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Solicitor General Asks Justices To Hear US Bank ERISA Suit

By Dorothy Atkins

Law360 (May 21, 2019, 9:45 PM EDT) -- The solicitor general urged the U.S. Supreme Court on Tuesday to consider the Eighth Circuit's finding that U.S. Bank pension plan participants can't allege fiduciary breaches under the Employee Retirement Income Security Act once a plan becomes overfunded, arguing that plans fluctuate and participants can sue even if they haven't lost money.

In a 30-page amicus brief, the solicitor general argued two U.S. Bank pension plan participants have standing to sue under ERISA over breaches of fiduciary duty, even if they haven't been financially injured, and the Eighth Circuit's ruling that found otherwise is at odds with multiple other circuits.

The solicitor general noted that the financial status of pension funds are based on actuarial tables, inflation, interest rates and other economic factors and as a result they could toggle "somewhat frequently" between overfunded and underfunded. However, fluctuations shouldn't stop participants from being able to sue over fiduciary breaches, the solicitor general argued.

"It would be bizarre to tether a plaintiff's standing — and thus a federal court's power to hear a case — to such a volatile and arbitrary metric," the brief says. "Nothing in ERISA or Article III compels such a result."

The high court had asked the solicitor general in October to weigh in on whether the justices should grant a petition for a writ of certiorari filed by two retirees. The retirees asked the high court to overturn the Eighth Circuit's decision upholding a lower court's ruling that tossed their lawsuit against U.S. Bank, U.S. Bancorp and various U.S. Bancorp directors. Their suit alleges that the defendants breached their fiduciary duties and engaged in prohibited transactions violating ERISA and causing significant losses.

But over the course of the litigation, the plan had become overfunded — meaning it had more money than it needed to cover its obligations — and therefore the Eighth Circuit found that the retirees weren't harmed and couldn't sue under ERISA.

The retirees appealed the Eighth Circuit's ruling and argued in their June petition that it put the appeals court at odds with other circuits and the long-held position of the U.S. Department of Labor. The retirees said those appellate courts have found that a violation of participants' ERISA rights was enough for participants to bring claims for injunctive relief and they don't need to allege financial injury.

On Tuesday, the solicitor general appeared to side with the retirees, and urged the high court to take up the question. The brief notes that under ERISA, a participant has standing to sue a plan over fiduciary breaches on behalf of the plan in a representative capacity, on his or her own behalf due to an invasion of his or her own legal right or due to an increased risk of monetary harm resulting from a breach of fiduciary duty. Under each scenario, the participant has standing regardless of whether the plan is overfunded or underfunded, the brief says.

The brief also explained that the risk a plan is underfunded does not vanish the instant a plan crosses the threshold from underfunded to overfunded.

“A plan that is underfunded by a dollar has virtually the same risk of future insolvency as one that is overfunded by a dollar,” the brief says. “That marginal difference cannot affect standing; if the risk is sufficiently non-speculative in the one case, it is equally non-speculative in the other.”

The solicitor general also asked the justices to direct the parties to brief the question of whether the Eighth Circuit erred in addressing statutory standing before Article III standing, adding that the secretary of Labor has limited resources and cannot police every plan in the country, which is why Congress created laws allowing beneficiaries to sue over fiduciary breaches.

“Providing beneficiaries ‘ready access’ to the courts furthers, not hinders, ERISA’s purposes,” the brief says.

Counsel for the retirees and representatives for the government didn’t immediately respond Tuesday to requests for comment. A U.S. Bank spokesperson told Law360 that the bank doesn’t comment on pending litigation.

The government is represented by Solicitor of Labor Kate S. O’Scannlain, Associate Solicitor G. William Scott, Thomas Tso and Stephen Silverman of the U.S. Department of Labor and by Solicitor General Noel J. Francisco, Deputy Solicitor General Edwin S. Kneedler and Assistant to the Solicitor General Sopan Soshi.

The retirees are represented by Karen L. Handorf, Michelle C. Yau and Mary J. Bortscheller of Cohen Milstein Sellers & Toll PLLC and Peter K. Stris, Douglas D. Geyser and John Stokes of Stris & Maher LLP.

U.S. Bank is represented by Stephen P. Lucke and Andrew Holly of Dorsey & Whitney LLP and Joseph R. Palmore and James R. Sigel of Morrison & Foerster LLP.

The case is James J. Thole et al. v. U.S. Bank NA et al., case number 17-1712, in the U.S. Supreme Court.

--Additional reporting by Danielle Nichole Smith and Adam Lidgett. Editing by Kelly Duncan.