

**Attention Pension Plan Fiduciaries:
Larue v. DeWolff, Boberg & Associates**

The Supreme Court of the United States recently issued a decision in the case of *Larue v. DeWolff, Boberg & Associates* that could have a drastic impact on fiduciaries of qualified retirement plans subject to the Employee Retirement Income Security Act (ERISA).

The Case:

Plaintiff, James Larue, a former employee of the management consulting firm of DeWolff, Boberg & Associates, brought suit against his former employer seeking lost appreciation in his 401(k) defined contribution retirement account. The plan in which Larue was a participant allowed participants to select from a variety of investments in which to invest their individual account balances. Larue alleged that the plan administrators failed to follow his investment instructions which “depleted” his account balance by approximately \$150,000. Larue asserted that the failure by the administrators to implement his investment strategy amounted to a breach of fiduciary duty under ERISA and sought the alleged depletion as damages.

The lower trial court and appellate court both ruled in favor of the employer holding that ERISA provides remedies to entire plans harmed by fiduciary misconduct, not individual participants. However, on February 20, 2008, the Supreme Court, by a unanimous decision, held that ERISA does in fact “authorize recovery for fiduciary breaches that impair the value of plan assets in a participant’s individual account.” The result in *Larue* is a bit of a surprise to many in the retirement plan community. The surprise from the Larue decision was due in large part by the 1985 case of *Massachusetts Mut. Life Ins. Co. v. Russell* in which the Court held that the remedial provision involved in *Larue* provides a remedy only for an entire plan, not for individuals covered by the plan. However, the current Court distinguished *Russell* and *Larue* because *Russell* involved a defined benefit plan, whereas *Larue* involved a defined contribution plan.

A defined benefit plan generally promises the participant a fixed level of retirement income based on the employee’s number of years of service and compensation and is not based on an individual account balance. In contrast, a defined contribution plan promises the participant the value of an individual account at retirement based upon the contributions made and the investment performance of the contributions. As a result, a participant in a defined benefit plan is not likely to be harmed by fiduciary misconduct unless the misconduct harms the entire plan. “For defined contribution plans, however, 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 [ERISA].”

Despite the holding, the Court did not find in favor of *Larue* outright. Rather, the Court remanded the case for further determinations by the lower court. In addition, the Court added a qualification to the opinion in footnote 3 by stating “we do not decide whether petitioner made the alleged investment directions in accordance with the requirements specified by the Plan, whether he was required to exhaust remedies set forth in the Plan before seeking relief in federal court pursuant to ERISA, or whether he asserted his rights in a timely fashion.”

As a result of *Larue*, it is more important than ever to clearly articulate the requirements of a plan participant with regard to directing his or her account investments and require strict adherence to such requirements. Also, plan sponsors should maintain a thorough procedure to ensure that all participants’ investment directions are implemented as requested and within the time period specified by the plan and its supporting documents.