LATHAM & WATKINS

Number 682 March 4, 2008

Client Alert

Latham & Watkins
Tax Department

Analysis of the *LaRue* US Supreme Court Decision

On February 20, 2008, the US Supreme Court released its opinion in *LaRue v. DeWolff, Boberg & Assoc., Inc.*[1] and held that an individual 401(k) plan participant can bring a breach of fiduciary duty action against the administrator of his or her 401(k) plan for investment losses attributable to the participant's account resulting from the administrator's failure to implement his or her investment directions properly. The Supreme Court concluded that such a participant may assert a claim under Section 502(a)(2) of the Employee Retirement Income Security Act (ERISA).[2] The decision creates new liability risks for 401(k) plan administrators.

"There are a number of implications from the *LaRue* decision that plan managers should bear in mind."

History: *Russell* Decision

For more than 20 years, the Supreme Court's holding in *Massachusetts Mut. Life Ins. Co. v. Russell*[3] has shaped litigation over fiduciary duties to employee pension plans. The Court determined that plan participants could not bring fiduciary breach claims for individual relief against administrators of defined benefit plans. Instead, under *Russell*, only actions on behalf of the plan as a whole could be brought. Until the recent *LaRue* decision, it has been unclear whether a 401(k) plan participant may seek individual relief for breaches of fiduciary duties affecting his or her individual plan account.

LaRue Decision

In *LaRue*, the plan participant asserted a breach of fiduciary claim alleging that the 401(k) plan administrator's failure to implement his request properly to make changes to his account investments resulted in a $150,000 "depletion" of his account. The Supreme Court explained that, unlike the defined benefit plan in *Russell*, the assets of a defined contribution plan are attributed to individual accounts, and concluded that it was appropriate to allow claims for individual relief by a participant whose 401(k) account was impaired by fiduciary misconduct.

Russell remains applicable when there are no individual accounts distinct from the pension plan, such as in defined benefit plans.

Possible Implications for Plan Managers

There are a number of implications from the *LaRue* decision that plan managers should bear in mind.

First, in light of *LaRue*, a 401(k) plan administrator may be subject to liability for failing to properly carry out the investment instructions of a plan participant should the participant's account lose value.[4] Therefore, plan administrators should make sure that investment instructions are carefully monitored and effected.

Latham & Watkins operates as a limited liability partnership worldwide with an affiliated limited liability partnership conducting the practice in the United Kingdom and Italy. Under New York's Code of Professional Responsibility, portions of this communication contain attorney advertising. Prior results do not guarantee a similar outcome. Results depend upon a variety of factors unique to each representation. Please direct all inquiries regarding our conduct under New York's Disciplinary Rules to Latham & Watkins LLP, 885 Third Avenue, New York, NY 10022-4834, Phone: +1.212.906.1200. © Copyright 2008 Latham & Watkins. All Rights Reserved.

Second, different procedures apply to claims for breach of fiduciary duty, as compared to claims for benefits. Plan participants claiming a breach of fiduciary duty may not be required in some jurisdictions to exhaust administrative remedies provided for in the 401(k) plan before filing suit. In addition, administrators' decisions in breach of fiduciary duty claims are not subject to review for abuse of discretion, but are subjected to a more stringent standard of review by the courts. However, on the positive side, some companies carry fiduciary liability insurance policies that provide coverage for claims of breach of fiduciary duty by plan administrators. Claims for benefits are not typically covered by insurance policies.

Finally, although the *LaRue* decision concerned a 401(k) plan, it is likely to be applied to other types of plans with individual accounts, such as ESOPs, stock bonus plans and profit sharing plans, thus exposing administrators of those plans to claims by individuals whose accounts are affected by errors.

Endnotes

[1] No. 06-856 (U.S. Feb. 20, 2008) (hereinafter *LaRue*).

[2] 29 U.S.C. § 1132(a)(2).

[3] 473 U.S. 134 (1985).

[4] *LaRue*.

Client Alert is published by Latham & Watkins as a news reporting service to clients and other friends. The information contained in this publication should not be construed as legal advice. Should further analysis or explanation of the subject matter be required, please contact the attorneys listed below or the attorney whom you normally consult. A complete list of our *Client Alerts* can be found on our Web site at www.lw.com.

If you wish to update your contact details or customize the information you receive from Latham & Watkins, please visit www.lw.com/LathamMail.aspx to subscribe to our global client mailings program.

If you have any questions about this *Client Alert*, please contact one of the authors listed below:

Joseph B. Farrell
Los Angeles

David W. Barby
Orange County

Michelle L.C. Carpenter
Los Angeles

Or any of the following attorneys listed to the right.

Barcelona
José Luis Blanco
+34.93.545.5000

Brussels
Andreas Weitbrecht
+32.2.788.60.00

Chicago
Robin L. Struve
+1.312.876.7700

Frankfurt
Hans-Jürgen Lütt
+49.69.60.62.60.00

Hamburg
Götz T. Wiese
+49.40.41.40.30

Hong Kong
Joseph A. Bevash
+852.2522.7886

London
Stephen M. Brown
+44.20.7710.1000

Los Angeles
James D. C. Barrall
Joseph B. Farrell
David M. Taub
Michelle L.C. Carpenter
+1.213.485.1234

Madrid
José Luis Blanco
+34.91.791.5000

Milan
Fabio Coppola
+39.02.3046.2000

Moscow
Mark M. Banovich
+7.495.785.1234

Munich
Claudia Heins
Stefan Süss
+49.89.20.80.3.8000

New Jersey
David J. McLean
+1.973.639.1234

New York
Jed W. Brickner
Bradd L. Williamson
+1.212.906.1200

Northern Virginia
Eric L. Bernthal
+1.703.456.1000

Orange County
David W. Barby
David A. Calder
+1.714.540.1235

Paris
Christian Nouel
+33.1.40.62.20.00

San Diego
Holly M. Bauer
+1.619.236.1234

San Francisco
Scott D. Thompson
+1.415.391.0600

Shanghai
Rowland Cheng
+86.21.6101.6000

Silicon Valley
Joseph M. Yaffe
Alice M. Chung
+1.650.328.4600

Singapore
Mark A. Nelson
+65.6536.1161

Tokyo
Bernard E. Nelson
+81.3.6212.7800

Washington, D.C.
David T. Della Rocca
+1.202.637.2200

Office locations:

Barcelona
Brussels
Chicago
Frankfurt
Hamburg
Hong Kong
London
Los Angeles
Madrid
Milan
Moscow
Munich
New Jersey
New York
Northern Virginia
Orange County
Paris
San Diego
San Francisco
Shanghai
Silicon Valley
Singapore
Tokyo
Washington, D.C.