Supreme Court Concludes Defined Benefit Pension Plan Participants Do Not Have Standing to Bring Breach of Fiduciary Duty Claim

By Jordan Mamorsky

The Supreme Court has long recognized that one of ERISA's principal purposes was to make "sure that if a worker has been promised a defined pension benefit upon retirement — and if he has fulfilled whatever conditions are required to obtain a vested benefit — he actually will receive it." *See e.g., Nachman Corp. v. Pension Ben. Guar. Corp., 446 U.S. 359, 375 (1980).* On June 1, 2020, the Supreme Court ratcheted this principle up another level, holding in *Thole v. U.S. Bank N.A.*, that defined benefit plan participants do not have Article III Constitutional standing (with some caveats) to bring a claim for breach of fiduciary duty against the plan's fiduciaries because they have no concrete injury.

To avoid any confusion why the Court arrived at this conclusion, Justice Kavanaugh, in writing the majority 5-4 decision, repeated at least *six separate times* the general concept underlying the opinion: win or lose plaintiffs, James Thole and Sherry Smith, two retirees in pay status, would still receive the exact same monthly pension benefits they are entitled to receive under the plan.

What The Decision Says: There Is Generally A Constitutional Standing Bar For A Pension Plan Participant To Bring a Breach of Fiduciary Claim

Thole and Smith are participants in a defined benefit pension plan sponsored and managed by U.S. Bank for its employees. On behalf of other participants in the plan, they brought a classic breach of fiduciary duty *class action* suit against the plan's fiduciaries alleging the fiduciaries self-dealt in allocating 100% of plan assets to equity investments including investments managed by U.S. Bank affiliates. The basis of the class action complaint was that this alleged misconduct resulted in heavy losses ($750 million) to the pension plan in 2008 causing the plan to be underfunded.

But fast forwarding to six years later, U.S. Bank solved the funding problem. It contributed over $300 million to the plan (during this litigation) resulting in the plan's no longer being underfunded. With no funding shortfall, U.S. Bank and the other named defendants moved to dismiss the remainder of the action for lack of standing.

Plaintiffs Thole and Smith, in order to defeat the challenge to their standing, needed to establish standing under both ERISA and Article III of the Constitution. Pursuant to ERISA Section 502 (a)(2),a participant or beneficiary of an ERISA governed plan may bring a civil action for appropriate relief under Section 409. Section 409 states that, "Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries… shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan."

Article III Constitutional standing is established where (1) a plaintiff suffers an injury in fact that is concrete, particularized, and actual or imminent, (2) the injury was caused by the defendant, and (3) the injury would likely be redressed by the requested judicial relief. *See Lujan v. Defenders of Wildlife, 504 U. S. 555, 560–561 (1992).*

Central to both analyses is the existence of an injury. To this end, the Supreme Court attempted to crystalize the standing analysis (noting "[c]ourts sometimes make standing law more complicated than it needs to be") but in so doing, crafted a general rule disconnected from former precedent and unspecific to the facts of the case. The Court, for example, concluded that the retirees, Thole and Smith, could not meet the Constitutional requirement of concrete injury because as the specific plaintiffs, they "... have received all of their monthly benefit payments so far, and the outcome of this suit would not affect their future benefit payments." But instead of limiting this decision to the specific facts of *Thole* (a plan that was fully funded) the Court hinged its analysis on a general premise: that unlike a defined contribution plan, a defined benefit plan is akin to a contract and its benefit promise does not result in a participant having an equitable or property interest in the plan as they would if they were a beneficiary of a trust.

The opinion did not directly address the elephant in the room and answer the question most were expecting: whether the defined benefit standing analysis turns on the plan's funding status. Instead, the Court appears to have erected a general bar for participants to bring defined benefit fiduciary suits due to the structure of such plans. How lower courts extend the decision will therefore be critical. If applied literally, the opinion could significantly limit future plaintiffs' defined benefit breach of fiduciary claims. It could also encourage future defendant plan sponsors to rid themselves of defined benefit fiduciary claims by funding their plans during the course of the litigation as U.S. Bank did in *Thole*.

Listed below are a several additional points to consider.

The Court Did Not Directly Address The Certiorari Questions of Plaintiffs' ERISA Standing But Suggested The Plan Fiduciaries Could Bring Such Claims

The Supreme Court granted certiorari on the questions presented which were:

1. May an ERISA plan participant or beneficiary seek injunctive relief against fiduciary misconduct under 29 U.S.C. 1132(a)(3) without demonstrating individual financial loss or the imminent risk thereof?

2. May an ERISA plan participant or beneficiary seek restoration of plan losses caused by fiduciary breach under 29 U.S.C. 1132(a)(2) without demonstrating individual financial loss or the imminent risk thereof?

These questions were extended to the Court because the Eighth Circuit Court of Appeals examined plaintiffs' claim predominantly through the lens of *ERISA standing*. Curiously, the Supreme Court sidestepped these two ERISA questions by stating the two ERISA standards are separate from the Constitutional standard under Article III, and instead focused its decision on the failure to meet the Article III requirements.

But in dicta, the Court alluded to the fact that plan fiduciaries would have ERISA statutory standing to bring the alleged claims: "fiduciaries (including trustees who are fiduciaries) can sue other fiduciaries — and they would have good reason to sue if, as Thole and Smith posit, one fiduciary were using the plan's assets as a 'personal piggybank.'"

The Decision Could Spur the DOL To Have A Greater Role in Defined Benefit Plan Litigation

ERISA Section 502 (a)(2) authorizes the Secretary of Labor, plan participants, beneficiaries and/or fiduciaries to bring a civil action for appropriate relief under ERISA. Interestingly, Justice Kavanaugh emphasized that the DOL, PBGC and plan fiduciaries, unlike the two individual plan participants in this case, would be well suited to bring a defined benefit plan claim. In response to the policy argument that, if plan participants may not sue defined benefit plans, no one will meaningfully regulate plan fiduciaries, the Court specifically punted responsibility to the DOL: "ERISA expressly authorizes the Department of Labor to enforce ERISA's fiduciary obligations. See ERISA § 502(a)(2), 29 U. S. C. § 1132(a)(2). And the Department of Labor has a substantial motive to aggressively pursue fiduciary misconduct, particularly to avoid the financial burden of failed defined-benefit plans being backloaded onto the Federal Government."

The Court's conclusion coupled with its rejection of a participant's standing to bring such a claim could compel the DOL to have an even greater role in policing defined benefit plans, although the Government itself, in its amicus brief in *Thole* advanced a very strong argument that participants have standing to bring the same actions for plan-wide relief under Section 502(a)(2) or 502(a)(3) for benefit plan breach of fiduciary claims.

A Glimmer of Hope for Defined Benefit Plan Participants?

Justice Kavanaugh hinted in *dicta* that plaintiffs could have established standing if their complaint demonstrated "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." While the comparison was not made, this premise seems to reflect similar, but now discounted, case law that found a special presumption of prudence relative to ESOP plan fiduciaries. Before being overruled by the Supreme Court on the issue, the Ninth Circuit, for example, had ruled that for plaintiffs to overcome a special presumption of prudent investment for an ESOP fiduciary the "plaintiffs must ... make allegations that clearly implicate the company's viability as an ongoing concern or show a precipitous decline in the employer's stock ... combined with evidence that the company is on the brink of collapse or is undergoing serious mismanagement." *Quan v. Computer Sciences Corp., 623 F.3d 870, 882 (2010).*

It will now be interesting to see if future defined benefit plan participants will seek to resurrect these old arguments but now in the context of demonstrating standing to bring a defined benefit breach of fiduciary claim. Perhaps, for example, this standard could be met for a chronically underfunded defined benefit plan that has long been mismanaged.

Splintering Decades Old Supreme Court Decisions That Liken ERISA Governed Plan Fiduciaries To Common Law Trustees

Section 403 of ERISA requires all assets of an employee benefit plan to be held in trust by one or more trustees and therefore, supposes the existence of a trustee-to-beneficiary fiduciary relationship. The Supreme Court has recognized this for decades *without distinction* between defined benefit and defined contribution plans and has even applied trust law fiduciary principles to defined benefit plans.

Justice Kavanaugh, without addressing the Court's departure from this authority, severed common trust law application to defined benefit plans. This weighty conclusion was made on the basis that defined benefit plans are a unique animal structured more like a contract than a trust because of the employer's responsibility to bear the entire investment risks and make up any funding shortfall. The Court specifically latched onto its prior decision in *Hughes Aircraft Co. v. Jacobson*, in which it reasoned that no defined benefit plan member has a claim to any particular asset that composes a part of the plan's general asset pool. *See 525 U.S. 432, 439 - 40 (1999).* But the facts of *Hughes* are distinguishable because that case dealt with whether the plan's beneficiaries had a legal right to surplus payments after the plan's assets grew. *Id.*, at 436 - 437. And the question of whether a beneficiary has a legal claim to payment when a plan achieves a surplus differs from whether a beneficiary has an equitable interest to restore assets to the plan caused by a fiduciary breach.

Justice Sotomayor, in a blistering dissent, focused her arguments on why the Court's approach might not square with decades long precedent or just plain common sense. She reasoned that defined benefit plan participants have an equitable ownership interest, as beneficiaries, in how a pension plan or its trust is run according to ERISA and governing plan documents. Most notably, Justice Sotomayor stated that "in one breath, the Court determines that petitioners have 'no equitable or property interest' in their plan's assets,[…] in another, the Court concedes that petitioners have an enforceable interest in receiving their 'monthly pension benefits,'[…]. Benefits paid from where?"

Sotomayor went on to say that the Court's conclusion is "unrecognizable in the fundamental trust law that both ERISA and the Plan Document expressly incorporated. If the participants and beneficiaries in a defined-benefit plan did not have equitable title to the plan's assets, then no one would. Yet that would mean that no 'trust' exists, contrary to the plain terms of both ERISA and the Plan Document."

What Thole Really Means For the Future of ERISA Litigation

Because of the unique fact set of Thole - where the employer voluntarily contributed over $300 million to the plan to fix the funding shortfall - the strong Supreme Court precedent supportive of the strong relationship between common law trust law and ERISA, and the Court's instruction of a potential standard for future defined benefit plaintiffs to plead, it bears watching how this opinion is applied and interpreted. The logic behind the Thole case, for example, could be extended in the defined contribution context to argue lack of Constitutional standing where a plaintiff brings a breach of fiduciary duty claim he was not personally harmed by but other participants were. Think, for example, about a participant bringing a class action claim challenging the prudence of a specific investment he was not invested in on behalf of the plan and other class members. In this context, the *Thole* decision might result in future courts wrestling with the application of another Supreme Court decision, *LaRue v. DeWolff, Boberg & Assocs., Inc.*, 552 U.S. 248 (2008) in whether a defined contribution participant has standing under ERISA Section 502(a)(2) to seek relief on behalf of a plan (not individually).

For additional guidance on issues relating to how the *Thole* decision affects your plan and potential liability, plan sponsors should contact their ERISA counsel.

www.wagnerlawgroup.com

@wagner-law-group
fb.com/WagnerLawGroup

Boston:
99 Summer Street, 13th Floor
Boston, MA 02110
Tel: (617) 357-5200

@wagnerlawgroup
@wagnerlawgroup

Boynton Beach:
1880 N. Congress Avenue, Suite 200
Boynton Beach, FL 33426
Tel: (561) 293-3590

Chicago:
190 South LaSalle Street, Suite 2100
Chicago, IL 60603
Tel: (847) 990-9034

Lincoln, MA:
55 Old Bedford Road, Suite 303
Lincoln, MA 01773
Tel: (617) 532-8080

New York:
200 Park Avenue, Suite 1700
New York, NY 10166
Tel: (212) 338-5159

San Diego:
8677 Villa La Jolla Drive, Suite 888
San Diego, CA 92037
Tel: (619) 232-8702

San Francisco:
315 Montgomery Street, Suite 900
San Francisco, CA 94104
Tel: (415) 625-0002

St. Louis:
1099 Milwaukee Street, Suite 140
St. Louis, MO 63122
Tel: (314) 236-0065

Tampa:
101 East Kennedy Boulevard, Suite 2140
Tampa, FL 33602
Tel: (813) 603-2959

Washington, D.C.:
800 Connecticut Avenue, N.W., Suite 810
Washington, D.C. 20006
Tel: (202) 969-2800