June 11, 2020

U.S. Supreme Court Limits Standing for ERISA Plan Participants to Sue for Breach of Fiduciary Duties

Key Takeaways

- In ***Thole* v. *U.S. Bank N.A.***, the Supreme Court held that participants in a defined-benefit pension plan governed by ERISA lacked Article III standing to sue for breaches of fiduciary duties if they had not suffered personal financial injury.

- Going forward, participants in defined-benefit plans seeking to bring suit against plan fiduciaries under ERISA will have the burden to show how the outcome of the lawsuit will affect their individual entitlement to retirement benefits prior to plan and employer default.

- The reasoning of *Thole* may apply with equal force in the context of defined-contribution plans, at least where the plan participants' claims concern specific investment options in the plan that they did not select.

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On June 1, 2020, the Supreme Court held in ***Thole* v. *U.S. Bank N.A.***[1] that participants in a defined-benefit pension plan governed by the Employee Retirement Income Security Act of 1974, commonly known as ERISA, lack Article III standing to sue the plan's fiduciaries based on losses to the plan that do not result in individual financial injury. The *Thole* petitioners lacked such an injury because, regardless of the alleged losses to the plan, they remained legally and contractually entitled to receive the same monthly payments in the future. As a result of the decision, participants in defined-benefit plans governed by ERISA will largely be unable to rely on losses to the plan or its funding status alone to pursue litigation against plan fiduciaries.

Below, we describe the legal framework, the factual background, the Court's decision, and its implications.

Legal Framework

ERISA pension plans take two forms: defined-contribution plans and defined-benefit plans. In a defined-contribution plan, each participant has an individual account to which contributions are made, and the

1 No. 17-1712, 2020 WL 2814294 (U.S. June 1, 2020).

participant receives benefits tied to the balance of that dedicated account.[2] Because of that arrangement, investment decisions made by plan fiduciaries can directly affect the benefits due to the participant. A common example is a 401(k) plan.

In a defined-benefit plan, the trustees manage a general pool of assets to which contributions are added, and the participant receives a fixed periodic payment upon retirement.[3] Unlike the benefits under a defined-contribution plan, the benefits under a defined-benefit plan do not fluctuate with the value of the plan or the investment decisions made by the plan fiduciaries.[4] ERISA imposes complex minimum-funding requirements for defined-benefit plans,[5] and some of those plans are further insured by the Pension Benefit Guaranty Corporation, a federal agency housed within the Department of Labor.[6]

Regardless of the type of plan at issue, ERISA imposes duties of loyalty and prudence to plan beneficiaries on plan fiduciaries.[7] Plan participants can enforce these duties through private rights of action that ERISA creates. Of particular relevance here, Section 1132(a)(2) of ERISA authorizes participants to file suit to hold fiduciaries "personally liable to make good to such plan any losses to the plan resulting from each such breach," and provides for "other equitable or remedial relief."[8] In addition, Section 1132(a)(3) authorizes suit "to enjoin any act or practice which violates any provision of" ERISA, or for other "appropriate equitable relief."[9]

Facts and Procedural History

The petitioners in *Thole* were participants in U.S. Bank's defined-benefit retirement plan; respondents were U.S. Bank and other fiduciaries that managed the plan. The plan participants filed suit in the U.S. District Court of the District of Minnesota on behalf of the plan, alleging that the plan fiduciaries violated their duties of loyalty and prudence under ERISA by making certain investment decisions. The plan participants invoked Section 1132(a)(2) to recover the losses allegedly suffered by the plan; they invoked Section 1132(a)(3) to obtain an injunction against the alleged misconduct and replacement of the plan's fiduciaries.

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2 29 U.S.C. § 1002(34); *see also Hughes Aircraft Co.* v. *Jacobson*, 525 U.S. 432, 439 (1999).

3 29 U.S.C. § 1002(35); *see also Hughes*, 525 U.S. at 439.

4 *Hughes*, 525 U.S. at 440–41.

5 29 U.S.C. § 1083.

6 29 U. S. C. § 1302.

7 29 U.S.C. § 1104(a)(1).

8 29 U.S.C. §§ 1109(a), 1132(a)(2).

9 29 U.S.C. § 1132(a)(3).

The fiduciaries moved to dismiss the complaint for lack of Article III standing, arguing that the participants had not alleged that the relevant investment decisions had resulted in a reduction of their benefits. The district court initially denied the motion, but it later concluded that the action was moot after U.S. Bank made additional contributions to bring the plan's assets above ERISA's minimum-funding threshold.[10] A partially divided panel of the U.S. Court of Appeals for the Eighth Circuit affirmed on alternative grounds, holding that the plan participants could not state a claim under Section 1132(a)(2) or (3) because they could not demonstrate actual or imminent financial loss now that the plan was overfunded.[11]

The Supreme Court granted certiorari to consider whether participants in an overfunded defined-benefit plan could state a claim under Sections 1132(a)(2) and (3). The Court also asked the parties to brief an additional question suggested by the U.S. Solicitor General: whether the plaintiffs had Article III standing.

The Supreme Court's Decision

In a 5-4 decision written by Justice Kavanaugh, the Supreme Court held that the plan participants lacked Article III standing to pursue their claims against U.S. Bank and the other plan fiduciaries. The Court explained that, as participants in a *defined-benefit* plan, the participants had both received and remained entitled to receive the same fixed monthly benefit payments whether they won or lost in the litigation. The Court thus concluded that the participants lacked a "concrete stake" in the litigation, as Article III requires.[12]

The plan participants and the Solicitor General had offered a number of contrary arguments, but the Court rejected each of them.

The plan participants had first argued that, like the beneficiaries of traditional trusts, the plan participants had standing to sue for breaches of fiduciary duty even in the absence of monetary losses. The Court disagreed.[13] Defined-benefit plans, the Court explained, are "more in the nature of a contract" than a trust: the benefits paid are not tied to the value of the plan, and the employer is entitled to any surplus and obligated to cover any shortfalls.[14] The Court thus concluded that participants in defined-benefit plans "possess no equitable or property interest in the plan" that might allow them to sue in the absence of monetary loss, as trust law sometimes permits.[15]

10 *Adedipe* v. *U.S. Bank, N.A.*, Civ. No. 13-2687, 2015 WL 11217175, at *1, *4 & n.4 (D. Minn. Dec. 29, 2015).

11 *Thole* v. *U.S. Bank, N.A.*, 873 F.3d 617, 626–30 (8th Cir. 2017).

12 2020 WL 2814294, at *3, *5.

13 *Id*. at *3.

14 *Id*.

15 *Id*.

The plan participants also contended that they had Article III standing to sue as representatives of the plan. Drawing on its cases discussing third-party standing, the Court held that, absent some special legal relationship, plan participants could sue on behalf of the plan only when the participants had *themselves* suffered a concrete injury caused by the challenged conduct.[16]

The participants next contended that they had standing because ERISA created statutory rights of action for beneficiaries in their position to bring suit for breach of fiduciary duty. The Court again disagreed, underscoring that "Article III standing requires a concrete injury even in the context of a statutory violation."[17]

The participants finally lamented that "no one will meaningfully regulate plan fiduciaries" if participants in defined-benefit plans lack standing in the absence of financial loss.[18] But the Court noted that it "has long rejected" the argument that a party must have standing if a lack of standing would mean that "no one would have standing."[19] The Court further explained that fiduciaries of ERISA defined-benefit plans "face a regulatory phalanx," and that employers possess "strong incentives to root out fiduciary misconduct."[20]

Separately, the Solicitor General had suggested that participants in defined-benefit plans may have Article III standing "if the mismanagement of the plan was so egregious that it substantially increased the risk that the plan and the employer would fail and be unable to pay the participants' future pension benefits."[21] The Court declined to resolve the viability of that standing theory, however, because the plan beneficiaries had not pursued that argument at the Supreme Court.[22]

Justice Thomas, joined by Justice Gorsuch, wrote a concurring opinion to explain that, in his view, the Court's ERISA case law focused too heavily on analogies to trust law and too little on the statutory text.[23]

Justice Sotomayor, joined by Justices Ginsburg, Breyer, and Kagan, dissented. In their view, the plan participants had standing under various principles of trust law, including that the participants had an equitable property interest in the plan's assets; that trust beneficiaries could sue for breaches of fiduciary

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16 *Id*. at *4.

17 *Id*. (quoting *Spokeo, Inc.* v. *Robins*, 136 S. Ct. 1540, 1549 (2016)).

18 *Id*. at *4.

19 *Id*. (quoting *Valley Forge Christian College* v. *Americans United for Separation of Church and State, Inc.*, 454 U. S. 464, 489 (1982)).

20 *Id*. at *4.

21 *Id*. at *5.

22 *Id*.

23 *Id*. at *6.

duties without proof of financial injury; and that representative suits on behalf of a trust are permissible when the trustee cannot or will not pursue a claim for breach of a fiduciary duty.[24]

Implications

As a result of the decision in *Thole*, it will be difficult for plaintiffs to bring fiduciary breach claims on behalf of defined-benefit plans that meet ERISA's minimum-funding requirement. In that situation, participants are unlikely to be able to show that their individual entitlement to benefits is at risk, let alone actually compromised. And even if the plan is underfunded, the reasoning of *Thole* suggests that plan participants would bear the high burden of showing that the underfunding will in fact impair their retirement income stream, given that their legal and contractual entitlement to the same level of benefits is unaffected unless the plan and employer default.

As noted above, the Court left open the question whether participants in a defined-benefit plan can establish Article III standing by showing that a breach of fiduciary duty substantially increases the risk of individual financial harm. That question will likely be a central focus in future ERISA benefits litigation. While the opinion in *Thole* does not clarify what types of risk would suffice, it suggested that the plaintiff would at least have to demonstrate a substantial risk of plan and employer default—and, perhaps, that the Pension Benefit Guaranty Corporation will not provide a backstop for vested benefits. Notably, some federal courts of appeals that have considered such risk-based theories of standing held that plan participants must show that the risk to individual benefits is not "dependent on the realization of several additional risks" to the plan and the employer, "which collectively render the injury too speculative to support standing."[25]

In addition, the decision in *Thole* could invite litigation over the standing of participants in defined-*contribution* plans who sue on behalf of their plans to challenge investment options that their own individual accounts did not elect.[26] After *Thole*, those participants may lack a concrete stake in the litigation because their own benefit levels will not change whether they win or lose. Any extension of *Thole* along those lines would of course be significant, given the prevalence of defined-contribution plans and the proliferation of litigation challenging fees and expenses connected to specific investment options in those plans.

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24 *Id*. at *7–18.

25 *See, e.g.*, *Lee* v. *Verizon Communications, Inc.*, 837 F.3d 523, 546 (5th Cir. 2016); *David* v. *Alphin*, 704 F.3d 327, 338 (4th Cir. 2013).

26 *See* Brief of the Chamber of Commerce of the United States et al. at 23-24 & n.12, *Thole*, No. 17-1712 (filed Nov. 19, 2020) (discussing such cases).

This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

Susanna M. Buergel +1-212-373-3553 sbuergel@paulweiss.com	Andrew J. Ehrlich +1-212-373-3166 aehrlich@paulweiss.com	Andrew L. Gaines +1-212-373-3339 againes@paulweiss.com
Brad S. Karp +1-212-373-3316 bkarp@paulweiss.com	Daniel J. Kramer +1-212-373-3020 dkramer@paulweiss.com	Jean M. McLoughlin +1-212-373-3135 jmcloughlin@paulweiss.com
Lorin L. Reisner +1-212-373-3250 lreisner@paulweiss.com	Walter Rieman +1-212-373-3260 wrieman@paulweiss.com	Kannon K. Shanmugam +1-202-223-7325 kshanmugam@paulweiss.com
Brette Tannenbaum +1-212-373-3852 btannenbaum@paulweiss.com	Lawrence I. Witdorchic +1-212-373-3237 lwitdorchic@paulweiss.com	

Associates William T. Marks and Melina M. Meneguin Layerenza contributed to this Client Memorandum.