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HIGH COURT TAKES ERISA FIDUCIARY CASE INVOLVING OVERFUNDED PENSION PLAN

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July 16, 2019

A class action lawsuit heading to the Supreme Court could resolve the often-debated question of whether participants in an overfunded defined benefit (DB) plan can sue for alleged violations of ERISA's fiduciary duty and prohibited transaction rules. In *Thole v. U.S. Bank, N.A.*, 873 F.3d 617 (8th Cir. 2017), retired participants in the U.S. Bank Pension Plan sued its trustees and parent sponsor, U.S. Bancorp, to recover plan losses allegedly caused by an imprudent investment strategy. But after the initial filing, the company made significant contributions to the plan, more than eliminating the underfunding. U.S. Bancorp then moved to have the case dismissed, arguing participants in an overfunded DB plan don't have standing to sue under ERISA. A Supreme Court ruling for the plaintiffs could make DB plans more vulnerable to ERISA litigation.

BACKGROUND

The participants alleged that through late 2010, the plan's investment manager invested the entire portfolio in equities, with approximately 40% of assets invested in the manager's proprietary mutual funds. Under this high-risk/high-reward investment strategy, the plan's funding more than sufficed to satisfy its benefit obligations in 2007. But during the 2008 financial downturn, the plan incurred $1.1 billion in losses, and the participants alleged these losses caused the plan to become underfunded.

The participants filed suit in 2013, claiming the investment strategy violated ERISA's fiduciary duties of prudence and loyalty and prohibited transaction rules. The district court dismissed the prudence claims on statute-of-limitations grounds, but allowed the other claims to proceed.

In 2014, U.S. Bancorp made additional contributions — purportedly to reduce its PBGC plan-termination insurance premiums — making the plan overfunded. The company then asked the district court to dismiss the remaining claims, arguing the participants lacked standing under Article III of the US Constitution after the additional contributions eliminated any risk to plan benefits. Under Article III, which defines the role of the courts, plaintiffs must show evidence of a concrete injury to have standing to sue in federal court.

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NO HARM, NO FOUL?

The participants never claimed that their benefit levels decreased or they forfeited any payments as a result of the allegedly imprudent investment strategy. Instead, the participants alleged that the plan's losses in 2008 were $750 million greater than they would have been if the plan's assets had been appropriately diversified. The participants claimed they were harmed by this increased risk that the plan would default on its benefit obligations.

Although the company argued that the participants failed to show a concrete injury, the district court disagreed, finding the increased risk of default gave them standing to sue under Article III. But the court nonetheless dismissed the case, finding that the plan's current overfunding rendered the participants' claims for relief moot.

The 8th Circuit upheld the dismissal but on "statutory standing" grounds, finding ERISA's civil enforcement provisions don't allow participants in an overfunded DB plan to sue for fiduciary violations. According to the appeals court, plaintiffs suing for a fiduciary breach must show actual or imminent injury to the plan or their benefits to have a cause of action under ERISA, and no such injury exists when plaintiffs' benefits are more than fully funded. The court said this statutory-standing rubric applies, regardless of whether participants seek monetary relief for individual financial losses or injunctive relief to stop fiduciary misconduct.

SIGNIFICANCE OF CASE

The question of whether participants in an overfunded DB plan can sue under ERISA has generated debate for quite some time. Different courts have reached different conclusions, some based on constitutional standing and others on statutory standing. Recognizing this discord, the Supreme Court asked the US solicitor general to submit an amicus brief to provide additional analysis and the government's position on the case. The resulting brief asks the justices to decide not only whether ERISA allows participants in an overfunded DB plan to sue, but also whether the 8th Circuit appropriately decided the case on statutory-standing grounds before addressing constitutional standing.

DB plans historically have provided less fertile ground for litigation than defined contribution (DC) plans, since fiduciary misconduct in DC plans tends to have a more direct and measurable effect on participants' benefits. (For DB plans, the sponsor must make up any funding shortfalls so the plan can pay all participants' benefits in full — unless PBGC takes over the plan and pays benefits only up to a maximum guaranteed level.) But a Supreme Court ruling in favor of the participants in this case could make DB plans more vulnerable to lawsuits.

Notably, the plaintiffs asked the court to award attorney's fees after U.S. Bancorp funded the plan in 2014, arguing that the original lawsuit (and not a desire to reduce PBGC premiums) was the true catalyst for the contributions. An award of attorney's fees in this case, based on corrective action taken without a court mandate ("success on the merits"), could entice plaintiff lawyers to file similar lawsuits, even after a company willingly corrects a funding shortfall caused by fiduciary misconduct.

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RELATED RESOURCES

- Docket in *Thole v. U.S. Bank, N.A.*, No. 17-1712 (US Supreme Court, *cert. granted* June 28, 2019)
- US Solicitor General's Amicus Brief in *Thole v. U.S. Bank, N.A.* (US Supreme Court, May 21, 2019)
- *Thole v. U.S. Bank, N.A.*, 873 F.3d 617 (8th Cir. 2018)

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