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Supreme Court: Participants Lack Standing to Sue Defined Benefit Plan Fiduciaries

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In a 5-4 decision, the Supreme Court has held that participants of defined benefit pension plans generally cannot sue fiduciaries over the management over the plan's investments. Although ERISA provides statutory causes of action for participants, the Department of Labor (DOL), or other fiduciaries to seek recovery on behalf of a plan for a fiduciary breach or by a participant or a fiduciary to obtain other equitable relief, the majority in *Thole v. U.S. Bank, N.A*. (June 1, 2020) found that participants do not satisfy the standing requirements under Article III of the Constitution of having suffered an actual injury if their benefits have not been, and will not be, reduced as the result of the breach.

Thole involved fiduciary breach claims that the plan suffered losses due to (i) self-dealing prohibited transactions in which plan assets were invested in mutual funds managed by a subsidiary of the employer and (ii) the plan's investment strategy of investing 100% of assets in equities. While the plan became underfunded for a time, the employer made contributions to the plan after litigation commenced to fully fund the plan. These contributions ensured that participants would not actually suffer any losses of benefits resulting from the fiduciary breaches.

Justice Kavanaugh, writing for the conservative majority, rejected analogies to the common law of trusts, where trust beneficiaries generally have standing to sue on behalf of a trust, finding that participants have no equitable or property interest in the plan. (In a concurring opinion, Justice Thomas objected to courts' long-standing practice of referring to the common law of trusts as a starting point for interpreting ERISA, which has been fundamental to the understanding of ERISA fiduciary duties.) Justice Kavanagh instead found that employers and the DOL have incentives to challenge fiduciary breaches because employers are liable for contributions and would be entitled to surpluses (if the plan were terminated) and the DOL has an interest in maintaining the financial stability of the plan to avoid having its liabilities assumed by the PBGC.

Thole likely will prevent defined benefit plans from facing a proliferation of class action litigation like 401(k) plans, ESOPs and other defined contribution plans have seen in recent years. With defined contribution plans, participants may incur a direct financial loss as the result of a fiduciary breach. In contrast, defined benefit plan losses do not directly impact participants' promised benefits. While losses can reduce the plan's assets available to pay benefits, the employer would be required to maintain the plan's funding over time by making contributions to fund the plan.

Thole does not necessarily foreclose all fiduciary breach actions by defined benefit plan participants. The majority

suggested in a footnote that participants may not have standing even if the plan is, or is likely to be, terminated while underfunded, because the PBGC guarantees benefits of participants subject to certain limits. However, a plan could incur losses that cause its funding to fall below a threshold that requires restrictions on paying lump sums and certain other payment forms. While not addressed by the Court, these funding-based restrictions would appear to give rise to the type of injury necessary for standing. In this case, *Thole* suggests that litigation can be avoided if the employer takes steps to maintain the plan's funding sufficiently to avoid restrictions.

Thole is an important decision for employers because it will likely cut off any potential surges in litigation involving pension plans. Fiduciary duties and the prohibited transaction rules of ERISA will remain subject to enforcement by the DOL. However, as the DOL recognized in an *amicus* brief on behalf of the participants, it lacks the resources to “police every plan in the country.”