Big ERISA Decisions on the Horizon—SCOTUS to Review Third ERISA Case this Term

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The **US Supreme Court** recently agreed to review the Eighth Circuit's decision in ***Thole v. US Bank***, in which the Eighth Circuit held that participants in an overfunded defined benefit pension plan lack standing to sue for **fiduciary breaches under ERISA**. The Supreme Court's decision in this case—the third ERISA case accepted by the court this term—could have significant implications for plan sponsors and plan fiduciaries. Many believe that if the Supreme Court rules that the plaintiffs have standing to bring suit, it could encourage a proliferation of litigation against plans where there is no actual impact on participants' benefits.

IN DEPTH

The US Supreme Court recently agreed to review the Eighth Circuit's decision in *Thole v. US Bank*, in which the Eighth Circuit held that participants in a defined benefit pension plan lack standing to sue for fiduciary breaches under ERISA where the plan is overfunded. The ruling could lead to an increase in participant litigation against fiduciaries of defined benefit pension plans if the US Supreme Court determines that participants have standing to bring such suits even when they suffer no actual economic harm (because the plans have sufficient funding to pay the participants' pension benefits).

Background

The plaintiffs in *Thole* sued US Bank, US Bancorp and multiple US Bancorp directors for allegedly violating their fiduciary obligations with respect to the US Bank Pension Plan. More specifically, the plaintiffs alleged that the defendants violated their fiduciary duties under ERISA by failing to diversify plan investments and investing in mutual funds managed by a US Bancorp subsidiary.

According to the plaintiffs, the failure to diversify plan investments caused the once-overfunded plan to drop to only 84% funded and lose more than $1.1 billion. After the plaintiffs filed suit, however, the defendants contributed more $300 million dollars to the plan, restoring it to overfunded status. As a result, the district court dismissed the action, noting that once the plan became overfunded "the plaintiffs no longer [had] a concrete interest in the monetary and equitable relief sought to remedy the alleged injury." In other words, according to the district court, there was no longer a controversy to address. The Eighth Circuit affirmed the district court's decision, but on different grounds, holding that because the plan was overfunded, the plaintiffs lacked standing to sue under ERISA. Late last month, the Supreme Court agreed to hear the case and address these issues.

Impact of Pension Plan Overfunding on Standing to Sue

The question of whether a participant in a fully funded defined benefit pension plan has standing to bring a fiduciary breach claim under ERISA is a significant issue, and one that has resulted in a split of opinion in various circuits. Several circuits have ruled that a violation of employees' ERISA rights is sufficient to bring a claim under ERISA. In contrast, the Eighth Circuit's decision suggests that plan participants cannot sue plan fiduciaries if they have not experienced actual financial harm, as is arguably the case where a defined benefit pension plan is overfunded.

Benefits under defined benefit pension plans, unlike 401(k) plan benefits, are not calculated based on the amount of assets held by the plan or the return on plan investments. Instead, defined benefit pension plans provide employees with guaranteed income during retirement, using a formula set forth in the plan document. As a result, in most cases, participants will get the benefits promised by the plan, regardless of plan investment performance. This means that, where a defined benefit pension plan is overfunded, participants typically suffer no actual economic harm.

Many believe that allowing uninjured plaintiffs to sue could significantly harm both plan sponsors and plan participants by encouraging a proliferation of litigation against plans where there is no actual impact on participants' benefits. However, others, like the plaintiffs in *Thole*, believe that denying participants standing to sue where a plan is overfunded undermines their ability to hold fiduciaries accountable for their conduct.

Potential Implications of the Case

Sponsors and fiduciaries of defined benefit pension plans should monitor the outcome of this case. Plan sponsors may see an increase in participant litigation against fiduciaries of defined benefit pension plans if the Supreme Court determines that participants have standing to bring such suits even when they suffer no actual economic harm. Of note, such cases could result in plan fiduciaries being liable for participants' legal fees for such suits even if the plan sponsor has already made the plan whole with subsequent funding contributions.

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