

# Fiduciary Liability

## Increased Risk Fueled by the 2009 Meltdown

*By Brad Brewer*

**F**iduciary liability is not a new topic, but the risks have increased as a result of a 2008 court ruling and the financial meltdown of the economy during 2008.

According to the fifth Annual Workplace Class Action Litigation Report by law firm Seyfarth Shaw LLP, for ERISA class actions, the monetary value of the top ten private plaintiff settlements entered into or paid in 2008 totaled \$17.7 billion, compared with \$1.8 billion in 2007. This article provides some background on the United States Supreme Court case making it easier for participants to file a lawsuit and measures a plan sponsor can take to mitigate their liability.



The United States Supreme Court decided the case of *LaRue v DeWolff, Boberg & Associates, Inc.* in the spring of 2008. The decision was unanimous, declaring that defined contribution participants can bring fiduciary breach lawsuits to recover individual damages.

In summary, LaRue participated in and ERISA regulated 401(k) plan sponsored by his employer and he was allowed to direct the investment of the monies allocated to his account. LaRue's claim centered on the grounds that the investment changes he provided to his employer, DeWolff, in 2001 and 2002 were never carried out. LaRue alleged he lost approximately \$150,000 as a result of DeWolff breaching its fiduciary duty to make the investment changes. LaRue lost at the trial level and also lost his appeal to the Fourth Circuit Court of Appeals before review by the Supreme Court.

It is helpful to understand the basis of the lower courts previous rulings. The case relied upon by the lower courts was *Mass Mutual Life v Russell*. Russell filed a disability claim under an ERISA governed employer sponsored disability plan. Russell claimed that the plan fiduciaries breached their duties in delaying payment of her claim, and as such, she sustained damages. In that case, the Supreme Court held that the provision of ERISA authorizing monetary damages was limited to the recovery of damages to "the plan". After the Russell case, some courts interpreted the decision to mean that money damages were not available to individual participants unless the entire plan was damaged.

The Supreme Court Justices unanimously concluded that the lower court ruling was wrong. The majority of the Justices based their decision on the fact that the defined contribution plans, not defined benefit plans, are the primary retirement vehicle for today's workforce. As such, a breach of fiduciary should not

have to damage the entire plan for an individual who has sustained damages to have a basis for relief.

Some of the comments expressed by the Supreme Court are interesting. Stevens writing recognized the evolution from defined benefit plans to participant directed individual account plans; “Defined contribution plans domi-

**Before choosing to go independent, advisors should take the time to evaluate potential firm relationships and determine which offer the products and services that are most consistent with their current practices.**

nate the retirement plan scene today.” Stevens’ comments also suggest the view that focusing only on damages to the plan as a whole in a 401(k) environment is an out of date viewpoint.

The substantial increase in ERISA litigation in 2008 is not entirely driven by the LaRue case. The dramatic losses in the equity markets, lost jobs, and tough economy all played a role as well. However, if the losses resulting from fiduciary breach are substantial, a hurdle has been removed for attorneys to pursue litigation on behalf of plan participants.

In order to mitigate liability with respect to ERISA litigation plan sponsors, recognizing their role as fiduciaries, should understand they have responsibility for the structure and operation of the committee charge with plan oversight and implementing a sound approach to plan investment monitoring. Actions plan sponsors should consider are:

- Review 404(c) compliance, particularly timely processing of participant investment changes
- Educate plan fiduciaries on their responsibilities
- Ensure the Investment Policy Statement is up to date and that the process for reviewing the plan’s investment options are prudent, objective, and documented

- Engage an objective investment adviser to take co-fiduciary responsibility and monitor the plan’s investments; relying on a bundled service provider is not sufficient
- Review fiduciary insurance policies to ensure coverage is adequate and up to date
- Review all administrative and investment practices and benchmark them to industry best practices
- Benchmark the plan’s investment and administrative fees to ensure the fees are reasonable

In conclusion, the recent increase in ERISA litigation underscores that serving as a plan fiduciary carries responsibility. Plan sponsors should review their existing practices and procedures to ensure they are mitigating their liability. Time will tell if the increase in the amount of ERISA litigation is a long-term trend. What is certain is the plan sponsors neglecting their fiduciary duties need to take action to mitigate their risk.



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