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CLIENT ALERT

Supreme Court Bars ERISA Lawsuits By Pension Plan Participants Without Concrete Injuries

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On June 1, 2020, the U.S. Supreme Court issued a notable decision limiting the circumstances under which a pension plan participant may challenge the fiduciary management of the plan through a lawsuit under ERISA (the Employee Retirement Income Security Act of 1974). Affirming a case dismissal, the Court held that participants of a defined benefit pension plan lacked constitutional standing to sue fiduciaries for breaches of duty under ERISA unless the participants could show they personally suffered (or without winning the suit, would suffer) monetary injury or other concrete injury from the alleged breaches.

In *Thole v. U.S. Bank, et al.*, the plaintiff participants claimed that fiduciaries of U.S. Bank's employee pension plan engaged in inappropriate investment strategies that allegedly increased the plan's losses during the 2008 financial crisis. U.S. Bank argued—and the Supreme Court agreed—that the participants could not sue because they lacked a legitimate personal stake in the outcome of the case where their pension benefits had been paid so far and would not be increased by a favorable outcome.

The *Thole* decision is significant both because it could strengthen plan fiduciaries' ability to defeat participants' ERISA lawsuits at an early stage, and because it more generally emphasizes the Supreme Court's robust attention to the constitutional standing requirement of "injury in fact," as previously seen in its 2016 *Spokeo, Inc. v. Robins* decision.

In a defined benefit plan like U.S. Bank's, participants receive retirement benefits from the plan at levels set by the plan documents. The payments do not fluctuate with the value of the plan. This is unlike a defined contribution plan (such as a 401(k) plan), in which contributions are placed into participants' individual accounts, with the value then fluctuating based on the underlying investment options. ERISA requires a defined benefit plan to be kept at minimum funding levels, and if funding falls below those levels, it is the responsibility of the employer to make contributions to address the underfunding.

The *Thole* plaintiffs claimed that in the financial crisis of 2008, the U.S. Bank plan suffered $748 million of losses caused by the fiduciaries' allegedly imprudent and disloyal investment strategies. Among other things, the plaintiffs claimed it was imprudent to focus the plan's investment strategy exclusively on equities, and that it was disloyal to use funds run by a U.S. Bank affiliate entity, allegedly benefiting U.S. Bank at the plan's expense.

In a 5-4 decision with Justice Kavanaugh delivering the Court's opinion, the Court held that the plaintiffs failed to meet constitutional standing requirements. In order for plaintiffs to have standing to sue under Article III of the Constitution, they must show (among other things) an "injury in fact." As that phrase was elucidated in the Supreme Court's 2016 *Spokeo* decision, the injury must be concrete, particularized, and actual or imminent. The Court concluded that there was no such injury in fact plausibly alleged here. Reasoning that "[c]ourts sometimes make standing law more complicated than it needs to be," the Court concluded the plaintiffs lacked an injury in fact or any "concrete stake" in the case because they had "received all of their monthly pension benefits so far, and they will receive those same monthly payments for the rest of their lives," no matter how the case was resolved. The Court remarked "[i]f [plaintiffs] 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 [plaintiffs] 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 Court turned aside the plaintiffs' arguments to the contrary. First, plaintiffs pointed to trust law principles to argue that any injury to the plan was an injury to them by virtue of their interests in the plan. The Court rejected that, reasoning that defined benefit pension plans are unlike "private trusts" or defined contribution plans in which the amount of money ultimately received depends on sound plan management. The participants in the defined benefit plan here had a right to receive payment that was unaffected by the plan's value; if the plan was mismanaged, the employer would be "on the hook" for any shortfall.

Second, the Court rejected the argument that plaintiffs could claim standing to sue as plan representatives. To do that, participants would still need to have suffered an injury of their own, or would need to be appointed to represent their plan. Third, while plaintiffs argued that ERISA expressly authorizes participant suits for appropriate relief, the Court followed its *Spokeo* decision in ruling that such a statutory cause of action does not automatically mean that the plaintiff meets constitutional injury in fact requirements for standing. Last, the Court turned aside an argument that defined benefit plan fiduciaries would not be meaningfully regulated if participants were not allowed to sue. The Court rejected the claim that standing could be based on the absence of any other plaintiff with standing. Moreover, the Court cited a "regulatory phalanx" faced by fiduciaries even without participant lawsuits, reasoning that misconduct could be prevented by the employer, its shareholders, the Department of Labor, co-fiduciaries, or criminal law enforcement.

In a notable limitation to its decision, the Court avoided resolving an argument by amici curiae that an injury in fact could arise from mismanagement that was so egregious that it substantially increased the risk that both the plan and the employer would fail. The Court expressed doubt about this as a basis for standing because the federal Pension Benefit Guaranty Corporation (PBGC) would be required to pay some or all vested pensions in that scenario. But the Court decided it need not decide the issue because the *Thole* plaintiffs had not successfully pleaded such an increased risk. Such theories might be addressed in future cases, particularly where the pension plan is underfunded, unlike the U.S. Bank plan in this case.

In a detailed dissent for the four-justice minority, Justice Sotomayor reasoned that plaintiffs had standing on three grounds. First, they suffered concrete injury from plan losses, because just like trust beneficiaries, they had an interest in the financial integrity of their plan. Justice Sotomayor criticized as illogical the Court's assertion that participants would necessarily receive payments for the rest of their lives. Second, without regard to any monetary injury, the dissent argued that a breach of fiduciary duty is in and of itself a concrete injury to the participant, and that many forms of noneconomic injury are recognized by the Court's precedent. Third, the dissent contended that participants should have standing to step in as their plan's representative instead of fiduciaries who are allegedly disloyal, and that the constitution did not "compel a pension plan to let a fox guard the hen house." The dissent warned of grave consequences from the Court's decision, which the minority predicted would allow pension plan fiduciaries to misuse plan assets with impunity.

It could be that the *Thole* decision will have significant implications for ERISA litigants. Some court of appeals decisions in recent years had already narrowly interpreted a defined benefit participant's standing to sue. But the *Thole* decision starkly emphasizes the importance of scrutinizing a participant's theory of injury as plaintiff. Additionally, the Court's analysis and its call for a less "complicated approach" to constitutional standing raises broader questions about whether the future might see increased scrutiny by the Supreme Court of more nuanced non-monetary theories of injury and standing.

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