Eighth Circuit Cases at SCOTUS during 2019 Term

By Timothy J. Droske

A 2019 Supreme Court term that started seemingly normally was radically altered by the COVID-19 pandemic. Oral arguments were temporarily suspended for the first time since the Spanish flu pandemic over a century ago[1] and later resumed in a new telephonic format that was live-streamed for the first time in the Supreme Court's history.[2] The Supreme Court was forced to stretch the end of its term into July, rather than its usual end-of-June recess. And the number of merits opinions ultimately issued by the Supreme Court was significantly lower than recent past terms.[3]

The COVID-19 pandemic also frustrated the Eighth Circuit's opportunity to hear Justice Ruth Bader Ginsburg speak at the Eighth Circuit Judicial Conference that was scheduled for August 2020.[4] Instead of hearing Justice Ginsburg speak first-hand about her landmark challenges to sex discrimination and time on the Supreme Court, the country instead collectively mourned and paid tribute to Justice Ginsburg's remarkable legacy after her passing in September. Justice Ginsburg's death, and Justice Amy Coney Barrett's nomination to fill her seat, put all eyes on the eight-member Supreme Court as it started its October 2020 Term.

The impact of these events played out in different ways for the three cases arising from the Eighth Circuit that the Supreme Court was scheduled to hear and decide last term. The first case, *Thole v. U.S. Bank,* No. 17-1712, was relatively unaffected by these events. It was argued at the Supreme Court building in January 2020, and decided by the full nine-member Court in a June 1, 2020 opinion.[5] The other two cases, in contrast—*Rutledge v. Pharmaceutical Care Management Association*, No. 18-540 and *Pereida v. Barr*, No. 19-438—have been directly impacted by both COVID-19 and Justice Ginsburg's passing. Both were set for argument in Spring 2020 for a decision as part of the Supreme Court's October 2019 Term. But COVID-19 forced the cancellation of those arguments, which were instead held telephonically in October 2020 to an eight-member court.[6] As a result, those cases will be decided by the same eight justices that heard oral arguments, lacking the potentially tie-breaking vote Justice Ginsburg would have provided last term, or that Justice Barrett will provide in cases moving forward.

Statistics regarding the Eighth Circuit before the Supreme Court last term, a summary of *Thole*, and brief previews of *Rutledge* and *Pereida*, are discussed below.

Eighth Circuit Statistics

Just like much of 2020 looks like an anomaly, the same is also true with respect to the Eighth Circuit's statistics before the Supreme Court last term (see table, next page). For only the second time in the past ten years, the Supreme Court did not hear multiple cases from the Eighth Circuit. While as noted above, this was a product of oral arguments being rescheduled due to the COVID-19 pandemic in two other cases from the Eighth Circuit, the fact remains that the Supreme Court only heard one case from the Eighth Circuit last term. In what was also an anomaly, the Eighth Circuit was able to boast a 100% affirmance rate before the Supreme Court last term. This was far better than the Eighth Circuit's average affirmance rate of 28.4% over the past decade. And it also means the Eighth Circuit bucked the Supreme Court's trend of reversing more often than it affirmed—last term the Supreme Court affirmed only 32% of the cases it decided. The same 100% affirmance scorecard, however, does not extend to the individual justices, since, as discussed below, *Thole* was one of 14 cases (23%) decided by a 5-4 vote last term.[7]

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Eighth Circuit Cases at SCOTUS – 2010-2019 Terms

Term	Number of Cases	Docket Percent	Aff'd – Rev'd – Split	Affirmed Percent
2019	1	1%	1-0	100%
2018	4	5%	1-3	25%
2017	3	4%	1-2	33%
2016	2	3%	0-2	0%
2015	6	7%	3-2-1	60%
2014	8	11%	1-7	13%
2013	2	3%	0-2	0%
2012	2	3%	0-2	0%
2011	0	-	-	-
2010	4	5%	1-3	25%
Average	3.2	4.2%		28.4%

SCOTUSblog, Stat Pack Archive, available at http://www.scotusblog.com/reference/stat-pack/

Thole v. U.S. Bank, N.A.[7] – Justiciability Under ERISA

The sole case from the Eighth Circuit that the Supreme Court decided last term was *Thole v. U.S. Bank, N.A.*, a putative ERISA class action involving the alleged mismanagement of pension funds that presented standing-related questions.[8] Justice Kavanaugh's majority opinion cast the case as requiring nothing more than a simple and straightforward Article III analysis, under which the plaintiffs clearly lacked standing:

> [T]he plaintiffs lack Article III standing for a simple, commonsense reason: They have received all of their vested pension benefits so far, and they are legally entitled to the same monthly payments for the rest of their lives. Winning or losing this suit would not change the plaintiffs' monthly pension benefits. The plaintiffs have no concrete stake in this dispute and therefore lack Article III standing.

But while the majority opinion bemoaned that "[c]ourts sometimes make standing law more complicated than it needs to be," the narrow 5-4 decision before the Supreme Court—along with the striking differences in reasoning between the District Court, Eighth Circuit, and Supreme Court—shows that the majority's view of the standing issue here as "simple and commonsense" was far from universal.

The plaintiffs in the case were James Thole and Sherry Smith, two participants in U.S. Bank's defined-benefit retirement plan. They brought a putative class action under ERISA against U.S. Bank for alleged mismanagement of the plan from 2007-2010. Claiming that the defendant had violated ERISA's fiduciary duties of loyalty and prudence in its investment decisions, the plaintiffs sought restitution to the plan of millions in losses that the plan had allegedly suffered. In addition, the plaintiffs sought injunctive relief, including replacement of the plan's fiduciaries and attorney's fees.

Critically, the plaintiffs continued to receive the same pension payment each month from 2007 through the pendency of the lawsuit irrespective of the plan's value or investment decisions, and were in fact contractually entitled to receive those same monthly payments for the rest of their lives. It was on that basis that defendants brought a motion to dismiss under

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Rule 12(b)(1), claiming that the plaintiffs had experienced no loss or risk of loss to their benefits, and thus lacked standing under Article III. The District Court, however, found standing on the basis that the plaintiffs alleged that the defendants' conduct had caused the plan to become actuarially underfunded, and remained underfunded at the time suit commenced.[9] According to the District Court, the plaintiffs had sufficiently alleged that due to the purported mismanagement, the plan lacked a surplus large enough to absorb the losses at issue, giving rise to a legally cognizable increased risk of default.

The following year, U.S. Bank renewed its Article III standing challenge, bringing forth facts showing that the plan was now actuarially overfunded, and arguing that fact rendered the suit non-justiciable. The District Court this time agreed that the case was non-justiciable under Article III, but held that mootness rather than standing was the proper analytical framework for its decision.

On appeal, the Eighth Circuit affirmed, but not on mootness or other Article III grounds.[10] Instead, the Eighth Circuit relied on its precedent in *Harley v. Minn. Mining & Mfg. Co.*, 284 F.3d 901 (8th Cir. 2002), to instead decide the case on ERISA "statutory standing" grounds.[11] The court determined that under that precedent, when a plan is overfunded, as it was here, a participant in a defined benefit plan no longer falls within the class of plaintiffs authorized under §1132(a)(2) of ERISA to bring suit for alleged breaches of fiduciary duties. The panel split, however, on the same question as applied to the claims for injunctive relief under §1132(a)(3). The majority found that a showing of actual injury was required here as well—a finding again not met given that the plan was overfunded. Concurring in part and dissenting in part, Judge Kelly agreed that the panel was bound by Eighth Circuit precedent denying statutory standing to participants in overfunded plans to seek restitution, but *Harley* did not preclude the claim for injunctive relief as provided for in §1132(a)(3) of ERISA.[12] Plaintiffs' request for *en banc* review was denied, with Judge Kelly and Judge Stras dissenting.[13] The Supreme Court granted review of the Eighth Circuit's decision after first soliciting the views of the Solicitor General, who expressed a view in favor of the plaintiffs-petitioners and granting certiorari.

All of the Justices in *Thole* agreed that Article III standing was the proper analytical framework. But the Court was sharply divided along traditional conservative and liberal lines on whether such standing existed here. Justice Kavanaugh wrote for the five-member majority; Justice Sotomayor wrote the dissent.[14]

Writing for the majority, Justice Kavanaugh emphasized that "[t]here is no ERISA exception to Article III."[15] Applying traditional Article III standing principles, the majority observed that the plaintiffs had "no concrete stake in this lawsuit." As the majority explained, the plaintiffs "have received all of their monthly benefit payments so far, and the outcome of this suit would not affect their future benefit payments." In other words, win or lose, the plaintiffs would still receive the same monthly benefits, "not a penny less," and "not a penny more." The Court rejected the plaintiffs' attempted analogy to trust law, their assertion they could have representative standing without a personal concrete stake in the lawsuit, and their argument that if they cannot sue, then no one will. And relying on *Spokeo*, the majority rejected the idea that the broad statutory language in ERISA permitting suit for equitable relief could negate Article III's injury-in-fact requirement or render it automatically satisfied.[1] Lastly, the majority found that the original basis for the District Court denying the motion to dismiss—that standing exists if the mismanagement substantially increased the risk the plan would fail and be unable to pay out its pension benefits—was no longer asserted by the

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plaintiffs, and in any event, was not plausibly pleaded. For these reasons, the Supreme Court "affirm[ed] the judgment of the U.S. Court of Appeals for the Eighth Circuit" on the grounds raised in the initial motion to dismiss.

The dissent disagreed with the majority, finding that Article III's requirement of a "concrete" injury was satisfied here for three independent reasons: 1) by analogy to the interest private trust beneficiaries have in protecting their trust; 2) because a breach of fiduciary duty is itself a cognizable injury irrespective of any corresponding financial harm; and 3) on the basis that the plaintiffs have standing to sue on the retirement plan's behalf.[1] The dissent also cited to *Spokeo* throughout its opinion, and—juxtaposing itself against the majority—closed by stating, "[t]he Constitution, the common law, and the Court's cases confirm what common sense tells us: People may protect their pensions."[16]

The Supreme Court's ruling in *Thole* shows that nearly 30 years after the seminal standing decision in *Lujan*[17] (another case arising out of the Eighth Circuit and the primary precedent cited by the *Thole* majority), the question of standing remains a critical, yet divisive issue. This is particularly the case in the *Spokeo*-related context of whether a sufficiently concrete injury has been alleged notwithstanding a statute's grant of a private right of action. The *Thole* case teaches that while standing is a threshold issue, it is one that is subject to a meaningful plausibility standard at the pleading stage, and on top of that can be disputed with a strong factual record under Rule 12(b)(1). Also, a "case or controversy" must exist throughout the case, which was critical to the District Court's decision to revisit standing and dismiss the case after the plan became overfunded. Counsel should be mindful, as this complex area of the law continues to develop, to be attentive to the various ways in which a case may or may not be determined to be justiciable. Strikingly, while the District Court, Eighth Circuit, and Supreme Court all agreed that the case was non-justiciable, each came to that conclusion on different grounds. And with the Supreme Court dividing 5-4, it seems certain standing will remain a fertile ground in future class action litigation, despite Justice Kavanaugh's entreaty that standing not be made more complicated than it needs to be.

Rutledge v. Pharmaceutical Care Management Association – ERISA Preemption

ERISA is also front and center in one of the two Eighth Circuit cases that was moved to the Supreme Court's current term due to the COVID-19 pandemic. In *Rutledge v. Pharmaceutical Care Management Association*, the dispute involves ERISA's preemptive scope. Arkansas, like the majority of states, has a law regulating drug reimbursement rates for pharmacy benefit managers ("PBMs") who operate as claims-processing middlemen. The Eighth Circuit found that the statute was preempted by ERISA, 29 U.S.C. §1144(a), which preempts "any and all State laws insofar as they may now or hereafter relate to any employee benefit plans . . . ."[18] It is now up to the eight-members of the Court who heard oral arguments to determine whether ERISA preemption applies here. A 4-4 split would have no precedential weight; it would simply result in a summary affirmance of the Eighth Circuit's decision by reason of an equally divided Supreme Court.[19]

Pereida v. Barr – Immigration

The other Eighth Circuit case rescheduled to the current term, *Pereida v. Barr*, involves a circuit split in how courts are to analyze whether a noncitizen has been convicted of a disqualifying offense listed in the Immigration and Nationality Act ("INA") as a crime involving moral turpitude ("CIMT") precluding that individual from applying for relief from deportation through asylum or cancellation of removal.[20] The circuits have split in what to do when the underlying statute of conviction is

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ambiguous as to whether it corresponds to a disqualifying CIMT listed in the INA. The Eighth Circuit took the position that because it is the noncitizen's burden to establish that his underlying conviction is *not* a disqualifying CIMT, any ambiguity as to whether the underlying conviction was for a CIMT cuts against the noncitizen, who is thus unable to prove his eligibility for discretionary relief such as asylum or cancellation of removal.[21] In contrast, other circuits have held that such ambiguity in the underlying conviction does not bar relief from removal, since in that event, the conviction does not "necessarily" establish the elements of a CIMT listed in the INA.[22] This case was argued in October 2020, and like *Rutledge*, will be decided by the eight-members of the Court who sat for argument.

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[1] Supreme Court, Press Release Regarding Postponement of March Oral Arguments (March 16, 2020), *available at* https://www.supremecourt.gov/publicinfo/press/pressreleases/pr_03-16-20

[2] Supreme Court, Media Advisory Regarding May Teleconference Argument Audio (April 30, 2020), *available at* https://www.supremecourt.gov/publicinfo/press/pressreleases/pr_04-30-20

[3] SCOTUSblog, Final Stat Pack for October Term 2019 at 33, *available at* https://www.scotusblog.com/wp-content/uploads/2020/07/Final-Statpack-7.20.2020.pdf

[4] *See* Scott Stewart, *Ruth Bader Ginsburg to Visit Omaha Next Year To Celebrate 19th Amendment*, The Daily Record (Aug. 27, 2019), *available at* https://omahadailyrecord.com/content/ruth-bader-ginsburg-visit-omaha-next-year-celebrate-19th-amendment

[5] *Thole v. U.S. Bank N.A.*, Supreme Court Docket, *available at* https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/17-1712.html

[6] *Rutledge v. Pharmaceutical Care Management Association*, Supreme Court Docket, *available at* https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/18-540.html; *Pereida v. Barr*, Supreme Court Docket, *available at https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/19-438.html*

[7] Dorsey & Whitney LLP—the law firm for which the author is an attorney—represented U.S. Bank, N.A. as counsel of record in the District Court and Eighth Circuit, and as co-counsel in the Supreme Court.

[8] *Thole v. U.S. Bank N.A.*, 140 S. Ct. 1615 (2020)

[9] *Adedipe v. U.S. Bank, N.A.*, 62 F. Supp. 3d 879, 887, 891 (D. Minn. 2014).

[10] *See Adedipe v. U.S. Bank, N.A.*, No. 13-2687, 2015 U.S. Dist. LEXIS 178380, at *9 (D. Minn. Dec. 29, 2015)

[11] *Thole v. U.S. Bank, N.A.*, 873 F.3d 617 (8th Cir. 2017).

[12] *Id.* at 632 (Kelly, J., concurring in part and dissenting in part).

[13] *Thole v. U.S. Bank, N.A.*, No. 16-1928, 2018 U.S. App. LEXIS 4339 (8th Cir. Feb. 22, 2018) (*en banc*).

[14] *See Thole*, 140 S. Ct. at 1617 (Kavanaugh delivered the Court's opinion, joined by Chief Justice Roberts, and Justices Thomas, Alito, and Gorsuch; Justice Thomas also filed a separate concurrence, joined by Justice Gorsuch; Justice Sotomayor filed a dissent, joined by Justices Ginsburg, Breyer, and Kagan.).

[15] *Id.* at 1620-21 (citing *Spokeo, Inc. v. Robins*, 578 U.S. __, 136 S. Ct. 1540 (2016)). The Supreme Court in *Spokeo* held that even when a plaintiff alleges a particularized violation of his or her statutory rights, Article III's "injury-in-fact requirement requires a plaintiff to allege an injury that is both concrete *and* particularized." *Spokeo*, 136 S. Ct. at 1544-45.

[16] *Id.* at 1625-34 (Sotomayor, J., *dissenting*).

[17] *See Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), *reversing* 911 F.2d 117 (8th Cir. 1990).

[18] 891 F.3d 1109, 1111-13 (8th Cir. 2018).

[19] *See, e.g.*, *Hawkins v. Community Bank of Raymore*, 136 S. Ct. 1072 (2016) (*per curiam* opinion that "[t]he judgment is affirmed by an equally divided Court," in case on review from the Eighth Circuit).

[20] *See Pereida v. Barr*, No. 17-3377, Question Presented, *available at* https://www.supremecourt.gov/docket/docketfiles/html/qp/19-00438qp.pdf

[21] 916 F.3d 1128, 1132-33 (8th Cir. 2019).

[22] Question Presented, *see supra* n.40.