ALERT MEMORANDUM

Supreme Court Limits Standing For Private ERISA Plaintiffs—Implications For ERISA And Beyond

June 11, 2020

On June 1, 2020, in an important decision for those who manage the assets of defined-benefit pension plans, and those who may wish to do so, the Supreme Court in *Thole v. U.S. Bank N.A.* ruled that participants of such plans lack Article III standing (otherwise known as constitutional standing) to bring suit to remedy breaches of ERISA that did not affect their guaranteed payments.[1] The Court, in a 5 to 4 decision authored by Justice Kavanaugh, reasoned that since plaintiffs would receive the same fixed-sum monthly payment regardless of whether they prevailed in their suit, they lacked the concrete interest in the suit necessary for Article III standing.[2] For asset managers who have previously been reluctant to manage money from defined-benefit plans, this decision lowers the risk of managing such assets, which amount to approximately $3.2 trillion.[3] This decision is also part of the Supreme Court's recent trend towards limiting plaintiffs' constitutional standing to seek relief even where Congress has expressly conferred statutory standing on private plaintiffs.

If you have any questions concerning this memorandum, please reach out to your regular firm contact or the following authors

NEW YORK

Thomas J. Moloney
+1 212 225 2461
tmoloney@cgsh.com

Arthur H. Kohn
+1 212 225 2920
akohn@cgsh.com

David H. Herrington
+1 212 225 2266
dherrington@cgsh.com

Lucas D. Hakkenberg
+1 212 225 2326
lhakkenberg@cgsh.com

[1] *Thole v. U.S. Bank N.A.*, 590 U.S. ____ (2020), No. 17-1712, slip op. (June 1, 2010).
[2] *Id.* at 3. Justice Sotomayor authored a dissenting opinion, joined by Justices Ginsburg, Breyer and Kagan, that would have found for the plaintiffs as to standing. *Thole*, slip op. at 3-4 (Sotomayor, J., dissenting).
[3] Dept. of Labor, Private Pension Plan Bulletin Historical Tables and Graphs, 1975–2017 (Sept. 2019) (Table E10).

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Background

ERISA empowers plan participants to sue to recover losses for breaches of fiduciary duty, along with allowing plan participants to seek equitable relief for other breaches of ERISA.[4] The *Thole* plaintiffs are retired participants in U.S. Bank's defined-benefit retirement plan, meaning that they receive a fixed-sum payment each month.[5] Plaintiffs filed a putative class action suit in 2014 alleging that U.S. Bank violated its fiduciary duties of loyalty and prudence under ERISA, and engaged in prohibited transactions, by improperly investing the plan's assets.[6] These alleged violations included investing the plan's assets entirely in equities and investing over 40 percent of the plan's assets in U.S. Bancorp's own mutual funds.[7] In 2008, when the financial crisis struck, the plan suffered a loss of $1.1 billion and became 84 percent underfunded.[8] Plaintiffs sought to have U.S. Bank repay the plan approximately $750 million in losses, along with injunctive relief, and attorney's fees.[9] While the case was pending before the district court, U.S. Bank made a $311 million excess contribution to the plan such that it became overfunded.[10] The district court subsequently dismissed the case as moot.[11] The court reasoned that because the plan was now overfunded plaintiffs' defined benefits were no longer at any risk, so they "lack[ed] a concrete interest in any monetary relief that the court might award to the Plan."[12]

The Eighth Circuit affirmed the district court's dismissal, but on statutory, rather than constitutional, grounds. The court concluded that when a pension plan is overfunded a beneficiary of that plan no longer falls within the class of individuals authorized by ERISA to bring suit.[13] In particular, "[g]iven that the Plan is overfunded, there is no actual or imminent injury to the Plan itself that caused injury to the plaintiffs' interests in the Plan."[14] The Supreme Court granted certiorari, and asked the parties to brief the question of constitutional standing as well as the question of statutory standing on which the Eighth Circuit based its decision.

The Supreme Court's Decision

Justice Kavanaugh wrote a succinct opinion on behalf of a five-justice majority holding that plaintiffs lacked Article III standing.[15] In the majority's view, the crucial fact was that plaintiffs had always received their defined benefits in full and were "legally and contractually entitled to receive those same monthly payments for the rest of their lives."[16] The amount of this entitlement did not vary with the fortunes of the allegedly mismanaged plan, nor would it change based on the outcome of their case against U.S. Bank: win or lose, the amount of their benefit would remain the same. Absent a "concrete stake in th[e] lawsuit," plaintiffs lacked Article III standing to sue.[17] Crucially, the Court acknowledged that "plaintiffs' complaint alleged the plan was underfunded for a period of time," but held that "a bare allegation of plan underfunding does not itself demonstrate a substantially increased risk that the plan and the employer would both fail."[18]

The Court proceeded to reject each of the four theories plaintiffs advanced to attempt to justify their standing.[19] First, plaintiffs contended that, like a trust beneficiary, they possess an equitable or property interest in the plan itself, not just their particular income stream.[20] The Court rejected this argument by reasoning that in the private trust context the ultimate amount of money received by the beneficiary varies

[4] ERISA §§502(a)(2); 502(a)(3).
[5] *Thole,* slip op. at 1.
[6] *Id.* at 2; *Thole v. U.S. Bank, Nat'l Ass'n*, 873 F.3d 617, 625 (8th Cir. 2017).
[7] *Thole*, 873 F.3d at 624.
[8] *Id.* at 624.
[9] *Thole,* slip op. at 2.
[10] *Thole,* 873 F.3d at 630.
[11] *Id.* at 622.
[12] *Id.*
[13] *Id.* at 630.
[14] *Id.* at 630 (quotation and citation omitted).
[15] *Thole*, slip op. at 2-3.
[16] *Id.*
[17] *Id.* at 3.
[18] *Id.* at 7-8.
[19] *Id.* at 3-7.
[20] *Id.* at 3-4.

based on the quality of trust management, while the amount received from defined-benefit plans is fixed.[21]

Second, plaintiffs claimed standing as representatives of the plan.[22] The Court responded that under its precedents plaintiffs can assert the rights of others only where they have already suffered some constitutional injury giving them a stake in the outcome of the case, or have been assigned the rights of someone who has been so injured.[23] The Court rejected an argument that ERISA's authorization for plan participants to bring suit assigned to them the rights of the plan, similar to how *qui tam* statutes assign to relators claims that belong to the United States.[24]

Third, plaintiffs argued that Congress had generally authorized plan participants to sue in equity to remedy harm to the plan.[25] Indeed, ERISA provides that "[a] civil action may be brought by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief" for a breach of fiduciary duty.[26] ERISA also provides that a "participant, beneficiary, or fiduciary" can bring a suit for equitable relief to remedy practices that violate ERISA.[27] Relying on *Spokeo v. Robins,* the Court noted that a statutory grant of standing to sue does not automatically confer Article III standing on a litigant: Article III standing still requires the plaintiff to show the statutory violation involved some concrete harm to him, a concrete harm plaintiffs had not alleged.[28]

Fourth, the Court rejected an argument that, if plaintiffs lacked standing, no one would monitor the conduct of plan fiduciaries.[29] The Court noted that it has previously rejected the argument that the plaintiff should be granted standing to sue because there are no other plaintiffs who would have standing; it also rejected the argument on its facts, contending that others, such as the Department of Labor ("DOL") or co-fiduciaries, could still bring claims against plan fiduciaries.[30]

Although it left little question that these particular plaintiffs lacked Article III standing to sue, the Court hinted at a narrow exception to its rule that a defined-benefit plan participant cannot bring suit unless the amount of such participant's benefit payment is affected.[31] To meet this possible narrow exception, plaintiffs would have to "plausibly and clearly claim that the alleged mismanagement of the plan substantially increased the risk that the plan and the employer would fail and be unable to pay the plaintiffs' future pension benefits."[32] The Court, however, further cautioned that an increased-risk-of-harm theory of standing may not be available where the PBGC would be required to pay all vested pension interests in full.[33]

Observations

i. <u>Implications For Defined-Benefit Plan Asset Managers</u>

Because the heightened fiduciary duties applicable to ERISA plans create an increased risk of litigation, many investment managers choose not to manage assets subject to ERISA.[34] The *Thole* decision may

[21] *Id*.
[22] *Id*. at 4-5.
[23] *Id*. at 5.
[24] *Id*.; Brief for United States as Amicus Curiae at 14, *Thole v. U.S. Bank N.A.*, 590 U.S. ____, No. 17-1712 (Sept. 18, 2019).
[25] *Thole,* slip op. at 5.
[26] ERISA §502(a)(2)
[27] ERISA § 502(a)(3) (Section 502(a)(3) provides standing to pursue violations of ERISA generally (in contrast to Section 502(a)(2) which only provides standing to pursue breaches of fiduciary duty)).
[28] *Thole*, slip op. at 5-6 (citing *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549 (2016)).
[29] *Id*. at 6.
[30] *Id*. at 6-7.
[31] *Id*. at 7.
[32] *Id*. at 7-8.
[33] *Id*. at 8 n. 2 (noting that "if the plan and the employer in this case were to fail, the PBGC would be required to pay these two plaintiffs all of their vested pension benefits in full" and stating that "[a]ny increased-risk-of-harm theory of standing therefore might not be available for plan participants whose benefits are guaranteed in full by the PBGC. But we need not decide that question in this case.").
[34] Our analysis is focused on the effect of *Thole* on asset managers, but *Thole* also provides protections for plan sponsors, including but not limited to those in the financial services industry like U.S. Bank. However, it is unlikely that *Thole* will slow the movement of employers away from

alter this risk calculus, at least with regard to the $3.2 trillion of assets held in defined-benefit plans.[35] *Thole* effectively removes the threat of litigation by private plaintiffs related to defined-benefit pension plans. This is true with respect to relief sought for breach of fiduciary duty under ERISA § 404, but also with respect to equitable relief for ERISA violations, such as prohibited transactions under ERISA § 406. Under *Thole*, to survive a motion to dismiss, defined-benefit plaintiffs would have to "clearly and plausibly plead" a "substantially increased risk" that both the plan and the sponsoring employer would fail, causing them to lose their benefit payments.[36] Even if plaintiffs met this stringent test, the Court suggests that they might still lack standing in situations where the PBGC's insurance would guarantee their full benefits.[37]

Given that private plaintiffs are now effectively barred from bringing suit, the DOL becomes the sole meaningful enforcer of ERISA obligations for defined-benefit plans. However, as noted by the United States in its amicus brief supporting standing for the private plaintiffs in *Thole*, "given [its] limited resources, the Secretary of Labor cannot monitor every plan in the country."[38] This observation is borne out by the sheer number of plans subject to ERISA, and the limited number of civil suits initiated by the DOL. Under ERISA, the DOL is responsible for overseeing 694,000 retirement plans (including defined-benefit and defined-contributions plans), approximately 2.2 million health plans, and a similar number of other welfare benefit plans, such as those providing life or disability insurance.[39] These plans have assets of over $9.8 trillion.[40] In 2019, the DOL closed 1,146 civil investigations into ERISA violations, of which 89 investigations were referred for civil litigation.[41] In contrast, in 2019, there were 6,096 ERISA suits filed in federal court.[42] As the numbers above indicate, the DOL is selective about which suits it brings, weighing each suit based on the following criteria: "the ability to obtain meaningful relief through litigation, the cost of litigation, viability of other enforcement options, and agency enforcement priorities."[43]

In sum, while *Thole* does not change the standard of conduct applicable to the managers of defined-benefit plan assets under ERISA, it heightens the barriers to private litigation alleging those standards were breached, almost to the point of insuperability. This limitation on private litigation is likely to deter frivolous claims, including claims for purely technical violations of ERISA. Indeed, the Court's decision may have been partly driven by its sense that this litigation was lawyer-driven: the majority repeatedly noted that, although plaintiffs had no concrete financial stake in the outcome of the case, plaintiffs' counsel had sought at least $31 million in attorney's fees.[44] On the other hand, if private plaintiffs cannot bring suit, the DOL's resource constraints may mean that questionable conduct by plan fiduciaries goes unaddressed.

ii. Implications for ERISA Generally

While the Court in *Thole* writes with a laser focus on defined-benefits plans, the decision will likely have an impact on standing in a variety of ERISA contexts, including in particular defined-contribution plans.[45] In addition, the decision may mark a retreat from previous precedent tying ERISA to trust law, along

maintaining defined-benefit pension plans, which is motivated by substantial concerns other than fiduciary risk.

[35] Dept. of Labor, Private Pension Plan Bulletin Historical Tables and Graphs, 1975–2017 (Sept. 2019) (Table E10).

[36] *Thole*, slip op. at 7.

[37] *Id.* at 8 n. 2.

[38] Brief for United States as Amicus Curiae at 26.

[39] Employee Benefits Security Administration Fact Sheet

[40] *Id.*

[41] *Id.*

[42] U.S District Courts—Civil Cases Commenced, by Nature of Suit

[43] Employee Benefits Security Administration Fact Sheet

[44] *Thole*, slip op. at 2-3

[45] Under a defined-benefit plan, participants' benefits are defined by a formula. Under a defined-contribution plan, participants' benefits are equal to the amount contributed to the plan for their account, adjusted to reflect investment earnings and losses.

with traditional views of subrogation, at least with regard to the role of the PBGC.

Thole firmly rejected the theory that plan participants can have standing as representatives of the plan, such that they can sue based on injuries suffered solely by the plan.[46] Prior to *Thole*, courts had increasingly required ERISA plaintiffs to prove that *they,* not just the *plan*, suffered some injury conferring standing.[47] *Thole* is the culmination of this movement, and extinguishes any prior case law that allowed plaintiffs to bring suit in a representative capacity on behalf of the plan when they did not suffer a loss.[48] In particular, plaintiffs who are participants in a defined-contribution plan may not have standing to bring suit where their plan offered a suite of investment options and they did not personally invest in the option with respect to which an ERISA violation was alleged. This limits the universe of plaintiffs in ERISA litigation generally, including class action litigation, although it is not an insurmountable obstacle as individuals who actually invested in any such investment option will have standing.[49]

Moreover, ERISA law has traditionally been so demanding of its fiduciaries due to the tight linkage between ERISA and trust law concepts. While *Thole* acknowledges that trust law traditionally informs interpretations of ERISA,[50] the Court reasoned that "a defined-benefit plan is more in the nature of a contract. The plan participants' benefits are fixed and will not change, regardless of how well or poorly the plan is managed."[51] This is a dramatic shift from the Court's previous discussions of ERISA, in which it stated that "rather than explicitly enumerating all of the powers and duties of trustees and other fiduciaries, Congress invoked the common law of trusts to define the general scope of their authority and responsibility."[52] Indeed, in its amicus brief, the United States argued that "[a]n ERISA beneficiary's standing to assert claims based on a materially increased risk of future nonpayment or underpayment finds further support in the traditional right of contingent beneficiaries to sue a trustee for breach of its duties."[53] That the *Thole* Court fails to engage materially with trust law could signal to lower courts that trust law should be less influential in interpreting ERISA. Indeed, Justice Thomas's concurrence, joined by Justice Gorsuch, objected entirely to using trust law as the "starting point for interpreting ERISA."[54]

If the Court continues to distinguish ERISA from the law of trusts, it may further limit the remedies available under ERISA § 502(a)(3), which permits "appropriate equitable relief" for any violation of the statute. In 2011, the *CIGNA Corp. v. Amara* Court, relying heavily on trust law, noted that "[e]quity courts possessed the power to provide relief in the form of monetary 'compensation' for a loss resulting from a trustee's breach of duty, or to prevent the trustee's

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[46] *Thole*, slip op. at 4-5.

[47] *See Taveras v. UBS AG*, 612 F. App'x27, 29 (2d Cir. 2015) ("Failure to allege individualized harm goes directly to constitutional standing and is fatal to Taveras's Amended Complaint"); *Johnson v. Delta Air Lines, Inc.*, No. 1:17-CV-2608-TCB, 2017 WL 10378320, at *1 (N.D. Ga. Dec. 12, 2017) (dismissing claim for lack of standing where plaintiffs had not personally invested in fund that purportedly violated ERISA).

[48] *Abbott v. Lockheed Martin Corp.*, No. 06-CV-0701-MJR, 2009 WL 839099, at *8 (S.D. Ill. Mar. 31, 2009) ("The Court concludes that as participants in the Plans, Plaintiffs have standing to recover the damages LMC and LMIMCo owe to the Plans under 29 U.S.C. § 1109."); *Deluca v. Blue Cross Blue Shield of Mich.*, 475 F. Supp. 2d 640, 646 (E.D. Mich. 2007) (Plaintiff as a plan beneficiary has standing, "regardless of whether he can show that he personally suffered or will suffer a concrete injury as a result of BCBSM's conduct.").

[49] Of course, some ERISA claims, including for example excessive fee litigation, allege fiduciary violations that are not tied to any particular investment option, but concern the plan generally.

[50] *Thole*, slip op. at 4.

[51] *Id*.

[52] *Central States, Se. & Sw. Areas Pension Fund v. Central Transp., Inc.*, 472 U.S. 559, 570 (1985).

[53] Brief for United States as Amicus Curiae at 21 *citing* Restatement (Second) of Trusts § 214(1) & cmt. A, *Thole v. U.S. Bank N.A.*, 590 U.S. ____, No. 17-1712 (Sept. 18, 2019).

[54] *Thole*, slip op. at 3 (Thomas, J., concurring) (citation and quotation omitted).

unjust enrichment."[55] Such a broad reading of equitable relief could be limited if the Court moves to divorce ERISA and trust law.

Finally, the *Thole* Court's suggestion that the PBGC's insurance of defined-benefit plans may deny standing to plan participants whose benefits are at risk would be a departure from the traditional view of subrogation. The PBGC is a federal agency created by ERISA that insures an individual's benefits under defined-benefit pension plans up to a certain amount (currently, approximately $67,000 per year for a worker who begins receiving payments at 65 with no survivor benefits).[56] Notably, the United States is not itself liable for the PBGC's obligations.[57] In *Thole*, the Court referred to this insurance coverage as a potential reason that a plan participant may lack standing to bring suit even if the participant could show that the plan and the employer were unlikely to satisfy the guaranteed payment obligations.[58] This is in tension with the traditional equitable understanding of subrogation, which "allows an insurer to stand in the shoes of its insured and seek indemnification from third parties whose wrongdoing has caused a loss for which the insurer is bound to reimburse."[59] Here, instead of seeing the plan participants as possessing claims that would be assigned to the PBGC in the event of a plan failure, the Court suggested that plan participants may lack standing at any point because of the insurance guarantee.

The Court's view of subrogation will not limit the standing of the PBGC to bring claims when it has to provide benefits pursuant to a failed plan. When a plan terminates in distress or involuntarily, the PBGC becomes trustee of the plan.[60] As trustee, the PBGC has authority to "to commence, prosecute, or defend on behalf of the plan any suit or proceeding involving the plan."[61] However, by limiting the standing of plan participants, the Court may increase the number of plans that fail, and consequently, the benefits that the PBGC has to provide to retirees. *Thole* requires plaintiffs to allege that both the plan and its sponsoring employer face a substantially increased risk of failure.[62] Under this standard, a healthy business could mismanage its defined-benefit plan such that it was severely underfunded. However, plan participants would have no redress until that business was also close to failing. At that point, the business may lack the resources to remedy the harm the business caused to the plan, subjecting the PBGC to greater obligations. The PBGC is empowered to terminate underfunded plans,[63] and it could then pursue claims for breaches of ERISA. However, as with the DOL, the PBGC lacks the resources to fulfill the void left by private plaintiffs.[64]

The *Thole* Court rejects notions of representative standing and questions the relevance of trust law to ERISA, along with traditional views of subrogation. ERISA plaintiffs will now face a searching inquiry into whether they can make a threshold showing that their benefits were put at substantial practical risk by the breaches of ERISA they allege.

iii. Implications for Constitutional Standing

Beyond the ERISA context, *Thole* reflects the increasing tendency among some members of the

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[55] 563 U.S. 421, 441-42 (2011) *citing* Restatement (Third) of Trusts § 95, and cmt. a (Tent. Draft No. 5, Mar. 2, 2009). The Court's description of equitable relief in *CIGNA* has already come under criticism with a subsequent case noting that "the Court's discussion of § 502(a)(3) in CIGNA was not essential to resolving that case," and that the Court's analysis of the scope of equitable relief remains the same as it was under the Supreme Court's precedent before *CIGNA*. *Montanile v. Bd. of Trustees of Nat. Elevator Indus. Health Benefit Plan,* 136 S. Ct. 651, 660 n. 3 (2016).

[56] Congressional Research Service, Pension Benefit Guaranty Corporation (PBGC): A Primer at 1, 7; Your Guaranteed Pension: Single-Employer Plans.

[57] Pension Benefit Guaranty Corporation (PBGC): A Primer at 2.

[58] *Thole*, slip op. at 8 n. 2.

[59] *Kaf-Kaf, Inc. v. Rodless Decorations, Inc.*, 90 N.Y.2d 654, 660 (1997).

[60] Pension Benefit Guaranty Corporation (PBGC): A Primer, at 4.

[61] 29 U.S.C. § 1342(d)(1)(B)(iv).

[62] *Thole*, slip op. at 7.

[63] 29 U.S.C. § 1342(c).

[64] In 2019, the PBGC had 21 cases in state and federal court, and 165 bankruptcy and state receivership cases. PBGC Annual Report 2019, at 100.

Supreme Court to impose heightened constitutional standing requirements on plaintiffs relying on Congressional grants of power to sue. *Thole* extends the Court's analysis in *Spokeo, Inc. v. Robins*, which held that plaintiffs could not sue for so-called "bare procedural violation[s]" of statutes; under Article III, plaintiffs have to show that they suffered some concrete harm in addition to the violation of a right guaranteed by statute.[65] *Spokeo* acknowledged that an injury sufficient to satisfy Article III's case-or-controversy requirement need not necessarily be a tangible one.[66] It noted that courts have historically recognized intangible injuries, such as to the right to free speech, and recognized Congress' power to identify intangible interests in need of protection, such as an interest in not having false information about oneself disseminated, and to pass statutes giving persons the right to sue to vindicate those interests.[67] But the Court ultimately concluded that the violation of a statutory right does not, without more, establish that the complaining party suffered an Article III injury.[68] A plaintiff still must show that he suffered, or is at risk of suffering, a "concrete harm" from the violation of the statutory right.[69]

In *Spokeo*, the Court did not determine whether the plaintiff had Article III standing; it simply held that the court below had failed to properly consider whether the plaintiff had suffered a sufficiently concrete harm to sue under the Fair Credit Reporting Act, and remanded the case for further proceedings consistent with its new analysis.[70] In *Thole*, the Court has now affirmatively held that plaintiffs lacked Article III standing even where Congress had expressly granted plaintiffs standing to sue to remedy a violation of a federal statute. Plaintiffs argued that the provisions allowing plan participants to sue to remedy breaches of fiduciary duty reflected Congress's judgment that all plan participants have a real, albeit intangible, interest in the prudent management of plan assets, irrespective of whether they faced any individual financial loss.[71] Plaintiffs also argued that Congress, especially sensitive to threats to Americans' retirement plans, judged that all participants in an ERISA plan possessed an intangible interest in the health of the plan.[72] Accordingly, Congress gave plan beneficiaries standing to sue on behalf of the plan to protect its assets from breaches of fiduciary duty.[73]

The Court rejected these arguments in part because, as a matter of statutory interpretation, it did not believe that ERISA plans should be treated entirely like trusts, and so defined-benefit plan beneficiaries should not have all the rights of trust beneficiaries.[74] But the majority opinion went further, suggesting that even a traditional trust beneficiary can claim a concrete interest in trust assets only because "the ultimate amount of money received by the beneficiaries will typically depend on how well the trust is managed, so every penny of gain or loss is at the beneficiaries' risk."[75] By implication, a trust beneficiary guaranteed only a specific benefit from the trust would have no Article III standing to sue the trustee for mismanagement unless the mismanagement actually did threaten what the beneficiary was owed. This, in turn, suggests that Congress' power to recognize intangible interests in need of protection, at least when those intangible interests are ultimately financial in nature, is more limited than it may have appeared in *Spokeo*. A plaintiff will still need to establish a fairly direct personal financial harm, or risk thereof, in order to demonstrate a concrete injury.

[65] *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1550 (2016).
[66] *Id.* at 1549.
[67] *Id.* at 1549-50.
[68] *Id.* at 1550.
[69] *Id.*
[70] *Id.* On remand, the Ninth Circuit concluded that the plaintiff had sufficiently established Article III standing. *Robins v. Spokeo, Inc*., 867 F.3d 1108, 1118 (9th Cir. 2017).
[71] Brief for Petitioners 41-42, *Thole v. U.S. Bank N.A.*, 590 U.S. ____, No. 17-1712 (Sept. 11, 2019)
[72] *Id.* at 42.
[73] *Id.* at 43-44.
[74] *Compare Thole*, slip op. at 4 (noting that trust law "informs but does not control interpretation of ERISA") *with Thole*, slip op. at 4 (Sotomayor, J., dissenting) (contending that ERISA "expressly required the creation of a trust" in which beneficiaries have an equitable interest).
[75] *Thole*, slip op. at 4.

Finally, the Court may have answered a question of federal procedure left open after its decisions in *Bell Atlantic Corp. v. Twombly*[76] and *Ashcroft v. Iqbal*:[77] If a plaintiff must plead a plausible claim to relief in order to defeat a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), does a plaintiff have to meet the same plausibility standard when it pleads the basis for federal jurisdiction, including the existence of Article III standing? Most circuit courts have answered in the affirmative,[78] but a few courts have questioned whether the *Twombly*/*Iqbal* standard should also be applied to the pleading of Article III standing.[79] The *Thole* opinion may have implicitly resolved this issue when it repeatedly stated that plaintiffs' claims should be dismissed because they failed to "*plausibly* and clearly allege" an Article III injury.[80] This likely confirms the majority view that the *Twombly*/*Iqbal* plausibility standard applies to motions to dismiss under Rule 12(b)(1) as well as Rule 12(b)(6).

Conclusion

Thole is an important case for investment managers who are weighing the risk/rewards of managing the substantial pool of funds protected by ERISA, particularly with respect to defined-benefit plans. *Thole* potentially materially reduces the litigation risks associated with the management of such assets. It is also creates a potent defense for those defending class actions in federal courts based on ERISA or on another federal statutory or regulatory scheme. *Thole* requires every potential class plaintiff or member of a putative class to demonstrate plausibly that they have suffered or are likely to suffer a concrete injury whether or not they have been the subject of a federal statutory or regulatory violation or Congress explicitly authorized a private action. In a larger sense, *Thole* represents the latest chapter in the Supreme Court's campaign to cut back federal constitutional standing to persons who can demonstrate actual and individualized concrete injuries.[81]

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[76] 550 U.S. 544 (2007).
[77] 556 U.S. 662 (2009).
[78] *See Crow Creek Sioux Tribe v. United States*, 900 F.3d 1350, 1354-55, 1355 n.2 (Fed. Cir. 2017) (collecting cases).
[79] *See Harry v. Total Gas & Power N. Am., Inc.*, 889 F.3d 104, 110-11 (2d Cir. 2018); *Maya v. Centex Corp.*, 658 F.3d 1060, 1067-68 (9th Cir. 2011).
[80] *Thole*, slip op. at 6-7 (emphasis added).
[81] This Alert Memorandum was prepared with the assistance of William Baldwin.