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# High court nixes ERISA fiduciary case over DB plan investments

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In a highly anticipated decision, the US Supreme Court has ruled that participants in U.S. Bank's defined benefit (DB) pension plan can't sue for alleged mismanagement of the plan's investments if benefits were unaffected (*Thole v. U.S. Bank*, No. 17–1712 (S. Ct. June 1, 2020)). Because the plaintiffs suffered no injury from the alleged ERISA fiduciary breach, the court concluded they lacked standing to sue under Article III of the US Constitution. Unlike the lower court decisions, however, the opinion focused on the contractual nature of DB plan benefits — not on whether the plan was sufficiently funded to avoid any risk to participants' benefits. The decision arguably sets a very high bar for establishing Article III standing to sue over DB plan investments and could deter these cases going forward.

## Lower courts focused on plan's funding level

The plaintiffs alleged that from late 2007 through 2010, the plan's investment manager overinvested in equities, resulting in a $1.1 billion asset loss during the 2008 financial crisis. The participants filed suit in 2013, claiming the previously overfunded plan had become underfunded, and a more diversified portfolio would have mitigated the losses in 2008 by $750 million.

In 2014, U.S. Bank made additional contributions — purportedly to reduce its PBGC plan-termination insurance premiums — making the plan overfunded again. The company then asked the district court to dismiss the case, arguing the participants lacked Article III standing to sue because the additional contributions eliminated any risk to plan benefits. Under Article III, plaintiffs must show evidence of a concrete injury to have standing to sue in federal court.

The district court granted the motion to dismiss, and the 8th US Circuit Court of Appeals affirmed. Both courts found the plaintiffs lacked standing because they faced no risk to their benefits under a fully funded plan.

## Supreme Court focuses on contractual nature of DB plans

In a 5-4 decision, the Supreme Court ruled the plaintiffs lacked standing to sue because they suffered no concrete injury. In reaching this conclusion, however, the court focused not on the plan's overfunded status, but the contractual nature of a DB plan benefit:

> Of decisive importance to this case, the plaintiffs' retirement plan is a defined-benefit plan, not a defined-contribution plan. In a defined-benefit plan, retirees receive a fixed payment each month, and the payments do not fluctuate with the value of the plan or because of the plan fiduciaries' good or bad investment decisions. By contrast, in a defined-contribution plan, such as a 401(k) plan, the retirees' benefits are typically tied to the value of their accounts, and the benefits can turn on the plan fiduciaries' particular investment decisions.

In this case, participants had received all of their monthly pension payments to date and were legally and contractually entitled to receive those monthly payments for life. As a result, the court found the plaintiffs had no stake in the outcome of the case and lacked Article III standing to sue.

## Participants might have standing in extreme cases

The court seemed to acknowledge participants could have standing if egregious mismanagement of a DB plan's assets increased the risk that the plan and the employer could fail and become unable to pay benefits. But in a footnote to the opinion, the court said that even if severe mismanagement caused the plan and the employer to fail, participants still might not have standing to sue if PBGC's plan termination insurance fully guarantees their benefits.

This aspect of the opinion suggests participants in severely underfunded DB plans may be able to sue under ERISA. But it also raises a host of questions. Can DB plan participants sue for an alleged breach only when either they risk losing benefits above PBGC's guarantee or the plan isn't covered by PBGC? If a plan lacks PBGC coverage, what level of underfunding puts participants' benefits at risk? Can other circumstances place benefits sufficiently at risk to give participants the right to sue?

The court didn't conclusively address these issues since the plaintiffs didn't assert any risk of losing future benefits due to the plan's underfunding. Instead, the plaintiffs alleged only that the losses in 2008 caused the plan to be less than fully funded for a period of time. A bare allegation of underfunding, the court said, "does not itself demonstrate a substantially increased risk that the plan and the employer would both fail."

## Impact of decision

A ruling in favor of the plaintiffs could have opened the door to more lawsuits over DB plan investments, which in the past have been less fertile ground for litigation than DC plan investments. That litigation risk seems greatly reduced now, since the court's decision arguably bars these suits for all but the most extreme mismanagement of severely underfunded plans.

In addition, plaintiffs' lawyers may now view litigation over DB plan investments as a losing proposition. The plaintiffs in this case had asked the district court for at least $31 million in attorneys' fees, arguing the lawsuit (rather than a desire to reduce PBGC premiums) was the true catalyst for the employer's additional contributions to the plan in 2014. The Supreme Court didn't address whether U.S. Bank's voluntary corrective action — even if taken in response to the lawsuit — justified an award of attorney's fees. Instead, the majority opinion said only that the plaintiffs' request for attorney's fees was insufficient to create Article III standing.

## Related resources

### Non-Mercer resource

- *Thole v. U.S. Bank*, No. 17–1712 (Supreme Court, June 1, 2020)

### Mercer Law & Policy resource

- High court takes ERISA fiduciary case involving overfunded pension plan (July 16, 2019)

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