed to follow his investment directions as a participant in the 401(k) plan sponsored by his employer, resulting in a loss of \$150,000 to his account. LaRue sued the firm in the district court for the District of South Carolina, alleging that the firm breached its ERISA fiduciary duty by failing to carry out his investment directions. LaRue sought reimbursement of the resulting losses under Section 502(a)(3), which allows a plan participant to seek an injunction to stop a practice that violates the ERISA or the plan, or “to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of [ERISA Title I] or the terms of the plan.”

The district court granted DeWolff, Boberg judgment on the pleadings, finding that the remedy LaRue sought is unavailable under the ERISA. On appeal to the Fourth Circuit, LaRue added an argument that he was entitled to relief under Section 502(a)(2), which authorizes a plan participant to seek “appropriate relief” under Section 409. Section 409(a) provides that a fiduciary that breaches any duties “shall be personally liable to make good to such plan any losses to the plan resulting from each such breach—and shall be subject to such other equitable or remedial relief as the court may deem appropriate.”

A three-judge panel of the Fourth Circuit held that even if LaRue had not waived his Section 502(a)(2) argument by failing to raise it in the district court, the argument could not succeed because recovery under that section must inure to the benefit of the plan as a whole, not to a particular plan participant. The court also held that LaRue was not entitled to relief under Section 502(a)(3) because his claim constituted compensatory damages, not available under that provision, and did not constitute equable relief.

In reversing the Fourth Circuit, the justices focus on the nature of a defined contribution plan and the impact of breach of fiduciary duty. “For defined contribution plans...fiduciary misconduct need not threaten the solvency of the entire plan to reduce benefits below the amount that participants would otherwise receive. 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.” Suggesting that “the legal issue under §502(a)(2) is the same whether his account includes 1 percent or 99 percent of the total assets in the plan, permitting individuals to sue over losses in their individual accounts reflects the nature of defined contribution plans. To not allow such liability, the justices conclude, “would serve no real purpose if, as respondents argue, fiduciaries never had any liability for losses in an individual account.”

The decision is available at <http://op.bna.com/dlrcases.nsf/r?Open=mtrt-7bzsxe>.

(Source: *LaRue v. DeWolff Boberg & Assocs. Inc.*, U.S., No. 06-856, February 20, 2008, as reported in BNA, *Daily Labor Report*, No. 34, February 21, 2008, pp. AA3-AA5, E1-E5.)