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WEIGH AGAIN YOUR FIDUCIARY RESPONSIBILITIES

A 2008 Supreme Court ruling places greater responsibility and liability on the fiduciary role of employers in managing 401(k) plans.

BY KELLI DUGAN
PHOTO BY DAN ANDERSON

More than five years after white-collar accounting fraud trials dominated headlines from Enron to WorldCom, ignorance of the law continues to excuse no one from its violation, and providers of 401(k) contribution plans have become the newest targets of litigious scrutiny.

A Supreme Court ruling handed down in February 2008 allows employees to sue not only the outside administrator of their employer's 401(k) plan, but also allows employees to sue their employers, as well.

The Employee Retirement Income

Security Act was originally enacted in 1974 in reference to defined benefit plans, or set retirement plans dispersed based on the number of years an employee had with a company.

For insight on the issue, we turned to an investment advisory firm in Mobile, Mitchell McLeod Pugh & Williams. Management and consultant services for qualified 401(k) plans are among the services the firm sells, and it's specialist in that area is Douglas McLeod, a registered investment advisor.

McLeod says ERISA, in its original language, did not provide legal recourse for individual plan participants to address perceived shortcomings in their portfolios' performances. In early 2008, though, the decision handed down by the U.S. Supreme Court in *LaRue vs. DeWolff, Boberg & Associates* opened a legal forum for employees dissatisfied with the management and performance of their 401(k) plans.

"In simplest terms, the landscape has changed," McLeod says. "One of the real

issues is that a lot of people who sponsor 401(k) plans don't really understand all the issues, especially what their fiduciary responsibilities are."

But what does this mean for the business owner, large or small, now that the legal interpretation of the law has changed?

McLeod says the timing of the *LaRue* decision, and it's subsequent impact, has been as much an issue as substance.

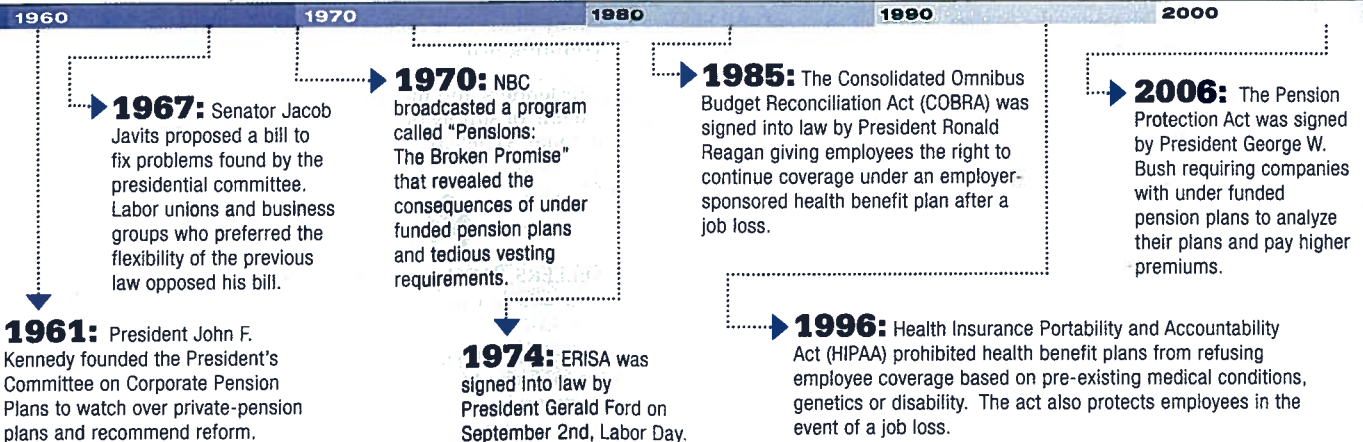
"How the market has performed over the last 10 years has a significant impact on people retiring in the next 10 years, so the fact that we're in the middle of a recession has brought this issue to the forefront," McLeod says.

Rick Mitchell, the firm's managing director, says *LaRue* essentially "opened the courthouse doors" for ERISA litigation from the day it was handed down, especially for an employee who feels the reason he doesn't have enough saved is because the fiduciary duties of the plan sponsor were not properly observed.

The real issue, McLeod says, is the

ERISA TIMELINE

BY BARBARA SILOR



Rick Mitchell (left) and Douglas McLeod, with Mitchell McLeod Pugh & Williams, a Mobile-based investment advisory firm



proliferation of conflicts of interest and hidden fees built into the structure of some 401(k) plans, and the often inadvertent failure of the plan sponsor to act as the fiduciary.

"It means you can't have a conflict of interest on any level, and you have to disclose all of your fees, but the problem is you've got all of these plans being carried out by people who don't have any fiduciary responsibility to do so."

At its core, it's an issue of the tremendous gap between "do your client no harm" and doing what's best for the person represented, Mitchell says.

For example, a plan sponsor might request an index fund be placed in his plan, McLeod says. An individual operating in a fiduciary capacity has the responsibility to provide the lowest-cost index fund, but an individual not acting in that capacity isn't held to the same standard and is not required to disclose the fact that the fees associated with the transaction are 10 times that of the lower-cost option.

"Plan participants are getting the short end of the stick twice because in these instances investments are not being selected on investment merits but by how much the investment advisor, who is not a fiduciary, gets paid," McLeod says.

CONSUMERS — THROUGH ERISA — HAVE THE RIGHT TO NOT ONLY SUE THE PLAN SPONSOR BUT THE COMPANY AND ITS MANAGEMENT.

And then there's the issue of timing.

"As long as markets were headed up, people really weren't that concerned with digging into retirement funds, but now there's a lot of understandable

consternation and bewilderment, and so now plan participants realize they have the opportunity to sue for breach of fiduciary responsibility and are more likely to do so," Mitchell says.

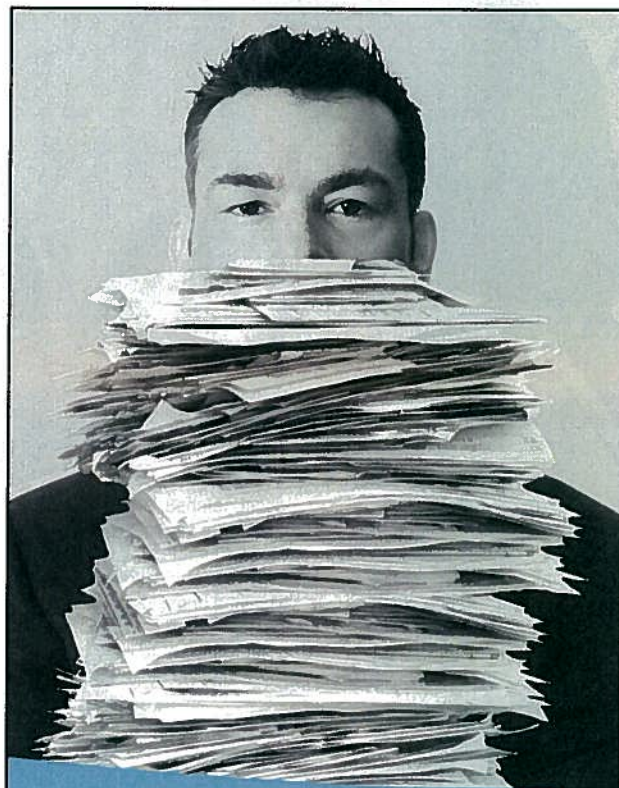
And with more than 50 million people holding 401(k) plans and relying on these vehicles to provide for their retirement, "the importance at the individual level is just staggering," McLeod says.

In a perfect world, Mitchell says, all funds should be chosen on their individual merits, not on revenue sharing speculation or for proprietary considerations, and McLeod says that is precisely what gives LaRue its teeth.

It's not a perfect world, and now consumers — through ERISA — have the right to not only sue the plan sponsor, but the company and its management for personal assets.

"A pure heart and empty mind is just not an excuse," McLeod says.

Kelli Dugan is a freelance contributor to Business Alabama. She lives in Mobile.



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