On June 1, 2020, the Supreme Court handed down a 5-4 decision holding that participants in a defined benefit pension plan who have been paid all of the monthly pension benefits to which they are entitled lack standing under Article III of the Constitution to sue plan fiduciaries over their investment of plan assets.

The case, Thole v. U.S. Bank, began when participants in U.S. Bank’s defined benefit pension plan filed a suit against U.S. Bank and others for breach of their fiduciary duties of prudence and loyalty under the Employee Retirement Income Security Act (ERISA). Specifically, the participants argued that the plan fiduciaries engaged in self-dealing and mismanaged plan assets (in part by investing in the mutual funds of a US Bank affiliate and paying excessive management fees), resulting in a $748 million loss to the plan. The district court dismissed the case as moot after US Bank made a $311 million contribution to the plan, and the plan became overfunded. That sizable contribution did not put an end to the case, however. The Eighth Circuit affirmed the district court’s decision, but on the basis that the participants lacked statutory standing under ERISA.

Fulfilling the popular perception that ERISA opinions are written by the junior member of the Court, Justice Brett Kavanaugh wrote for the majority. (Our white paper on Employee Benefits in the Supreme Court details the reality of this perception and many other interesting statistics and facts regarding the Supreme Court’s developing ERISA legacy.) The other conservative members of the Court—that is, Chief Justice John Roberts and Justices Clarence Thomas, Samuel Alito and Neil Gorsuch – joined the majority opinion.

To establish constitutional standing under Article III, a plaintiff must show, among other things, a “concrete, particularized, and actual or imminent” injury. The thrust of the majority’s opinion was that the participants received their full monthly benefit payments thus far and neither future investment decisions by the plan fiduciaries nor the outcome of the lawsuit would prospectively alter the monthly payments. As such, the Court held that the participants had “no concrete stake in the lawsuit” and consequently lacked Article III standing. Before addressing the participants’ arguments, the Court noted that their lawyers had requested at least $31 million in attorney’s fees, but quipped that an interest in attorney’s fees is not a basis for standing.

The participants argued that they had standing based on four theories: (1) a trust-law argument that they had an equitable interest in the plan; (2) as representatives of the plan’s interests; (3) pursuant to ERISA section 502(a), which allows participants to sue for restoration of plan losses; and (4) simply because no other party had an interest in regulating fiduciary misconduct.

The Court was not persuaded by the participants’ trust-law argument, finding
that a defined benefit plan is more in the nature of a contract under which payment amounts are fixed, as compared to a private trust or defined contribution plan where the amounts paid depend on how well the trust is managed. Because pension payments are fixed and the employer, not the plan participants, receives any surplus after all of the benefits have been paid, the Court concluded that the participants did not have an equitable interest in the plan’s assets. In a concurring opinion, Justice Thomas, joined by Justice Gorsuch, reemphasized his long-standing position that attempts to analogize ERISA complaints to trust law actions are misplaced because the statute controls, not the common law of trusts.

The Court next turned to the participants’ arguments that they had representational standing and statutory standing under ERISA section 502(a). First, the Court held that the participants could not sue as representatives unless they personally had suffered a concrete injury or had been assigned the plan’s rights by contract. Second, the Court noted that the participants cannot rely on ERISA section 502(a) because even statutory violations require a separate showing of concrete injury.

Finally, the Court rejected the participants’ argument that no other party had an interest in regulating the behavior of the plan fiduciaries. It remarked that employers and shareholders as well as government actors, like the Department of Labor, were interested in regulating fiduciary misconduct because they were ultimately responsible for financial shortfalls and plan failures.

The dissenting opinion, authored by Justice Sotomayor, took issue with the majority’s “focus on fiscal harm,” finding three separate bases for concrete injury. First, the dissenting opinion supported the trust-law analysis, noting that the plan’s assets were held in a trust as required by both ERISA and the relevant plan documents. The dissent observed that even if participants’ pension payments are fixed, the participants have an interest in the “integrity” of the assets in the trust because those assets are the source from which their pension payments are derived. Second, it noted that a breach of the ERISA fiduciary duties of loyalty and prudence in and of itself is a cognizable harm. Third, the dissenting opinion recognized the participants’ representational standing, pointing out that the plan’s representatives under the majority’s analysis would likely be the defendants themselves.

The Court’s opinion offers relief to plan fiduciaries of defined benefit plans under which participants are receiving, and are likely to continue to receive, their full monthly pension payments. However, the Court left open the question of whether participants in defined benefit plans have Article III standing when “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 participants’ future pension benefits.” This could occur if a plan remains significantly underfunded for a long period of time or the employer is under financial distress, but it remains to be seen whether plaintiffs will sue in these
situations and how courts will decide the issues in light of Thole.

**Eversheds Sutherland Observation:** Although the Court’s decision is likely to shield the fiduciaries of most defined benefit plans from participant allegations of financial mismanagement, that protection probably does not extend to the fiduciaries of variable annuity defined benefit plans – in which a participant’s monthly benefit increases or decreases depending on the performance of plan assets relative to a pre-established benchmark rate of return – or a cash balance plan in which the hypothetical interest rate is based on the performance of plan assets. The Court’s opinion in Thole turned largely on the fact that the plaintiffs suffered no financial injury from the alleged financial mismanagement and that they would receive the same monthly benefit whether they won or lost the lawsuit. That is not necessarily the case with participants in variable annuity plans and cash balance plans that credit earnings based on the performance of plan assets.

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