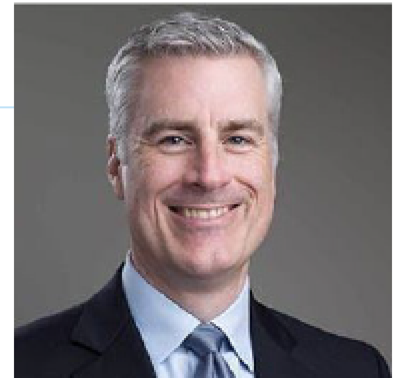
Thole v. U.S. Bank – The Supreme Court Cracks Down on ERISA Standing



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If you are a defendant in an ERISA case, the best way to get rid of the case is not to be right on the merits—it is convincing a court that the plaintiff is not even allowed to bring the case in the first place. As a result, defendants are always trying to push the envelope on standing. The latest skirmish in the ongoing standing wars is the Supreme Court's recent ruling in *Thole v. U.S. Bank*.[1]

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Thole was a class action brought by U.S. Bank employees James Thole and Sherry Smith, who alleged that the bank and other related entities violated ERISA's fiduciary duties of loyalty and prudence.

The allegations, which the courts were required to treat as true at the pleading stage, were serious. Plaintiffs alleged that from 2007 to 2010 defendants "made imprudent investments that allowed them to manipulate accounting rules, boost their reported incomes, inflate their stock prices, and exercise lucrative stock options to their own (and their shareholders') benefit." Plaintiffs alleged that in 2008 alone, mismanagement caused the plan to lose $748 million more than a properly managed plan would have.[2]

U.S. Bank seemingly acknowledged that it had made mistakes. In 2014, after plaintiffs brought their lawsuit, it made $311 million in voluntary excess contributions to the plan (although it contended that this was unrelated to plaintiffs' lawsuit and was merely part of a plan to reduce insurance premiums).[3]

However, plaintiffs' case had a potential flaw. The plan at issue was a defined benefit plan, not a defined contribution plan—i.e., it was a traditional pension plan that paid beneficiaries a fixed amount every month regardless of the performance of the underlying investments. As a result, plaintiffs were paid at all times the monthly benefits promised to them by the plan, even when the plan was underfunded.

This gave U.S. Bank an opportunity. It argued that because plaintiffs had not suffered any monetary loss—they had received all the benefits they had been promised—they had not been injured and thus did not have standing under Article III of the Constitution to bring their lawsuit in the first place.[4] The district court agreed,[5] and a divided panel of the Eighth Circuit Court of Appeals affirmed.[6] Plaintiffs successfully sought certiorari from the Supreme Court.

The Supreme Court affirmed 5-4 in a breezy eight-page opinion by Justice Kavanaugh, joined by the other conservative members of the Court: Roberts,

Thomas, Alito, and Gorsuch. At the outset, the Court quickly summarized the background facts, and specifically noted the size of the attorney's fees award plaintiffs' counsel was seeking—$31 million, "no small thing."

The Court then addressed and rejected the four arguments made by plaintiffs on appeal. First, the Court dismissed plaintiffs' analogy to trust law and the idea that they had standing because they had an equitable or property interest in the plan. Because the plan at issue was a defined benefit plan, it was "more in the nature of a contract." Plaintiffs' benefits were set and not tied to the value of the plan, and thus they could not allege that mismanagement of the plan affected them. As a result, they had no equitable interest.

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Second, the Court rejected the idea that plaintiffs had standing as representatives of the plan itself, because they still lacked a concrete monetary stake which representation would not cure. Furthermore, they had not been legally or contractually appointed to represent the plan.

Third, the Court dismissed the idea that ERISA itself established standing by granting plan beneficiaries a statutory right to sue plans for equitable relief. The Court found that Article III principles superseded such statutory rights and still required plaintiffs to demonstrate a concrete monetary injury, which they lacked.

Fourth, the Court minimized plaintiffs' policy arguments concerning fiduciary misconduct. Plaintiffs argued that if they had no standing to sue, there could be no meaningful monitoring of the plan's fiduciaries, which was contrary to ERISA's purpose. However, the Court was unsympathetic, and declined to find standing just because it was difficult for plaintiffs or others to satisfy standing requirements.

The Court also disagreed with the premise of plaintiffs' policy argument, contending that employers and shareholders are already incentivized to root out fiduciary misconduct. The Court further asserted that fiduciaries face a "regulatory phalanx" in the form of Department of Labor regulation, civil suits by other plan fiduciaries, and possible criminal penalties. If all else failed, the Court noted that plaintiffs' benefits are backstopped by the federal government's Pension Benefit Guaranty Corporation (PBGC).

In short, the Court felt the case was not complicated and decided it for "a simple, commonsense reason": "Winning or losing this suit would not change the plaintiffs' monthly pension benefits. The plaintiffs have no concrete stake in this dispute and therefore lack Article III standing."

The Court did note one caveat, however. The Court opined that plan beneficiaries might have standing to sue "if the 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 beneficiaries' future pension benefits." However, the Court found that plaintiffs had not asserted that theory, and had not made sufficient factual allegations to support it.[7]

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The lengthy dissent, authored by Justice Sotomayor, identified three different ways plaintiffs had standing. First, analogizing to trust law, the dissent stated that the plan assets were equivalent to a trust, and as beneficiaries, plaintiffs had an equitable interest in that trust. Thus, losses inflicted on the trust due to fiduciary mismanagement caused harm to that interest.

Second, the dissent argued that a breach of fiduciary duty "is a cognizable injury, regardless whether that breach caused financial harm[.]" This is because ERISA has granted beneficiaries the right to have their benefit plans prudently managed, and any mismanagement constitutes an infringement on this right. Such an infringement is a concrete injury that is sufficient to create standing, even absent financial injury.

Third, the dissent argued that plaintiffs had the right to sue on the plan's behalf. Because the plan is a "legal fiction," someone has to sue on its behalf, and if plan beneficiaries are not allowed to do so, this would let the "fox guard the henhouse," as the fiduciaries managing the plan have no incentive to sue themselves.

Finally, the dissent recognized the potential harmful consequences of the Court's opinion. The dissent noted that plaintiffs' only remedy under the decision was to tolerate mismanagement and malfeasance until the plan failed. The fact that the plan might be insured by the PBGC did not mean that beneficiaries "should endure disloyalty, imprudence, and plan mismanagement so long as the Federal Government is there to pick up the bill[.]"

Furthermore, the dissent observed that the PBGC itself is in financial danger, with a net accumulated financial deficit over $51 billion, and exposure to future losses of nearly $185 billion. As a result, the Court's decision places it in an even more precarious position. (The dissent did not add, but could have, that even in the best of times the PBGC does not always pay beneficiaries 100% of their promised benefits. The PBGC only pays up to a statutory maximum amount, which changes annually.[8])

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The Court's decision seems at first glance to be tailored to a specific set of facts under an obscure federal law, but is emblematic of at least three larger trends in federal jurisprudence.

First, the Court has increasingly used standing doctrine to tighten access to the federal courts. Dating back to at least *Lujan v. Defenders of Wildlife*,[9] the Court has interpreted Article III of the Constitution as justifying ever more narrow standing rules. Sometimes this has been done to avoid potential far-reaching environmental lawsuits, such as in *Lujan* and *Summers v. Earth Island Institute*,[10] and sometimes simply to dodge hot-button social issues, such as gay marriage in *Hollingsworth v. Perry*.[11] These cases, in combination with stricter pleading rules,[12] have tightened the screws on plaintiffs and added further arrows to defendants' quivers. In most cases these tougher rules do not pose significant barriers, but in closer cases like *Thole* they can be determinative.[13]

Second, the Court's opinion is yet another example of the federal courts' increasing skepticism of class actions. In recent years the courts have limited class relief by strengthening arbitration agreements and class action waivers,[14] applying stricter jurisdiction and standing rules,[15] and increasingly scrutinizing the composition of alleged classes. Accompanying this skepticism in *Thole* was the Court's concern over plaintiffs' $31 million attorney's fee request. As the dissent notes, the Court's opinion, although short, mentions this request twice (once as "no small thing") even though the fees were irrelevant to the only issue presented by the appeal. This unnecessary commentary about fees betrays the Court's larger substantive concern over class actions in general. As the dissent chided the Court, its "focus on fees is about optics, not law."

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Third, the decision reflects the Court's increasing trend to interpret employee benefit plans under contract law principles and not trust law. Although it is indisputable that ERISA was founded on trust law—the statutory scheme is replete with terminology such as "trustee," "beneficiary," and "fiduciary"[16]—in recent years the Court has tried to reframe ERISA cases as contractual disputes. The Court has emphasized that "[t]he plan, in short, is at the center of ERISA," and pushed back on arguments based on ideas and principles not found in the plan documents themselves.[17] This trend is evident in *Thole* as well, in which the Court rejected trust-based arguments because the defined benefit plan was "more in the nature of a contract." Justice Thomas' concurrence is even blunter, specifically complaining, "I continue to object to this Court's practice of using the common law of trusts as the 'starting point' for interpreting ERISA."[18]

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From a practice standpoint, what can ERISA litigators take away from this decision? To be sure, it emboldens plans and their fiduciaries by giving them yet another procedural defense it can raise at the start of litigation. Class actions based on alleged mismanagement of defined benefit retirement plans will now be very difficult

to bring if the plaintiffs' benefits have been paid according to schedule. The ability to shut down litigation before it even starts negates the significant expenses incurred in discovery and potential settlement.

However, for plaintiffs, it is worth emphasizing that this case has limited reach because it only applies to defined *benefit* plans, which are increasingly rare.[19] It is far easier to show that mismanagement of a defined *contribution* plan creates standing, as benefits paid from those plans are directly correlated to the value of the plan's assets.

Furthermore, the Court itself provided future plaintiffs with a possible argument even in defined benefit cases by noting that beneficiaries might have standing if the mismanagement was serious enough that it "substantially increased the risk that the plan and the employer would fail and be unable to pay the participants' future pension benefits." It's not clear from this aside how much mismanagement a plaintiff would have to allege in order to obtain standing, or if the Court would even entertain this theory if it ever revisits the issue, but it is a ray of hope for plaintiffs in an otherwise disappointing decision.

Endnotes

1 140 S. Ct. 1615 (June 1, 2020).

2 *Id.* at 1624 (Sotomayor, J., dissenting).

3 *Id.* at 1624-25 (Sotomayor, J., dissenting). The plan became overfunded again during the course of litigation, which was a factor in the underlying litigation but not in the Court's standing analysis.

4 U.S. Const. Art. III; *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (plaintiff must have suffered a "concrete and particularized" "injury in fact" caused by the defendant).

5 *Adedipe v. U.S. Bank*, No. CV 13-2687 (JNE/JJK), 2015 WL 11217175 (D. Minn. Dec. 29, 2015).

6 *Thole v. U.S. Bank*, 873 F.3d 617 (8th Cir. 2017).

7 Justices Thomas and Gorsuch concurred in the opinion, stating that they would have affirmed on the alternate ground that plaintiffs do not have private rights under ERISA or any contract to pursue claims against plan fiduciaries because those rights belong to the plan only.

8 *See* https://www.pbgc.gov/wr/benefits/guaranteed-benefits/maximum-guarantee (Maximum Monthly Guarantee Tables).

9 504 U.S. 555 (1992).

10 555 U.S. 488 (2009).

11 570 U.S. 693 (2013).

12 *See Ashcroft v. Iqbal*, 556 U.S. 662 (2009); *Bell Atlantic v. Twombly*, 550 U.S. 544 (2007).

13 Standing concerns will be front and center in the next Supreme Court term as well in *California v. Texas*, Case No. 19-840, which addresses the validity of the Affordable Care Act. Defenders of the ACA contend that the plaintiffs challenging the ACA do not have standing because they are not financially affected by the deactivation of the law's individual mandate penalty.

14 *See Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407 (2019).

15 *See Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016).

16 *See Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989) ("ERISA abounds with the language and terminology of trust law.").

17 *See, e.g., US Airways, Inc. v. McCutchen*, 569 U.S. 88 (2013) (plan terms override equitable defense of unjust enrichment); *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 148 (1985) (ERISA has the "repeatedly emphasized purpose to protect contractually defined benefits").

18 140 S. Ct. at 1623 (Thomas, J., concurring).

19 According to the Bureau of Labor Statistics' 2018 National Compensation Survey, only 17% of private-sector workers have access to defined benefit plans.