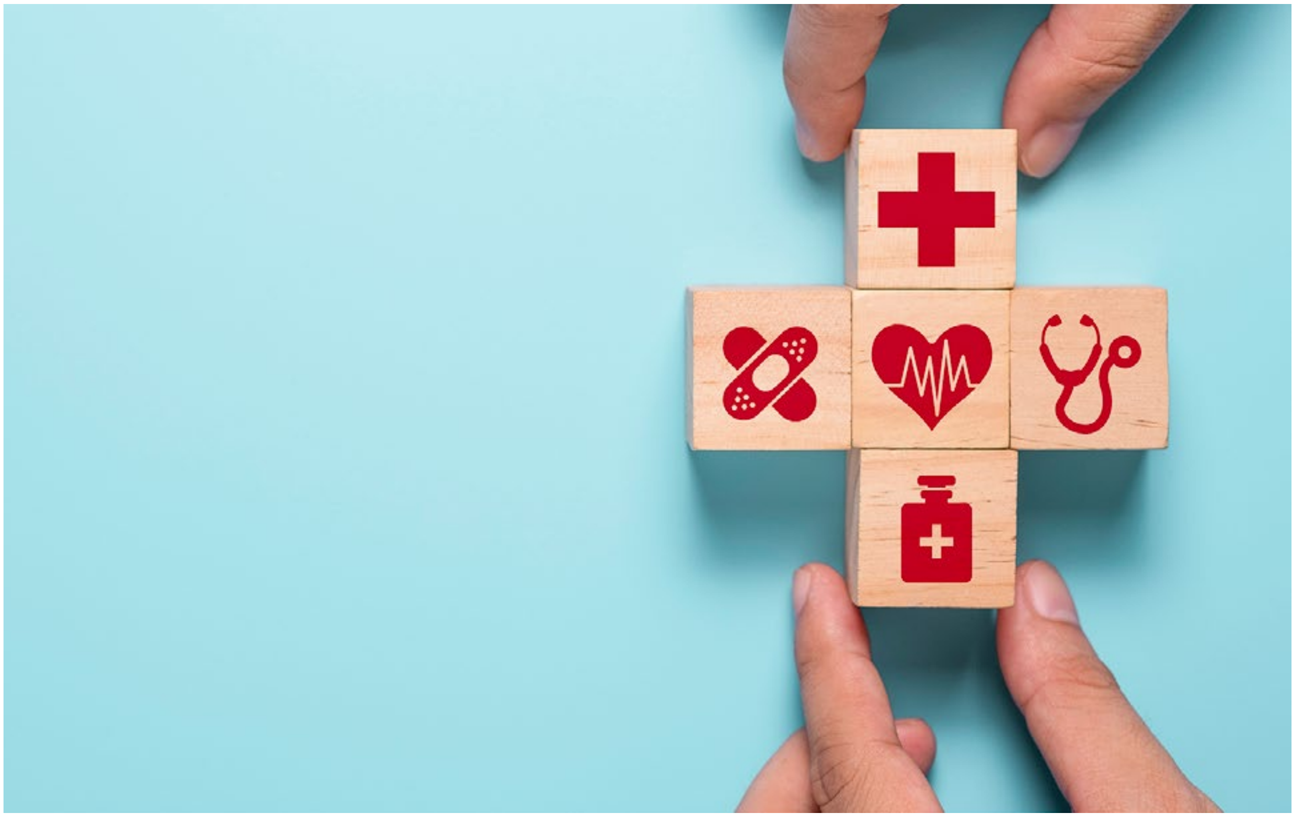

PENSION RULING LIMITS HEALTH PLAN MISMANAGEMENT CASES

Written By Brady Bizarro, Esq.

In the complex world of ERISA litigation, court rulings can often impact both retirement and health and welfare benefit plans. When a crossover occurs in a case primarily involving retirement plans, the impact on health and welfare plans is typically limited.

Every so often, though, a case centers around a threshold question which impacts every federal case, and as such, the ruling has significant consequences for all employee benefits cases.

Last summer, the Supreme Court of the United States decided *Thole v. U.S. Bank N.A.*, a case principally about pension plans.[1] The 5-4 ruling was considered extremely consequential in this area because it limited beneficiaries' right to sue plan fiduciaries.

Now, attorneys representing health plan fiduciaries are finding success in utilizing the Court's ruling in *Thole* to dismiss cases brought against them.

The *Thole* case involved one of the most fundamental legal doctrines in America law: the standing requirement. Standing is the determination of whether a specific person is the proper party to bring a matter to a court for adjudication.

To establish constitutional standing, a plaintiff must prove (1) that she suffered an injury in fact that is concrete, particularized, and actual or imminent, (2) that the injury was caused by the defendant, and (3) that the injury would likely be redressed by the requested judicial relief.[2]

Here, the plaintiffs, Thole and Smith, were two retired employees who participated in U.S. Bank's retirement plan. They filed a class-action suit against the plan fiduciaries, alleging that they mismanaged more than $748 million, causing them harm. The Court ruled that because the plan participants had suffered no monetary injury, they lacked standing to sue the plan fiduciaries.

To understand why this case is having a major effect on health plan litigation, it is essential to dig into the facts, the Court's majority opinion, and its lengthy dissent authored by Justice Sonia Sotomayor. The plaintiffs in this case were part of a defined-benefit plan, not a defined-contribution plan.

In defined-benefit plans, retirees receive a fixed payment each month, and those payments do not change with the value of the plan or because of plan fiduciaries' good or bad investment decisions.

Compare that to a defined-contribution plan, most commonly a 401(k) plan, in which benefits are usually tied to the value of their accounts, and those benefits can fluctuate depending on plan fiduciaries' investment decisions.

Thole and Smith, as pensioners, receive $2,198.38 and $42.26 per month, respectively, despite the plan's value at any given moment or any of the investment decisions made by the plan fiduciaries. They have received all of the money due to them and are legally and contractually entitled to receive those amounts for the rest of their lives.

While the plaintiffs did not sustain a monetary injury, they brought suit against the plan fiduciaries under ERISA, claiming that the defendants violated ERISA's duties of loyalty and prudence by poorly investing plan assets some ten years ago, to the tune of a $748 million loss. They asked the Court to force the fiduciaries to repay the losses to the plan, to replace the plan fiduciaries, and to award them $31 million in attorney's fees.

The district court in Minnesota found that the plaintiffs had sufficient standing to proceed with the case, and after that determination, U.S. Bank made a substantial contribution to the pension plan, bringing it above the statutory minimum. The district court ultimately dismissed the case, and on appeal, the U.S. Court of Appeals for the Eighth Circuit found that the plaintiffs lacked statutory standing.

Justice Brett Kavanaugh authored the Supreme Court's majority opinion, joined by the Court's other conservative justices. He noted that the pensioners had thus far received all of the money due to them and that the outcome of this suit would have no impact on the plaintiffs' future monthly benefit benefits.

If they lost the case, they would still receive the exact same monthly payment. If they won the case, they would not receive any additional benefit payments. The majority went on to dismiss four alternative arguments advanced by the plaintiffs, concluding that they lacked a sufficient stake in the case to have standing to sue.

First, the plaintiffs argued that a plan fiduciary's breach of a trust-law duty of prudence or duty of loyalty itself causes harm, even if the plan participants have not and will not suffer any monetary losses.

The Court disagreed, noting that this argument would be proper if the plan at issue were a defined-contribution plan or a trust. In a defined-benefit plan, the Court does not recognize a plan participant's equitable or property interest in the plan. Then, the Court determined that the plaintiffs did not have standing as representatives of the plan itself because they did not suffer an injury in fact.

Third, the plaintiffs argued that language in ERISA itself grants plan participants a statutory right to sue for breach of fiduciary duty and other equitable relief. In response, the majority noted that a statutory right to sue does not itself satisfy the constitutional standing requirement.

Finally, the plaintiffs asserted that if beneficiaries are unable to bring fiduciary breach claims against plan fiduciaries, no one will meaningfully regulate plan fiduciaries. Here, the Court noted that employers have strong incentives to avoid fiduciary misconduct because they are on the hook for plan shortfalls.

ERISA authorizes the Department of Labor ("DOL") to enforce fiduciary obligations, and the Court explained that since the federal government is required by law to pay vested pension benefits of retirees, the DOL has a strong incentive to police plan fiduciaries. Further, certain claims of fiduciary misconduct can be bought directly against individual plan fiduciaries (for example, if using plan assets for personal gain). Justice Kavanaugh sums up oversight of ERISA plan fiduciaries as a "regulatory phalanx."[3]

Justice Sotomayor wrote a lengthy dissent, joined by Justices Ginsburg, Breyer, and Kagan. For the dissent, there is no meaningful difference in the rights afforded to participants of defined-benefit plans from those of defined-contribution plans or trusts.

Without affording plan participants in these cases an equitable interest in the plan, no one would hold that title, leaving about 35 million people with defined-benefit plans vulnerable to fiduciary misconduct in the eyes of the dissent. Justice Sotomayor also found the majority's argument that a financial injury is necessary to establish standing exceedingly unpersuasive.

For example, the Supreme Court has long recognized that a breach of fiduciary duty claim exists regardless of the beneficiary's personal gain or loss. It is for this reason, the dissent observes, that the majority declares that this case has no bearing on those alleging failure to provide plan information (which would support standing).

The majority did not persuade the dissenting justices that a beneficiary's noneconomic right to loyalty and prudence from fiduciaries is meaningfully different.

The dissent also presents two arguments for standing based in contract law. First, they observe that the Plan Document itself confers upon the beneficiaries an equitable stake in the financial integrity of the plan.

Second, they cite to the majority's claim that the plaintiffs have a contractual right to receive monthly payments for life and note that a breach of contract always creates a right of action, even when no financial harm was caused.

Essentially, the dissent recognizes an equitable interest based in trust law for defined-benefit plans while the majority views beneficiaries' rights under these arrangements as largely contractual.

Since the *Thole* decision, over one hundred cases have cited to its holding. Out of those, at least three cases involved health and welfare benefit plans and claims of health plan mismanagement. They were all dismissed by courts for lack of standing.

At first glance, this should seem unusual because unlike pension plans, self-funded health plans are not defined-benefit plans. The Court's ruling in *Thole* did not contemplate health and welfare benefit plans. If anything, self-funded health plans are most like defined-contribution plans since the "benefit" received is not defined and the contribution, the amount contributed by a plan participant to the plan, is typically defined.

Nevertheless, the strategy being utilized by attorneys representing self-funded plans is to analogize the facts of their cases with *Thole.*

In particular, they assert that the alleged fiduciary misconduct never had or will have a material impact on the benefits due to plan participants. In *De Fuente v. Preferred Home Care of N.Y. LLC*, the plaintiffs were home health aides enrolled in a self-funded health plan.[4]

The plan was part of a captive arrangement in which the employer paid premiums to the captive insurer, which then used the premium to establish a reserve to pay covered medical claims. The plaintiffs alleged the employer breached its fiduciary duties and engaged in prohibited transactions under ERISA by receiving profits and excess premiums from the captive insurer.

The district court found that the plaintiffs, like those in *Thole*, had received all of the benefits to which they were entitled and winning or losing would not increase their health benefits. As such, the district court found that the plaintiffs lacked standing to sue.

In *Crosby v. Cal. Physicians' Serv.*, the plaintiffs alleged that their health plan improperly considered age and therapy history in medical necessity determinations for children with autism.

The district court cited *Thole*, noting that the plaintiffs had received all of the benefits due to them, and that the plaintiffs must show they have been injured beyond their need to pursue administrative appeals. In the district court's view, they did not, and the case was dismissed for lack of standing.[5]

Finally, in *Bryant v. Wal-Mart Stores, Inc.*, the plaintiff brought suit against Wal-Mart's health plan for alleged failure to provide timely COBRA notices. The district court, however, found that the plaintiff was not injured by a lapse in coverage, and cited to *Thole* when it dismissed for lack of standing.[6]

Taken together, these cases, with their reliance on the holding in Thole, reveal that the Supreme Court has paved the way to limit suits against health plan fiduciaries alleging mismanagement of plan assets.

It will now be much more difficult for plan participants to satisfy the constitutional standing requirement in ERISA cases where they are alleging breach of ERISA's duties of loyalty and prudence by poorly investing or utilizing plan assets.

The Court made clear that in such cases, the plaintiff would have to show that they received fewer benefits due to them, or will receive fewer benefits due to them, as a result of the alleged fiduciary breach.

One unanswered question in the *Thole* case involves extreme situations. The majority left open the question of whether a plaintiff would have standing to sue 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."[7]

In today's economy, given the volatility of the post-pandemic market and risky investment opportunities such as cryptocurrency, I would caution plan fiduciaries to continue to handle plan assets with the skill and prudence which is typical in our industry.

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Brady joined The Phia Group as a healthcare attorney in early 2016. As the Director of Legal Compliance & Regulatory Affairs, he specializes in regulatory, transactional, and compliance matters related to healthcare and employee benefits law. He provides general consulting services to clients, including employers, third-party administrators, brokers, and vendors associated with health benefit plans on matters related to the health insurance industry, including ERISA, ACA, and HIPAA compliance.

He also performs contract review and due diligence on healthcare transactions and assists with dispute resolution efforts between the various players in the healthcare industry in an effort to protect plan members and plan sponsors. Brady has previously spoken at numerous industry conferences, including those held by the Self-Insurance Institute of America ("SIIA") and the Health Care Administrator's Association ("HCAA"). He served as chairman of SIIA's Future Leaders Committee in 2020 and is a regular contributor to The Self-Insurer, the world's leading alternative risk transfer journal.

Attorney Bizarro earned his law degree from Boston University School of Law, concentrating in health law. During law school, Brady served as an editor for BU Law's International Law Journal, participated in the Edward C. Stone Moot Court Competition, completed a legal internship in the U.S. House of Representatives, and wrote for the National Security Law Brief. He also worked as a summer associate at Greene LLP, a complex civil litigation firm in Boston that specializes in healthcare fraud cases, and as a Rule 3:03 attorney with Greater Boston Legal Services, where he represented indigent defendants in employment and discrimination cases in state court.

Prior to law school, he worked as a mediator for the Massachusetts Attorney General's Office and for the National Defense University in Washington, D.C. Brady graduated magna cum laude in 2010 from Boston University, where he was the recipient of the Herbert and Mary Greig Scholarship in American History.

References:

1 Thole v. U.S. Bank N.A., 140 S. Ct. 1615 (2020).

2 Lujan v. Defenders of Wildlife, 504 U. S. 555, 560-561 (1992).

3 Thole, at 1621.

4 De Fuente v. Preferred Home Care of N.Y. LLC, 2020 U.S. Dist. LEXIS 187681, at *1 (E.D.N.Y. Oct. 9, 2020).

5 Crosby v. Cal. Physicians' Serv., 2020 U.S. Dist. LEXIS 210654, at *1 (C.D. Cal. Nov. 2, 2020)

6 Bryant v. Wal-Mart Stores, Inc., 2020 U.S. Dist. LEXIS 125266, at *10 (S.D. Fla. July 15, 2020)

7 Thole, at 1621-1622.