The State Of Article III Standing In ERISA Cases

By **Elizabeth Hopkins** (December 6, 2021)

More than a year after the U.S. Supreme Court's June 2020 Employee Retirement Income Security Act ruling in Thole v. U.S. Bank, it is fair to ask whether lower courts have heeded the justices' admonition and made sense of Article III's case or controversy requirement in the context of ERISA.

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To answer this question, I looked at federal district and circuit court decisions applying Thole to ERISA disputes and the results of this survey, perhaps not surprisingly, do not paint such a simple picture.

Background on ERISA and Thole

Almost a half century ago, Congress enacted ERISA,[1] a landmark legislation designed to protect pensions and other employee benefit plans from abuse and mismanagement.

Consistent with its broadly protective purposes, ERISA empowers not just plan fiduciaries and the secretary of labor to bring suit to enforce the statute, but — in a noted departure from the background trust law — ERISA also empowers plan participants and beneficiaries themselves to sue for benefits, to recover losses to the plan and to obtain injunctive and other appropriate equitable relief to remedy violations.

Nevertheless, in Thole v. U.S. Bank, [2] the Supreme Court held that this broad grant of statutory standing does not vitiate the need for plaintiffs, including plan participants, to establish Article III standing by showing that they have a concrete stake in the lawsuit.

In Thole, two retirees who participated in a defined benefit pension plan filed a putative class action against plan fiduciaries alleging that fiduciary breaches caused $750 million in plan losses. They sought recovery of these losses on behalf of the plan and removal of the fiduciaries.

After the U.S. Court of Appeals for the Eighth Circuit affirmed the district court's dismissal of the suit on Article III standing grounds, the Supreme Court granted certiorari and affirmed the judgment of the Eighth Circuit. The Supreme Court reasoned that the retirees had no concrete stake in the lawsuit because they had received all of their monthly benefit payments so far and, win or lose, they would continue to receive the same amount.[3]

In reaching this conclusion, the court was not moved by the plaintiffs' argument they had a beneficial interest in the plan losses sufficient to confer standing, somewhat surprisingly rejecting an analogy to trust law, at least in the context of a defined benefit plan where the level of benefits is guaranteed — usually — regardless of the assets in the plan and where any residual — usually — reverts to the plan sponsor.

Nor could the plan participants assert representational standing based on the harm suffered by the plan because, the court concluded, they had not been legally or contractually appointed to represent the plan.

In a similar vein, the court rejected the argument that the provisions in ERISA Section 502 that afford plan participants and beneficiaries, as well as the secretary of labor and plan fiduciaries, the right to sue for plan losses and other relief automatically confers constitutional standing.

To the contrary, the court held that, even in the face of a statutory violation, Article III requires plaintiffs to show a concrete injury, although the court dropped a rather cryptic footnote clarifying that the decision did not concern an attempt to obtain plan information.

The court was also not persuaded that, without the ability of plan participants to bring suit, plans and their assets would be left largely unregulated. The court pointed out that employers who sponsor plans often have a strong incentive to ensure that their plans are properly managed, and that the secretary of labor likewise has a significant incentive to police the defined benefit plans that it insures through the Pension Benefit Guaranty Corporation.

Finally, noting an argument raised by amici for the participants that Article III standing could be premised on an increased risk that the plan would fail and be unable to pay the benefits promised, the court pointed out that this increased risk of loss had not been briefed by the participants or plausibly alleged in the complaint.

The court ended on a breezy note, stating that courts should "not make standing law more complicated than it needs to be."[4]

Post-Thole Analysis

Among the 41 post-Thole ERISA cases I surveyed — which included three cases about defined benefit plans, 23 cases about defined contribution plans, 14 cases about health care plans and one case brought by a disability plan participant — the results were quite mixed.

This was true for all but the last category, where in Dioquino v. United of Omaha Life Insurance Co. in April the U.S. District Court for the Southern District of California held, not surprisingly, that a participant had standing to challenge the denial of his claim for long-term disability benefits despite his failure to exhaust plan remedies.[5]

The remaining categories held a number of surprises.

Of the three cases involving defined benefit plans, one district court — the U.S. District Court for the Southern District of West Virginia – concluded in Conner v. Associated Radiologists Inc. in May that an association of radiologists that sponsored a defined benefit pension plan had Article III standing to assert a counterclaim against one of the participating doctors who was partially responsible for the plan's funding shortfall on termination.[6]

The U.S. District Court for the District of Idaho in November 2020, seizing on the issue that the court left open in Thole, refused to dismiss Ely v. Board of Trustees of Pace Industry Union Management Pension Fund on standing grounds where it determined that the participant would likely have a redressable injury in the event of the plan's projected insolvency.[7] The other decision found no standing in unsurprising applications of Thole.[8]

By far the greatest number of decisions citing Thole involved not defined benefit pension plans, but defined contribution plans. In most of these cases, the courts unsurprisingly found that participants had standing to sue for fiduciary breach.

Courts in four of these cases, however, found that plaintiffs lacked standing to challenge mismanagement or disloyalty with respect to plan investments which they did not choose for their own accounts.[9]

In another case, the U.S. District Court for the Northern District of Texas concluded in Ortiz v. American Airlines Inc. in August 2020 that plan participants lacked standing to challenge the inclusion of certain funds in the defined contribution plan because the plaintiffs themselves chose to invest in the funds, and they did not plausibly allege that they would have selected another more prudent option if it had been offered.[10]

And in a final and surprising decision from the U.S. District Court for the Northern District of California, the court held in Anderson v. Intel Corp. in January 2021, despite footnote 1 of the Thole decision, that plan participants did not have standing to assert claims for inadequate and misleading disclosures where the participants did not explain how these disclosures had injured them.[11]

Perhaps the most troubling and inconsistent applications of Thole have been in cases asserting fiduciary mismanagement of health care plans. On the one hand, numerous courts — such as the U.S. District Court for the Southern District of New York in Medical Society of NY v. UnitedHealth Group Inc. in September — have concluded that plan participants established standing to sue to redress alleged fiduciary breaches even without allegations of financial harm.[12]

Indeed, in Peters v. Aetna Inc. in June the U.S. Court of Appeals for the Fourth Circuit found that a potential $7 injury stemming from an allegedly improper administrative fee sufficed with respect to a restitution claim and that, even without this financial injury, the plaintiff had standing to pursue claims for surcharge, disgorgement, declaratory and injunctive relief because no financial injury was needed for those forms of relief.[13]

On the other hand, following Thole, a number of courts have concluded that statutorily authorized ERISA plaintiffs lacked standing to sue for ERISA fiduciary breaches and other violations with respect to their health care plans.

One of these cases — Atlantic Neurosurgical Specialists PA v. United Healthcare Group Inc. — involved medical providers who brought suit after the insurance company that administered the health care plan refused to accept their authorized representative forms.

In June, the U.S. District Court for the District of New Jersey dismissed the suit, concluding that the providers lacked Article III standing because, the court reasoned, they had not been injured by the insurer's procedure for designating authorized representatives even though their claims on behalf of the plan participants had not been paid.[14]

The remaining six health care cases in which courts, referencing Thole, found no standing were brought by plan participants. In Scott v. UnitedHealth Group, U.S. District Judge Patrick Schiltz of the U.S. District Court for the District of Minnesota found in May that plan participants did not have standing to challenge impermissible cross-plan offsetting engaged in by the administrator of their plans, UnitedHealth.

This same judge had already determined in Peterson v. UnitedHealth Group in 2017,[15] a case brought by medical providers, that UnitedHealth violated the terms of governing ERISA plans by engaging in this practice of refusing to pay one patient's claim for health care benefits based on alleged overpayments made to the same medical provider for services provided under another plan to another patient.

But in the case brought by the plan participants, the court held that the participants lacked Article III standing to challenge the practice because they did not allege that their own claims had been offset in this manner.[16]

The U.S. Court of Appeals for the Second Circuit in June upheld a district court decision in De Fuente v. Preferred Home Care of NY LLC, holding that plan participants lacked standing to assert their claims that their employers violated ERISA by misappropriating contributions that they were required, by state law, to make to health care plans.[17]

The court reasoned that the participants did not allege that they had been denied any health care benefits provided in the plan and their general allegations that the defendants violated their duties of prudence and loyalty were not sufficient under Thole to confer standing.

In a similar vein, several district courts have concluded that plaintiffs lacked standing to challenge allegedly improper practices by plan administrators either because the plaintiffs had not been denied any benefits,[18] or because the courts concluded that the plaintiffs did not sufficiently tie their benefit denials to the challenged practices.[19]

In the area of health care in particular, it is quite hard to reconcile cases finding that plaintiffs lack standing to sue with numerous cases in which courts have concluded that plaintiffs had surmounted the Article III hurdle. Whether this will be sorted out at the circuit level or even eventually in the Supreme Court remains to be seen.

But at the moment, it seems fair to say that Thole has not simplified Article III analysis in the ERISA context and that where plan participants stand with respect to standing is anyone's guess.

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Disclosure: Hopkins represents the plaintiff in Ryan S. v. UnitedHealth Group, cited in footnote 19.

[1] 29 U.S.C. § 1001 et seq.

[2] 140 S. Ct. 1615 (2020).

[3] Id. at 1619.

[4] Id. at 1622.

[5] Dioquino v. United of Omaha Life Ins. Co ., No. 20-cv-00167, 2021 WL 1378748 (S.D. Ca. April 12, 2021).

[6] Conner v. Associated Radiologists, Inc ., No. 2:19-cv-00329, 2021 WL 1821308, *14 (S.D.W. Va. May 6, 2021).

[7] Ely v. Board of Trustees of Pace Industry Union Management Pension Fund , No. 3:18-cv-00315, 2020 WL 465,106, *19 (D. Idaho Nov. 30, 2020).

[8] Fisher v. Secchitano , 833 Fed. App'x 141 (9th Cir. 2021).

[9] Garthwait v. Eversource Energy Co ., No. 3:20-CV-00902, 2021 WL 4441939, *7 (D. Conn. Sept. 28, 2021); Silva v. Evonik Corp. , No. 20-2202, 2020 WL 12574912, *2 (D.N.J. Dec. 30, 2020); Lange v. Infinity Healthcare Physicians, S.C ., No. 20-cv-737, 2021 WL 3022117, *3 (W.D. Wis. July 16, 2021); In re LINKEDIN ERISA Litig. , No. 5:20-cv-05704, 2021 WL 5331448, *4 (N.D. Cal. Nov. 16, 2021).

[10] Ortiz v. Am. Airlines, Inc. , No. 4:16-CV-151, 2020 WL 4504385, *13 (N.D. Tex. Aug. 5, 2020).

[11] Anderson v. Intel Corp ., No. 19-CV-04618, 2021 WL 229235, *13-*14 (N.D. Cal. Jan. 21, 2021).

[12] See, e.g., Medical Society of N.Y. v. UnitedHealth Group, Inc ., No. 16-cv-5265, 2021 WL 4263717, *2-*3 (S.D.N.Y. Sept. 20, 2021); Jones v. United Behavioral Health , No. 19-cv-06999, 2021 WL 1318679, *5 & n.6 (N.D. Cal. Mar. 11, 2021).

[13] Peters v. Aetna, Inc ., 2 F.4th 199 (4th Cir. June 22, 2021).

[14] Atlantic Neurosurgical Specialists P.A. v. United Healthcare Group, Inc ., No. 20-13834, 2021 WL 3124313, *7 (D.N.J. July 22, 2021).

[15] 242 F. Supp. 3d 384 (D. Minn. 2017), aff'd, 913 F.3d 769 (8th Cir. 2019).

[16] Scott v. UnitedHealth Grp ., No. 20-CV-1570, 2021 WL 2018839, *4-*5 (D. Minn. May 20, 2021).

[17] De Fuente v. Preferred Home Care of N.Y. LLC , 858 Fed. App'x. 432 (Mem) (2d Cir. June 7, 2021).

[18] Bryant v. Wal-Mart Stores, Inc ., No. 16-24818, 2020 WL 4333452, *11-*17 (S.D. Fla. July 16, 2020) (denying class certification motion on the grounds that the named plaintiffs lacked standing to challenge allegedly deficient COBRA notices where they in fact elected COBRA coverage after receiving the notices).

[19] Smith v. Health Care Serv. , No. 19 C 7162, 2021 WL 963814, *4-*6 (N.D. Ill. July 15, 2021); Boyle v. United Parcel Service, Inc ., No. 3:20-cv-541, 2021 WL 3432887, *3 (W.D. Ky. Aug. 5, 2021); Ryan S. v. UnitedHealth Group, Inc. , No. SACV 19-1363, 2020 WL 8028609 (C.D. Cal. Dec. 3, 2020); Crosby v. California Physicians' Service , 498 F.Supp.3d 1218, 1227-28 (C.D. Ca. 2020).