ROPES & GRAY

**ALERT ▪** Executive Compensation & Employee Benefits

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# Supreme Court Significantly Raises the Bar for Defined Benefit Plan Participants to File ERISA Fiduciary Breach Lawsuits, but the Risk of Lawsuit Remains

On June 1, 2020, the U.S. Supreme Court ruled in *Thole v. U.S. Bank N.A.* that participants of defined benefit plans lack standing under Article III of the U.S. Constitution to sue fiduciaries for alleged failures to satisfy their duties under ERISA, if the participants cannot establish that they have experienced individual financial loss or the imminent risk thereof. The Court held in a 5-4 opinion that the plaintiffs did not have a stake sufficient to bring a lawsuit because they had received all of their vested monthly pension benefits to date and had not shown how the alleged mismanagement of the pension plan substantially increased the risk that the plan would be unable to pay their future entitlements. As a practical matter, this should make it harder for plan participants to bring suits of this nature in the future.

While the decision may be a welcome outcome for sponsors and fiduciaries of defined benefit plans, it should not be read as a license to relax any aspect of the fiduciary decision-making process or minimize the importance of meticulous documentation.

In *Thole*, plaintiffs James Thole and Sherry Smith had filed a putative class action suit in 2014 against U.S. Bank and related entities for alleged mismanagement of its defined benefit pension plan from 2007 to 2010, claiming that the plan had been over-allocated to equities and proprietary mutual funds and those allocations and a lack of diversification caused the plan to lose nearly $750 million and become underfunded in 2008. The plaintiffs argued that such investment decisions violated ERISA's duties of loyalty and prudence. U.S. Bank filed a motion to dismiss the complaint, claiming that the plaintiffs had not suffered any financial loss because U.S. Bank provided a cash infusion to enable the plan to meet minimum funding requirements by 2014, and the plaintiffs were never at risk of losing their vested benefits. The U.S. District Court in Minnesota dismissed the case, and the U.S. Court of Appeals for the Eighth Circuit affirmed, on the basis that the plaintiffs lacked statutory standing under ERISA.

The Supreme Court was asked to address three main issues: (1) whether a plan participant or beneficiary may seek injunctive relief against fiduciary misconduct under ERISA without demonstrating individual financial loss or the imminent risk thereof; (2) whether a plan participant or beneficiary may seek restoration of plan losses caused by a fiduciary breach under ERISA without demonstrating individual financial loss or the imminent risk thereof; and (3) whether or not the plaintiffs had demonstrated Article III standing. The majority opinion, written by Justice Kavanaugh, focused on the third issue in affirming the Eighth Circuit's judgment.

The plaintiffs had argued that they suffered harm even though they received all payments due to them, because ERISA participants have an equitable or property interest in the plan (similar to the beneficiary of a trust), and, therefore, injuries to the plan were injuries to the person. The Court rejected that argument, finding that defined benefit plan participants are not similarly situated to beneficiaries of a private trust, and as a result, no such interest exists, and that "the value of the trust property and the ultimate amount of money received by the beneficiaries will typically depend on how well the trust is managed, so every penny of gain or loss is at the beneficiaries' risk. By contrast, a defined benefit plan is more in the nature of a contract."

The plaintiffs also asserted standing as representatives of the plan, but the Court ruled that the plaintiffs had to have an injury-in-fact that gives them "a sufficiently concrete interest in the outcome of the issue in dispute," which they did not have here.

The plaintiffs further argued that ERISA confers on participants and beneficiaries a general cause of action to sue for restoration of plan losses and other equitable relief. The Court rejected this argument, finding that a statutory right to sue (as in ERISA Section 502) does not automatically satisfy the "injury-in-fact requirement" under Article III.

Finally, the plaintiffs offered a policy-based argument that if they could not sue, no one would be able to meaningfully regulate fiduciary behavior. In response, the Court explained how it has rejected similar arguments as a basis for Article III standing in the past.

In rejecting these arguments, the majority focused on the fact that this was a defined benefit plan as opposed to a defined contribution plan, where the management of the plan affects participants' benefits. The Court explained that "misconduct by the administrators of a defined benefit plan will not affect an individual's entitlement to a defined benefit unless it creates or enhances the risk of default by the entire plan." In dicta, Justice Kavanaugh appeared to go one step further, stating that "even if a defined benefit plan is mismanaged into plan termination, the federal [Pension Benefit Guaranty Corporation] by law acts as a backstop and covers the vested pension benefits up to a certain amount and often in full…[and] any increased-risk-of-harm theory of standing therefore might not be available for plan participants whose benefits are guaranteed in full by the PBGC." After taking into consideration the backstop of the PBGC, participants and plaintiffs' firms are now left wondering at what point a plan will be in such precarious condition financially that it may be unable to satisfy its future obligations to plan participants.

In a concurring opinion joined by Justice Gorsuch, Justice Thomas reasoned that in cases where a plaintiff sues to vindicate private rights, typically the courts have found the plaintiff to have a de facto injury if his or her personal or legal rights were invaded. However, since, in the case of a defined benefit plan, employers owe their fiduciary duties to the plan and not to the participants, no such rights were invaded here. Justice Thomas also took issue with the plaintiffs' trust law-based argument for interpreting ERISA, stating that the Court should reconsider its reliance on "loose analogies in both our standing and ERISA jurisprudence."

In a blistering and lengthy dissent joined by Justices Ginsburg, Breyer, and Kagan, Justice Sotomayor argued that the plaintiffs had a "concrete injury" sufficient for Article III standing for three independent reasons. First, the plaintiffs had an interest in protecting the "financial integrity" of the plan, just as private trust beneficiaries have an interest in protecting their trust. Since ERISA expressly requires a trust to be used to hold plan assets, the plaintiffs had an equitable interest in their retirement plan as they would under trust law.

Second, the dissent argued that the plaintiffs had standing because a breach of a fiduciary duty, regardless of the financial harm or lack thereof, would be sufficient to find an adequate injury. Based on the history of trust law, it asserted, the right to sue based on a breach of fiduciary duty alone is sufficient for standing.

Finally, Justice Sotomayor found that the plaintiffs should be able to sue on behalf of the plan even if fiduciary duties are owed to the plan under either theory above. Since the plan is a legal fiction, the Court's representational standing doctrine would permit the plaintiffs to sue on behalf of the plan. Justice Sotomayor concluded by noting how the majority's opinion would cause "harmful consequences" to defined benefit plan participants, leaving them on their own to deal with fiduciary misconduct without the opportunity to seek the appropriate legal remedies in court.

The Court's ruling in *Thole* will likely further curtail the number of class action lawsuits brought against sponsors and fiduciaries of defined benefit plans—a trend that has been underway for years as the number of defined benefit pension plans has continued to dwindle. Nonetheless, the opinion seems to imply that the standing question comes down to a facts-and-circumstances inquiry in deciding at what point the plan's financial condition has become so dire that it would give participants standing to sue fiduciary misconduct in causing the plan's financial harm. This inquiry may be further complicated if the PBGC's funded status suffers a downturn in the future. The Court did not provide any guidelines for this facts-and-circumstances inquiry. In the absence of such direction, defined benefit plan fiduciaries should continue to maintain robust governance protocols and ensure that their actions are well deliberated and diligently documented.