ERISA Defined Benefit Plan Members Lack Standing to Bring Fiduciary Claims

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The United States Supreme Court recently reviewed the federal constitutional standing requirements for members of a private defined-benefit pension plan who alleged that the plan trustees violated their fiduciary duties. In a 5-4 decision, the Court held that these members and beneficiaries do not have standing to assert breach of fiduciary duty claims when they suffered no injury to their rights to receive their pension benefits. (*Thole v. U.S. Bank N.A.* (2020) 590 U.S. _____.) In reaching this decision, the majority in *Thole* rejected the common law of trusts as a basis of imposing liability under the Employee Retirement Income Security Act of 1974 ("ERISA") – the federal regulatory scheme governing private pension plans. While most public pension plans are considered "governmental plans" exempt from regulation under ERISA, state courts have looked to ERISA case law for guidance in determining the fiduciary duties of public plan trustees because decades of Supreme Court cases have held that the fiduciary provisions of ERISA derive from the common law of trusts. If the *Thole* decision is more than an anomaly, state courts may reconsider the relevance of ERISA precedent – at least in determining the fiduciary duties of defined-benefit plan trustees.

The plaintiffs in *Thole* – members of the defendant pension plan – brought an action against the trustees for mismanagement of plan investments. The plaintiffs alleged that the trustees violated their fiduciary duties under ERISA by making poor investment decisions and that the plan suffered $750 million in losses as a result. Writing for a majority of the Court, Justice Kavanaugh in a relatively short opinion dismissed the action for lack of standing. To establish standing under Article III of the United States Constitution, a plaintiff in federal court must demonstrate the following: (1) he or she suffered an injury in fact; (2) the injury was caused by the defendant; and (3) the injury would likely be redressed by judicial relief. In Justice Kavanaugh's opinion, the plaintiffs had suffered no injury at all. Because their benefits were calculated as a monthly pension, independent of the value of the assets in the plan trust fund and the investment decisions made by the trustees, the plaintiffs had suffered no monetary loss as a result of the trustees' actions. In other words, if the plaintiffs were to win, or lose, their lawsuit, "they would still receive the exact same

monthly benefits that they are already slated to receive ....” (*Thole v. U.S. Bank NA, supra,* Slip Opinion at p. 3.) The *Thole* Court majority left open the possibility that future plaintiffs would have standing to claim that the trustees’ mismanagement was “so egregious” that it “substantially increased the risk that the plan and the employer would fail ... to pay the participants’ future pension benefits.” (*Id.* at p. 7.) The Court nevertheless held that plaintiffs had failed to make that allegation in *Thole* and therefore dismissed the case.

The majority opinion characterizes its decision as a “simple, commonsense” application of standing law. To reach this result, however, the *Thole* Court was required to reject the application of trust law to the trustees of the defendant’s pension plan. And in two paragraphs of the opinion, this is exactly what the Court did.

Plaintiffs argued that, as beneficiaries of the plan trust, they are injured when the trustees breach their fiduciary duties and cause harm to the trust assets. Centuries of trust law have recognized a claim for breach of fiduciary duty by trust beneficiaries, regardless of any monetary loss directly suffered by the beneficiary. As several decisions of the Court have recognized, Congress wrote the fiduciary duty provisions of ERISA “draw[ing] much of their content from the common law of trusts.” (*Varity Corp. v. Howe* (1996) 516 U.S. 489, 496; see *Harris Trust Sav. Bank v. Salomon Smith Barney, Inc.* (2000) 530 U.S. 238, 250 [common law of trusts offers a “starting point” for analysis of ERISA fiduciary duties].) Thus, the law of trusts will, at the least, “inform ... an effort to interpret EIRSA’s fiduciary duties.” (*Varity Corp, supra,* 516 U.S. at 497; see *Tibble v. Edison, Int’l.* (2015) 575 U.S. 523 [ERISA fiduciary duty provisions “derived from the common law of trusts.”].)

Despite this precedent, the *Thole* Court characterized the trust-based argument of plaintiffs as a failed “analog[y]” to trust law. In the Court’s view, while trust law may inform, it does not control the interpretation of ERISA and the analogy is inapt because participants in a defined-benefit plan are not “similarly situated” to the beneficiaries of a private trust or defined-contribution plan. In the latter contexts, the value of trust property will determine the amount of the benefit paid to the beneficiaries and investment mismanagement will obviously reduce that value. In contrast, a defined-benefit plan “is more in the nature of a contract” that pays fixed benefits. And, in the end, the employer is “on the hook” for any plan benefit shortfalls. Thus, the Court held, the analogy does not fit the case. Finally, the Court rejected an argument that the conduct of defined-benefit plan trustees will be left unregulated in the absence of a private right of action, explaining that the Department of Labor is authorized to enforce ERISA fiduciary obligations. (*Thole v. U.S. Bank NA, supra,* Slip Opinion at p. 4.)

A concurring opinion authored by Justice Thomas and signed by Justice Gorsuch goes further. These justices explain that the Court’s ERISA precedents “unnecessarily” complicate the case because they require the Court “to engage with [plaintiffs’] analogies to trust law ....” (*Id.*, concurring opinion. at p. 1.) In their view, “[t]he fiduciary duties created by ERISA are owed to the plan, not [plaintiffs].” Thus, any rights that might have been violated simply do not belong to plaintiffs under ERISA. In Justice Thomas’s opinion, decisions such as *Varity* “misinterpret” ERISA and the Court should reconsider its “reliance on loose analogies” in its ERISA jurisprudence. (*Id.* at pp. 2-3.)

The dissenters primarily challenged the majority decision on the application of trust principles to the trustees of a defined-benefit plan. In a dissent authored by Justice Sotomayor and joined by Justices Ginsburg, Breyer and Kagan, they argued that all employee benefit plan trustees owe fiduciary duties of loyalty and prudence to the members of their plans. The text of ERISA requires plan assets to be held “in trust” for the “exclusive purposes” of providing benefits to plan participants and their beneficiaries. (*Id.*, dissenting opinion at p. 1, quoting 29 U.S.C., §§1103(a), (c)(1).) Because ERISA requires plan assets to be held

in trust, Justice Sotomayor opined, the “critical question” becomes whether the plaintiffs have an equitable interest in the plan assets even though their benefits are fixed. And under the common law of trusts, she rejoined, they clearly do. Indeed, as centuries of trust law have recognized, a trust is only created when legal title is separated from beneficial ownership. And while the plan document may be considered a contract, the dissent chides the majority for failing to recognize that the contract creates a trust relationship. The dissent continues that for well over a century the Court has recognized that a fiduciary relation creates a right of the beneficiaries to sue the trustee for breach of fiduciary duty “regardless whether the beneficiary suffers personal financial loss.” (*Id.* at p. 10.) Citing *Varity* and similar decisions, the dissenters explain that Congress intended ERISA to impose trust-like fiduciary standards to provide even greater protection for defined-benefit plan beneficiaries. Thus, they conclude, the plaintiffs have standing to pursue their fiduciary duty claims under the Constitution. (*Id.* at 12.)

At first glance, the *Thole* decision appears to be an anomaly: the Court has recognized the fiduciary obligations of ERISA benefit plan trustees in a string of decisions dating back to the enactment of ERISA itself. The majority opinion also pointedly notes that plaintiffs’ attorneys were seeking $31 million in attorneys’ fees – “[n]o small thing” in the Court’s words – and perhaps the decision may be read in this light. Nevertheless, *Thone* clearly distinguishes defined-contribution from defined-benefit plans, and this distinction is the fulcrum of the decision. The Court’s jurisprudence on ERISA’s fiduciary provisions is thus likely to be divided along those lines in future cases.

In state courts, the Supreme Court’s holding in *Thone* is unlikely to directly impact the standing required of plan members in fiduciary actions because standing standards are generally less stringent. In California, for example, allegations of a fiduciary duty breach resulting in harm to a portion of the trust held to pay particular benefits have been held sufficient to state a cause of action, though not necessarily to establish a fiduciary breach. (*O’Neal v. Stanislaus County Employees’ Retirement Assn*. (2017) 8 Cal.App.5th 1184, 1196-1197.) And, as the Supreme Court expressly noted in *Thole*, the Department of Labor has jurisdiction to enforce ERISA’s fiduciary duty provisions; thus, fiduciary guidance from the Department will retain its persuasive authority. But the decision will effectively preclude ERISA defined-benefit plan members from bringing fiduciary litigation against plan trustees, which challenges investment and other decisions, unless the requisite “egregious” mismanagement is alleged. Whether this dearth of future cases will undermine the value of ERISA case law in state court actions remains to be seen.