

Beware! It's open season on ERISA fiduciaries



By Robert G. Chadwick Jr.

Is it open season on Employee Retirement Income Security Act (ERISA) fiduciaries? Just consider these numbers: Nearly half of all lawsuits brought under ERISA, and most class action suits

brought under the statute, allege a breach of fiduciary duties. During the 12-month period ending March 31, 2007, nearly 10,000 new federal lawsuits were filed under ERISA. In 2007 alone, ERISA class action settlements exceeded \$1.8 billion. Yes, it is open season on ERISA fiduciaries and there appears to be no limits.

Fiduciaries of defined contribution retirement plans, such as 401(k) plans, 403(b) plans, employee stock ownership plans (ESOPs) and profit sharing plans, have been especially popular targets of ERISA lawsuits. Under a defined contribution plan, an employee elects to defer and invest a part of his income for retirement. The contribution amount is fixed, but the retirement benefit is not. The amount of a retirement benefit is influenced by such factors as employee income, administrative expenses and investment gains and losses. When these factors do not achieve the desired retirement benefit, a lawsuit alleging errors, omissions or misconduct by plan fiduciaries can result.

Recently, questions arose regarding the

extent of legal weaponry available to potential plaintiffs in ERISA lawsuits against fiduciaries of defined contribution retirement plans. These questions were addressed, if not answered, by the U.S. Supreme Court on Feb. 20, 2008, in *LaRue v. DeWolff, Boberg & Associates*.

Historical background

Class action suits. Historically, class actions were the weapon of choice for participants suing fiduciaries of defined contribution retirement plans. Such actions alleged injuries to not just one but all plan participants. Typical class actions include:

Employer stock drop.

After a drop in the value of an employer's stock, suit is brought by a class of participants in an ESOP plan, or a 401(k) plan which includes employer stock as an investment option.

Fees and expenses. A class of participants in a 401(k) plan sues a fiduciary for allegedly failing to disclose fees and expenses associated with certain investment options, or unreasonable administrative fees and expenses.

Imprudent selection. A class of plan participants in a 401(k) plan sues a fiduciary for allegedly not acting prudently when selecting investments, products and services for the plan.

Individual suits. Recently, more fiduciary

liability suits have been filed by single participants in defined contribution retirement plans seeking only relief as to their individual plan assets or accounts. Typical individual actions include:

Mismanagement. A fiduciary is alleged to have impaired the participant's individual account by allegedly failing to follow investment directions, or offering imprudent investment options.

Class claims. Many of the claims which were previously made in suits seeking class-wide relief, such as stock drop and excessive fees, are now being made in individual suits.



New questions

Individual suits presented several questions for federal courts that had not previously been presented by class action

suits.

First, can a fiduciary be sued by a single plan participant for alleged misconduct that impaired the value of the participant's individual assets or account in a defined contribution retirement plan?

A 1985 decision by the U.S. Supreme Court left the answer to this question very much in doubt. Fiduciaries argued that allowing such suits would discourage employers from voluntarily adopting defined contribution retirement plans. Plaintiffs asserted such suits were the only means for remedying fiduciary misconduct that affected only a single participant's assets or account rather than the entire plan.

Second, can a fiduciary be sued by a former plan participant of a defined contribution retirement plan?

This question was created by the ability of participants of defined contribution plans to cash out or rollover their individual assets or accounts. Fiduciaries argued that former plan participants lacked legal standing to sue under ERISA. Plaintiffs argued that they were merely seeking benefits due to them while still participants of the plan.

Third, is a suit alleging impaired value of a single participant's assets or account benefits claim or fiduciary liability claim?

This question arose because benefit claims and fiduciary liability claims are treated differently under ERISA. For a benefit claim, a plaintiff generally must sue only the plan itself and must exhaust plan remedies as a condition precedent to filing suit. For a fiduciary liability

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claim, a fiduciary is personally liable for any misconduct and the plaintiff can file suit without exhausting plan remedies. The question became important for ERISA fiduciary liability insurance carriers that insure fiduciary liability claims, but not benefits claims.

The Supreme Court

Inconsistent answers to these questions brought them before the U.S. Supreme Court

in *LaRue v. DeWolff, Bober & Associates*. LaRue was a former participant in a 401(k) plan who had cashed out of the plan. He alleged that his former employer, as the fiduciary, had impaired the value of the individual account in the amount of \$150,000, by not following his directions regarding investment allocation.

Individual suits. Distinguishing the 1985 decision which created confusion for the lower courts, the Supreme Court said that a single

participant of a defined contribution plan can sue a fiduciary to recover the impaired value of his individual account or assets in the plan. The court said that other relief, such as consequential damages, are not recoverable.

Suits by former participants. The court held that, as long as the claim relates to benefits under a plan, the claim may be brought by a former participant who has cashed out his defined contribution plan.

Benefits claim or fiduciary liability claim? The court was less than clear in addressing this question. The opinions of seven justices seemingly answered this question by allowing LaRue's fiduciary liability claim to proceed. Still, a concurring opinion by Justices Roberts and Kennedy left open the possibility that this question could be revisited by the court in the future. Such a possibility could mean continued confusion in the lower courts as to whether a suit alleging impaired value of a single participant's assets or whether the account is a benefits claim or fiduciary liability claim.

Projected impact

The Supreme Court's confirmation that an individual suit is a weapon available under ERISA to a current or former plan participant of a defined contribution plan to sue a plan fiduciary opens the door for lawsuits by law firms that are ill equipped to prosecute class actions. It also opens the door for smaller plans as to which a class action may not be feasible; by former plan participants, possibly in conjunction with other employment-related claims; and with respect to claims that may be unique to one, but not all, plan participants.

These practical implications of the Supreme Court's decision may or may not be immediate, but eventually they will lead to more individual suits.

Fiduciaries should, of course, act immediately to minimize the risk of liability. Action steps should include: education as to fiduciary responsibilities under ERISA; implementation or updating of procedural tools; and implementation of risk management tools. ■

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