

ERISA DEFINED BENEFIT PLANS ARE NOT  
“TRUST”WORTHY

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## INTRODUCTION

What role does the common law of trusts play in policing investment decisions made in the context of a defined-benefit retirement plan governed by ERISA? That issue, among others, divided the Supreme Court this past term in *Thole v. U.S. Bank N.A.*<sup>1</sup> The Court's majority decided the case by holding that plan beneficiaries had no Article III standing to challenge allegedly self-interested investment decisions made by the plan's sponsor and administrator.<sup>2</sup> Because the Court grounded its decision in constitutional standing, Congress would be powerless to confer standing on plan beneficiaries without also amending the substantive rights accorded those beneficiaries.

Unlike recent Court decisions on abortion rights<sup>3</sup> or Title VII rights of LGBT workers,<sup>4</sup> ERISA cases rarely make front-page news. But the issue the Court addressed in the *Thole* case potentially affects the retirement security of thirty-five million Americans who participate in the country's nearly forty-seven thousand private-sector defined benefit pension plans.<sup>5</sup> These plans collectively hold three trillion dollars in assets.<sup>6</sup>

This Article has two objectives. The first is to examine the consequences that might have followed if the Court had decided that the plan beneficiaries did have standing. Applying the substantive law of trusts, together with the remedies afforded by trust law, would have done little good for the plan beneficiaries and would not serve as a deterrent for questionable behavior by the plan's trustee.<sup>7</sup> ERISA is a regulatory statute, and potential abuses call for a regulatory solution.

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1. 140 S. Ct. 1615, 1618-19 (2020).

2. *Id.* at 1619.

3. *See, e.g.*, *June Med. Servs., L.L.C. v. Russo*, 140 S. Ct. 2103 (2020).

4. *See, e.g.*, *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731 (2020).

5. EMP. BENEFITS SEC. ADMIN., DEP'T OF LAB., PRIVATE PENSION PLAN BULLETIN HISTORICAL TABLES AND GRAPHS 1975-2017, at 5 tbl.E4 (2019), <https://www.dol.gov/sites/dolgov/files/ebsa/researchers/statistics/retirement-bulletins/private-pension-plan-bulletin-historical-tables-and-graphs.pdf> [<https://perma.cc/PH72-NSPH>] (showing 34,960,000 participants in 2017); *id.* at 1 tbl.E1 (showing 46,698 plans in 2017).

6. *Id.* at 13 tbl.E10 (showing \$3.2 trillion in assets).

7. *See infra* Part III.

In reaching this conclusion, this Article builds on earlier work questioning the wholesale importation of trust law principles into ERISA doctrine. More than thirty years ago, Daniel Fischel and John Langbein argued that the trust law model, in which the trustee must act exclusively for the benefit of trust beneficiaries, is problematic in the contexts of ERISA plans, which are designed for the mutual benefit of the employer and the employee.<sup>8</sup> More recently, Natalya Shnitser has emphasized the hazards employers must navigate in switching between the employer’s different “hats”—one for its role as settlor, which permits the employer to consider its own interests in establishing and designing a plan, and another for its role as plan fiduciary, which requires the employer to act solely in the interest of plan participants in the course of plan administration.”<sup>9</sup>

This Article’s second objective is to examine the potential impact of the Court’s analysis of Article III standing. Although trust law is a poor fit for regulating investment decisions by defined benefit plans,<sup>10</sup> the Court’s standing decision has the potential to cripple more productive regulatory efforts. To the extent that the Court’s opinion holds that plan beneficiaries lack constitutional standing unless their benefits are in jeopardy, the opinion may limit the ability of Congress to use the private right of action as a tool for enforcing ERISA mandates.<sup>11</sup>

## I. THE *THOLE* CASE

*Thole* was a breach of fiduciary duty suit brought by beneficiaries of a defined benefit plan established by their employer, U.S. Bank.<sup>12</sup> ERISA defined benefit plans guarantee plan beneficiaries

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8. Daniel Fischel & John H. Langbein, *ERISA’s Fundamental Contradiction: The Exclusive Benefit Rule*, 55 U. CHI. L. REV. 1105, 1118-19 (1988).

9. Natalya Shnitser, *Trusts No More: Rethinking the Regulation of Retirement Savings in the United States*, 2016 BYU L. REV. 629, 661-62 [hereinafter Shnitser, *Trusts No More*]; see also Natalya Shnitser, *The New Fiduciaries*, 88 U. CIN. L. REV. 685, 691-92 (2020) [hereinafter Shnitser, *The New Fiduciaries*].

10. See *infra* Part III.

11. See *infra* notes 129-32 and accompanying text.

12. *Thole v. U.S. Bank N.A.*, 140 S. Ct. 1615, 1618 (2020) (“The plaintiffs claimed that the defendants violated ERISA’s duties of loyalty and prudence by poorly investing the assets of the plan.”).

a fixed periodic payment during retirement.<sup>13</sup> In establishing a defined benefit plan, the employer determines the formula for fixing the amount of the periodic payments.<sup>14</sup> The amount is generally tied to salary and years of service.<sup>15</sup> ERISA requires the employer to establish a trust fund from which retirement payments will be drawn,<sup>16</sup> and to maintain funding levels sufficient to pay the promised benefit when the covered employee retires.<sup>17</sup>

U.S. Bancorp sponsored a defined benefit plan for employees.<sup>18</sup> U.S. Bancorp designated U.S. Bank, a wholly owned subsidiary, as trustee of the plan.<sup>19</sup> U.S. Bank was, in turn, the parent of FAF Advisors, the plan's investment advisor.<sup>20</sup>

The plaintiffs in *Thole* brought a class action against all three parties, alleging that U.S. Bank and FAF Advisors breached their fiduciary duties and that U.S. Bancorp knowingly participated in the breaches.<sup>21</sup> The plaintiffs alleged two principal breaches, both of which focused on the plan's investment decisions. First, the plaintiffs alleged that the trustee and investment advisor breached their fiduciary duties by investing 100 percent of the trust's funds in equities, resulting in \$1.1 billion of market losses when the stock market crashed in 2007-2008.<sup>22</sup> Second, the plaintiffs alleged that the plan's investment advisor breached its fiduciary duty by investing 40 percent of the plan's assets in the advisor's own proprietary mutual funds.<sup>23</sup>

To remedy the alleged breaches, the plaintiffs sought restoration of losses suffered by the trust, disgorgement of profits realized by the investment advisor, removal of the fiduciaries, and an

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13. *Id.*

14. *See id.*; *see also* Shnitser, *Trusts No More*, *supra* note 9, at 641-42.

15. *See* Kathryn L. Moore, *An Overview of the U.S. Retirement Income Security System and the Principles and Values It Reflects*, 33 *COMPAR. LAB. L. & POL'Y J.* 5, 20 (2011).

16. 29 U.S.C. § 1103(a) (requiring that "all assets of an employee benefit plan shall be held in trust").

17. *See id.* §§ 1082-1083.

18. *Adedipe v. U.S. Bank, N.A.*, 62 F. Supp. 3d 879, 884 (D. Minn. 2014).

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.* at 885-86.

23. *Id.* at 886. A third claim focused on FAF's investment of plan assets in a bond portfolio it managed—a portfolio that became distressed in 2007, leading FAF's head of securities lending to engage in a scheme that violated securities laws. *Id.*

injunction against employment of the 100 percent equity investment strategy.<sup>24</sup> Plaintiffs also sought imposition of a constructive trust.<sup>25</sup>

The district court initially concluded that the plaintiffs had standing to bring the action,<sup>26</sup> but subsequently concluded that when the plan became overfunded, the plaintiff’s claims became moot.<sup>27</sup> The Eighth Circuit affirmed,<sup>28</sup> as did a divided Supreme Court.<sup>29</sup> Justice Kavanaugh, writing for a 5-4 majority, concluded that the plaintiffs lacked Article III standing because the outcome of the litigation would not in any way change the amount to which they were entitled under the plan.<sup>30</sup> The majority concluded that the only parties who would benefit from a judgment in favor of the plaintiffs would be the plaintiffs’ lawyers, who sought thirty-one million dollars in attorney’s fees.<sup>31</sup> Justice Thomas, writing for himself and Justice Gorsuch, concurred with the Court’s opinion but, in an apparent look to the merits of the case, argued that the Court should not start analysis of ERISA cases with an examination of common law trust doctrine.<sup>32</sup> Justice Sotomayor’s dissent, by contrast, relied heavily on trust law to conclude that the plaintiffs had standing.<sup>33</sup>

## II. THE TRUST LAW FRAMEWORK

ERISA is replete with reference to trust. The statute provides that “all assets of an employee benefit plan shall be held in trust by one or more trustees.”<sup>34</sup> It goes on to embrace the “prudent man”

24. *Id.*

25. *Id.*

26. *Id.* at 895-96.

27. *Adedipe v. U.S. Bank, N.A.*, No. 13-2687 (JNE/JJK), 2015 WL 11217175, at \*8 (D. Minn. Dec. 29, 2015).

28. *Thole v. U.S. Bank, N.A.*, 873 F.3d 617, 632 (8th Cir. 2017), *aff’d*, 140 S. Ct. 1615 (2020).

29. *Thole*, 140 S. Ct. at 1622.

30. *Id.* at 1619.

31. *Id.*

32. *Id.* at 1623 (Thomas, J., concurring) (“I continue to object to this Court’s practice of using the common law of trusts as the ‘starting point’ for interpreting ERISA.” (citing *Varity Corp. v. Howe*, 516 U.S. 489, 497 (1996))).

33. *Id.* at 1625-30 (Sotomayor, J., dissenting).

34. 29 U.S.C. § 1103(a).

standard of care prevalent in trust law at the time of ERISA's adoption.<sup>35</sup> This invocation of trust law reflects ERISA's purposes and origins: separation of pension plan assets from the employer's other assets to ensure that the employer's financial difficulties do not jeopardize retirement security for employees.<sup>36</sup>

The next Part will explore differences that cast doubt on application of trust law principles to investment decisions made by defined benefit plan trustees. First, however, this Section explains why a breach of trust action by participants in the U.S. Bank retirement plan would have faced difficulty even if a private trust had been involved, and goes on to explore the remedies that would have been available if a court were to find a breach.

#### *A. Investment of the Entire Trust Corpus in Equities*

The *Thole* plaintiffs contended that the plan administrators breached their duty to invest prudently by failing to diversify among asset classes.<sup>37</sup> They argued that the decision to invest 100 percent of the plan's assets in equities subjected the plan beneficiaries to excess market risk—risk that would have been mitigated had administrators selected a portfolio better balanced between equities and fixed-income investments.<sup>38</sup>

The prudent investor rule obligates trustees of private express trusts to diversify investments.<sup>39</sup> But the rule, as embodied both in the Uniform Prudent Investor Act and the Third Restatement, does not provide bright-line rules instructing trustees how much they

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35. *Id.* § 1104(a). The prudent man rule embodied in the Second Restatement of Trusts took the position that certain sorts of investments were too speculative for investment by trustees. See RESTATEMENT (SECOND) OF TRS. § 227 cmt. e (AM. L. INST. 1957). By contrast, the prudent investor rule embodied in the Third Restatement “does not classify specific investments or courses of action as prudent or imprudent in the abstract.” RESTATEMENT (THIRD) OF TRS. § 90 cmt. e(1) (AM. L. INST. 2005).

36. For an account of one of the most notorious retirement plan collapses and its connection to ERISA, see generally James A. Wooten, “*The Most Glorious Story of Failure in the Business*”: *The Studebaker-Packard Corporation and the Origins of ERISA*, 49 BUFF. L. REV. 683 (2001) (examining the history and termination of the Studebaker-Packard Corporation).

37. See *supra* notes 21-23 and accompanying text.

38. See *supra* notes 21-23 and accompanying text.

39. RESTATEMENT (THIRD) OF TRS. § 90(b) (AM. L. INST. 2005).

should invest in any asset class.<sup>40</sup> Instead, the rule advises trustees to consider the risk tolerance of the trust and its beneficiaries.<sup>41</sup> Over the long term, equities have generally outperformed fixed-income investments, largely because markets require compensation for the greater risk that equity investors must bear.<sup>42</sup> As a result, the longer the time horizon of a trust and its beneficiaries, the higher the percentage of equities a prudent trustee will hold.

Under the prudent investor rule, then, investment of a trust’s entire corpus in equities is not imprudent per se. If the trust’s time horizon is sufficiently long, a court would be hard-pressed, under current doctrine, to hold that the rule proscribes an all-equity portfolio.<sup>43</sup> A trustee could point to target-date retirement funds offered by major mutual fund companies, all of which hold heavy

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40. For instance, a comment to the Third Restatement provides that the trustee’s responsibilities with respect to market risk “involve quite subjective judgments that are essentially unavoidable in the process of asset management, addressing the appropriate degree of risk to be undertaken in pursuit of a higher or lower level of expected return from the trust portfolio.” *Id.* cmt. e(1). A comment to section 2 of the Uniform Prudent Investor Act provides:

The Act impliedly disavows the emphasis in older law on avoiding “speculative” or “risky” investments. Low levels of risk may be appropriate in some trust settings but inappropriate in others. It is the trustee’s task to invest at a risk level that is suitable to the purposes of the trust.

UNIF. PRUDENT INV. ACT § 2 cmt. (UNIF. L. COMM’N 1994).

41. The Uniform Prudent Investor Act provides that “[a] trustee’s investment and management decisions respecting individual assets must be evaluated not in isolation but in the context of the trust portfolio as a whole and as a part of an overall investment strategy having risk and return objectives reasonably suited to the trust.” UNIF. PRUDENT INV. ACT § 2(b). A comment to the Third Restatement provides:

[R]isk management by a trustee requires that careful attention be given to the particular trust’s risk tolerance, that is, to its tolerance for volatility. Risk tolerance largely depends on a combination of the regular distribution requirements of the trust and any irregular distributions that may in fact become necessary or appropriate.

RESTATEMENT (THIRD) OF TRS. § 90 cmt. e(1) (AM. L. INST. 2005).

42. *See, e.g.*, RESTATEMENT (THIRD) OF TRS. § 90 cmt. g (AM. L. INST. 2005) (“[C]ommon stocks can be expected to outperform bonds in the long run but yet to have poorer returns—even negative returns—during some periods. Because investors are risk averse, they require extra compensation for increased risk.”).

43. Elsewhere, I have argued that current prudent investor jurisprudence ignores agency costs that induce trustees to overinvest in securities that generate high returns, even if those securities involve high risk. *See* Stewart E. Sterk, *Rethinking Trust Law Reform: How Prudent Is Modern Prudent Investor Doctrine?*, 95 CORNELL L. REV. 851, 885-94 (2010).

concentrations of equities—in excess of 90 percent—for clients who do not expect to retire for more than thirty years.<sup>44</sup>

### *B. Investment in Affiliated Mutual Funds*

A significant percentage of the equities held by the U.S. Bancorp defined benefit plan was held in FAF's proprietary mutual funds from which FAF received management fees.<sup>45</sup> The plaintiffs contended that purchasing these funds constituted a breach of the duty of loyalty because FAF and its parent were acting in self-interest, not solely in the interest of plan beneficiaries.<sup>46</sup>

Trust law's duty of loyalty is generally exacting.<sup>47</sup> When a trustee benefits from actions taken in its fiduciary capacity, the action constitutes a breach of fiduciary duty with no further inquiry into whether the action was also in the best interest of the trust beneficiaries.<sup>48</sup> The Uniform Trust Code and other state statutes, however, recognize a significant exception to the no further inquiry rule: a trustee's investment in affiliated mutual funds does not

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44. See RESTATEMENT (THIRD) OF TRS. § 90 cmt. e(1) (AM. L. INST. 2005) (“[I]t is ordinarily helpful in justifying the reasonableness of a trustee's conduct to show that an investment or strategy is widely used by trustees in comparable trust situations.”). Vanguard's Target Retirement 2050 Fund currently holds a little over 90 percent of its assets in domestic and international stocks. *Vanguard Target Retirement 2050 Fund*, VANGUARD (Oct. 31, 2020), <https://investor.vanguard.com/mutual-funds/profile/VFIFX> [https://perma.cc/UDJ5-F8FK]. Fidelity's Freedom 2050 Fund holds around 93 percent in domestic and international stocks. *Fidelity Freedom 2050 Fund*, FIDELITY (Sept. 30, 2020), <https://fundresearch.fidelity.com/mutual-funds/summary/315792416> [https://perma.cc/QZS4-2EE6].

45. See *supra* notes 21-23 and accompanying text.

46. See *supra* notes 21-23 and accompanying text.

47. The Third Restatement provides that “[e]xcept in discrete circumstances, the trustee is strictly prohibited from engaging in transactions that involve self-dealing.” RESTATEMENT (THIRD) OF TRS. § 78(2) (AM. L. INST. 2005).

48. See *id.* cmt. b (“[U]nder the so-called ‘no further inquiry’ principle it is immaterial that the trustee may be able to show that the action in question was taken in good faith, that the terms of the transaction were fair, and that no profit resulted to the trustee. A trustee, therefore, commits a breach of trust by purchasing trust property, even as the highest bidder at a public auction; otherwise the possibility of purchase by the trustee would create a temptation for the exercise of less than the trustee's best efforts and business judgment on behalf of the trust to determine whether sale is appropriate and to obtain the most favorable price and terms from others for the trust property.”). For a general defense of the no further inquiry rule, see Melanie B. Leslie, *In Defense of the No Further Inquiry Rule: A Response to Professor John Langbein*, 47 WM. & MARY L. REV. 541 (2005).

ERISA's “prohibited transactions” provision (29 U.S.C § 1106) mimics the no further inquiry rule. See *infra* note 115 and accompanying text.

constitute a per se violation of the duty of loyalty.<sup>49</sup> Banks and other interested parties lobbied hard for the exception, but John Langbein, among others, has defended the exception on policy grounds: mutual funds are an efficient method of diversifying trust investments, and when the settlor has chosen a particular trustee, the settlor understands that the trustee will invest in its own funds rather than funds managed by a competitor.<sup>50</sup>

Although investing in affiliated mutual funds does not constitute a per se breach of the duty of loyalty, a trust beneficiary can still attack a trustee for holding shares in an affiliated fund if investment in that fund was imprudent.<sup>51</sup> Surmounting that hurdle would be unnecessary if the no further inquiry rule were applicable.

### C. Trust Law Remedies

Assuming a beneficiary could establish that investment exclusively in equities or investment in affiliated mutual funds constituted breach of a trustee’s obligations, the beneficiaries would be entitled to three principal trust law remedies: recovery by the trust of any losses suffered as a result of breach, disgorgement of any profits made by the trustee as a result of the breach, and removal of the trustee.<sup>52</sup> Taken in combination, these remedies ensure that

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49. See UNIF. TR. CODE § 802(f) (UNIF. L. COMM’N 2010) (“An investment by a trustee in securities of an investment company or investment trust to which the trustee, or its affiliate, provides services in a capacity other than as trustee is not presumed to be affected by a conflict between personal and fiduciary interests if the investment otherwise complies with the prudent investor rule of [Article] 9. In addition to its compensation for acting as trustee, the trustee may be compensated by the investment company or investment trust for providing those services out of fees charged to the trust.” (alteration in original)); RESTATEMENT (THIRD) OF TRS. § 78 cmt. c(8) (AM. L. INST. 2005) (noting that most states have enacted statutes recognizing the exception).

50. John H. Langbein, *Questioning the Trust Law Duty of Loyalty: Sole Interest or Best Interest?*, 114 YALE L.J. 929, 975 (2005). For criticism of the rule, see Melanie B. Leslie, *Trusting Trustees: Fiduciary Duties and the Limits of Default Rules*, 94 GEO. L.J. 67, 116-19 (2005).

51. See, e.g., RESTATEMENT (THIRD) OF TRS. § 78 cmt. c(8) (AM. L. INST. 2005).

52. The Third Restatement provides:

A trustee who commits a breach of trust is chargeable with (a) the amount required to restore the values of the trust estate and trust distributions to what they would have been if the portion of the trust affected by the breach had been properly administered; or (b) the amount of any benefit to the trustee personally as a result of the breach.

the trustee makes the beneficiary whole and deter future trustees from engaging in similar behaviors.

A trustee whose only breach is investing the entire trust portfolio in equities does not generally profit from the breach. The trustee would nevertheless be required to make the trust beneficiaries whole by restoring to the trust any losses resulting from the imprudent investment.<sup>53</sup> If, instead, the trustee makes self-interested investment decisions, the trustee would be required to disgorge any profits the trustee made, even if the trustee's investment decision turned out well for the beneficiaries.<sup>54</sup> This disgorgement requirement—like potential removal of the trustee (and consequent loss of commissions)<sup>55</sup>—serves a deterrent function.

### III. APPLICATION TO DEFINED BENEFIT PLANS

#### A. Introduction

The trust law rights and remedies outlined in the preceding Part reflect the trustee's duty to attend solely to the interests of the trust and its beneficiaries. Although the trustee is typically entitled to payment in the form of a commission based on the size of the trust,<sup>56</sup> the assumption underlying the private trust is that the settlor

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*Id.* § 100 (AM. L. INST. 2011). It also authorizes judicial removal of a trustee for cause. *Id.* § 37 (AM. L. INST. 2001).

53. *See Id.* § 100 cmt. b (AM. L. INST. 2011) (“[T]he liability of a trustee who is sued and found to have committed a breach of trust is the amount required to restore the values of the trust estate and its distributions to what they would have been if the affected portion of the trust estate had been properly administered.”).

54. *Id.* § 100 cmt. c. For instance, if a trustee who is also a real estate broker takes a commission on sale of property that brings an attractive price to the trust, the trust beneficiaries are entitled to affirm the sale, but recover the commission from the broker. *See id.*

55. On the development of the American rule allowing compensation for trustees, see Langbein, *supra* note 50, at 939-41.

56. *See* RESTATEMENT (THIRD) OF TRS. § 38 cmt. c (AM. L. INST. 2001). Modern statutes recognize that trustee fees are typically negotiated and included in the trust's terms. *See, e.g.*, UNIF. TR. CODE § 708(b) (UNIF. L. COMM'N 2010) (generally allowing commissions in the amount specified in the trust agreement). Corporate trustees typically have a fee schedule based on the size of trust assets. *See generally* Scott Martin, *Who's Charging What for Trust Services?*, WEALTH ADVISOR (Aug. 27, 2019), <https://www.thewealthadvisor.com/article/whos-charging-what-trust-services> [<https://perma.cc/ES8U-JCCN>] (surveying fees charged by leading financial institutions).

conferred on the trustee only legal title to the trust property; the trustee is to manage that property for the benefit of the equitable title holders—the trust beneficiaries.<sup>57</sup>

Defined benefit plans are more complicated.<sup>58</sup> As Fischel and Langbein pointed out more than three decades ago, ERISA plans are designed to benefit both employer and employee.<sup>59</sup> Unlike the paradigmatic private express trust, the defined benefit plan does not arise out of a gratuitous transfer.<sup>60</sup> The employer creates the defined benefit plan to attract and retain employees.<sup>61</sup> By setting up the plan, the employer undertakes a continuing obligation to augment the original trust proceeds to ensure that the plan has sufficient funding to provide the benefits the employer has promised its employees<sup>62</sup>—unlike the settlor of a private trust, who has no obligation to augment the original trust proceeds.

ERISA’s structure reflects the tension between employer interests and employee interests. ERISA plans need not be administered by trustees independent of the employer;<sup>63</sup> instead, plans may be—and often are—administered by employees or affiliates of the employer.<sup>64</sup> Although ERISA requires the plan administrators, investment

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57. John H. Langbein, *The Contractarian Basis of the Law of Trusts*, 105 YALE L.J. 625, 655 (1995) (“The trustee owns the assets, but only to facilitate the beneficiaries’ enjoyment.”). See generally MELANIE B. LESLIE & STEWART E. STERK, *TRUSTS AND ESTATES* 108-42 (2d ed. 2011).

58. As the Court has pointed out on numerous occasions, ERISA is “a comprehensive and reticulated statute” whose provisions are “complex and detailed.” *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 447 (1999) (first quoting *Nachman Corp. v. PBGC*, 446 U.S. 359, 361 (1980); and then quoting *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 262 (1993)). The Court went on to emphasize that trust law “must give way if it is inconsistent with ‘the language of the statute, its structure, or its purposes.’” *Id.* (quoting *Varity Corp. v. Howe*, 516 U.S. 489, 497 (1996)).

59. Fischel & Langbein, *supra* note 8, at 1117.

60. See Shnitser, *Trusts No More*, *supra* note 9, at 630-31.

61. *Id.* at 631.

62. See *Lockheed Corp. v. Spink*, 517 U.S. 882, 887 (1996) (noting that ERISA seeks “to ensure that employees will not be left emptyhanded once employers have guaranteed them certain benefits”).

63. See 29 U.S.C. § 1108(c)(3), which provides that an ERISA fiduciary is not prohibited from “serving as a fiduciary in addition to being an officer, employee, agent, or other representative of a party in interest.”

64. See Fischel & Langbein, *supra* note 8, at 1127 (emphasizing that a prohibition on employer control of investment policy would likely reduce ex ante creation of defined benefit plans).

advisors, and investment managers to act as fiduciaries<sup>65</sup> and provides that the plan assets “shall never inure to the benefit of any employer and shall be held for the exclusive purposes of providing benefits to participants in the plan and their beneficiaries,”<sup>66</sup> the statute also includes a critical exception: the employer may terminate the plan,<sup>67</sup> and upon termination, the employer becomes entitled to a share of plan surplus.<sup>68</sup> In other words, the employer is a residual beneficiary in a defined benefit plan.<sup>69</sup>

Indeed, although ERISA trustees owe a fiduciary obligation to plan beneficiaries, the primary impact of a defined benefit plan trustee’s investment decisions will be felt by the plan sponsor, not the sponsor’s employees or retirees. While the private trustee’s investment objective is to maximize the value of the trust to its beneficiaries in light of the risk tolerance of the various beneficiaries,<sup>70</sup> the defined benefit plan structure focuses not on *maximization* of value but on *sufficiency* of plan assets to pay promised benefits; wildly successful investment policies would

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65. ERISA provides that every plan “shall provide for one or more named fiduciaries who jointly or severally shall have authority to control and manage the operation and administration of the plan.” 29 U.S.C. § 1102(a)(1). The statute also provides that the plan trustees have authority and discretion to manage and control plan assets, except to the extent that the plan subjects the trustee to the direction of a named fiduciary who is not a trustee, or the plan delegates management authority to an investment manager. *Id.* § 1103(a).

66. *Id.* § 1103(c)(1).

67. *See id.* § 1341(a)-(c).

68. *Id.* § 1344(d). The employer may not, however, retain the entire surplus; the employer has a choice between sharing the surplus with the IRS or with plan beneficiaries. *See infra* notes 83-85 and accompanying text.

69. As the Court put it in *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 446 (1999) (citation omitted), ERISA was designed to ensure that employees are “not [] left empty-handed,” “not with depriving employers of benefits incidental thereto.”

70. The Uniform Prudent Investor Act provides: “A trustee shall invest and manage trust assets as a prudent investor would, by considering the purposes, terms, distribution requirements, and other circumstances of the trust.” UNIF. PRUDENT INV. ACT § 2(a) (UNIF. L. COMM’N 1994). The comment to section 2 emphasizes:

Returns correlate strongly with risk, but tolerance for risk varies greatly with the financial and other circumstances of the investor, or in the case of a trust, with the purposes of the trust and the relevant circumstances of the beneficiaries. A trust whose main purpose is to support an elderly widow of modest means will have a lower risk tolerance than a trust to accumulate for a young scion of great wealth.

*Id.* § 2 cmt.

primarily benefit the plan sponsor by reducing the contributions the sponsor would otherwise have to make to the plan.<sup>71</sup>

These differences between the private trust and the defined benefit plan undermine the resort to private trust law as a measure of the investment obligations of a defined benefit plan trustee. Fiduciary obligations vary with circumstances. As John Langbein has lamented, “[c]ourts sermonize about fiduciary duties without paying adequate attention to the question of whether and why the particular person is a fiduciary and what standards the fiduciary relationship imports in the particular circumstance.”<sup>72</sup> Neither the substantive law of trusts nor the panoply of trust law remedies is ideally suited to provide protection to defined benefit plan beneficiaries.<sup>73</sup> A review of the concerns expressed on behalf of plan beneficiaries in the *Thole* case illustrates the difficulties with the trust law analogy.

### *B. Investment of All Trust Assets in Equities*

A trust portfolio that focuses exclusively on equities risks significant short-term losses in return for the prospect of long-term gain. Because investors generally understand the short-term volatility of equity prices, they invest in equities only because they expect that equities will appreciate more rapidly than other investments over the long term.<sup>74</sup>

A beneficiary with a short-term interest in the corpus of a trust could reasonably contend that investment of 100 percent of the trust corpus is imprudent in light of the beneficiary’s time horizon.<sup>75</sup> But the typical defined benefit plan, which will pay out benefits over a period of decades, has a far longer time horizon than any individual

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71. In setting the employer’s required annual contribution to a defined benefit plan, the value of the plan assets is a critical factor. *See* 29 U.S.C. § 1083(a).

72. Langbein, *supra* note 57, at 658.

73. As Natalya Shnitser has noted, ERISA’s drafters turned to donative trust law for limited purposes, and trust law was only “one piece of ERISA’s [overall] protective regime,” which was also marked by vesting, funding, and insurance requirements. Shnitser, *The New Fiduciaries*, *supra* note 9, at 690.

74. *See* Edward A. Zelinsky, *The Defined Contribution Paradigm*, 114 YALE L.J. 451, 460 (2004).

75. *See id.*

beneficiary.<sup>76</sup> At the same time, in the context of a defined benefit plan, the party with the greatest short-term interest in the trust corpus is the employer, not the plan beneficiaries.<sup>77</sup> If the plan incurs losses because of a plunge in the price of equities, ERISA requires the employer to amortize the shortfall over a seven-year period to ensure that the plan is adequately funded.<sup>78</sup> By contrast short-term losses will, in most cases, have little effect on the already-accrued rights of plan beneficiaries, whose entitlement to payments will be stretched out over a long period.<sup>79</sup> This allocation of market risk to employers rather than employees helps explain why employers have shifted significantly away from defined benefit plans to defined contribution plans, in which employees bear market risk.<sup>80</sup>

When an employer in shaky economic condition becomes unable to make the required payments to its defined benefit plan, plan beneficiaries bear some risk. But that risk is significantly mitigated by the Pension Benefit Guaranty Corporation (PBGC), which would step in to make payments promised to beneficiaries up to a maximum set by formula (currently \$5812.50 per month for a person who starts receiving benefits at age sixty-five).<sup>81</sup> Only employees

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76. See *id.* (noting longer time horizon of plan trustees as compared with individual participants in retirement plans).

77. When a plan fiduciary unaffiliated with the sponsor makes imprudent investment decisions, the sponsor—who stands to suffer most from those decisions—clearly has standing to bring suit against the administrator, although the claim may face an uphill battle on the merits. See, e.g., *PBGC ex rel. Saint Vincent Cath. Med. Ctrs. Ret. Plan v. Morgan Stanley Inv. Mgmt. Inc.*, 712 F.3d 705, 709 (2d Cir. 2013) (dismissing on the merits claim against fiduciary manager of a portion of the plan’s portfolio).

78. 29 U.S.C. § 1083(c).

79. See Shnitser, *Trusts No More*, *supra* note 9, at 643 (noting that asset management concerns are “seldom of concern” to defined benefit plan participants (quoting John H. Langbein, *The Conundrum of Fiduciary Investing Under ERISA*, in PENSION RESEARCH COUNCIL, PROXY VOTING OF PENSION PLAN EQUITY SECURITIES 132 (Dan M. McGill ed., 1989))). Plan sponsors do have the right to modify benefits that accrue in future years, and short-term losses might provide incentives to reduce those benefits if sponsor finances are stretched by the need to make up funding shortfalls. See 29 U.S.C. § 1054(h)(1).

80. See Martin Gelter, *The Pension System and the Rise of Shareholder Primacy*, 43 SETON HALL L. REV. 909, 922-23 (2013); Anne Tucker, *Retirement Revolution: Unmitigated Risks in the Defined Contribution Society*, 51 HOUS. L. REV. 153, 169 (2013); Zelinsky, *supra* note 74, at 461-62.

81. 29 C.F.R. § 4022.22(a)(2) (1998) provides the formulae for maximum benefits. The PBGC’s current tables applying those formulae appear on [PBGC.gov](https://www.pbgc.gov/wr/benefits/guaran). *Maximum Monthly Guarantee Table*, PENSION BENEFIT GUAR. CORP., <https://www.pbgc.gov/wr/benefits/guaran>

promised pensions in excess of that amount would bear losses as a result of a severely underfunded plan.<sup>82</sup>

Moreover, although those employees are the only ones who could bear losses as a result of an all-equity strategy, they also stand to derive the greatest benefit from a heavy focus on equities if the employer is in financial distress. An investment policy that focuses on equities, if successful, could provide those employees with all of their promised benefits—a result that might not be possible with a less aggressive strategy. At the same time, if the investments tank, they retain their benefits up to the amount of the PBGC guaranty.<sup>83</sup> The interests of these beneficiaries, then, are closely aligned with the employer’s interest—and not with the PBGC’s interests. Plan participants whose benefits are completely guaranteed by the PBGC, and who therefore would suffer no harm if the plan’s investments generate significant losses, might plausibly benefit from a heavy focus on equities. If the equity strategy proves successful, the employer may elect to terminate the plan and recapture the surplus above the amount needed to fund promised benefits.<sup>84</sup> But the employer faces a problem: the employer would face a 50 percent tax on that surplus, unless the employer shares at least 25 percent of the surplus to increase the pension benefits of qualified plan participants.<sup>85</sup> If the employer shares the surplus in this way, the tax falls to 20 percent, creating an incentive for sharing.<sup>86</sup> The result is that most employees enjoy some upside potential from an all-equity investment strategy and bear little

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teed-benefits/maximum-guarantee [https://perma.cc/VHC4-WRYW].

82. See Eric D. Chason, *Outlawing Pension-Funding Shortfalls*, 26 VA. TAX REV. 519, 530 (2007) (“Employees covered by the [PBGC] guaranty have little reason to worry about plan funding.”).

A 2008 PBGC study of healthy pension plans concluded that “16% of [plan] participants would see their benefits reduced if PBGC” were to assume responsibility for benefits; those participants would lose, on average, 28 percent of their benefits. See C. Wei Li, Tong Yao & Jie Ying, *Should Corporate Pensions Invest in Risky Assets? A Risk-Sharing Perspective*, 12 n.10 (Nov. 5, 2020) (unpublished manuscript), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3277798](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3277798) [https://perma.cc/RC57-UZGW].

83. See Chason, *supra* note 82, at 530.

84. 29 U.S.C. § 1344(d)(1).

85. 26 U.S.C. § 4980(d).

86. *Id.* § 4980(a), (d).

downside risk.<sup>87</sup> That calculus makes it unlikely that they could succeed on a breach of fiduciary duty claim.

The party that stands to lose as a result of an all-equity strategy is the PBGC. Because the current structure allows the sponsor to shift losses to the PBGC while retaining gains, the structure creates a moral hazard. The severity of that problem is open to debate. Empirical evidence suggests that firms that face the greatest bankruptcy risk are the least likely to invest heavily in equities—a fact that undermines the contention that defined benefit plans invest in equities to shift risk to the PBGC.<sup>88</sup> Perhaps employers prefer equity investments because the appreciation of equities better tracks future wage increases, which will affect the ultimate payout to plan beneficiaries.<sup>89</sup>

None of this is to suggest that defined benefit plans should be 100 percent invested in equities. But if the moral hazard problem is deemed serious enough to warrant limits on equity investments, a regulatory approach seems preferable in light of ERISA's primary goal—ensuring sufficient funding to pay promised benefits.<sup>90</sup> Reliance on breach of trust suits by plan beneficiaries not harmed by excessive risk taking seems an unattractive avenue for regulating plan investment behavior.

### *C. Trust Investment in Affiliated Funds*

Another focus of the plaintiffs' complaint in the *Thole* case was the plan's investment in mutual funds managed by U.S. Bank affiliates.<sup>91</sup> When a defined benefit plan invests in mutual funds managed by the plan sponsor or one of its affiliates, the sponsor

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87. Li, Yao, and Ying argue that because employees typically have a substantial part of their wealth tied up in "safe wages," systemic risk exposure in their pension payoffs may be beneficial to them. Li et al., *supra* note 82, at 3. They argue that the surplus-sharing mechanism is a way they might benefit from pension investment risk. *Id.* at 4, 5 n.4. On the other hand, they recognize that the sponsor can reduce the surplus available to employees by using any surplus to reduce ongoing contributions. *Id.* at 15.

88. See Joshua D. Rauh, Risk Shifting Versus Risk Management: Investment Policy in Corporate Pension Plans 33 (June 24, 2007) (unpublished manuscript), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=931237](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=931237) [<https://perma.cc/A447-WBMV>].

89. *Id.* at 4-5.

90. See *supra* notes 16-17, 62 and accompanying text.

91. *Thole v. U.S. Bank N.A.*, 140 S. Ct. 1615, 1624 (2020) (Sotomayor, J., dissenting).

benefits from the management fees built into the price of the fund. Investments in those funds, therefore, would appear to violate ERISA’s command that plan assets “shall never inure to the benefit of any employer.”<sup>92</sup>

From a regulatory perspective, there may be reasons to limit a defined benefit plan’s investment in funds from which the plan sponsor earns a fee. Plan administrators might decline to investigate funds with lower fees if permitted to invest in funds that directly benefit the plan’s sponsor. But trust law has dismissed that very concern by permitting a trustee to invest in affiliated funds despite the otherwise exacting prohibition on self-dealing embodied in the no further inquiry rule.<sup>93</sup>

Moreover, the potential harm resulting from investment in affiliated funds is more serious in the case of the private trust, in which the trust beneficiaries bear the entire cost arising from trustee self-dealing. By contrast, within the defined benefit plan, if a plan’s investment in the sponsor’s proprietary funds results in a net reduction in plan assets, the employer bears much of the cost of that reduction because the employer’s future contributions are a function, in part, of current plan funding levels. The basic point, then, is that if trust law tolerates trustee investment in affiliated funds within the context of private trusts, trust law doctrine would appear to furnish little basis for a prohibition on defined benefit plan investment in affiliated funds.

#### *D. Trust Law Remedies*

The substantive law of trusts provides little basis for challenging investment practices like those used in U.S. Bank’s defined benefit plan. But even if plan fiduciaries had breached their fiduciary duty, the traditional remedies for breach of trust would not provide significant benefit to trust beneficiaries.

Consider the two primary remedies for breach of fiduciary duty: the obligation to make the trust whole for losses suffered as a result of breach of trust and the obligation to disgorge any profits realized

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92. 29 U.S.C. § 1103(c).

93. *See supra* Part II.B.

as a result of the breach.<sup>94</sup> In the context of imprudent investment of defined benefit plan funds, the standard remedy would require augmenting plan assets by the amount of the losses caused by imprudence.<sup>95</sup> Similarly, if the plan sponsor or trustee improperly earned profits as a result of investing in affiliated funds, those profits would be repaid to augment the trust principal. That augmentation, however, would not necessarily redound to the benefit of any of the plan beneficiaries. Their benefits are fixed by the plan and guaranteed by the PBGC (at least up to the PBGC maximum).<sup>96</sup> Most beneficiaries, then, will see no short-term or long-term benefit from restoration to the plan of amounts caused by imprudent investments.

So long as the plan sponsor is in no financial difficulty, the sponsor will reap most of the benefit from restoration. As we have seen, if the plan becomes overfunded as a result of the restoration, the sponsor will be entitled to reduce or eliminate future contributions to the plan until the plan is no longer overfunded.<sup>97</sup> If, instead, restoration reduces the level of plan underfunding, restoration will reduce the annual payments the sponsor will have to make to amortize the underfunding.<sup>98</sup> If the sponsor, through its affiliated trustee, is responsible for the imprudent investment decisions, holding the sponsor or the trustee liable will largely shift funds from one of the sponsor's pockets to another.

There are two ways in which plan beneficiaries could conceivably benefit from restoration of losses from imprudent investment. First, beneficiaries whose plan benefits exceed the maximum guaranteed by the PBGC would obtain additional security from restoration. But, at least with respect to alleged excessive investment in equities, ex post restoration of investment losses might create ex ante incentives most damaging to this group; if the sponsor and the plan are in financial difficulty, equity investing may be the course that holds out the most hope for preservation of benefits not guaranteed by the PBGC.<sup>99</sup>

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94. *See supra* note 52 and accompanying text.

95. *See supra* note 53 and accompanying text.

96. *See supra* notes 81-82 and accompanying text.

97. *See supra* Part III.B.

98. *See supra* note 78 and accompanying text.

99. *See supra* Part III.B.

Second, if restoration results in significant overfunding of the plan, restoration might redound to the benefit of plan beneficiaries if the sponsor elected to terminate the plan. In that event, the sponsor would have a tax incentive to use 25 percent of the overfunding to increase benefits for plan beneficiaries.<sup>100</sup> The termination scenario, however, is unlikely to unfold. It requires, first, the heroic assumption that if assets are restored to the plan, the plan would be significantly overfunded,<sup>101</sup> and second, the assumption that the sponsor would use that overfunding to terminate the plan, recovering only a portion of the overfunding<sup>102</sup> rather than using the overfunding to reduce future contributions, which would allow the sponsor to retain all of the benefit of the reduction.<sup>103</sup> If the sponsor’s financial situation puts it in danger of defaulting on its pension obligations, requiring it to restore investment losses will primarily benefit the PBGC at the expense of the sponsor’s creditors and, in some cases, the sponsor’s shareholders.

ERISA, however, provides the PBGC with rights and remedies more directly tied to the PBGC’s interests than fiduciary duty litigation brought by plan beneficiaries. For instance, ERISA requires that the PBGC receive notice of plan underfunding,<sup>104</sup> and it authorizes the PBGC to terminate a plan when its interests are in jeopardy,<sup>105</sup> to hold the employer liable for all unfunded benefit liabilities,<sup>106</sup> and to impose a lien on employer assets to cover any

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100. *See supra* notes 85-86 and accompanying text.

101. If the plan were not significantly overfunded, a standard termination would not leave any surplus for the sponsor, because the sponsor would be required either to purchase annuities providing all of the promised benefits or to “otherwise fully provide all benefit liabilities under the plan.” 29 U.S.C. § 1341(b)(3)(A).

102. Recall that if the sponsor terminates, the sponsor faces a choice: a 50 percent tax on any surplus, or a 20 percent tax if the sponsor distributes 25 percent of the surplus to plan participants. 26 U.S.C. § 4980.

103. *See* 29 U.S.C. § 1083(a).

104. *Id.* § 1021(f)(1).

105. ERISA authorizes the PBGC to institute proceedings to terminate a defined benefit plan whenever the plan does not meet funding standards required by § 412 of the Internal Revenue Code. *Id.* § 1342(a). Section 412 provides that funding standards are met whenever the employer pays both the target normal cost for the plan year and the shortfall amortization charge for the year. *See* 26 U.S.C §§ 412(a), 430.

106. 29 U.S.C. § 1362(b)(1)(A).

shortfalls.<sup>107</sup> More broadly, ERISA authorizes criminal<sup>108</sup> and civil<sup>109</sup> enforcement of its mandates. In particular, not just plan beneficiaries but also the Secretary of Labor may seek “appropriate relief” for breach of fiduciary duty.<sup>110</sup> The sheer number of troubled defined benefit plans may limit the capacity of the PBGC or the Secretary to invoke those remedies,<sup>111</sup> but if plan beneficiaries are to be enlisted as private attorneys general to augment government monitoring—monitoring authorized by statute<sup>112</sup>—enforcement of cognizable claims should focus not on the plan’s investment policy but on compliance with ERISA’s regulatory structure.

### *E. The Regulatory Alternative*

When an employer sets up a defined benefit plan, ERISA’s primary concern is ensuring that the plan has sufficient assets to pay the benefits the employer has promised.<sup>113</sup> Indeed, the impetus for ERISA was the raft of pension plans that left retirees with empty promises when their employers ran into financial difficulty.<sup>114</sup>

So long as plan assets are sufficient to support the benefits the sponsor has promised, it makes little difference to the beneficiaries whether the plan amassed those assets through superior investment management or through increased sponsor contributions made necessary by inferior investment results. In recognition of this fact, ERISA regulations—unlike private trust law—deal explicitly with the overall funding of the plan rather than focusing on the plan’s

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107. *Id.* § 1368(a).

108. *Id.* § 1131.

109. *Id.* § 1132.

110. *Id.* § 1132(a)(2).

111. In 2016, more than eighteen thousand single-employer defined-benefit plans (81 percent of defined benefit plans insured by the PBGC) were underfunded, and more than thirteen thousand of those plans had funding levels below 80 percent of required minimum funding. *Covered Plan Information Table S-48: Plans, Participants and Funding of PBGC-Insured Plans by Funding Ratio (2016)*, PENSION BENEFIT GUAR. CORP. (2017), [https://www.pbgc.gov/sites/default/files/2017\\_pension\\_data\\_tables.pdf](https://www.pbgc.gov/sites/default/files/2017_pension_data_tables.pdf) [<https://perma.cc/U3H6-PZKS>].

112. ERISA authorizes suits by the Secretary, a participant, a beneficiary, or a fiduciary. 29 U.S.C. § 1132(a)(2).

113. *See supra* notes 16-17 and accompanying text.

114. For an account of one of the most notorious retirement plan collapses and its connection to ERISA, see Wooten, *supra* note 36, at 684 (examining the history and termination of the Studebaker-Packard Corporation).

general investment policy and practices. Congress has identified and prohibited a broad range of investment practices that put plan beneficiaries at high risk. In particular, Congress has limited the percentage of plan assets that may be held in employer stock and employer real property<sup>115</sup> and has prohibited plan fiduciaries from specified transactions, including loans, leases, and asset transfers, between the plan and the employer.<sup>116</sup> Outside of this broad range of explicit prohibitions, Congress has largely left investment decisions to the plan administrator, recognizing that it is typically in the sponsor’s interest (and therefore the plan trustee’s interest) to invest prudently to avoid the need to increase contributions to compensate for shortfalls in overall plan assets.<sup>117</sup>

Perhaps the existing regulatory structure is insufficiently stringent. Congress could address that problem with legislation tied to particularized concerns about asset insufficiency. The Pension Protection Act of 2006<sup>118</sup> significantly strengthened funding requirements for defined benefit plans, eliminating loopholes that contributed to underfunding.<sup>119</sup> But even that statute allows for underfunding, so long as the employer amortizes the underfunding over a seven-year period.<sup>120</sup> Moreover, the statute authorized employers to seek waivers for business hardship.<sup>121</sup> And shortly after the statute became effective, Congress enacted additional relief provisions in light of the Great Recession of 2008-2009.<sup>122</sup> Congress could undo these remaining loopholes, and if consensus emerged that excessive investment in equities (like the investment

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115. 29 U.S.C. § 1107.

116. *Id.* § 1106(a). The statute also prohibits similar transactions between the plan and the fiduciary. *Id.* § 1106(b).

117. *See supra* note 79 and accompanying text.

118. Pension Protection Act of 2006, Pub. L. No. 109-280, § 201, 120 Stat 780, 858-68 (codified at 26 U.S.C § 431(b)).

119. Among other reforms, the Pension Protection Act mandated use of a single actuarial method for computing plan assets and liabilities, limited smoothing of assets to a two-year period, and required amortization of underfunding over a seven-year period. *See generally* Israel Goldowitz, *Funding of Public Sector Pension Plans: What Can Be Learned from the Private Sector?*, 23 CONN. INS. L.J. 143, 169-70 (2016); Joshua Gad-Harf, *The Decline of Traditional Pensions, the Impact of the Pension Protection Act of 2006, and the Future of America’s Defined-Benefit Pension System*, 83 CHI.-KENT L. REV. 1409, 1427-29 (2008).

120. 29 U.S.C. § 1083(c).

121. *Id.* § 1082(c)(1)(A).

122. *See* Goldowitz, *supra* note 119, at 170-71.

policy pursued by the U.S. Bank plan) threatened pension security, Congress could impose new limits on plan investment.

One might object that more stringent regulation will discourage employers from maintaining defined benefit plans in the first place. But that ship has sailed.<sup>123</sup> The existing regulatory structure has already led the vast majority of private employers to replace defined benefit plans with defined contribution plans that present less risk to employers.<sup>124</sup> Continuation of that trend seems inevitable even without additional regulation. The current concern should be with ensuring adequate funding of existing plans so that plan participants are made whole if and when their employers terminate their defined benefit plans. Surely from any perspective, regulation that gets at the heart of the asset sufficiency problem is preferable to common law trust doctrine that targets investment practices only tangentially relevant to the sufficiency concerns that underlie ERISA.

A second objection to the regulatory approach is more serious: neither the IRS nor the Department of Labor has sufficient financial incentive to monitor defined benefit plans and to enforce whatever regulations govern the behavior of plan sponsors and trustees.<sup>125</sup> Although the Secretary of Labor and the PBGC have acted to enforce existing regulations in a number of cases,<sup>126</sup> their resources do not permit close attention to forty-seven thousand defined-benefit plans.<sup>127</sup> But the most effective way to address inadequate enforcement by the PBGC would not be to authorize suits by plan beneficiaries for breach of a duty to invest prudently, but rather to recognize in beneficiaries a private right to enforce ERISA's existing

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123. See generally Zelinsky, *supra* note 74, at 512-13 (noting that post-Enron history suggests that efforts to resuscitate defined benefit plans are unlikely to be forthcoming).

124. For an excellent account of the decline of private-sector defined benefit plans, see EDWARD A. ZELINSKY, *THE ORIGINS OF THE OWNERSHIP SOCIETY* 31-38 (2007); see also Shnitser, *Trusts No More*, *supra* note 9, at 644 (noting a four-decade decline of defined benefit plans).

125. Justice Sotomayor emphasized this point in her *Thole* dissent. *Thole v. U.S. Bank N.A.*, 140 S. Ct. 1615, 1636-37 (2020) (Sotomayor, J., dissenting).

126. See, e.g., *Pension Benefit Guar. Corp. v. Evans Tempcon, Inc.*, 630 F. App'x 410 (6th Cir. 2015); *Pension Benefit Guar. Corp. v. Kentucky Bancshares, Inc.*, 597 F. App'x 841 (6th Cir. 2015); *Perez v. Koresko*, 86 F. Supp. 3d 293 (E.D. Pa. 2015); *Solis v. Caro, N.C.*, No. 11C6884, 2012 WL 1409558 (N.D. Ill. Apr. 23, 2012).

127. See *supra* note 5.

statutory mandates. Congress has done that. ERISA gives plan participants the right to enforce ERISA’s statutory mandates.<sup>128</sup> The statute also gives courts discretion to award attorney’s fees.<sup>129</sup>

Unfortunately, this is where the Court’s opinion in *Thole* is most problematic. The Court’s opinion responds to the theory of standing advanced by the petitioners in the case—a theory that did not rely on a tangible threat to participant benefits.<sup>130</sup> The Court expressly left open the possibility that participants might have standing, as amici had argued, “if 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.”<sup>131</sup> But the Court also made it clear that “underfunding does not itself demonstrate a substantially increased risk that the plan and the employer would both fail.”<sup>132</sup> If one reads the Court’s opinion narrowly, to foreclose standing only when plan participants fail to allege increased risk of loss, the opinion would have little precedential impact and would certainly not foreclose Congress from expanding protection of plan beneficiaries. But if one takes seriously the Court’s focus on “increased risk that the plan and the employer would both fail,” the Court’s language creates a formidable barrier for private enforcement of statutory funding requirements until the employer’s financial condition becomes so dire that enforcement would be futile.<sup>133</sup>

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128. ERISA confers on plan participants and beneficiaries the right “(A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan.” 29 U.S.C. § 1132(a)(3).

129. A court may award fees to either party. *See id.* § 1132(g)(1) (“In any action under this subchapter . . . by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney’s fee and costs of action to either party.”).

130. The petitioners’ brief relied on two harms generated by the alleged breach: “the breach (1) invades the participant’s legally protected interest in having that fiduciary obligation fulfilled and (2) injures trust property in which the participant has a long-recognized equitable ownership interest.” Brief for Petitioners, *Thole v. U.S. Bank N.A.*, 140 S. Ct. 1615 (2020) (No. 17-1712), 2019 WL 4447276, at \*20. The brief’s second point heading emphasized, by reference to the law of trusts, that beneficiaries have standing without regard to monetary loss: “The Common Law Of Trusts Has Long Permitted Beneficiaries To Sue For Restoration Of Losses, Fiduciary Removal, and Injunctive Relief *Absent Individualized Monetary Loss.*” *Id.* at \*28 (emphasis added).

131. *Thole*, 140 S. Ct. at 1621-22.

132. *Id.* at 1622 (citing *LaRue v. DeWolff, Boberg & Assocs., Inc.*, 552 U.S. 248, 255 (2008)).

133. *Id.* The Court’s opinion by no means held that standing would exist in the case of

Justice Thomas's concurrence, joined by Justice Gorsuch, however, offers more hope for a congressional solution. Justice Thomas focused on the fact that "none of the rights identified by petitioners belong to them."<sup>134</sup> To support that contention, he focused on statutory provisions that, in his view, made it clear that ERISA's fiduciary duties were owed to the plan, not its beneficiaries.<sup>135</sup> And he went on to note that ERISA did not provide for assignment of those rights to the plan beneficiaries.<sup>136</sup> The clear import of the concurrence is that Congress could create duties owed to the beneficiaries, which would, in turn, create Article III standing. The concurrence builds on Justice Thomas's concurrence in *Spokeo, Inc. v. Robins*, in which he concluded expressly that "Congress can create new private rights and authorize private plaintiffs to sue based simply on the violation of those private rights."<sup>137</sup> Justice Thomas emphasized that the separation of powers concerns that lie behind Article III standing rules do not create the same danger "where one private party has alleged that another private party violated his private rights."<sup>138</sup> For Justice Thomas, then, the problem was that Congress had created no private rights in plan participants, not that Congress was powerless to create them.

## CONCLUSION

Defined benefit plans sponsored by private employers may be a dying breed, but their death will be a slow one, and millions of

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increased risk and noted, in a footnote, that the increased risk theory might be unavailable so long as the PBGC served as a backstop for plan participants. *Id.* at 1622 n.2. That, of course, would create the odd result that if Congress were to abolish the PBGC, it might thereby create Article III standing in plan beneficiaries.

Another route Congress might take to confer standing on participants would be to confer on those participants an immediate right to withdraw the present value of their pension benefits at any time. That route would seem to create a significant risk that underfunding would reduce the participant's benefits, but would also be inconsistent with the general purpose of defined benefit plans, which is to avoid putting investment risk in the hands of plan participants. *See supra* notes 41-42 and accompanying text.

134. *Thole*, 140 S. Ct. at 1623 (Thomas, J., concurring).

135. *Id.*

136. *Id.*

137. 136 S. Ct. 1540, 1550 (2016) (Thomas, J., concurring).

138. *Id.*

Americans will rely on these plans for decades to come. Economic crises create stress on defined benefit plans, threatening their ability to provide promised benefits and potentially leaving the beleaguered PBGC (and ultimately the taxpayer) holding the bag. But recognizing participant claims based on investment duties imported from private trust law would provide little tangible benefit to participants, for at least two reasons. First, the flexible standards of private trust law give trustees wide leeway to pursue a variety of investment strategies. Second, ERISA’s structure imposes on plan sponsors, not plan participants, to bear the cost associated with investment losses.

The primary concern for participants is plan funding, not plan investment policy. There is a reasonable case for strengthening ERISA’s statutory funding obligations. But the *Thole* majority’s standing analysis threatens congressional power to enlist private parties—plan beneficiaries and their lawyers—as enforcers of new or existing funding obligations. Justice Thomas’s concurrence, combined with Justice Sotomayor’s dissent, holds out a more significant possibility that Congress could reframe funding obligations to remedy that problem.