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Justices Seem Keen To Solve ERISA Case's Article III Question

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Earlier this week, the U.S. Supreme Court heard oral argument in Thole v. U.S. Bank NA — one of four Employee Retirement Income Security Act cases the court will review this term.[1]

Among the four cases, the decision in Thole has the greatest potential to reach beyond ERISA, and could address what constitutes an injury sufficient to confer Article III standing under the U.S. Constitution. If the focus of oral argument is any indication, the court appears willing to answer that question even though neither the district court nor the court of appeals did so.

Background

Thole asks whether ERISA plaintiffs lack standing — constitutional or statutory — to sue for fiduciary breaches when a defined benefit plan is adequately funded. The plaintiffs in Thole, participants in a defined benefit plan sponsored by U.S. Bank, alleged that the defendants breached their fiduciary duties under ERISA by making imprudent and disloyal investments.

The plaintiffs claimed that these breaches resulted in hundreds of millions of dollars in losses to the plan. But during the litigation, U.S. Bank made a large contribution to the plan — meaning the plan had more than enough money to meet its projected liabilities (i.e., benefit payments).

After the contribution was made, defendants moved to dismiss for lack of Article III standing, arguing that plaintiffs had no concrete injury in fact. The district court dismissed on mootness grounds, holding that plaintiffs would be in the same position whether they prevailed in their case or not. The U.S. Court of Appeals for the Eighth Circuit affirmed, but sidestepped the difficult Article III question by relying on its own precedent to hold that participants of an overfunded defined benefit plan lack statutory standing under ERISA.

The Supreme Court's order granting certiorari made things interesting by adopting the solicitor general's recommendation that the parties address both statutory and Article III standing in

their merits briefs. And, at oral argument, the justices' questions suggested that the court remains interested in Article III's thorny standing issues.

Tension Between History and Practicality

The core of the disagreement between Thole and U.S. Bank is precisely what defined benefit plan beneficiaries have a legal interest in, a question that traces ERISA's roots back to traditional trust law principles. This disagreement played out at oral argument by pitting history versus practicality.

Courts routinely look to trust law for guidance on interpreting ERISA when the statute is silent. Thole's counsel leaned heavily on this principle, urging the court to consider the "centuries-old" rule under trust law that beneficiaries of a trust could sue even when "there was no conceivable possibility of a financial loss."

But certain members of the court, Justice Samuel Alito and Justice Brett Kavanaugh in particular, were less interested in a history lesson and more interested in the practical effect of allowing Thole's suit to move forward.

"I want to hear about practicalities," Justice Alito implored Thole's counsel. "What I want you to tell me is, what is the practical chance … that [the beneficiary] is not going to get paid [her] benefits? ... [Is] the risk greater than the risk of being hit by a meteorite?"

According to U.S. Bank's counsel, the risk was zero percent, which, he said, was fatal to the plaintiffs' standing argument. U.S. Bank stressed that in a defined benefit plan the benefits are not tied to the alleged injury to the plan because the pension payments are not contingent on assets in the trust.

Because of the way ERISA is structured, argued U.S. Bank's counsel, if a plan is not sufficiently funded, the company has an obligation to make good on its promised benefits. So, plaintiffs, like every other beneficiary of the plan, will continue to receive the same pension payments they have been receiving since retirement — "not one penny less ... not one penny more" — regardless of the outcome of the case.

Justice Kavanaugh summed up the tension in what he called this "close case" as one between history and the current state of the law on constitutional standing:

> [The trust law] history is strong but the answer to the question — it's 99.99 percent certain that the benefits promised are going to be there. And how do we resolve what I see as that tension? Because it — it would be odd for us to grant standing in a case where the — the chances are so small.

Statutory Standing Under ERISA

The court could avoid deciding the broader Article III issue if it agrees with the Eighth Circuit's holding — that ERISA does not provide a cause of action to participants like plaintiffs who are beneficiaries of an adequately funded plan — but none of the justices signaled an interest in that resolution.

To the contrary, the justices skeptical of the plaintiffs' standing framed their concerns as constitutional ones. During the solicitor general's argument, for example, Chief Justice John Roberts noted "the significance of Article III to [the court's] role in the separation of powers," and pointed out that trust law

history “doesn’t necessarily take into account how Article III works today under the Constitution.” U.S. Bank’s counsel agreed, urging the court to consider the case under the Article III framework. “There is no ERISA exception to Article III,” he said.

Justice Elena Kagan, joined by Justice Sonia Sotomayor, however, appeared convinced that ERISA not only provides a cause of action to participants like plaintiffs, but a legal interest in the financial integrity of the plan — perhaps enough to also confer standing under Article III.

Justice Kagan told U.S. Bank that its “argument just falls apart if we look at ERISA and say that’s exactly what Congress did here, was to give all of the beneficiaries and participants an equitable interest in the integrity of the trust.”

But Justice Alito was doubtful, asking U.S. Bank’s counsel: “Do you think that Article III is satisfied whenever Congress puts the label ‘property interest’ or ‘equitable interest’ on something?”

U.S. Bank’s counsel argued that Congress cannot confer constitutional standing with labels, taking the opportunity to remind the court of its last major foray into defining an Article III injury, Spokeo Inc. v. Robins, when the court held that a mere statutory violation is insufficient to establish a concrete injury under the Constitution.[2]

Obvious constitutional concerns aside, however, the skeptical justices did not signal with their questioning how they would decide whether ERISA provides a cause of action to plaintiffs, assuming Article III standing is satisfied.

Assessing the Impact of a Potential Ruling

The justices are acutely aware of the significant impact the court’s ruling will have on the ability of defined benefit plan beneficiaries to police fiduciary breaches. On one hand, allowing the plaintiffs’ suit to move forward could signal that, as Justice Neil Gorsuch put it, “[everybody] could sue for everything.”

Justice Stephen Breyer expressed concern with linking a plaintiff’s standing to bring lawsuits to gyrations in the stock market. “I wonder if there is anything that prevents against the roller coaster which would mean many, many suits,” Justice Breyer mused, “even though the beneficiaries are even better off sometimes after the stock market is finished its little roller coaster.”

On the other hand, adopting U.S. Bank’s position could foreclose participants of a defined benefit plan from ever suing for breaches of fiduciary duty unless they plead a substantial risk that their benefits will not be satisfied. Justice Kavanaugh seemed uneasy with this nebulous standard, asking “isn’t that just going to be a pleading exercise that ... presents a whole new collateral set of cases trying to figure out have you pled exactly enough increased risk of harm here?”

Aside from possible pleading issues, at least five justices active during argument (the chief justice and Justices Breyer, Alito, Gorsuch and Kavanaugh) expressed doubts about plaintiffs’ standing to sue.

Justices Sotomayor and Kagan signaled that they believed ERISA conferred not only a statutory cause of action for plaintiffs’ lawsuit, but also an equitable interest in the plan such that Article III standing was also satisfied.

Justice Ruth Bader Ginsburg expressed concern about the U.S. Department of Labor's limited ability to police pension plan mismanagement and about depriving beneficiaries the opportunity to act as private attorneys general, but did not signal whether that was enough to confer standing.

Conclusion

If any of the justices believe the case can be decided on the narrow statutory grounds used by the Eighth Circuit, they certainly didn't voice that belief during the hearing, and questions about Article III animated the arguments.

Earlier this term, in another ERISA case involving issues not addressed by the U.S. Court of Appeals for the Second Circuit, the court vacated the ruling to provide the "Court of Appeals ... an opportunity to decide whether to entertain those arguments in the first instance."[3] The court could do the same thing here by vacating the Eighth Circuit's ruling and remanding the case for an initial consideration of whether the plaintiffs have Article III standing.

But unlike Retirement Plans Committee of IBM et al. v. Jander et al., where the parties "focused their arguments primarily upon other matters [besides the question upon which certiorari was granted],"[4] the court asked the parties to address the Article III standing issue that the Eighth Circuit never reached. Whether that distinction makes a difference, and whether the court ultimately decides to address the Article III standing issues in Thole remains to be seen.

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[1] For an overview of the other ERISA cases teed up for review, see Ashley Parrish, David Tetrick, Darren Shuler and Danielle Chattin, High Court Term Could Shape Future of ERISA Litigation, Law360, (Nov. 13, 2019), https://www.law360.com/articles/1203091/high-court-term-could-shape-future-of-erisa-litigation.

[2] 578 U.S. ___, 136 S. Ct. 1540 (2016).

[3] Retirement Plans Committee of IBM et al. v. Jander et al., Dkt. 18-1165 (U.S. Jan. 14, 2020).

[4] Id. at * 2-3.