SECURITIES LAW360

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Supreme Court Hears Arguments In ERISA Case

By **Ben James**, ben.james@portfoliomedia.com

Monday, Nov 26, 2007 --- Plaintiff and former 401(k) plan participant James LaRue squared off with his former employer, DeWolff, Boberg & Associates Inc., before the U.S. Supreme Court on Monday, setting the stage for a ruling that some say could discourage employers from sponsoring retirement plans and lead to a groundswell of suits from plan participants alleging that their investments were mishandled.

"The case is significant because it has exposed, for the first time, exposed a fault line in the ERISA remedial scheme," said Alden Bianchi, leader of Mintz Levin Cohn Ferris Glovsky and Popeo PC's employee benefits and compensation practice. "What constitutes a loss to the plan that you can sue and recover on, and what constitutes a loss to the individual, which you can't?"

LaRue accused DeWolff of failing to follow his instructions and make changes to the investments in his retirement account, which LaRue said made him suffer a six-figure loss.

The nation's highest court is tackling the issue of whether or not a 401(k) plan participant can sue under section 502(a)(2) of ERISA to recover losses to an individual's account resulting from a breach of fiduciary duty. It is also tackling whether or not section 502(a)(3) of ERISA, which allows a participant to sue for "equitable relief" for ERISA violations, permits a plaintiff to seek monetary relief as compensation for losses stemming from a breach of fiduciary duty.

A ruling in LaRue's favor would open up a whole new line of lawsuits, and increase expenses, which could make employers less likely to sponsor retirement plans, said Thomas Gies, a Washington-based partner with Crowell & Moring who represented DeWolff before the Supreme Court. ERISA reflected a balance of the interests of workers and employers, Gies added.

Gies also drew a distinction between the LaRue case and instances when an ERISA plan fiduciary engages in self-dealing or theft. The LaRue case involved no allegations of theft, and the plaintiff's accusations center on conduct that is "at most, an innocent mistake," Gies remarked.

Gies wasn't arguing that plan participants should have no recourse against being taken advantage of, just that given that particulars of LaRue's situation and legal argument, LaRue wasn't due money damages under ERISA, he

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said.

“If somebody makes off with the money, there should be a remedy. But where do you draw those lines?” Gies asked. “They want to extend the current law to sue for damages. Our view is that Congress did not write ERISA to go that far and include that kind of remedy.”

Paul Ondrasik, a Washington-based partner with Steptoe & Johnson, was present at Monday's arguments in LaRue and said that the court's questions didn't lend themselves to a prediction that it was leaning in favor of either party.

“The questioning would suggest that the justices were not of a single mind on the issue,” Ondrasik said, noting that he wouldn't be surprised by a split opinion.

Ondrasik also said that the LaRue case is the most significant case concerning what remedies are available to ERISA plan participants since Massachusetts Mutual Life Insurance Co. et al. v. Russel, which the Supreme Court decided in 1985. In that case, the Supreme Court reversed a lower court's finding that Rusell, a former claims examiner, could seek damages in a suit she lodged under ERISA. Ondrasik was an attorney for Massachusetts Mutual in that case.

There is a possibility that a verdict in favor of DeWolff and against LaRue could inspire Congress to make changes to ERISA, Ondrasik said.

Gies also said that the LaRue case could inspire congressional action and called that possibility an undercurrent in the litigation.

“Congress made this a statute of limited remedies, and if Congress, in its wisdom, were to decide more remedies were available, that's for Congress and not for the court,” Gies said.

But Bianchi said that any substantive action on ERISA from Congress was a long shot at best. The trillions of dollars invested in retirement plans means that there are powerful and well-matched interest groups on both sides of the issue, he said.

“ERISA remedies (what you can sue who for, and when) are incredibly contentious. There's a ton of money at stake,” said Bianchi. “This is the playground of the 800-pound gorillas.”

LaRue is represented by Peter K. Stris of Whittier Law School.

DeWolff, Boberg and Associates Inc. is represented by Crowell & Moring LLP.

The case is James LaRue v. DeWolff, Boberg & Associates Inc. et al., case number 06-586 before the U.S. Supreme Court.

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