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BENEFITS REPORT

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

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JUNE 2020

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.

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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.

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' 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.

IRS Issues Coronavirus-Related FAQs for Retirement Plans and IRAs

ADRINE ADJEMIAN
AND ROBERT R. GOWER

JUNE 2020

On May 4, 2020, the Internal Revenue Service (IRS) issued a limited set of FAQs providing administrative guidance addressing the special "coronavirus-related distribution" (CRD) and plan loan provisions under the Coronavirus Aid, Relief, and Economic Security Act (the "CARES Act"). As anticipated, the guidance draws heavily from IRS Notice 2005-92, which provided administrative clarifications for the Katrina Emergency Tax Relief Act of 2005 (KETRA), a law that provided for relief similar to the CARES Act in the wake of Hurricane Katrina.

Background

The CARES Act provides that plan sponsors may allow qualified individuals who are participants in eligible defined contribution retirement plans, such as 401(k), 403(b), governmental 457(b) plans and individual retirement plans (IRAs), to request CRDs up to an aggregate limit of $100,000 during the 2020 calendar year. A qualified individual is a participant who:

1. is diagnosed with SARS-CoV-2 or with coronavirus disease 2019 (COVID-19) by a test approved by the Centers for Disease Control and Prevention (CDC),
2. has a spouse or dependent who is diagnosed with SARS-CoV-2 or COVID-19 by a test approved by the CDC, or
3. experiences adverse financial consequences due to SARS-CoV-2 or COVID-19 as a result of being quarantined; being furloughed, laid off or having

work hours reduced; being unable to work due to lack of child care; having to close or reduce hours of a business owned or operated by the individual; or as a result of other factors as determined by the Secretary of the Treasury (or the Secretary's delegate).

An individual who takes a CRD from their retirement plan account will not be subject to the 10% early distribution penalty tax that would otherwise generally apply to distributions made prior to attaining age 59½. The CARES Act also allows participants to repay the CRD amount they received to an eligible retirement plan or eligible retirement account within three years from the distribution date.

Additionally, for plan loans made between March 27, 2020 and September 22, 2020, the CARES Act increases the maximum loan amount qualified individuals may borrow from eligible retirement plans (not including IRAs) to the lesser of 1) $100,000 (minus the amount of the qualified individual's outstanding plan loans), or 2) the individual's vested benefit under the plan. The CARES Act also permits plan sponsors to give qualified individuals up to an additional year to repay certain loans. If a plan loan is outstanding on or after March 27, 2020, and any repayment on the loan is due between March 27, 2020 and December 31, 2020, that repayment due date may be delayed for up to one year, and any payments after the suspension period must be adjusted to reflect the delay and any interest accruing during the delay.

FAQs

The CARES Act FAQs provide the following administrative clarifications with respect to CRDs:

- Plan sponsors have a choice whether, and to what extent, to provide for CRDs and/or enhanced CARES Act loan provisions. As an example, this means that a plan sponsor may choose whether to permit CRDs and, separately, decide whether to permit repayment of CRDs to the plan.
- A plan administrator may rely on an individual's certification that he or she satisfies the conditions to be a qualified individual in determining whether a distribution is a CRD, unless the administrator has actual knowledge to the contrary.
- The CARES Act CRD provisions permitting in-service withdrawals are limited to defined contribution 401(k), 403(b) and governmental 457(b) plans. Importantly, this means that CRDs are generally not available from a money purchase pension plan, unless the qualified individual otherwise has a distributable event.
- Regardless of whether a plan sponsor treats a distribution as a CRD, a qualified individual who receives a 2020 distribution by December 30, 2020 may still treat a distribution that meets the requirements to be a CRD as coronavirus-related on his or her federal income tax return.
- CRDs should be reported on the qualified individual's federal income tax return. The taxable portion of the distribution must be reported as income ratably over the 3-year period (2020, 2021, and 2022), unless the qualified individual chooses to include the entire amount as income in 2020.
- Qualified individuals who receive CRDs must use the Form 8915-E (which is expected to be available before the end of 2020) to report any repayment of a CRD and to determine the amount of any CRD includible in income for the year, regardless of whether such individual is required to file a federal income tax return.
- The payment of a CRD must be reported by the plan on the Form 1099-R even if the qualified individual repays the CRD in the same year. The FAQs do not describe how he CRDs should be reported, but the IRS expects to provide more information on that later this year.
- The IRS and the Treasury Department are formulating additional guidance which they intend to release in the near future and which will likely further apply the principles of its guidance set forth in IRS Notice 2005-92 under KETRA. Additional guidance may also be issued to expand the list of factors taken into account to determine whether an individual is a qualified individual as a result of experiencing adverse financial consequences.

FIRM NEWS

On March 26, **Mary Powell, Kevin Nolt, Robert Gower** and **Lindsay Docto** presented a Trucker Huss Webinar, *COVID-19 Impact on Employee Benefit Plans*. Topics included recent federal healthcare legislation and IRS guidance for high deductible health plans.

On April 8, **Angel Garrett** was a panelist on a webinar presented by the Asian American Bar Association (AABA) of the Greater Bay Area, *Workplace Shifts: Employment Issues During COVID-19*. Angel was also a speaker on AABA's May 16 online series: *Pathways to Law Conference Session #1 — Private Law Panel.*

On April 9, **Marc Fosse** and **Mary Powell** presented a Trucker Huss Webinar, *ERISA and Tax Considerations for Severance Benefit Plans*, discussing the relevant legal requirements and best practices for severance benefit plans.

On April 16, **Angel Garrett** was a moderator for a webinar, *COVID-19: Employment Issues in the Workplace and Beyond,* presented by the Asian Pacific American Bar Association of Silicon Valley.

On May 18, **Tiffany Santos** was a panelist on Part I of the ABA JCEB's Employee Benefits Spring Update Webinar Series, *Hot Topics for Health and Welfare Plans*.

On May 21, **Marc Fosse** was the featured speaker for a Western Pension & Benefit Council webinar on *Severance Benefit Plans.* As shelter-in-place continues, many employers are faced with decisions about whether to provide severance pay or benefits in connection with a reduction-in-force or layoff. The topics discussed during this presentation included relevant legal requirements and best practices.

On May 28, **Mary Powell, Sarah Kanter** and **Lindsay Docto** presented a Trucker Huss Webinar, *COVID-19 Guidance for Health Plans: Putting It All Together!*, providing an overview — plus some insights — on recent legislation, regulations and guidance issued in response to the COVID-19 pandemic.

On June 4, **Nick White** and **Freeman Levinrad** presented a Trucker Huss Webinar, *E-Disclosure – The DOL Regulations Are Finally Final!*, reviewing the much-anticipated final electronic disclosure regulations.

On June 4, **Angel Garrett** was a speaker on the Queen's Bench Bar Association's Education Committee webinar, *An Agent of Change in the Workplace: Developments Related to COVID-19*.

On June 11, **Angel Garrett** will be a panelist on the AABA webinar, *Staying Afloat in an Underwater Economy: A Post-Recession Practitioners Panel.*

On June 25, **Clarissa Kang** will be a panelist on the ABA Joint Committee on Employee Benefits webinar, *Intel v Sulyma — The Death of Constructive Knowledge and the Brave New World of ERISA Liability.* While on its surface this decision simply addresses a technical aspect of the scope of ERISA's 3-year statute of limitations provision, it has far-reaching consequences for how ERISA fiduciaries and plan service providers manage risk.

Effective July 1, **Kevin Nolt** will be President of the Governing Board of WP&BC. The Governing Board provides guidance to and coordination between all ten chapters of the WP&BC, and it partners with the National Institute of Pension Administrators (NIPA) in offering an annual conference for benefits professionals.

In the Spring 2020 edition of ASPPA's *Plan Consultant*, **Nick White**, **Sarah Kanter** and **Lindsay Docto** authored an article on California's Assembly Bill 5 (AB 5), which discussed how the new law — intended to restore workplace rights and protections for workers who have been misclassified as independent contractors — will affect employee benefit plans.

The Trucker ✦ Huss *Benefits Report* is published monthly to provide our clients and friends with information on recent legal developments and other current issues in employee benefits. Back issues of *Benefits Report* are posted on the Trucker ✦ Huss web site (www.truckerhuss.com).

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