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The Supreme Court Requires Concrete Injury to Sue a Defined Benefit Pension Plan

By Daniel Aronowitz, Kimberly Maher | June 29, 2020 | Fiduciary Liability

The Supreme Court of the United States has issued several surprising decisions at the end of the 2020 Spring Term. The closely watched June 1 decision in *Thole v. U.S. Bank*[i] is no exception. In a 5-4 split ruling, the Court held that defined benefit pension plan participants lacked standing to challenge alleged plan misconduct if that alleged misconduct did not jeopardize their ability to receive benefits. The Dissenting Opinion called the decision "remarkable," given that this high standing bar prevents pension plan participants from suing for alleged mismanagement of their pension until the plan is "on the verge of default." The *Thole* decision may have a real impact in slowing down the recent epidemic of class action cases that are now routinely filed against employee benefit plans.

The *Thole* Decision

Plaintiffs were two vested participants in the defined benefit retirement plan sponsored by U.S. Bank. Both were company retirees receiving a fixed monthly payment and who had, in fact, been paid all of their monthly benefit payments. They were contractually entitled to receive those same monthly payments for the rest of their lives. Even though they had not sustained any monetary injury, they filed a class action lawsuit against the fiduciaries of the plan for alleged mismanagement of the plan. Plaintiffs claimed that the plan fiduciaries violated the Employee Retirement Income Security Act's (ERISA) duties of loyalty and prudence by poorly investing the assets of the plan. Specifically, plaintiffs alleged that U.S. Bank invested all of the plan's $2.8 billion of the plan's assets in high-risk equities, including more than 40% in the bank's proprietary mutual funds, and paid itself excessive management fees. The plan lost $1.1 billion during the 2007-2008 recession, which the plaintiffs alleged was $748 million more than a prudently managed plan would have lost, and that this mismanagement was the cause of the plan being underfunded. After the lawsuit was filed, U.S. Bank contributed $350M to the plan, and the plan became fully funded.

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Based on the sizable contribution to the plan, the plaintiffs' attorneys filed a petition for at least $31 million in attorneys' fees. The district court dismissed the lawsuit, and the U.S. Court of Appeals for the Eighth Circuit affirmed the dismissal on the basis that the plaintiffs lacked statutory standing under ERISA because the participants had not suffered any actual losses since the plan had recovered to a healthy financial condition.

The Supreme Court affirmed the Eighth Circuit court decision, but on the ground that the plaintiffs lacked Article III standing because the outcome of the lawsuit would not affect their future benefit payments. Whether the plaintiffs won or lost, they would have continued to receive the same monthly pension payment. The Court thus concluded that they had "no concrete stake" in the lawsuit necessary to satisfy Article III standing.

The Court rejected all four of plaintiffs' standing arguments[ii]:

- Trust-Based Theory of Standing: Plaintiffs argued that an ERISA defined benefit plan participant possesses an equitable or property interest in the plan, so that injuries to the plan constitute injuries to the plan participants even if they have not suffered – or will not suffer – any individual monetary losses. The Court held that this trust-based theory of standing was flawed because a defined benefit plan is more in the "nature of a contract," and thus participants in a defined benefit plan are not similarly situated to the beneficiaries of a private trust [or to a defined contribution plan]. The Court characterized a defined benefit plan in the "nature of a contract": the benefits of plan participants are fixed and will not change, regardless of plan mismanagement. In the final analysis, "the employer, not plan participants, is on the hook for plan shortfalls."
- Representational Standing: Plaintiffs next argued that they can assert standing as representatives of the plan itself. The Court rejected this argument by explaining that without a legal or contractual assignment to represent the plan, litigants still must have suffered an injury in fact to represent the interests of others.
- Statutory Standing Under ERISA: Plaintiffs argued that they had standing under the general cause of action to sue for restoration of plan losses and other equitable relief under ERISA §§502(a)(2) and (3). But the Court held that Article III standing requires a concrete injury even in the context of a statutory violation, and plaintiffs have failed to allege a concrete injury.
- Lack of Regulatory Enforcement Without Private Lawsuits: Plaintiffs finally argued that no one will meaningfully regulate fiduciary misconduct of plan fiduciaries if plan participants cannot sue. The Court rejected this "faulty premise" on the grounds that "fiduciaries who manage defined-benefit plans face a regulatory phalanx." The Court reasoned that the Department of Labor has a substantial motive to aggressively pursue fiduciary misconduct, and the federal Pension Benefit Guaranty Corporation is required by law to pay the vested pension of retirees. Moreover, the Court stated that employers and shareholders have no rational incentive to mismanage retirement plans because they are on the hook for plan shortfalls.

The Court summarized that "[c]ourts sometimes make standing law more complicated than it needs to be." For the Court, it was straightforward analysis that the plaintiffs have received all of

their vested pension benefits so far, and the outcome of the plan mismanagement claims would have no impact on their monthly pension benefits. Consequently, they lacked a concrete stake in the dispute and therefore lacked Article III standing.

The Euclid Perspective

We are surprised by the ruling. We had predicted that the Supreme Court would grant standing to challenge alleged plan mismanagement even though the plan was subsequently overfunded. Pundits had argued that plan funding is subject to change based on market conditions, and thus funding should not be the litmus test for standing. Indeed, U.S. Bank did not fully fund its plan until the lawsuit was filed, and plaintiffs' counsel argued that they deserved substantial attorney fees [at least $31 million] for causing this cash infusion. Moreover, recent history has taught us that large companies are no longer guaranteed to last as long as their retirement plan obligations [witness Kodak, Polaroid, ToysRUS, Blockbuster, and Circuit City].

The most unexpected aspect of the majority analysis in *Thole* is that the decision did not rely on the funding status of the plan. Whereas the Eighth Circuit ruled that no statutory standing existed based on the restored funding of the plan, the Supreme Court did not base its decision on plan funding. It instead was more focused on the fact that the participants had no concrete injury since they were receiving their contractual benefits and the impact of the case would not affect their monthly payments. Given that the Court did not attach the funded/underfunded status of the plan to its standing analysis, this concrete injury requirement of the plaintiffs should be applicable to many of the ERISA class actions being filed in recent years, including against defined contribution plans. The higher constitutional standing standard should also apply to governmental and other types of plan in which the statutory standing rests under state law and not ERISA. We raise a few more perspectives below.

When Can Plan Participants Sue for "Increased Risk of Harm" or "Egregious" Mismanagement?: The scope of the ruling is, in the words of the dissent, "remarkable." Justice Sotomayor started her dissent summarizing the strict standing rule: "The Court determines that pensioners may not bring a federal lawsuit to stop or cure retirement-plan mismanagement until their pensions are on the verge of default," or as the Dissent further describes as "on the brink of financial ruin." The question is when can participants sue for alleged plan mismanagement to meet the new, higher standard – i.e., when is the plan on the "verge of default." The Dissent argues that the "Court seems to suggest that pecuniary injury is the *sine qua non* of standing." The majority opinion fleshes this out by summarizing plaintiffs' *amicus* position, namely that plan participants in a defined benefit plan should have standing to sue if the mismanagement of the plan is "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." The Court seem to endorse this standard, but held that it was not raised, nor would it apply, in the *Thole* case. Citing *LaRue v. DeWolff, Boberg & Associates, Inc.*, 552 U.S. 248, at 255, the Court stated that "a bare allegation of plan underfunding does not itself demonstrate a substantially increased risk that the plan and the employer would both fail." Indeed, "[m]isconduct 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." The Court even went further to clarify that any "increased-risk-of-harm" standing theory requires an analysis as to whether the PBGC insurance backstop applies.[iii]

A standing threshold of risk of default or pecuniary injury is even more problematic for multiemployer plans, particularly the 125 or more multiemployer plans that are in critical and declining status. It remains to be seen if multiemployer trustees of poorly funded plans can be sued for contributing to funding issues, particularly when the law now allows benefit changes for certain levels of funding impairment.[iv] Unlike a single employer plan like the U.S. Bank plan, multiemployer plans must rely on collective bargaining agreements and limited contribution tools under the Pension Protection Act to increase funding. The PBGC is also on the verge of bankruptcy, as the dissenting opinion noted, and the insurance benefit for multiemployer plans is not even close to the defined benefit contractual entitlement. Despite these obvious distinctions, the *Thole* decision still gives guidance for when multiemployer plan participants have standing to sue for alleged plan mismanagement in plans with funding issues.

Does the *Thole* Standing Test Apply to Defined Contribution Plans?:

While the *Thole* case involved a defined benefit plan, the question becomes whether the strict view of pension plan standing applies to defined contribution plans. The majority opinion stated that in a defined benefit retirement plan, retirees receive fixed monthly payments that "do not fluctuate with the value of the plan or because of the plan fiduciaries' good or bad investment decisions." By contrast, the court further noted, a retirees' benefits in a defined contribution 401k-type plan are tied to the value of their accounts, and the benefits are affected by the plan fiduciaries' particular investment decisions.

Within two weeks of the *Thole* decision, however, the Trustees of Columbia University filed a motion to partially reconsider an earlier ruling granting class action status in a lawsuit over the fees and investment options in the school's retirement plan. The trustees argued that the class action ruling should be pared down to exclude any claims challenging investment funds that the named plaintiffs did not personally hold. The Columbia plan trustees argued that "[a]lthough *Thole* arose in the context of a defined-benefit plan, its reasoning is unambiguous – individualized injury is a prerequisite to Article III standing for a fiduciary breach lawsuit."[v] Federal courts to date have disagreed as to whether defined contribution plan participants suing under ERSIA have standing to challenge plan investment options that they do not personally own.[vi] This is a significant issue as more than 120 excessive fee cases were filed in the last ten years against defined contribution plans, and lately two or three cases are being filed daily as plaintiff firms try to cash in on this latest class action trend.

Excessive Fee Case Thoughts: The Concurring Opinion from Justice Thomas bears further scrutiny.[vii] Justice Thomas asserted that the fiduciary duties created by ERISA are "owed to the plan, not petitioners," and thus participants have no legal or equitable ownership interest in the plan assets. He cites directly to the statute to support this position (though the Dissent demonstrates how prior case law refutes this position[viii].) But his further statement is more interesting. Justice Thomas stated that he "continue[s] to object to this Court's practice of using the common law of trusts as the 'starting point' for interpreting ERISA" because the starting point

in statutory construction should be the language of the statute itself. We find this point noteworthy because the most damaging proposition advanced by the plaintiff law firms in the avalanche of excessive fee cases against defined contribution plans is one based on trust law because ERISA does not have a specific standard or rule: specifically that plans with actively managed plans allegedly violate a fiduciary duty of care if these plans do not outperform a purported benchmark of market index funds with lower fees. In fact, the First Circuit Court of Appeals in *Brotherston v. Putnam Investments* adopted this view after asserting that "ERISA's borrowing of trust law principles is robust," and holding that "any fiduciary of a plan . . . can easily insulate itself by selecting well-established, low-fee and diversified market index funds. And any fiduciary that decides it can find funds that beat the market will be immune to liability unless a district court finds it imprudent in its method of selecting such funds, and finds that a loss occurred as a result. In short, these are not matters concerning which ERISA fiduciaries need cry 'wolf.'"[ix] The Supreme Court declined to decide the *Brotherston* case earlier this year. Therefore, plan sponsors need legislative or judicial help to prevent the unpredictable and expensive litigation risk that the First Circuit seems to endorse. To the extent that the higher standing bar in *Thole* slows the momentum of the opportunistic plaintiffs bar, beleaguered plan sponsors should welcome the minor relief, but we are not optimistic given the recent filing explosion. Plan sponsors and their insurance carriers have paid approximately $700 million to date in excessive fee settlements, including over $200 million in attorneys fee, and there is no end in sight.

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[i] *Thole v. US Bank*, No. 17-1712, slip op. (590 US ___, 1 June 2020).

[ii] A plan participant seeking to bring a lawsuit under ERISA must establish both statutory and constitutional bases for standing: (1) a statutory basis for the lawsuit under ERISA, and (2) and a constitutionally sufficient injury arising from the defendant's breach of fiduciary duty under ERISA.
[iii] *Thole v. US Bank*, No. 17-1712, slip op. (590 US __, 1 June 2020). Slip op. 8 at footnote 2: "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."
[iv] The Kline-Miller Multiemployer Pension Reform Act of 2014 (MPRA) established a new process for multiemployer pension plans to propose a reduction of pension benefits if a plan is expected to run out of money before all contracted benefits are paid to retirees. See https://www.treasury.gov/services/pages/benefit-suspensions.aspx
[v] *Cates et al v. The Trustees of Columbia University et al*, Docket No. 1:16-cv-06524 (S.D.N.Y. Aug 17, 2016) Court Docket. Defendant's Motion to Reconsider filed on June 16, 2020, at p. 5.
[vi] Courts have allowed plan participants to sue for fund options they did not hold in the Columbia University, Citigroup, Deutsche Bank, Cornell University, Yale University, and JPMorgan cases; but courts have ruled to the contrary in cases involving Georgetown University, Morgan Stanley, and Northrop Grumman.
[vii] *Thole v. US Bank*, No. 17-1712, slip op. (590 US ____, 1 June 2020) (Thomas, J, concurring, at 3).
[viii] *Id.* (Sotomayor, J, dissenting, at 15).
[ix] *Brotherston v. Putnam Invs., LLC,* 907 F.3d 17, 39, (2018).