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NP

Supreme Court: Pension plan participants do not have standing to sue plan fiduciaries

By Brian Kopp and Thomas McCord

In a 5–4 decision, the Supreme Court ruled that pension plan participants did not have standing to sue plan fiduciaries of a defined benefit pension plan for alleged imprudent investment decisions unless they could reasonably demonstrate the fiduciary breach substantially increased the risk that the plan and the employer would fail and be unable to make future pension payments. The case is a significant loss to the plaintiffs' bar because it will be difficult for plan participants to sue plan fiduciaries under the Employee Retirement Income Security Act of 1974, as amended (ERISA) unless the participants can show that they have been individually harmed by the fiduciaries' acts and will receive a portion of a recovery. A recovery that solely benefits the plan may not be sufficient to give the participant the required standing to sue.

The facts of *Thole et al. v U.S. Bank N.A. et al.* are straightforward. The plaintiffs were retired participants in U.S. Bank's defined benefit pension plan. They alleged that the plan's fiduciaries violated ERISA's duties of loyalty and prudence by poorly investing the plan's assets and engaging in self-interested investments. The plaintiffs alleged the plan suffered approximately $750 million in losses as a consequence of the fiduciaries' breaches.

The majority's decision is premised on Article III of the Constitution, which requires a plaintiff to have "standing" to bring a lawsuit. This requires the plaintiff to demonstrate (i) that the plaintiff suffered an injury-in-fact that is concrete, particularized, and actual or imminent; (ii) that the injury was caused by the defendant, and (iii) the injury would likely be redressed by the requested relief. Specifically, the Court concluded that the plaintiffs fail to show that they incurred a concrete injury.

The decision was very much tied to how a single-employer defined benefit plan works. Such plans promise to pay participants a monthly retirement benefit for their lives. The employer is responsible for funding the plan to ensure benefits will be paid and investment risk falls on the employer. Participants do not have individual rights to any plan assets. Rather, participants only have a right to receive their monthly benefits from the plan.

The Court noted that in a defined benefit pension, the amount paid to any individual participant does not fluctuate based on plan investments or the fiduciaries' good or bad investment decisions.

Because plaintiffs had received all of their promised benefits, and "the complaint did not plausibly and clearly claim that the alleged mismanagement of the plan substantially increased the risk that the plan and the employer would fail and be unable to make future pension payments," the Court concluded that plaintiffs failed to show they had been injured. In other words, any recovery for a breach of fiduciary duty would inure to the plan generally and not any particular participant. The Court recognized that while at times the pension plan had been underfunded, the "bare allegation of plan underfunding does not itself demonstrate a substantially increased risk that the plan and the employer would both fail."

Unlike the majority, the dissenting justices agreed with the plaintiffs' arguments that they had standing to bring the lawsuit. Specifically, the dissenting justices believed the plaintiffs had standing (i) by analogizing to trust law where beneficiaries can sue a trustee for a breach of fiduciary duty, (ii) based on agency theories and statutory provisions supporting the view that participants have the right to bring a lawsuit on behalf of the plan, and (iii) due to practical implications (i.e., if participants cannot bring these sorts of lawsuits, the harm to the plans will not be addressed). The dissenting justices also noted that the Pension Benefit Guaranty Corporation, which insures defined benefit pension plans, has solvency issues and does not protect the full pensions of highly compensated participants. Each of these theories was rejected in the majority opinion.

It is difficult to read this decision and not conclude that the majority was suspicious of the growing number of class action ERISA lawsuits being brought by the plaintiffs' bar that are driven more by the prospect of attorney's fees rather than recovery to the plaintiffs. As a practical matter, if the plaintiffs, in this case, were to succeed in their lawsuit, U.S. Bank would be liable for the breach of fiduciary duty, which would result in it having to make a payment to the plan. But this payment, in turn, would simply reduce U.S. Bank's funding obligation to the plan, without increasing participants' benefits. But even a small damages payment could lead to an award of attorneys' fees, which is a significant driver behind these lawsuits.

This decision, of course, does not prevent the Department of Labor or other co-fiduciaries from bringing lawsuits. Moreover, in ERISA cases where plaintiffs can demonstrate that participants incurred actual damages or reduced benefits, standing may not be an issue. In particular, we would not expect the plaintiffs' bar to view this case as an impediment to bringing 401(k) and other defined contribution plan class actions where the alleged breaches result in direct losses to participant account balances. However, in ERISA class action cases involving defined benefit plans and welfare benefit plans, where the recovery goes solely to the plan—not individual participants—and the plan's ability to pay promised benefits is not imperiled, standing issues may now bar the lawsuits.

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