The Supreme Court Limits Standing to Sue in Cases Involving Defined Benefit Plans

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On June 1, 2020, the U.S. Supreme Court issued its decision in *Thole v. U.S. Bank, N.A.*, 2020 WL 2814294 (2020). The majority opinion — written by Justice Kavanaugh — is likely to have a significant impact on ERISA litigation involving defined benefit plans. While the decision may also have some impact in cases involving defined contribution plans, like 401(k) plans, language in the opinion highlighting the difference between those two types of plans might result in courts applying the decision more narrowly.

A very brief refresher regarding the distinction between defined benefit plans and defined contribution plans helps put *Thole* in some context. A defined benefit plan, as the name implies, provides participants with a specific benefit upon retirement for the duration of their lives. The amount of each participant's benefit is typically expressed as a formula using three factors — the number of years of service, an average of the employee's final (or highest) salary years, and a benefit multiplier. The employer is required to fund the plan trust and is therefore incentivized to invest the assets so that the plan meets its obligation to pay benefits owed to all participants.

By contrast, in a defined contribution plan, the total of the amounts contributed to a participant's account (employer and employee contributions, and forfeitures), plus earnings, dictates the amount of plan benefits to be paid to a participant. The plan fiduciary (either the plan sponsor or a designated investment fiduciary) is responsible for prudently selecting investment options. Employers and other plan fiduciaries may be held liable for failing to prudently select plan investment options — for example, by selecting and continuing to offer unnecessarily expensive investment funds when less expensive options with similar risk profiles are available.

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The plaintiffs in *Thole* (James Thole and Sherry Smith, participants in U.S. Bank's defined benefit pension plan) alleged that the plan's fiduciaries breached their duties to the plan by mismanaging its investments, in turn causing the plan to incur some $750 million in losses. The primary issue before the Court was whether the plaintiffs had standing under Article III of the U.S. Constitution to bring an action to recover those losses. Article III standing requires that plaintiffs in lawsuits be able to demonstrate a tangible "injury-in-fact" — a personal stake in the outcome of the litigation.

Justice Kavanaugh noted at the outset that the two named plaintiffs were each entitled to specific monthly benefit amounts for the remainder of their lives, and that to date, they had each received all amounts to which they were entitled. And in his opinion — joined by the four other justices in the Court's conservative wing — that fact meant that neither of the named plaintiffs had standing to pursue their claims, because neither could demonstrate that they had sustained any loss due to the defendants' alleged fiduciary breaches. As stated in the majority opinion:

> Thole and Smith have received all of their monthly benefit payments so far, and the outcome of this suit would not affect their future benefit payments.If Thole and Smith were to *lose* this lawsuit, they would still receive the exact same monthly benefits that they are already slated to receive, not a penny less. If Thole and Smith were to win this lawsuit, they would still receive the exact same monthly benefits that they are already slated to receive, not a penny more. The plaintiffs therefore have no concrete stake in this lawsuit.

The United States filed a "friend of the court brief" in favor of plaintiffs, and asserted that plaintiffs had standing if the plan's mismanagement 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 benefits." The majority opinion dispensed with this argument on the grounds that the plaintiffs themselves did not clearly claim that the alleged mismanagement of the plan substantially increased the likelihood that both the plan and U.S. Bank would be unable to pay their future pension benefits. The Court also noted that "…a bare allegation of plan underfunding does not itself demonstrate a substantially increased risk that the plan and the employer would both fail." That language is likely to make it very difficult for future plaintiffs to be able to proceed with claims that mismanagement of a defined benefit plan suffices to confer standing on participants, unless they can plead facts showing they are facing an imminent risk of loss due to the failure of both the plan and the employer.

Thole is therefore likely to have a chilling impact on plaintiffs bringing claims complaining about *defined benefit plan* mismanagement. But what effect will the decision have on litigation relating to *defined contribution plans*? The issue is a significant one, because the vast majority of ERISA cases challenging fiduciary conduct in recent years involve 401(k) and 403(b) plans. Will those cases be stymied by *Thole* as well? It seems relatively unlikely, because the majority opinion took pains to note the distinction between the two types of plans, and seemed to take for granted that defined contribution plan participants may suffer direct losses to their individual accounts due to fiduciary mismanagement:

> In a defined-benefit plan, retirees receive a fixed payment each month, and the payments do not fluctuate with the value of the plan or because of the plan fiduciaries' good or bad investment decisions. By contrast, in a defined-contribution plan, such as a 401(k) plan, the retirees'

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> benefits are typically tied to the value of their accounts, and the benefits can turn on the plan fiduciaries' particular investment decisions.

The majority opinion also rejected plaintiffs' attempt to analogize to private trust law, which has informed the Court's ERISA jurisprudence for decades. Specifically, the Court rejected plaintiffs' argument that, just as beneficiaries of a private trust have standing to sue for losses to the trust caused by fiduciary misconduct, so too should participants in a defined benefit plan have standing to sue the plan's fiduciaries for losses to the plan. The Court reasoned that a defined benefit plan "is more in the nature of a contract," in that the benefits to which participants are entitled are not tied to the value of the plan. In a concurring opinion, Justice Thomas, joined by Justice Gorsuch, took this distinction one step further by objecting to the Court's reliance on the common law of trusts as a "starting point" for interpreting ERISA. Should this philosophy take hold, it would represent a departure from past Supreme Court jurisprudence and could signal a possible reduction in the scope of remedies available in future ERISA cases.

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