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Publications

Supreme Court Limits Ability of Pension Plan Participants to Sue for Fiduciary Breach

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In *Thole v. U.S. Bank*, the Supreme Court held that defined benefit plan participants who are receiving their full pension benefit lack constitutional standing to bring a lawsuit alleging that the plan fiduciaries breached their duties. Below, we briefly summarize the *Thole* case, analyze the Court's decision, and discuss implications for fiduciaries of defined benefit plans.

The Plaintiffs' Allegations

James Thole and Sherry Smith ("plaintiffs") are retired participants in a defined benefit pension plan sponsored by U.S. Bank. Thole receives a monthly pension benefit from the plan of $2,198.38, and Smith receives a monthly benefit of $42.26. The plaintiffs filed a putative class action against U.S. Bank and the plan's fiduciaries, alleging that a failure to prudently manage the plan's investments—by, for example, making investments in high-risk equities and U.S. Bank's proprietary mutual funds—between 2007 and 2010 caused losses to the plan of approximately $750 million. The plaintiffs did not allege that their monthly benefits (or benefits of any other members of the putative class) were impacted as a result of the alleged fiduciary breach. Rather, as the Court pointed out, the plaintiffs "have been paid all of their monthly pension benefits so far, and they are legally and contractually entitled to receive those same monthly payments for the rest of their lives."

Court Holds That Plaintiffs Lack Constitutional Standing

The Court, in a 5-4 majority opinion authored by Justice Kavanaugh, held that because the plaintiffs had not sustained any concrete injury as a result of the alleged breaches of fiduciary duty, they lacked standing to sue under Article III of the Constitution. The Court's decision turned on the fact that, as participants in a defined benefit plan, the plaintiffs had received and would continue to receive fixed payments from the plan each month, regardless of the fiduciaries' investment decisions. As Justice Kavanaugh put it, the plaintiffs would not receive "a penny more" in benefits if they won the lawsuit, and would not receive "a penny less" if they lost. Thus, the plaintiffs lacked the "injury in fact" required to establish standing under Article III of the Constitution.

In holding that the plaintiffs lacked standing, the Court made the following points:

1. <u>Trust law does not apply</u>. The Court rejected the plaintiffs' argument that participants in a defined benefit plan possess an equitable interest in the plan's assets under trust law principles such that injury to the plan is injury to the plan's participants. Instead, the Court reasoned that, in contrast to beneficiaries of private trust or defined contribution plan participants, the participants in a defined benefit plan have contractual rights to fixed payments, regardless of the experience of the plan assets.

2. <u>No derivative standing</u>. The Court also rejected the plaintiffs' argument that they had standing to sue on behalf of the plan. The Court found that the plaintiffs, themselves, must still have suffered a concrete injury and have a stake in the outcome of the litigation – merely alleging an injury to the plan was not sufficient.

3. <u>ERISA section 502 does not confer constitutional standing</u>. The Court rejected the argument that the plaintiffs had constitutional standing because ERISA section 502(a) provides participants with a statutory right to sue for losses resulting from a fiduciary breach. The Court emphasized that a statutory right to sue does not automatically confer constitutional standing – a plaintiff still must allege a concrete injury herself or himself.

4. <u>Fiduciary duties are enforced by other parties</u>. The plaintiffs argued that plan participants must have standing to sue for fiduciary breach because no other party (such as the plan sponsor or fiduciaries themselves) will be incentivized to hold fiduciaries accountable. The Court rejected the argument as a basis for constitutional standing. The Court further pointed out that the plan sponsor, who will be responsible for any underfunding caused by imprudent asset management in a defined benefit plan, is highly motivated to ensure fiduciaries are discharging their duties. Additionally, the Department of Labor is authorized under ERISA to enforce ERISA's fiduciary obligations, and should be motivated to do so to avoid employer default and takeover of the plan by the PBGC.

Notably, the Eighth Circuit, from which this appeal was brought, focused its decision affirming dismissal of the plaintiffs' claims on the fact that the plan became *over*funded over the course of the litigation at the district court. The Court of Appeals concluded that, as a result, the plaintiffs lacked *statutory* standing under ERISA sections 502(a)(2) and (a)(3). By contrast, the Supreme Court held that the plaintiffs lack *constitutional* standing, and did not base its decision on the fact that the plan was overfunded. In fact, the Court suggested that unless the plaintiffs allege that the fiduciary breaches put the plan sponsor at risk of default (and therefore unable to fulfill its obligation to provide participants with retirement benefits), plaintiffs in defined benefit plans could not show any injury for the purpose of constitutional standing. As Justice Kavanaugh put it, "a bare allegation of plan underfunding does not itself demonstrate a substantially increased risk that the plan and the employer would both fail."

Is Defined Benefit Litigation Dead?

While the Supreme Court's decision was likely welcomed by plan fiduciaries and ERISA defense lawyers alike, fiduciaries and practitioners should take care not to mark a gravestone on defined benefit fiduciary breach litigation just yet. To be sure, the Court established a higher threshold for pleading constitutional standing than many lower courts had imposed previously on participants in defined benefit plans. That higher threshold likely will discourage some plaintiffs' firms from filing lawsuits relating to defined benefit plans. However, plaintiffs may well be able to plead a sufficient injury in some circumstances – such as when a defined benefit plan participant fails to receive promised benefits payments as a result of the alleged fiduciary breach – to establish standing, even under the legal standard announced in *Thole*. There may also be claims based on certain forms of benefits that are more likely to survive a motion to dismiss. Therefore, plan fiduciaries should continue to focus on the processes and procedures they use to establish compliance with ERISA's fiduciary duty provisions.

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