A NEW LOOK AT STANDING FOR ERISA CAUSES OF ACTION IN DEFINED-BENEFIT PLANS

Lauren Lofy*

Since the Employee Retirement Income Security Act of 1974 ("ERISA") was enacted, courts have shifted away from analogizing to trust law and consequently have created a new precedent that raises the bar for ERISA litigation. Courts have narrowed the application of the Article III standing-to-sue requirement as it applies to ERISA breach-of-fiduciary-duty cases when a Defined-Benefit Plan is involved. This cause of action in Defined-Benefit Plans is dismissed on the grounds that private plaintiffs lack sufficient injury to establish standing. However, private plaintiffs in Defined-Contribution Plans are not experiencing this same difficulty, despite ERISA granting the same rights regardless of the type of plan. Notably, in Thole v. U.S. Bank, N.A. *(decided June 1, 2020), the U.S. Supreme Court began a push towards a more expansive application of the standing doctrine in breach-of fiduciary-duty claims involving Defined-Benefit Plans, also demonstrating the controversy of standing in ERISA cases because the Court was split on this issue 5-4. This Note discusses inconsistencies that are embodied in the new precedent based on the plain language of the statute and Congress's implicit intent. It also analyzes the consequences of courts' narrowed interpretations and the effect on future ERISA litigation, while noting that the dissent in* Thole *was a more compelling argument and would eliminate many of these consequences. In analyzing these issues, this Note advocates for equal treatment among private plaintiffs and suggests adopting a new approach for the standing requirement. There are two proposed methods that would allow for participants and beneficiaries of Defined-Benefit Plans alleging breach of fiduciary duty to establish standing, both of which remain consistent with Congress's intent and effectively resolve the implications associated with the current precedent.*

---

* J.D. Candidate, University of Arizona, James E. Rogers College of Law, 2022.
Special thanks to Professor Steven Bossé for his insight and encouragement about this topic and his invaluable guidance throughout the note-writing process and to Professor Christopher Griffin for his thoughtful edits and feedback. I also want to thank all the Arizona Law Review editors for their contributions.

TABLE OF CONTENTS

INTRODUCTION

The Employee Retirement Income Security Act of 1974 ("ERISA")[1] governs private, employer-sponsored retirement plans ("Retirement Plans"), which include both defined-benefit plans ("Defined-Benefit Plans") and defined-contribution plans ("Defined-Contribution Plans").[2] In Defined-Benefit Plans, participants are promised a fixed amount each month upon their retirement, regardless of the value of the plan's assets.[3] The benefit that participants receive from Defined-Contribution Plans is determined by the amount of their contributions and the value of those invested contributions upon the participant's retirement.[4]

---

1. Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001–1461.

2. ERISA only covers plans in the private-sector and does not cover plans for governmental entities, churches, or plans created solely to comply with laws for workers' compensation, unemployment, or disability. *Employee Retirement Income Security Act (ERISA)*, U.S. DEP'T. OF LAB., https://www.dol.gov/general/topic/retirement/erisa [https://perma.cc/29TV-F4LW] (last visited Oct. 13, 2020) [hereinafter *ERISA Overview*].

3. *Id.*

4. *Types of Retirement Plans*, U.S. DEP'T. OF LAB., https://www.dol.gov/general/topic/retirement/typesofplans [https://perma.cc/M4KK-PQJ7] (last visited Nov. 30, 2020) [hereinafter *Types of Retirement Plans*].

These differences have caused courts[5] to dismiss suits related to Defined-Benefit Plans, but not for Defined-Contribution Plans, for lack of constitutional standing because of the failure to allege a cognizable injury under Article III, creating a new precedent.[6] The narrowed scope of the standing doctrine is in part due to the following: courts are now declining to analogize to the common law of trusts, which is giving the courts much broader power and minimal guidelines; courts are interpreting ERISA in ways that are consistent with their policy goals; and courts are ignoring the language in ERISA.

The recent U.S. Supreme Court case, *Thole v. U.S. Bank, N.A.*,[7] demonstrates the new judicial trends regarding Article III standing.[8] *Thole* shows how the courts are split when determining how to apply standing when private plaintiffs in Defined-Benefit Plans bring suit alleging breach of fiduciary duty—a right that was expressly granted to plaintiffs under ERISA § 502(a)(2). While the four Justices in the dissent made an argument that was more consistent with Congress's intent and with upholding the integrity of Retirement Plans governed by ERISA, the majority opinion will cause many unintended consequences. These consequences include a lack of accountability and liability for fiduciaries of Defined-Benefit Plans because any misconduct will go unaddressed by the federal agency tasked with bringing these types of suits. Further, enforcement suits brought by private-party plaintiffs will automatically be dismissed for lack of standing. Consequently, this interpretation fashions multiple categories of private plaintiffs for ERISA suits who are treated differently by the courts, despite Congress giving these plaintiffs identical rights in the statute. *Thole* marked an important shift in the judicial interpretation of constitutional standing under ERISA, which further emphasizes that the broad discretion given to courts needs to be narrowed by Congress so as to make courts' opinions consistent with the federal Constitution and with ERISA.

Part I of this Note provides an overview of ERISA, some of its goals and purposes, and the function and use of trust law in courts' decisions. Next, Part II discusses ERISA litigation and how ERISA expressly grants parties the right to bring civil actions for claims including breach of fiduciary duty, but as of late courts have moved towards finding a lack of standing for private plaintiffs with Defined-Benefit Plans. This Note will discuss *Thole*—a case that is also significant because the Justices were split 5-4 on the issue of standing—as well as other caselaw examples. This Note will then analyze the effects and implications of this case, and

---

5. Federal courts have exclusive jurisdiction over any claim brought under §1132(a) except claims brought under §1132(a)(1)(B). 29 U.S.C. § 1132(e)(1).

6. *See infra* Part II.C.

7. 140 S. Ct. 1615 (2020).

8. *TransUnion LLC v. Ramirez* is a U.S. Supreme Court case decided in June of 2021 that demonstrates the same trend of Article III standing as in *Thole*, but this case was brought under the Fair Credit Reporting Act ("FCRA"). *See generally* TransUnion LLC v. Ramirez, 141 S. Ct. 2190 (2021). This case is important to the discussion of standing and is another demonstration of the U.S. Supreme Court being split on the issue of what constitutes an injury in fact. But the case does not centrally affect this Note's focus on inequitable treatment among plaintiffs and the ability to bring suit in a representative capacity.

the new precedent it set, on future ERISA litigation. Next, Part III of this Note discusses the issues with the courts' narrow interpretation of Article III standing as it applies to ERISA and the inconsistency of this interpretation with Congress's intent and the explicit rights granted in ERISA. Lastly, Part IV proposes a few methods that will resolve the inconsistencies and allow private plaintiffs who sue based on breach of fiduciary duty in Defined-Benefit Plans to establish standing under ERISA § 502(a)(2).

I. EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974

Prior to the enactment of ERISA,[9] there was minimal oversight for Retirement Plans established by employers.[10] These plans were under scrutiny for failing to pay promised benefits, failing to safeguard against fund mismanagement and abuse, and lack of transparency and communication to employees.[11] ERISA was established in response to this scrutiny and expanded the government's role in protecting and regulating Retirement Plans.[12] The participants and the beneficiaries of Retirement Plans are protected by implementing requirements—regarding "participation, vesting, benefit accrual, . . . funding," and accountability—that these plans must abide by.[13]

A. Overview of ERISA

ERISA protects the assets in Retirement Plans by imposing standards of conduct that the fiduciaries must comply with and ensuring that the participants and beneficiaries receive their earned benefits.[14] Fiduciaries are individuals, such as plan administrators, trustees, directors, and investment managers, who control and manage the operation and administration of a plan within their discretion.[15] Included

---

9. Throughout this Note, ERISA sections will be referred to in-text with all citations referencing directly to where they are codified in the U.S. Code.

10. *See* Rebecca J. Miller et al., *ERISA: 40 Years Later*, J. ACCT. (Aug. 31, 2014), https://www.journalofaccountancy.com/issues/2014/sep/erisa-20149881.html#:~:text=The%20Employee%20Retirement%20Income%20Security%20Act%20(ERISA)%20was%20enacted%20in,created%20Pension%20Benefit%20Guaranty%20Corp [https://perma.cc/R8FY-MVKR].

11. *See id.*

12. *See id.*

13. *ERISA Overview*, *supra* note 2; *FAQs About Retirement Plans and ERISA*, U.S. DEP'T. OF LAB. 1, https://www.dol.gov/sites/dolgov/files/EBSA/about-ebsa/our-activities/resource-center/faqs/retirement-plans-and-erisa-for-workers.pdf [https://perma.cc/2BQ2-QRYP] (last visited Nov. 20, 2020) [hereinafter *ERISA FAQs*].

14. *Fact Sheet: What Is ERISA*, U.S. DEP'T. OF LAB., https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/fact-sheets/what-is-erisa [https://perma.cc/56C8-T2GY] (last visited Oct. 15, 2020) [hereinafter *ERISA Fact Sheet*]. ERISA sets the "minimum standards for participation, vesting, benefit accrual and funding; provides fiduciary responsibilities for those who manage and control plan assets[; and] gives participants the right to sue for benefits." *ERISA Overview*, *supra* note 2.

15. John H. Langbein, *What ERISA Means by "Equitable": The Supreme Court's Trail of Error in Russell, Mertens and Great-West*, YALE L. SCH. CTR. L., ECON., & PUB. POL'Y (Jan. 16, 2003), https://www.harp.org/langbein.htm [https://perma.cc/AB3M-ZEKD]; Jenny Lucey, *Who Is an ERISA Fiduciary Now, and What Should One Be Doing*, INT'L

in the provisions are requirements and guidelines for fiduciary conduct and responsibilities, which include diversifying the plan's investments in order to "minimize the risk of large investment losses," ensuring that the plan is in conformity with ERISA, abiding by the terms of the plan document, and acting with "loyalty" and "prudence" in all actions.[16] If a fiduciary breaches their duty under ERISA, participants and beneficiaries, among others, are permitted to file suit against the fiduciary to obtain equitable remedies.[17]

When Congress drafted ERISA, it intended to enumerate many provisions to provide express guidance, but also intended for a body of federal common law to help solve any "gaps."[18] Congress never intended for ERISA to be all-encompassing but instead chose to give power to courts to fill in the gaps left by the statute.[19] Congress intended for the common law of trusts to serve as a basis for interpreting the statute and applying the law to claims brought under ERISA.[20]

Three federal administrative bodies—the Labor Department's Employee Benefits Security Administration ("EBSA"), the Treasury Department's Internal Revenue Service ("IRS"), and the Pension Benefit Guaranty Corporation ("PBGC")—were given different administration and enforcement responsibilities within the titles of ERISA.[21] The EBSA governs the provisions of Title I, which deals with the conduct of a plan's fiduciaries; the participants' benefit rights including vesting and participation; protection and investment of a plan's assets; and rules for reporting and disclosure. Additionally, the EBSA is primarily responsible for the civil-enforcement provision in ERISA.[22] The PBGC, created by Title IV of ERISA, acts as a federal insurance program that will step in to pay retirement

---

FOUND. EMP. BENEFIT PLANS (Sept. 28, 2020), https://blog.ifebp.org/index.php/who-is-an-erisa-fiduciary-now-and-what-should-one-be-doing#:~:text=A%20person%20is%20a%20fiduciary,of%20the%20plan's%20assets%2C%20or [https://perma.cc/5GRQ-3VKD].

16. *See* 29 U.S.C. § 1104; *Meeting Your Fiduciary Responsibilities*, U.S. DEP'T. OF LAB. 2–3 (Sept. 2020), https://www.dol.gov/sites/dolgov/files/EBSA/about-ebsa/our-activities/resource-center/publications/meeting-your-fiduciary-responsibilities.pdf [https://perma.cc/UW8G-9EPZ] [hereinafter *Fiduciary Responsibilities*]. Loyalty is defined as avoiding "self-serving behavior" and it requires that the fiduciary act in the best interest of the participants and beneficiaries; prudence is defined as requiring fiduciaries to exercise "the care, skill, prudence, and diligence . . . [of a] prudent man acting in like capacity." Langbein, *supra* note 15; 29 U.S.C. § 1104(a)(1)(B).

17. 29 U.S.C. § 1132(a); *see also ERISA Overview*, *supra* note 2. ERISA provides remedies in the form of recovering benefits due to the participants, relief to the plan for any losses or profits from misconduct, injunctive relief, and a catchall provision for equitable relief that the court deems appropriate. Langbein, *supra* note 15.

18. Andrew L. Oringer, *A Regulatory Vacuum Leaving Gaping Wounds—Can Common Sense Offer a Better Way to Address the Pain of ERISA Preemption?*, 26 HOFSTRA LAB. & EMP. L. J. 409, 429, 432 (2009).

19. *Id.*

20. *See infra* Part I.D.

21. *See ERISA FAQs*, *supra* note 13, at 14–15; *History of EBSA and ERISA*, U.S. DEP'T. OF LAB., https://www.dol.gov/agencies/ebsa/about-ebsa/about-us/history-of-ebsa-and-erisa [https://perma.cc/8NB5-8PM4] (last visited Nov. 20, 2020) (describing each administrative body and its function) [hereinafter *History of EBSA and ERISA*].

22. *ERISA FAQs*, *supra* note 13, at 14; *History of EBSA and ERISA*, *supra* note 21.

benefits, up to certain legal limits as determined by Congress, if the plan terminates or becomes deficient.[23] The IRS handles issues arising from the vesting, participation, and funding standards in Title I as well as the provisions in Title II dealing with compliance of Retirement Plans with the Internal Revenue Code ("Code").[24]

ERISA's terms and provisions differ from the Code in many ways, but the two statutes have many substantially similar requirements[25] and therefore areas with overlapping jurisdiction.[26] The Code governs qualified Retirement Plans—plans that receive tax-favored treatment—whereas ERISA governs pension plans that include both qualified and nonqualified Retirement Plans.[27] An important distinction between ERISA and the Code is that a participant must bring a lawsuit against a plan or its fiduciaries under ERISA rather than under the Code.[28] Congress intended for civil suits to assist in the enforcement of ERISA's provisions, but courts have ruled that actions should be brought only after administrative procedures have been exhausted to reduce the strain on courts' resources and to allow for proper development of the record.[29]

B. Policy Goals and Objectives

ERISA aims to protect Retirement Plans from mismanagement and abuse by closely regulating the actions of those who control and manage Retirement Plans, and imposing liability when they fail to act in accordance with the statute.[30] There are also additional requirements imposed upon fiduciaries and managers relating to communication and transparency of information, benefits, and funding of Retirement Plans.[31] In doing so, ERISA encourages employees to save for their own

---

23. *How PBGC Operates*, PENSION BENEFIT GUAR. CORP., https://www.pbgc.gov/about/how-pbgc-operates [https://perma.cc/M42D-DYNK] (last visited Oct. 13, 2020); *Guaranteed Benefits*, PENSION BENEFIT GUAR. CORP., https://www.pbgc.gov/wr/benefits/guaranteed-benefits [https://perma.cc/RHF6-3325] (last visited Oct. 31, 2020) (discussing the legal limits on the PBGC's payment guarantees).

24. *History of EBSA and ERISA*, *supra* note 21.

25. Title II of ERISA amended the Code, in part, so that many of the requirements are parallel with one another. Cent. Laborers' Pension Fund v. Heinz, 541 U.S. 739, 746 (2004) (stating that the result is a "nearly verbatim replication in the Internal Revenue Code" from ERISA).

26. *See Relationship with IRS*, U.S. DEP'T. OF LAB., https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/enforcement/oe-manual/relationship-with-irs https://perma.cc/G9SA-583H] (last visited Oct. 14, 2020) [hereinafter *Relationship with IRS*].

27. *Id.* (stating that nonqualified plans do not receive tax-favored treatment).

28. *See id.*; *ERISA FAQs*, *supra* note 13, at 1, 14.

29. Whitman F. Manley, Note, *Civil Actions Under ERISA Section 502(a): When Should Courts Require That Claimants Exhaust Arbitral or Intrafund Remedies*, 71 CORNELL L. REV. 952, 953 (1986).

30. *ERISA Fact Sheet*, *supra* note 14; *ERISA FAQs*, *supra* note 13, at 11.

31. *ERISA Fact Sheet*, *supra* note 14; *ERISA FAQs*, *supra* note 13, at 10–11.

retirement through their participation in Retirement Plans because these plans provide employees with increased security around their earned benefits.[32]

Uniformity among laws governing Retirement Plans is necessary to reduce the uncertainty employees face and promote the implementation of employer-sponsored plans that encourage employee participation.[33] The statute incentivizes employers to create effective Retirement Plans in order to reduce "financial and administrative" burdens.[34] In addition, ERISA provides incentives for employees through the ability to achieve a high rate of return on investments, the protections and rights granted to employees, and the clear guidelines that must be followed by fiduciaries and employers.[35] All plans subject to ERISA must abide by the same set of laws, which provides nationwide consistency for governing and regulating plans.[36] In order to institute this uniformity, Congress included a provision in ERISA stating that ERISA preempts state laws related to Retirement Plans or that are otherwise covered under ERISA.[37]

C. Types of Retirement Plans: Defined-Benefit Plans and Defined-Contribution Plans

Retirement Plans are established by employers to provide retirement income to employees.[38] Employees earn benefits during the course of their employment, but the nature and amount of the accrued benefits depend on the type of plan.[39] The two types of Retirement Plans under ERISA are Defined-Benefit Plans and Defined-Contribution Plans.[40] Cash Balance Plans fall within the category

---

32. *See* SPECIAL COMM. ON AGING U.S. SENATE, 98TH CONG., THE EMP. RET. INCOME SEC. ACT OF 1974: THE FIRST DECADE 28, 30, 32 (Comm. Print 1984) (noting that ERISA aims to promote a new method of funding private retirement with increased security around the benefits); *Advisory Council Report on Approaches to Retirement Security in the United States*, U.S. DEP'T. OF LAB., https://www.dol.gov/agencies/ebsa/about-ebsa/about-us/erisa-advisory-council/2009-approaches-to-retirement-security-in-the-united-states [https://perma.cc/CT3B-5WBD] (last visited Nov. 23, 2020).

33. Ryan McParland, *ERISA: A Statute's History, Purposes, and Progression*, L. STUDENT CONNECTION (June 1, 2011, 7:46 PM), http://nysbar.com/blogs/lawstudent connection/2011/06/erisa_history_purposes_and_pro.html [https://perma.cc/39L5-XZNR].

34. *Id.*

35. Randall D. Weiss, *Private Pensions: The Impact of ERISA on the Growth of Retirement Funds*, *in* FUNDING PENSIONS: ISSUES AND IMPLICATIONS FOR FINANCIAL MARKETS 137, 138 (2008).

36. McParland, *supra* note 33.

37. *See* 29 U.S.C. § 1144(a); Amy B. Monahan, *Pay or Play Laws, ERISA Preemption, and Potential Lessons from Massachusetts*, 55 U. KAN. L. REV. 1203, 1206–08 (2007).

38. *See ERISA Fact Sheet, supra* note 14.

39. *ERISA FAQs*, *supra* note 13, at 1–2.

40. *Types of Retirement Plans*, *supra* note 4.

of Defined-Benefit Plans[41] and Profit-Sharing Plans,[42] whereas Cash or Deferred Arrangements (commonly called 401(k) Plans)[43] are common types of Defined-Contribution Plans.[44] Defined-Benefit Plans promise a fixed monthly payment once the participant reaches retirement and those benefits are guaranteed, with limitations, by the PBGC if the plan becomes deficient or is terminated.[45] These limits imposed by the PBGC depend on many factors, such as bankruptcy, the date of termination, and the age of the employee; and the PBGC releases their maximum monthly guarantees for each year.[46] Defined-Contribution Plans do not promise a specific payout once an employee reaches retirement; instead, the amount the participant receives is based on the employee's contributions and will fluctuate depending on the value of their individual investments at the time benefits are paid.[47]

When a Retirement Plan will be able to meet its benefit obligations, it is considered fully funded (or sometimes overfunded), but if it is not able to meet its benefit obligations, it is underfunded.[48] Employers are exposed to investment risk with Defined-Benefit Plans in the event the plan is underfunded because the employer is financially responsible for any deficiencies.[49] In contrast, employees each bear their own investment risk in Defined-Contribution Plans, shifting the burden of deficiencies from the employer onto the employee.[50] In both Defined-Benefit Plans and Defined-Contribution Plans, the employee participants are

41. Cash Balance Plans promise a benefit in terms of an account balance that the employee will become entitled to and the benefits are fixed even when the value of the investments fluctuate. *Types of Retirement Plans*, *supra* note 4.

42. In a Profit-Sharing Plan, the employer determines annually how much to contribute to the plan, and the payout is determined using a formula designated by the plan. *Types of Retirement Plans*, *supra* note 4.

43. *See generally* 26 U.S.C. § 401(k). Cash or deferred arrangements are referred to as 401(k) Plans because they are governed by Section 401(k) of the Internal Revenue Code. *See* William L. Sollee, *Cash or Deferred Arrangements (Section 401(k)): Legal Issues and Plan Design*, WM. & MARY L. SCH. SCHOLARSHIP REPOSITORY 75 (1983). In a 401(k) Plan, employees can contribute part of their salary (prior being taxed) to the 401(k) account, and employers sometimes choose to match these contributions. *See id.*; *Types of Retirement Plans*, *supra* note 4.

44. *Types of Retirement Plans*, *supra* note 4.

45. *Id.*; *see also General FAQs About PBGC*, PENSION BENEFIT GUAR. CORP., https://www.pbgc.gov/about/faq/pg/general-faqs-about-pbgc#:~:text=PBGC%20is%20a%20federal%20agency,set%20monthly%20amount%20at%20retirement [https://perma.cc/YL22-6PDV] (last visited Apr. 23, 2021) (noting that a Retirement Plan may be terminated by the PBGC or the employer).

46. *Maximum Monthly Guarantee Tables*, PENSION BENEFIT GUAR. CORP., https://www.pbgc.gov/wr/benefits/guaranteed-benefits/maximum-guarantee [https://perma.cc/3VAZ-APY3] (last visited Nov. 23, 2020).

47. *Types of Retirement Plans*, *supra* note 4.

48. Brief of Washington Legal Foundation as Amicus Curiae in Support of Respondents at 4, Thole v. U.S. Bank, N.A., 140 S. Ct. 1615 (2020) (No. 17-1712) [hereinafter *Brief in Support of Respondents*].

49. Hughes Aircraft Co. v. Jacobson, 525 U.S. 432, 440 (1999).

50. *Relationship with IRS*, *supra* note 26.

guaranteed their earned benefits and are able to file a civil suit in the event of a failure to receive what they are entitled to.[51]

D. Function of the Common Law of Trusts in Interpreting ERISA

Under § 403, Retirement Plan assets must be held in a trust for the *exclusive* benefit of the participants and their beneficiaries—the requirements in § 403 apply to both Defined-Benefit Plans and Defined-Contribution Plans.[52] As such, both types of plans are considered trusts, and many of the responsibilities and powers imposed by ERISA on fiduciaries are derived from the common law of trusts.[53] Traditional private trusts and Retirement Plans, while different in their nature and purpose, have many similarities in their language and terminology, allowing trust law to provide guidance when the courts are interpreting ERISA.[54]

Trust law was implicitly invoked by Congress to define the "scope of . . . authority and responsibility" rather than enumerating this in the statute itself.[55] In 2000, the U.S. Supreme Court held that the congressional intent behind ERISA was to incorporate trust-law principles, which would allow private plaintiffs in Defined-Benefit Plans to bring successful[56] breach-of-fiduciary-duty suits.[57] The common law of trusts supports constitutional standing when beneficiaries bring suit against trustees for failure to comply with any of their duties.[58]

II. ERISA LITIGATION

The language in ERISA affords many rights to Retirement Plan participants and beneficiaries, including the right to bring a civil suit.[59] The U.S. Supreme Court has held that the plain language of ERISA allows for remedies for plaintiffs, which is consistent with the purpose of ERISA and with the statute's roots in trust law.[60] However, the statute is still subject to judicial interpretation, and the plaintiff's

---

51. *See infra* Part II.

52. 29 U.S.C. § 1103(a), (c)(1); Thole v. U.S Bank, N.A., 140 S. Ct. 1615, 1625 (2020).

53. Cent. States, Se. & Sw. Areas Pension Fund v. Cent. Transp., Inc., 472 U.S. 559, 570 (1985).

54. *See* S. REP. NO. 93-127, at 4685 (1973); Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 110 (1989).

55. *See* S. REP. NO. 93-127, at 4685 (1973); *Cent. States, Se. & Sw. Areas Pension Fund*, 472 U.S. at 570 n.10.

56. For the purposes of this Note, a "successful" suit simply means that the claim will proceed past a motion to dismiss.

57. *See* Harris Tr. & Sav. Bank v. Salomon Smith Barney, Inc., 530 U.S. 238, 250 (2000)*; see also* Varity Corp. v. Howe, 516 U.S. 489, 496–97 (1996) (explaining that trust law is to be incorporated into ERISA only if it is consistent with ERISA's language, structure, or purpose).

58. RESTATEMENT (THIRD) OF TRUSTS §§ 93–94 (2012); *see also* UNIF. TRUST CODE §1001 cmt. (UNIF. LAW COMM'N 2003) ("Beneficiaries and cotrustees have standing to bring a petition to remedy a breach of trust . . . . A person who may represent a beneficiary's interest under Article 3 would have standing to bring a petition on behalf of the person represented.").

59. *See infra* Part II.A.

60. *Varity Corp.*, 516 U.S. at 515.

ability to recover is becoming more difficult depending on the type of Retirement Plan involved and the plaintiff's cause of action.

A. Right to Bring Civil Action

ERISA § 502(a) provides Retirement Plan participants the right to bring a civil action.[61] "The civil enforcement scheme of § 502(a) is one of the essential tools for accomplishing the stated purposes of ERISA"[62] and was enacted to further enforce the provisions in ERISA.[63] Section 502(a) states that a civil action may be brought for 11 enumerated reasons, including the following: by a participant, beneficiary, or fiduciary for "violations of ERISA's substantive standards of conduct"[64] and by a participant, beneficiary, fiduciary, or the Secretary of Labor for breach of fiduciary duty.[65] ERISA provides a "catch-all" category in § 502(a)(3) that allows plaintiffs to obtain "other appropriate equitable relief" in situations that Congress "did not anticipate when it enacted ERISA."[66] Section 502(a)(2) provides that in the event of a breach of fiduciary duty, relief must be sought under § 409(a), which explains the liability imposed upon fiduciaries as follows: a fiduciary who breaches any of "the responsibilities, obligations, or duties . . . shall be personally liable to make good to such plan any losses to the plan" resulting from the breach and to restore any profits made by improper use of the Retirement Plan assets, and shall be subject to "other equitable or remedial relief" in the court's discretion.[67] Fiduciaries are subject to this liability when they fail to carry out their duties "solely in the interest of participants and beneficiaries."[68] However, the language in § 409(a) only mentions remedies to the "plan," rather than mentioning the participants or beneficiaries.[69]

The congressional intent behind the statute's primary goal of protection has been interpreted by the U.S. Supreme Court in differing ways. In 1985, the Court held that Congress was mainly concerned with protecting the assets in Retirement Plans and with remedies that would protect the entire plan.[70] The statute aims to protect the plan assets rather than the rights of an individual beneficiary because the

---

61. 29 U.S.C. § 1132(a).

62. Pilot Life Ins. Co. v. Dedaux, 481 U.S. 41, 52 (1987).

63. Manley, *supra* note 29, at 952.

64. *See id*. *See generally* 29 U.S.C. § 1132(a)(3) ("A civil action may be brought . . . by a participant, beneficiary or fiduciary (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.").

65. *See* 29 U.S.C. § 1132(a)(2).

66. *See id.* § 1132(a)(3); COLLEEN E. MEDILL, INTRODUCTION TO EMPLOYEE BENEFITS LAW: POLICY AND PRACTICE 640 (5th ed. 2018).

67. 29 U.S.C. §§ 1109, 1132(a)(2). Because the fiduciaries would be "personally liable," there is no way to avoid this liability through an exculpatory clause in the plan. *Id.* § 1109; MEDILL, *supra* note 66, at 612.

68. 29 U.S.C. § 1104(a); *Fiduciary Responsibilities*, *supra* note 16, at 2.

69. *See* 29 U.S.C. § 1109(a).

70. Mass. Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 142 (1985) (holding that suits brought under ERISA § 502(a)(2) could only provide remedies consistent with § 409(a), meaning remedies to the plan).

potential plaintiffs are all interested in the financial integrity of the plan, and therefore the Court focused on addressing the "possible misuse of plan assets."[71] However, in 1996, the Court held that because Congress provided remedies for individuals when there is a breach of fiduciary duty under § 502(a)(3), it was clear that Congress never intended for ERISA's provisions to protect only the plan itself.[72]

B. Article III Standing Doctrine

Article III of the federal Constitution imposes a standing-to-sue requirement on all claims brought in the federal courts,[73] including claims brought under ERISA: plaintiffs must establish Article III standing in addition to the substantive requirements under ERISA if the claim is to succeed.[74] "In order to establish the irreducible, constitutional minimum of Article III standing, a plaintiff must show . . . an injury in fact," which requires the plaintiff to show they have personally suffered a concrete harm.[75] However, a notable exception to this injury-in-fact requirement arises in derivative actions, where a shareholder–plaintiff has standing based on an injury to the corporation, rather than an injury to such individual.[76] The policy behind this type of action is based upon the unreasonableness of directors to bring suit on behalf of the corporation because they "would in effect be suing themselves."[77]

1. Standing in Federal Lawsuits: Overview

Private plaintiffs that bring a federal suit based on a statutory violation must demonstrate concrete harm in order to seek damages,[78] meaning that these plaintiffs

---

71. *Id.*

72. Varity Corp. v. Howe, 516 U.S. 489, 507 (1996); 29 U.S.C. § 1132(a).

73. The language "case" or "controversy" in Article III has been interpreted and become known as the standing-to-sue doctrine. Spokeo, Inc. v. Robins, 578 U.S. 330, 337–38 (2016). It is important to note that many of the cases discussed in this Subsection were not brought under ERISA and are important to this Note only for purposes of discussing and analyzing Article III standing.

74. U.S. CONST. art. III; Thole v. U.S. Bank, N.A., 140 S. Ct. 1615, 1618, 1620 (2020). Federal courts "have subject matter jurisdiction over ERISA claims only where the appellants have both statutory *and* constitutional standing." David v. Alphin, 704 F.3d 327, 338 (4th Cir. 2013). It is possible, and probably even common especially in ERISA suits, for a plaintiff to establish statutory standing but not constitutional standing. *See* Fox v. McCormick, 20 F. Supp. 3d 133, 139 (D.D.C. 2013).

75. Lee v. Verizon Commc'ns, Inc., 837 F.3d 523, 544 (5th Cir. 2016) (citing Susan B. Anthony List v. Driehaus, 573 U.S. 149, 158 (2014) (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992))) (The court also notes two other elements that must be present to establish Article III standing, but for the purpose of this Note, the focus is only on the "injury in fact" element because it is the main focus of standing when courts are opining on ERISA cases, and poses the most difficulty in moving forward with breach-of-fiduciary-duty cases involving Defined-Benefit Plans.).

76. Daniel R. Fischel, *The Demand and Standing Requirement in Stockholder Derivative Actions*, 44 U. CHI. L. REV. 168, 168 (1976).

77. *Id.* at 175–76.

78. The Court has held that this is not the case when plaintiffs are seeking injunctive relief. TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2210 (2021) (citing Clapper v. Amnesty Int'l USA, 568 U.S. 398, 414 (2013)) (noting that a "material risk of future harm can satisfy the concrete-harm requirement").

do not automatically satisfy the injury-in-fact requirement.[79] Courts have held that demonstrating injury in fact requires the plaintiff to show a "personal stake in the outcome of the controversy," such that the injury is "concrete and particularized," and "actual or imminent, not conjectural or hypothetical."[80] Further, the U.S. Supreme Court has held that standing is not established when there is a "hypothetical future harm that is not certainly impending," but threatened injury may be sufficient if it *is* "certainly impending."[81] The concrete-harm requirement is important to the separation of powers by dividing Congress's role of creating and defining rights with the courts' role of determining whether a plaintiff has suffered an injury in fact.[82] The U.S. Supreme Court has held that Congress's creation of statutory obligations does not relieve courts of this duty to make an independent decision regarding the injury-in-fact requirement.[83] However, arguably, certain harms are central to Congress's enactment of federal laws and those harms should provide a basis for lawsuits, even in instances where the harm is not concrete.[84]

When dealing with the deprivation of an individual's statutory right, the Court has held that procedural violations or violations of statutory rights do not automatically establish standing and are dependent on whether the violation is abstract or concrete.[85] The presence of a "risk of real harm" to an individual may be sufficient, but this is to be determined on a case-by-case basis.[86] Yet, standing on

---

79. Spokeo, Inc. v. Robins, 578 U.S. 330, 341 (2016). The holding in *Spokeo, Inc.* was a critical Supreme Court case that set a new precedent for establishing the injury-in-fact requirement for Article III, and the opinion was recently upheld by the majority in *TransUnion LLC*. Both of these cases were brought under the FCRA but are notable for their analysis of the injury-in-fact requirement in the context of a statutory violation.

80. *Lee*, 837 F.3d at 544 (quoting *Susan B. Anthony List*, 573 U.S. at 158); Doug Linder, *Constitutional Limitations on the Judicial Power: Standing, Advisory Opinions, Mootness, and Ripeness*, EXPLORING CONST. L. (2020), http://law2.umkc.edu/faculty/projects/ftrials/conlaw/caseorcontroversy.html [https://perma.cc/7VSM-BEAD] (last visited Feb. 18, 2022).

81. *Clapper*, 568 U.S. at 409–10 (noting that "possible future injury" does not meet the requirements for standing because it is too speculative, which is distinguishable from an impending threatened injury because it may constitute an injury in fact).

82. *TransUnion LLC*, 141 S. Ct. at 2205 ("[U]nder Article III, an injury in law is not an injury in fact.").

83. *Id.* at 2205.

84. *Id.* at 2222 (Thomas, J., dissenting) (quoting *Spokeo, Inc.*, 578 U.S. at 341–42) ("This case is a particularly grave example of the harm this Court identified as central to the FCRA: 'curb[ing] the dissemination of false information . . . .' And it aligns closely with a 'harm that has traditionally been regarded as providing a basis for a lawsuit.'").

85. *Spokeo, Inc.*, 578 U.S. at 341–42; *TransUnion LLC*, 141 S. Ct. at 2197, 2211.

86. *See* S*pokeo, Inc.*, 578 U.S. at 341–42 (citing *Clapper*, 568 U.S. 398) ("This does not mean, however, that the risk of real harm cannot satisfy the requirement of concreteness."); *see also* Summers v. Earth Island Inst., 555 U.S. 488, 496 (2009). The Court in *Spokeo* took no position on whether the plaintiffs were able to establish injury in fact, but rather held that the circuit court failed to address whether the statutory violations alleged would rise to the "degree of risk sufficient to meet the concreteness requirement" and remanded the case back to the circuit court. *Id.* at 342–43.

this basis is not commonly found by courts;[87] instead, courts have created a precedent that injuries yet to materialize are insufficient to constitute a concrete harm without any further inquiry.[88]

In addition to the problem of courts overriding the risk-of-harm analysis, such analysis requires the facts of each case to be analyzed to decide whether the harm rises to the level of "concrete," but this is outside of the bounds of the courts' authority.[89] Decisions involving an analysis of the facts are best made by a jury or by Congress to avoid courts determining what harms rise to the level of "concrete" because these decisions may be based solely on policy goals.[90]

2. Standing in ERISA Lawsuits

The fact that ERISA grants an individual the right to bring suit does not mean that the individual satisfies the injury-in-fact requirement and thus does not guarantee that the claim will not be dismissed for a lack of standing.[91] The judicial system has mandated that plaintiffs show direct, personal injury in order to establish standing when seeking monetary relief, but some courts do not impose this requirement when plaintiffs are merely seeking certain injunctive or other equitable relief under ERISA § 502(a)(3).[92] Plaintiffs suing under § 502(a)(3) are seeking remedies for harms that are not in the form of financial losses but rather harm from a violation of ERISA's provisions or of the Retirement Plan's terms.[93] For example, in breach-of-fiduciary-duty cases, if plaintiffs are seeking to enforce the disclosure requirements in Title I or if the equitable relief sought does not revolve around a monetary loss to the Retirement Plan, then the plaintiff may bring suit under

87. *See*, *e.g.*, *TransUnion LLC*, 141 S. Ct. at 2222 (Thomas, J., dissenting) ("The majority deflects this line of analysis by all but eliminating the risk-of-harm analysis. According to the majority, an elevated risk of harm simply shows that a concrete harm is *imminent* and thus may support only a claim for injunctive relief.").

88. *See generally id.*; *Spokeo, Inc.*, 578 S. Ct. 330. See also *infra* Part II.C, for a discussion of this precedent in cases brought under ERISA.

89. *TransUnion LLC*, 141 S. Ct. at 2226 (Kagan, J., dissenting) ("Congress is better suited than courts to determine when something causes a harm or risk of harm in the real world.").

90. *See id.* at 2224 (Thomas, J., dissenting) (quoting Sierra v. City of Hallandale Beach, Fla., 996 F.3d 1110, 1129 (11th Cir. 2021) (Newsom, J., concurring)) ("How do we go about picking and choosing" what is "sufficiently 'concrete' and 'real'[?] . . . I see no way to engage in this 'inescapably value-laden' inquiry without it 'devolv[ing] into [pure] policy judgment.'").

91. *See Spokeo, Inc.*, 578 U.S. at 330–31; Mertens v. Hewitt Assocs., 508 U.S. 248, 253 (1993); Thole v. U.S. Bank, N.A., 140 S. Ct. 1615, 1620 (2020).) Statutory standing does not equate to constitutional standing. Lujan v. Defenders of Wildlife, 504 U.S. 555, 577–78 (1992).)

92. New Orleans ILA Pensioners Ass'n v. Bd. of Trs. of New Orleans Emps. Int'l Longshoremen's Ass'n AFL-CIO Pension Fund, No. 07-6349, 2008 WL 215654, at *4 (E.D. La. Jan. 24, 2008). This is consistent with other causes of action that lower the bar for the injury-in-fact requirement when plaintiffs are only seeking injunctive relief. *See supra* note 79.

93. *See New Orleans ILA Pensioners Ass'n*, 2008 WL 215654, at *4; s*ee also* 29 U.S.C. § 1132(a)(3).

§ 502(a)(3).[94] Courts require a higher standard of individualized harm to obtain relief under § 502(a)(2) because the claims are monetary in nature, unlike under § 502(a)(3), which precludes monetary relief.[95]

3. Standing in Shareholder Derivative Lawsuits

In contrast, shareholder derivative suits arising in the corporate context have different requirements for standing because the usual showing of individualized harm is not required. A claim is derivative rather than direct when a corporation experienced the harm rather than the shareholders and when the remedy is owed to the corporation rather than the shareholders.[96] Federal law supports derivative suits,[97] and allows shareholders to satisfy the standing requirement that otherwise would not establish the requisite injury because the harm was to the corporation rather than the individual shareholders.[98] However, Article III supports such suits because both the injury and the remedies belong to the corporation, where the shareholder–plaintiff is merely acting in a representative capacity to ensure that breaches are not unaddressed.[99]

Derivative actions consist of two causes of action: an action against the corporation for failing to bring suit and "an action brought by a shareholder on behalf of the corporation to redress harm to the corporation."[100] In a breach-of-fiduciary-duty claim against the directors of a corporation, the corporation has standing rather than the shareholders themselves.[101] However, the board of directors is "unlikely to initiate a suit against itself."[102] Because of this problem, courts have created derivative suits that allow recovery based on harms to the corporation rather than individual shareholders.[103] Under this theory, these suits would allow private

94. *New Orleans ILA Pensioners Ass'n*, 2008 WL 215654, at *4 (first citing Horvath v. Keystone Health Plan E., Inc., 333 F.3d 450, 456 (3d Cir. 2003); then citing Cent. States Se. & Sw. Areas Health & Welfare Fund v. Merck-Medco Managed Care, L.L.C., 433 F.3d 181, 199–200 (2d Cir. 2005); and then citing Wells v. Cal. Physicians' Serv., No. C05-01229 CRB, 2007 WL 926490, at *5 (N.D. Cal. Mar. 26, 2007)).

95. *See id*.

96. *See* WILLIAM K. SJOSTROM, JR., BUSINESS ORGANIZATIONS: A TRANSACTIONAL APPROACH 518 (Rachel E. Barkow et al. eds., 3d ed. 2020) (citing Tooley v. Donaldson, Lufkin & Jenrette, Inc., 845 A.2d 1031 (Del. 2004)).

97. *See, e.g.*, FED. R. CIV. P. 23.1(a). However, Rule 23.1 does not automatically ensure that shareholders can bring a derivative suit because there are additional requirements that such shareholders must satisfy. Fischel, *supra* note 76, at 169.

98. *See* Brief for the United States as Amicus Curiae Supporting Petitioners at 13–14, Thole v. U.S. Bank, N.A., 140 S. Ct. 1615 (2020) (No. 17-1712).

99. *See, e.g.*, Fischel, *supra* note 76, at 194 (discussing instances when shareholders have standing). *See generally id*.

100. Seth Aronson et al., *Shareholder Derivative Actions: From Cradle to Grave*, MONDAQ 1 (June 2009), https://www.mondaq.com/pdf/clients/87654.pdf [https://perma.cc/2EPX-4RYV].

101. SJOSTROM, JR., *supra* note 96, at 518.

102. *Id.*

103. *Id.*

plaintiffs to remedy a wrong committed by the fiduciaries, when the fiduciaries fail to do so.[104]

C. **Thole v. U.S. Bank, N.A.** ***and Other Caselaw Examples***

On June 1, 2020, the U.S. Supreme Court split 5–4 when the majority in *Thole v. U.S. Bank, N.A.* held that the participants in a Defined-Benefit Plan lacked standing to sue under Article III.[105] Participants in the plan brought a putative class-action suit against the employer and fiduciaries for breach of fiduciary duty alleging that the defendants failed to carry out their duties of loyalty and prudence because of bad investment decisions causing the plan to suffer a loss of $750 million in 2008.[106] The majority reasoned that the participants had not suffered a concrete injury because they were retired employees with guaranteed monthly payments regardless of the plan's value.[107] In addition, once the plan became overfunded in 2014 any substantial risk of default was eliminated, [108] so the Court dismissed the case based on the absence of constitutional standing resulting from the plaintiffs' lack of an injury in fact.[109]

The Court in *Thole* was split on the issue of Article III standing.[110] Three Justices in the majority held that there was no standing because the plaintiffs had no "concrete stake in [the] lawsuit" because their pension payments were fixed and thus unaffected by the fiduciary misconduct.[111] They also noted that the plaintiffs were not "legally or contractually appointed to represent the plan."[112] These Justices distinguished Defined-Benefit Plans from Defined-Contribution Plans (and from private trusts), suggesting that the characteristics of a Defined-Contribution Plan would allow for private plaintiffs to establish an injury in fact to support standing because any loss to the plan directly reduces a participant's benefits, causing immediate harm to the plan participants.[113] Two other Justices concurred with the majority, but further reasoned that the plaintiffs had "no private right" in the Defined-Benefit Plan assets because the rights did not belong to them but rather belonged to the plan; thus, plaintiffs had no equitable or legal interest in the plan's assets.[114] The majority seemingly held that this claim was brought prematurely[115]

---

104. Aronson et al., *supra* note 100, at 1.
105. Thole v. U.S. Bank, N.A., 140 S. Ct. 1615, 1619 (2020).
106. *Id.* at 1618–19.
107. *Id.* at 1619.
108. *Brief in Support of Respondents*, *supra* note 48, at 4–6.
109. *Thole*, 140 S. Ct. at 1618–19.
110. *See generally Thole*, 140 S. Ct. 1615.
111. *Id.* at 1619.
112. *Id.* at 1620.
113. *Id.* at 1616–19; *see also Brief in Support of Respondents*, *supra* note 48, at 4.
114. *Thole*, 140 S. Ct. at 1622–23 (stating that there was "no assignment of the plan's rights by ERISA or any contract" and thus the fiduciaries duties laid out in ERISA belong to the plan not the participants).
115. Plaintiffs brought suit before suffering any change in their benefits received each month and are suing based on the possibility that future benefits may be affected, so the suit is brought prematurely because no injury has occurred yet. *See id.* at 1619. When the harm materializes, then plaintiffs will be able to establish a concrete harm sufficient for standing. TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2211 (2021).

and might only have been successful if the plaintiffs argued that there was a substantially greater risk that the plan or the employer would be unable to pay the future benefits owed to them.[116] The majority further suggested that standing would likely still not be available if the plan or the employer could not pay the benefits because the PBGC would be required by law to cover the benefits, thus diminishing any argument based on an increased risk of harm.[117]

The remaining four Justices dissented, reasoning that there was standing to sue based on three reasons. First, the plaintiffs had an interest in the financial integrity of their Defined-Benefit Plan just as "private trust beneficiaries have in protecting their trust."[118] This interest exists regardless of what type of Retirement Plan is involved.[119] Second, the breach of fiduciary duty constitutes injury in fact regardless of any financial harm or risk of financial harm because the participants have a contractual right to loyal and prudent management and because the monthly payments to which participants are entitled create a "contractua[l] entitle[ment]."[120] Third, the participants can bring suit on behalf of the Defined-Benefit Plan.[121] The U.S. Supreme Court has previously held that "lawsuits to enforce ERISA's fiduciary duties 'must' be brought 'in a representative capacity.'"[122] The Justices reasoned that participants *should* be able to bring a lawsuit to "stop or cure" plan mismanagement prior to the plan being at risk of default.[123]

In cases involving Defined-Contribution Plans, courts generally hold that plaintiffs are able to establish Article III standing in claims alleging breach of fiduciary duty, as exemplified in the following cases. In *LaRue v. DeWolff, Boberg & Associates., Inc.*, the Court held that relief was available under § 502(a)(2) for lost profits that resulted from a breach of fiduciary duty in a Defined-Contribution Plan because the misconduct had a direct effect, or a direct imminent risk, on the amount of a participant's benefits.[124] In *Massachusetts Mutual Life Insurance Co. v. Russell*, the Supreme Court held that the plaintiffs in a Defined-Benefit Plan may sue for breach of fiduciary duty under ERISA § 502(a)(2) only when there has been a monetary loss to the plan as a whole, because § 502(a)(2) only provides remedies to the plan, and not when seeking individual remedies.[125] *Russell* narrows the scope of relief that plaintiffs can seek when suing under § 502(a)(2) for breach of fiduciary

---

116. *Thole*, 140 S. Ct. at 1621–22.

117. *Id.* at 1622 n.2.

118. *Id.* at 1625 (Sotomayor, J., dissenting).

119. *Id.*

120. *Id.* at 1628–30 (Sotomayor, J., dissenting).

121. *Id.* at 1632 (Sotomayor, J., dissenting).

122. *Id.* at 1633 (citing Varsity Corp. v. Howe, 516 U.S. 489, 516 (1996) (Thomas, J., dissenting)).

123. *Id.* at 1623 ("[T]he Court determines that pensioners may not bring a federal lawsuit to stop or cure retirement-plan mismanagement until their pensions are on the verge of default. This conclusion conflicts with common sense and longstanding precedent.").

124. LaRue v. DeWolff, Boberg & Assocs., Inc., 552 U.S. 248, 262–63 (2008) (Thomas, J., concurring) (noting that participants of Defined-Contribution Plans can recover, meaning they have standing, because fiduciary misconduct has a direct effect on the amount of their benefits).

125. *See* 473 U.S. 134, 142 (1985).

duty,[126] but this applies only to Defined-Benefit Plans, not Defined-Contribution Plans.[127] The Court distinguished *LaRue* from *Russell* because with Defined-Benefit Plans any fiduciary misconduct must cause a risk of insolvency[128] to the plan as a whole in order to cause injury in fact to participants of the plan.[129] That is not the case in a Defined-Contribution Plan because a participant's benefits are tied directly to the value of the plan, and any fluctuations in the plan's value directly alter the amount of the participant's benefits.[130]

In cases involving Defined-Benefit Plans, courts generally hold that these plans are likely unable to establish Article III standing in claims alleging breach of fiduciary duty, which is demonstrated in the following cases. In *Fox v. McCormick*, the District Court for the District of Columbia found that the participants in a Defined-Benefit Plan lacked Article III standing for a breach of fiduciary claim, reasoning that the participants failed to show a direct injury, or substantially increased risk of default, that would support the relief they sought.[131] The District Court for the Eastern District of Louisiana found that the participants lacked constitutional standing when the participants in a Defined-Benefit Plan alleged breach of fiduciary duty under ERISA for mismanagement of fund assets and sought that the trustees replenish all losses to the plan as well as equitable relief.[132] The court reasoned that in order to sue for damages in a representative capacity on behalf of the plan, there must still be a direct injury to the individual bringing the claim because the participants only have an interest in their future payments, not in the actual assets of the Defined-Benefit Plan.[133] The Fourth Circuit Court of Appeals dismissed a class-action suit alleging breach of fiduciary duty under an overfunded Defined-Benefit Plan sponsored by Bank of America Corporation because the participants failed to show injury in fact.[134] The court held that the participants did not have the "same kind of representational standing as a trustee" because they were not contractually assigned any rights to the plan,[135] as can be the case with

---

126. Personal remedies must be sought under ERISA § 502(a)(3), while remedies to the plan can be brought under ERISA § 502(a)(2). *See* 29 U.S.C.A. § 1132(a)(2)–(3).

127. Rogers v. Baxter Int'l, Inc., 521 F.3d 702, 706 (7th Cir. 2008).

128. "A bare allegation of plan underfunding does not itself demonstrate a substantially increased risk that the plan and the employer would both fail." Thole v. U.S Bank, N.A., 140 S. Ct. 1615, 1622 (2020).

129. *LaRue*, 552 U.S. at 255–56.

130. *Id.*

131. Fox v. McCormick, 20 F. Supp. 3d 133, 136–37, 142 (D.D.C. 2013) (involving plaintiffs seeking equitable relief in the form of a declaration that the trustees breached their fiduciary duty under ERISA and monetary relief for all losses to the Defined-Benefit Plan).

132. New Orleans ILA Pensioners Ass'n v. Bd. of Trs. of New Orleans Emps. Int'l Longshoremen's Ass'n AFL-CIO Pension Fund, No. CIV. A. 07-6349, 2008 WL 215654, at *1–2, *4 (E.D. La. Jan. 24, 2008).

133. *See id.* at *3–4 (citing Hughes Aircraft Co. v. Jacobson, 525 U.S. 432, 439–40 (1999)).

134. David v. Alphin, 704 F.3d 327, 329–30 (4th Cir. 2013). The case also involved a claim under the Defined-Contribution Plan, a 401(k) Plan, that was dismissed for reasons other than for lack of constitutional standing (the statute of limitations had expired). *Id.* at 338–39.

135. *Id.* at 334–36 (citing Sprint Commc'ns Co., L.P. v. APCC Servs., Inc., 554 U.S. 269 (2008)).

assignees.[136] The court further reasoned that participants were not exposed to substantial risk of default by the entire plan, and thus the risk that future payments *might* be affected as a result of the alleged breach was too speculative because the plan sponsor and then the PBGC would be responsible for paying the benefits.[137]

In a class-action suit alleging breach of fiduciary duty involving a Defined-Contribution Plan, the Seventh Circuit Court of Appeals affirmed the denial of a motion to dismiss, holding that the participants had a private right when the fiduciaries allowed poor investment decisions and that the participants were able to obtain relief from losses to their account resulting from the fiduciaries' decisions.[138] In a Fourth Circuit Court of Appeals class action alleging breach of fiduciary duty under a Defined-Contribution Plan, the court reversed the lower court's dismissal for lack of standing and held that the plaintiffs did in fact have both statutory and constitutional standing.[139] The court reasoned that the former employees had standing because the fiduciaries caused losses to the plaintiff's individual account balances, which gave them a "colorable claim" for the decrease in their benefits.[140] In both the Ninth Circuit and the First Circuit, there were class actions filed by former employees alleging breach of fiduciary duty that caused a reduction in their individual benefits in a Defined-Contribution Plan, and both courts held that the district court in their jurisdiction had erred in dismissing the suit for lack of standing.[141] Both courts held that the former employees were still considered "participants" under ERISA and had plausibly stated a concrete, redressable injury, which collectively supported their standing to bring suit under ERISA.[142]

The Supreme Court has not yet addressed whether standing could be established when a Defined-Benefit Plan terminates in an "underfunded state" *and* when the PBGC would not be able to pay the full benefits.[143] The common justification for lack of Article III standing in cases involving Defined-Benefit Plans is that the injury to the participants' benefits is too speculative because there is not a substantial risk of default to the plan as a whole, and participants' benefits are still guaranteed by the PBGC. But if the plan's sponsor became insolvent or otherwise unable to take the plan out of its underfunded state, and a participant's benefits

---

136. The court distinguished the case from *Sprint Communications* because the plaintiffs in *Sprint* were assignees and were contractually assigned legal rights, and the plaintiffs in *David* had no such rights and by following the "*Sprint* theory of standing" it could cause unnecessary and costly litigation when there is no actual harm. *Id.* at 335–36 (citing Sprint Commc'ns Co., L.P. v. APCC Servs., Inc., 554 U.S. 269 (2008)).

137. *Id.* at 338 (noting that the risk was too speculative because if a Defined-Benefit Plan becomes underfunded, the plan sponsor would be required to make additional contributions, and if the plan sponsor is unable to do so then the PBGC will step in to pay the benefits).

138. Rogers v. Baxter Int'l, Inc., 521 F.3d 702, 703–06 (7th Cir. 2008) (holding that participants and beneficiaries can obtain relief for losses to their individual accounts or losses to the plan as a whole).

139. *In re* Mut. Funds Inv. Litig., 529 F.3d 207, 210 (4th Cir. 2008).

140. *Id.* at 213.

141. Evans v. Akers, 534 F.3d 65, 67, 76 (1st Cir. 2008); Harris v. Amgen, Inc., 573 F.3d 728, 731–34 (9th Cir. 2009).

142. *Evans*, 534 F.3d at 67, 76; *Harris*, 573 F.3d at 731–34.

143. David v. Alphin, 704 F.3d 327, 338 (4th Cir. 2013).

supersede the statutory limits guaranteed by the PBGC, then this justification is no longer applicable, and the Court must either dismiss on other grounds or hold that the plaintiff has established an injury in fact.

D. Trends in Courts' Decisions

When Congress enacted ERISA, it knew courts would use their discretion in interpreting the statute and deciding cases.[144] Thus, courts have the power to opine on cases consistent with results they desire in order to further their policy goals.[145] This power of interpretation also allows the courts to reduce the volume of cases they hear by narrowing the scope of constitutional standing, which raises the standards for who can bring a claim and delays the point at which the claim will be mature from the perspective of many courts—i.e., prior to any personal, economic injury.

Previously, the U.S. Supreme Court has held that Congress invoked the common law of trusts when creating ERISA[146] and has even implied that plaintiffs would be able to establish standing in suits involving private trusts.[147] But in *Thole*, the majority declined to apply or look towards trust law because there was an important distinction between private trusts and Defined-Benefit Plans when it came to who bore the risks and losses.[148]

Courts have been trending towards limiting plaintiffs' ability to establish constitutional standing in breach-of-fiduciary-duty cases involving Defined-Benefit Plans "even where Congress has expressly conferred statutory standing on private plaintiffs."[149] ERISA expressly permits breach-of-fiduciary cases to be brought by both participants and beneficiaries,[150] but courts have dismissed these kinds of suits

---

144. The courts have developed a "body of federal common law" in order to interpret ERISA. Robert A. Perez Sr., *ERISA Litigation Fundamentals*, HEALTH ADMIN. RESP. PROJECT (1996), https://www.harp.org/perez.htm#:~:text=The%20federal%20courts%20are%20developing,benefits%20were%20payable%20under%20ERISA [https://perma.cc/FY5C-LGMC].

145. *See* Lawrence Baum, *What Judges Want: Judges' Goals and Judicial Behavior*, 47 POL. RSCH. Q. 749, 755, 757 (1994) ("Policy goals are the primary determinants of justices' positions."); Timothy J. Capurso, *How Judges Judge: Theories on Judicial Decision Making*, 29 U. BALT. L.F. 5, 5 (1998).

146. Cent. States, Se. & Sw. Areas Pension Fund v. Cent. Transp., Inc., 472 U.S. 559, 570 (1985).

147. Thole v. U.S. Bank, N.A., 140 S. Ct. 1615, 1625 (2020) (Sotomayor, J., dissenting) (citing to the majority opinion).

148. *Id.* at 1620 ("The trust-law analogy therefore does not fit this case and does not support Article III standing for plaintiffs who allege mismanagement of a defined-benefit plan.").

149. Thomas J. Moloney et al., *Supreme Court Limits Standing for Private ERISA Plaintiffs—Implications for ERISA and Beyond*, CLEARY GOTTLIEB 1 (June 11, 2020), https://www.clearygottlieb.com/-/media/files/alert-memos-2020/supreme-court-sharply-limits-standing-for-erisa.pdf [https://perma.cc/YED8-JGDU]; *see also* Kannon K. Shanmugam et al., *Paul Weiss Discusses Supreme Court Decision Limiting Standing to Sue for ERISA Plan Participants*, COLUM. L. SCH. BLUE SKY BLOG (June 15, 2020), https://clsbluesky.law.columbia.edu/2020/06/15/paul-weiss-discusses-supreme-court-decision-limiting-standing-to-sue-for-erisa-plan-participants/ [https://perma.cc/6NTJ-CA75].

150. *See* 29 U.S.C. § 1132(a); *see also supra* Part II.A.

when a Defined-Benefit Plan is in question.[151] The Court in *Thole* and *LaRue* inferred that the difficulty of establishing standing with Defined-Benefit Plans is obviated when suing under Defined-Contribution Plans because of their differing natures.[152] Judicial decisions allow breach-of-fiduciary cases involving Defined-Contribution Plans to successfully move past the motion-to-dismiss stage on the grounds that the plaintiffs established an injury in fact.[153] *Thole* is the most recent case demonstrating the trend in judicial decisions for narrowing the application of constitutional standing, which is especially concerning given the expected reliance on this decision for years to come.[154]

E. Implications on ERISA Litigation

The judicial system has been moving towards a narrower application of the standing-to-sue doctrine in breach-of-fiduciary-duty claims involving Defined-Benefit Plans, which in turn has triggered many harmful consequences. As a result of these heightened barriers, it is likely that breach-of-fiduciary-duty claims will have to be brought by parties other than the Defined-Benefit Plan's participants or beneficiaries,[155] despite what § 502(a) states. Courts are emphasizing the type of Retirement Plan in question, which has caused movement away from analogizing to trust law and unequal treatment among ERISA plaintiffs who bring suit despite having the same rights under ERISA, thus limiting remedies available to certain private plaintiffs. The majority decision in *Thole* has significantly reduced the threat of litigation involving Defined-Benefit Plans because private-party plaintiffs will likely not make it past the motion-to-dismiss stage, especially because the PBGC guarantees their benefits.[156] This decision removes Defined-Benefit Plan participants' ability to seek relief in a court of law related to fiduciary misconduct, thereby allowing the misconduct to continue until it reaches the level of severity[157] that is currently required by the courts.[158]

Thole and other cases have addressed the issue of who is allowed to sue under ERISA,[159] but the courts have (probably unintentionally) fashioned multiple

---

151. *See supra* Part II.C–D.

152. *See supra* text accompanying notes 93, 106–108.

153. *See supra* Part II.C.

154. Moloney et al., *supra* note 149. It is important to mention that there was another U.S. Supreme Court case decided in June of 2021 where the Justices split 5–4 on the issue of Article III standing. Ultimately the majority was consistent with a narrowed application of standing just as in *Thole*; however, this case was dissimilar from *Thole* because it involved a breach of obligation under the FCRA. *See generally TransUnion LLC*, 141 S. Ct. 2190.

155. *See infra* notes 156–62.

156. *See* Moloney et al., *supra* note 149.

157. *See, e.g.*, *supra* notes 128–130 (noting that the misconduct must significantly threaten insolvency to the entire plan).

158. *See Supreme Court Significantly Raises the Bar for Defined Benefit Plan Participants to File ERISA Fiduciary Breach Lawsuits, but the Risk of Lawsuit Remains*, ROPES & GRAY (June 5, 2020), https://www.ropesgray.com/en/newsroom/alerts/2020/06/Supreme-Court-Significantly-Raises-the-Bar-for-Defined-Benefit-Plan-Participants-to-File-ERISA [https://perma.cc/EV32-CYDM].

159. *See supra* Part II.C.

categories of plaintiffs based on the type of Retirement Plan involved, and each plaintiff's right to sue is different. Private plaintiffs will either be able to bring a successful breach-of-fiduciary-duty suit or the claim will be dismissed, depending on which Retirement Plan is involved. With the majority in *Thole* declining to apply trust law, and instead distinguishing Defined-Benefit Plans from private trusts,[160] remedies available to certain participants and beneficiaries under ERISA will be limited because those suits will likely be dismissed for lack of standing. The Court noted that Defined-Contribution Plans are more similarly situated to private trusts,[161] thus implying that private plaintiffs in Defined-Contribution Plans will not have the same difficulties in establishing standing or in obtaining equitable relief as those who have Defined-Benefit Plans.[162] Even though the same requirements and same provisions in ERISA apply to both Defined-Benefit Plans and Defined-Contribution Plans, participants in these plans are treated drastically differently in practice and are given different rights.[163]

The majority in *Thole* dismissed the case for lack of constitutional standing but failed to address that ERISA § 502(a)(2) explicitly gives participants the right to bring the very suit they brought.[164] The Court has raised the standard for who can establish standing in ERISA litigation by requiring that plaintiffs show personal injury rather than merely injury to the plan.[165] With these suits continually dismissed, who can bring suit to protect the Defined-Benefit Plan (as expressly permitted in ERISA)? The answer seems to be very clear: participants and beneficiaries will not have this power in reality, so the Department of Labor ("DOL") or the plan's fiduciaries will be the only parties able to bring a successful breach-of-fiduciary-duty suit under Defined-Benefit Plans.[166]

ERISA § 502(a)(2)–(3) allows beneficiaries and participants to sue on behalf of the plan[167] in large part because otherwise the plan's interests are protected

---

160. *See* Thole v. U.S. Bank, N.A, 140 S. Ct. 1615, 1619–20 (2020).

161. In both private trusts and Defined-Contribution Plans, the amount of money a beneficiary will receive is dependent upon how the assets are managed, whereas in Defined-Benefit Plans, the amount of money a beneficiary will receive is a fixed amount "regardless of how well or poorly the plan is managed." *Id.* at 1619–20.

162. *See id.* at 1619–20.

163. The provisions in ERISA do not differentiate between the two types of plans, but courts grant rights to participants and beneficiaries under Defined-Contribution Plans but deny that right to participants and beneficiaries under Defined-Benefit Plans. Courts are using their interpretation of constitutional standing to dismiss Defined-Benefit Plan suits, which is overriding explicit rights under ERISA.

164. *See generally Thole*, 140 S. Ct. at 1615 (seemingly ignoring this right granted by the statute); 29 U.S.C. § 1132(a)(3).

165. *See Thole*, 140 S. Ct. at 1616–19. Here, the Court is dismissing the suit for lack of standing despite the Defined-Benefit Plan being underfunded and suffering millions of dollars in losses and requiring that individuals' benefits be directly affected in order to bring a successful ERISA suit. *Id.*

166. *See* 29 U.S.C. § 1132(a)(2) (stating that the Secretary of Labor and fiduciaries can bring a civil action for breach of fiduciary duty under ERISA § 409).

167. *See* Varity Corp. v. Howe, 516 U.S. 489, 516 (1996) (Thomas, J., dissenting); Mass. Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 142 & n.9 (1985); *see also Thole*, 140 S.

by the very fiduciaries accused of mismanaging the funds.[168] A large majority of plans that experience a fiduciary-duty breach will not be pursued by the DOL,[169] and it is highly unlikely that a fiduciary to a plan will bring a suit against their co-fiduciaries to that same plan.[170] Because plan participants and beneficiaries will not be able to bring a successful breach-of-fiduciary-duty suit, the DOL will become the primary enforcer of ERISA obligations in claims involving Defined-Benefit Plans.[171] The DOL has very limited resources,[172] so placing the sole burden on this federal agency will spread its already very limited resources even thinner.[173] Therefore, the risk that fiduciary misconduct will go unaddressed is high.[174] If fiduciaries are not going to be held accountable for the requirements under ERISA and are able to breach their duties without any reprimand, then the instances of misconduct will likely increase because the threat of liability is low.[175]

Mismanagement of plan funds may create an injury in the future to the plaintiffs, which should be addressed and remedied before the injury occurs and before the misconduct causes more harm—for example, before the plan becomes insolvent. The current standard to establish standing in Defined-Benefit Plans requires plaintiffs to show that the underfunded status has caused a substantially increased risk of plan insolvency,[176] but waiting until this severe point causes harm that could have been avoided and increases the number of plans that the PBGC has to provide benefits for. Courts' recent trends will subject the PBGC to "greater obligations," but, regardless, the PBGC does not have the resources to make all potential private plaintiffs whole again.[177]

Courts are only allowing ERISA breach-of-fiduciary-duty suits to be brought based on monetary injury that has been personally suffered by the

---

Ct. at 1633 (Sotomayor, J., dissenting) (noting that "ERISA embraces [the] tradition" of conferring standing upon beneficiaries to bring suit against the trustee (citing the RESTATEMENT (THIRD) OF TRUSTS § 94, cmt. d(1) (2012))).

168. Jason Brost & Kimberly Jones, *Split Supreme Court Awards U.S. Bank a Win in ERISA Pension Lawsuit*, JD SUPRA (June 4, 2020), https://www.jdsupra.com/legalnews/split-supreme-court-awards-u-s-bank-a-79240/ [https://perma.cc/4PJH-VJJV].

169. *See infra* text accompanying notes 172–74.

170. *See, e.g.*, *Thole*, 140 S. Ct. at 1632 (Sotomayor, J., dissenting) ("But imagine a case like this one, where the fiduciaries refuse to sue because they would be the defendants. Does the Constitution compel a pension plan to let a fox guard the henhouse?").

171. *See* 29 U.S.C. § 1132(a)(2) (stating that in addition to a participant, beneficiary, or fiduciary, the Secretary of Labor can bring a civil action alleging breach of fiduciary).

172. *See* Moloney et al., *supra* note 149 (noting that the Department of Labor oversees nearly 700,000 retirement plans, 2.2 million health plans, and "a similar number of other welfare benefits plans").

173. *See id.*

174. *See id.* (noting that in 2019 the Department of Labor referred less than 90 of their civil investigations to move forward for civil litigation, while there were over 6,000 ERISA suits that year).

175. The concept of deterrence (where the public's fear of similar punishment is a means to help prevent future wrongdoings) is applicable in ERISA cases; fiduciary misconduct will not be deterred when fiduciaries face no real threat for being held liable.

176. *See supra* text accompanying notes 128–129.

177. *See* Moloney et al., *supra* note 149.

participants rather than allowing suits based on monetary injury to the Retirement Plan itself.[178] This means that a participant or beneficiary cannot sue on behalf of the Retirement Plan, causing breach-of-fiduciary-duty claims brought by private plaintiffs in a Defined-Benefit Plan to be dismissed.[179] Courts are able to use Article III as the means to dismiss these types of suits, which is consistent with a policy goal of reducing the amount of suits heard and only hearing cases in which there is a personal injury, not merely a risk of personal injury. Lawsuits involving injury to a Defined-Benefit Plan must be brought by someone other than the participant or beneficiary or must pose a substantial risk of insolvency to the plan as a whole,[180] and the Supreme Court suggests that there still may be a lack of standing if the PBGC is able to guarantee the full benefits.[181]

III. RESOLVING INCONSISTENCIES BETWEEN ERISA AND COURTS' INTERPRETATIONS

Retirement Plans have changed since ERISA was first enacted, and the needs surrounding these plans have also changed; for example, when drafting ERISA Congress was mainly concerned with Defined-Benefit Plans (the most common type of Retirement Plan at the time), but now Defined-Contribution Plans are more prevalent due to the greater liability for employers in Defined-Benefit Plans. Courts are attempting to respond to these changes as they interpret caselaw with very little guidance from Congress.[182] Precedent has shifted over the past few decades towards a narrower interpretation of the standing doctrine, as shown through the majority opinion in *Thole*, creating harmful and unintended consequences including a smaller range of available remedies.[183]

The Supreme Court (through the majority in *Thole*) has effectively taken the position that Defined-Benefit Plan private plaintiffs will not be successful in

178. *See supra* text accompanying note 125.

179. *See supra* Part II.C.

180. *See supra* text accompanying notes 128–129.

181. *See* Moloney et al., *supra* note 149 (citing Thole v. U.S. Bank, N. A., 140 S.Ct. 1615 (2020).

182. *See, e.g.*, Manley, *supra* note 29, at 964 (noting that in regard to exhaustion and arbitration, the "inconsistent results reached by federal courts" are not surprising because "Congress provided little guidance"); *see also* Tim McDonald, *Back in Style: The Supreme Court's Renewed Interest in ERISA*, THOMPSON HINE ERISA LITIGATION BLOG (Oct. 25, 2019), https://www.erisalitigation.com/2019/10/back-in-style-the-supreme-courts-renewed-interest-in-erisa/ [https://perma.cc/4SJY-8ACE] ("When new legislation or regulatory guidance is not forthcoming, ERISA practitioners only have the Supreme Court and the lower federal courts to look to for assistance."). Previously courts used the common law of trusts to function as "ERISA's backdrop," especially where the federal common law failed to fill in the gaps of ERISA, but as shown in *Thole*, the courts are now moving away from analogizing to trust law. *See* Oringer, *supra* note 18, at 432 (citing Beck v. PACE Int'l Union, 551 U.S. 96, 101 (2007)); *supra* Part I.D.

183. *See, e.g.*, Oringer, *supra* note 18, at 411, 420 (noting that courts' interpretation of ERISA should permit "recourse to a broader range of remedies," and that currently the interpretation of the provisions in ERISA are very narrow—referring to the ERISA preemption provision, and also the civil-enforcement provision).

establishing Article III standing,[184] regardless of the explicit right granted to those plaintiffs in ERISA. However, the Court does not provide this same limitation of rights related to Defined-Contribution Plans,[185] thus significantly differentiating between how these two groups of private plaintiffs are treated by the courts. The Supreme Court is aiming to reduce the number of lawsuits, but by doing so, it is contradicting what Congress expressly stated in the statute.[186]

The dissent in *Thole* made a very compelling argument and only needed a single vote to become the majority, which would have created a very different precedent surrounding ERISA litigation. The dissent upheld the intent and integrity of ERISA, while the majority moved away from the original legislative intent and aimed to reduce the strain on judicial resources by preventing "premature" claims.[187] Congress was mainly concerned with Defined-Benefit Plans when drafting ERISA because these plans had substantially larger participation than Defined-Contribution Plans,[188] but Congress intended to provide the same rights to both types of plaintiffs, and in particular, the right for private plaintiffs to bring a breach-of-fiduciary-duty suit under Defined-Benefit Plans.[189]

A. Limitations on Remedies and Plaintiffs' Rights

Remedies in ERISA § 409 focus on the Retirement Plan itself,[190] so participants should be able to bring a suit for losses to that plan, especially because class-action lawsuits have power in numbers, and a substantial number of private parties may be affected with potentially large losses.[191] In addition, allowing these suits would further the policy of preventing and deterring fiduciary misconduct.[192] ERISA allows breach-of-fiduciary-duty suits to be brought by party–plaintiffs on

---

184. *See supra* Part II.C.

185. *See supra* text accompanying notes 113–114; *see also supra* Part II.C.

186. For another recent example of the U.S. Supreme Court contradicting what Congress expressly permits, see *TransUnion LLC*, 578 U.S. at 2225 (Kagan, J., dissenting) ("The Court here transforms standing law from a doctrine of judicial modesty into a tool of judicial aggrandizement. It holds, for the first time, that a specific class of plaintiffs whom Congress allowed to bring a lawsuit cannot do so under Article III.").

187. *See supra* Part I.B; *supra* text accompanying notes 56–57, 70–72, 115–116.

188. Since ERISA was enacted in 1974, the active participation in Defined-Benefit Plans fell from 27 million to 23 million by 1998, while employment grew by 23% during that time. On the other hand, Defined-Contribution Plans went from 11 million to 50 million during that same time period. Further, this shift from Defined-Benefit Plans to Defined-Contribution Plans has continued since 1998. WILLIAM G. GALE ET AL., THE EVOLVING PENSION SYSTEM: TRENDS, EFFECTS, AND PROPOSALS FOR REFORM 55 (2006).

189. *See supra* note 185.

190. *See supra* text accompanying notes 68–69.

191. Further evidence of the ability to act on behalf of the plan is that a private plaintiff can seek plan relief under ERISA § 502(a)(2) rather than through a class-action lawsuit, so long as there are sufficient procedural safeguards to protect the other plan members. *See* Craig C. Martin et al., *Practice Series: ERISA Litigation Handbook*, JENNER & BLOCK 159 (2011), https://jenner.com/system/assets/assets/6347/original/ERISA_20 Litigation_20Handbook_4th_20Ed_2011.pdf?1334067212 [https://perma.cc/6Q9Y-TN6E].

192. *See supra* text accompanying notes 172–175.

behalf of the Retirement Plan in a representative capacity,[193] which is consistent with the common law of trusts because it gives beneficiaries the power, and thus constitutional standing, to bring a suit against the trustee when the trustee fails to do so.[194]

Under ERISA § 502(a)(2), a participant or beneficiary can bring suit for breach of fiduciary duty and may do so "in a representative capacity on behalf of the plan as a whole."[195] Congress intended for civil actions to be brought in a representative capacity on behalf of the plan, which is demonstrated by the explicit inclusion of the Secretary of Labor as a party that can bring such a suit.[196] The Secretary of Labor has no direct interest in the plan and is only interested in maintaining the plan's "financial integrity"—an interest that is also shared by participants and beneficiaries to the plan,[197] to both of whom Congress gave the explicit right to bring a civil action.[198] Because suits brought under ERISA § 502(a)(2) only provide remedies to the Retirement Plan,[199] these suits must be brought by somebody acting on behalf of the plan.

ERISA embraces many of the traditions of the common law of trusts.[200] Trust law has recognized a beneficiary's right to bring a representational suit to enforce the terms of the trust, including with regard to the trustee's duties and to obtain redress for breach of trust.[201] The common law of trusts expressly gives beneficiaries constitutional standing when suing on behalf of the trust.[202] Beneficiaries of trusts, just like participants and beneficiaries of a Retirement Plan, are given this power in part because there will be instances where the trustee (or fiduciary) will fail to bring a breach-of-fiduciary-duty suit because the suit will be against their interests.

Under traditional common law, the collateral-source rule states that any payments received from third parties are to be ignored for determining the amount of damages.[203] In the ERISA context, the PBGC acts as government insurance to Retirement Plans and steps in to help make the plaintiffs whole again by paying any

193. *See infra* text accompanying notes 195–199; *supra* text accompanying notes 167–168.

194. *See* RESTATEMENT (THIRD) OF TRUSTS § 94(1) (AM. L. INST. 2012).

195. *See* Mass. Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 142 n.9 (1985).

196. *See* 29 U.S.C. § 1132(a)(2).

197. *See supra* text accompanying note 70; s*ee also Mass. Mut. Life Ins. Co.*, 473 U.S. at 142 n.9.

198. *See* 29 U.S.C. § 1132(a)(2).

199. *See supra* text accompanying notes 67–69.

200. *See supra* Part I.D.

201. *See supra* text accompanying note 195; Thole v. U.S. Bank, N.A, 140 S. Ct. 1615, 1633 (2020) (Sotomayor, J., dissenting) (quoting Spokeo, Inc. v. Robins, 578 U.S. 330, 341 (2016)).

202. *See supra* text accompanying note 195.

203. *See* David M. Melancon & Kelly Brilleaux, *Something for Nothing: The Collateral Source Rule and Gratuitous Payments or Services*, IRWIN FRITCHIE URQUHART & MOORE LLC, at 42 (Nov. 2012) https://www.irwinllc.com/publications/FTD-1211-Melancon Brilleaux.pdf [https://perma.cc/Z7U9-2GEZ].

benefits that the plan and plan sponsor were unable to pay.[204] Courts have used the PBGC as an additional reason for why private plaintiffs in Defined-Benefit Plans are unable to establish standing because their benefits are fixed and, even in the event of plan losses, they will still likely receive their benefits from the PBGC.[205] However, the PBGC should not be considered when determining whether there was an injury, or significant risk of injury, sufficient to establish standing because of the collateral-source rule. In the absence of the PBGC, the risk of injury to private plaintiffs is no longer as speculative as courts maintain.[206] In addition, if there was harm through the wrongdoings of the fiduciaries and through losses caused to Defined-Benefit Plan, this should be redressed, and the fiduciaries should be held accountable for their breach, regardless of whether this federal agency is able to provide relief.

The U.S. Supreme Court has narrowed the scope of the standing doctrine over the past few decades since ERISA's enactment, which has caused the Court and lower courts to create new precedent in recent years. This new precedent requires that private plaintiffs suing under a Defined-Benefit Plan show that the fiduciary misconduct has caused a substantial risk of insolvency to the plan as a whole, which then allows fiduciary misconduct to go unaddressed unless it rises to this extreme level. However, nonprivate plaintiffs are not held to this same requirement and can bring a breach-of-fiduciary-duty claim without the risk of the claim being dismissed. Despite the language in § 502(a)(2) that provides all potential plaintiffs with the same right to bring suit, courts hold different plaintiffs to different standards. ERISA's provisions do not distinguish between the various types of plaintiffs and therefore grant all of the enumerated parties the same rights.[207] Private plaintiffs should be treated equally, which requires the scope of the standing doctrine to be broadened to be more inclusive when examining "injuries" in ERISA claims.

B. Constitutional Interpretation and ERISA

Courts have held that Defined-Benefit Plan participants and beneficiaries are unable to bring a successful suit based on breach of fiduciary duty because their fixed benefits mean they do not have a cognizable injury, and are thus dismissing suits despite ERISA § 502(a)(2).[208] This is causing unequal treatment among private plaintiffs based on how courts apply constitutional standing to claims. The requirements of constitutional standing, which are an interpretation of the courts to begin with,[209] are vague when it comes to ERISA cases—as shown in the 5–4

---

204. *See supra* text accompanying notes 23, 45–46.

205. *See supra* text accompanying notes 117, 137, 156, 181.

206. When a Defined-Benefit Plan experiences financial losses, the plan sponsor is responsible for making additional contributions to return the plan back to its fully-funded status. David v. Alphin, 704 F.3d 327, 338 (4th Cir. 2013). If the plan sponsor is unable to do so, then participants' benefits are now affected and the participant experiences injury. Without the PBGC acting as an additional backstop, the risk of injury becomes much more substantial.

207. *See supra* text accompanying notes 145, 150, 163. *See generally* 29 U.S.C. § 1132(a).

208. *See supra* Part II.C.

209. Article III does not mention "injury in fact." This is a term made up by the judicial branch when interpreting the Constitution. *See* Lujan v. Defenders of Wildlife, 504

decision in *Thole* where the Justices were split on whether standing had been established.

Courts' opinions related to breach-of-fiduciary-duty claims have changed over the past several decades because they are aiming to make decisions related to ERISA without depending on the actual statutory language. The courts have decided that these claims related to Defined-Benefit Plans are barred based on Article III and decline to give weight to the fact that private plaintiffs "[fall] squarely within the class of individuals . . . with a statutory right of action."[210] Fiduciary misconduct is unlawful under ERISA and participants are given the right to bring a suit based on this misconduct, yet courts bar these suits based on the Constitution.[211] The interpretation of Article III "cases or controversies" has caused ERISA to permit a breach-of-fiduciary-duty suit that is in actuality now barred by the courts in select circumstances.

Congress intended for the courts to have power to create a body of common law as it applies to ERISA, but the statutory language also indicates Congress's unambiguous intent in many of the provisions. First, Retirement Plans are trusts,[212] and both types of plans should be treated as such when applying and interpreting the law. Second, plaintiffs can bring suit on behalf of the plan and can act in a representative capacity,[213] and courts should uphold this for private plaintiffs regardless of what type of Retirement Plan is involved in the lawsuit. Third, the fiduciaries are to act in a way that protects the interests of the participants and beneficiaries,[214] so participants and beneficiaries should be allowed to bring suit for fiduciary misconduct before it is too late. Courts, most notably in *Thole*, have disregarded this intent and have changed the interpretation of these provisions to support a lack of standing.[215]

The Supreme Court has interpreted "cases or controversies" in Article III to require a concrete and particularized injury to the plaintiff, which has created a high standard for many private plaintiffs.[216] However, even the definition of what constitutes "concrete" varies significantly among cases, and "cases or controversies" can also mean drastically different things depending on the context.[217] The violation

---

U.S. 555, 560–61 (1992). Article III uses the language "case or controversy" when establishing requirements for federal courts to hear cases. *See* U.S. CONST. art. III, § 2, cl. 1.

210. L. Stephen Bowers, *Supreme Court Limits Fiduciary Actions Under ERISA*, WHITE & WILLIAMS LLP TAKING CARE OF BUSINESS BLOG (June 10, 2020), https://whiteandwilliamsbusiness.com/supreme-court-limits-fiduciary-actions-under-erisa/ [https://perma.cc/3VGL-EVNL].

211. *See supra* notes 182–189.

212. *See supra* text accompanying notes 52–53.

213. *See supra* text accompanying notes 193–199.

214. *See supra* text accompanying note 68; *see also supra* notes 14, 22.

215. It is within the Supreme Court's power to interpret the Constitution, so courts are not necessarily ignoring the congressional intent because ultimately the constitution, and the courts' interpretation of the constitution, has precedent. This Note merely advocates for such interpretation to be more expansive to be consistent with the congressional intent.

216. *See supra* Part II.B; Evan Tsen Lee & Josephine Mason Ellis, *The Standing Doctrine's Dirty Little Secret*, 107 NW. UNIV. L. REV. 169, 170–71 (2012).

217. Lee & Ellis, *supra* note 216, at 222.

of rights created by Congress would seemingly satisfy the concrete injury-in-fact requirement, but a mere violation of a statutory right is insufficient without a personal stake in the outcome.[218] This narrowed application of concrete injuries has caused cases alleging breaches of fiduciary duties (which constitute a violation of ERISA because participants and beneficiaries have the right to prudent and loyal management of the Retirement Plan)[219] to be dismissed. The current standing requirements applied by courts do not allow private plaintiffs in Defined-Benefit Plans to obtain relief because they have yet to experience financial loss and thus do not have a sufficient injury.[220] This has created a contradiction among how the courts are opining on ERISA cases and the rights that Congress has expressly conferred upon private plaintiffs. If fiduciaries breached their duty in a Defined-Benefit Plan, there should be a means to redress these wrongs.

IV. New Approaches for Establishing Constitutional Standing

If the dissent's position in *Thole* had been adopted, it would have solved the issues created by the majority.[221] But to address these implications and move towards better precedent surrounding ERISA, there should be a means to provide standing for private plaintiffs in breach-of-fiduciary-duty suits involving Defined-Benefit Plans. This Note proposes lowering the bar for what constitutes injury in fact depending on the type of claim, allowing private plaintiffs in Defined-Benefit Plans to satisfy a different standard to show concrete, individualized harm. This Note also advocates that derivative actions should become available under ERISA and be established as a valid cause of action for private plaintiffs bringing a breach-of-fiduciary-duty suit on behalf of the plan. The end result of these approaches remains consistent with ERISA's roots in trust law and with Congress's intent.

One approach is to have different standing requirements depending on the type of claim, meaning that not all claims are subject to the same level of scrutiny. Cases where Congress has expressly created rights that were violated should merely require that the plaintiff "show that he or she falls within the 'zone of interests' the statute aims to protect."[222] In particular, private plaintiffs in Defined-Benefit Plans would not be subject to establishing a concrete and particularized injury when alleging breach of fiduciary duty. Rather, they would establish standing based on the express right granted to them by Congress in ERISA to bring the exact suit they brought. ERISA was enacted to protect participants and beneficiaries[223]—these plaintiffs are exactly within the zone of interest. Congress did not give the express right to bring civil suits to private plaintiffs just to have those suits become barred by courts. "The zone of interests test connects the statute's objective to the class of plaintiffs permitted to sue."[224] This approach would help resolve the inconsistencies between the court's current interpretation of standing and the language in ERISA by

218. *See supra* text accompanying notes 78–80.
219. *See supra* text accompanying note 16.
220. *See supra* Part II.B–C.
221. *See supra* Part II.E.
222. Lee & Ellis, *supra* note 216, at 169.
223. *See* 29 U.S.C. § 1001(b); *see also supra* Part I.A–B.
224. Lee & Ellis, *supra* note 216, at 223.

relaxing the standing requirements in order to allow for remedial relief and effectively recognize the rights Congress granted to private plaintiffs.

Another approach is for Congress to create a cause of action similar to that of shareholder-derivative suits, or otherwise to have courts recognize such actions as a means to establish standing based on the similarities between breach-of-fiduciary-duty claims in ERISA and in the corporate context. The constitutional-standing requirement has been interpreted by courts to require an injury in fact experienced by the plaintiff bringing suit.[225] However, derivative actions are expressly permitted so long as the shareholder bringing the suit is adequately representing the interests of other shareholders regarding enforcement of the rights of the corporation.[226] Plaintiffs rely on the corporation's injury in order to establish standing as shareholders because the shareholders had not experienced any harm that would allow them to establish standing under the standard requirements.[227] The creation of derivative actions has made an exception to the injury-in-fact requirements, acknowledging the ability and validity of bringing suits in a representative capacity.

Courts and legislators have created derivative actions as a means to address breach-of-fiduciary-duty claims when corporate directors engage in misconduct but refuse to initiate the suit themselves because it would implicate them as the defendants.[228] The purpose of derivative suits is to give individual shareholders a way to protect the interests of the corporation from misconduct;[229] this same purpose is applicable in ERISA breach-of-fiduciary-duty claims. Congress gave participants and beneficiaries the right to bring civil suit for fiduciary misconduct.[230] In shareholder-derivative suits, the injury is based on harm to the entity not the individual,[231] which is the same harm alleged by private plaintiffs when suing under § 502(a)(2) for breach of fiduciary duty based on an injury to the Defined-Benefit Plan.[232] Shareholders in derivative suits are fundamentally analogous to participants and beneficiaries of a Defined-Benefit Plan,[233] enough to justify applying the same theory of standing for these private plaintiffs under ERISA.

---

225. *See supra* Part II.B.
226. *See* FED. R. CIV. P. 23.1(a).
227. *See* Aronson et al., *supra* note 100, at 1–2.
228. *See supra* text accompanying notes 102–04.
229. Aronson et al., *supra* note 100, at 1–2.
230. 29 U.S.C. § 1132(a)(2).
231. *See* Aronson et al., *supra* note 100, at 1–2.
232. *See supra* text accompanying notes 67–69; *see, e.g.*, *supra* text accompanying note 92.
233. In addition to other similarities, there are other procedural requirements that are demonstrated by the Delaware Court of Chancery rule that requires shareholder–plaintiffs to demand that the corporation's board of directors pursue the claim prior to initiating the derivative action, in order to reduce unnecessary litigation by requiring shareholders to first exhaust "intracorporate remedies." *See* SJOSTROM, JR., *supra* note 96, at 519 (quoting Aronson v. Lewis, 473 A.2d 805, 811–12 (Del. 1984)). This demand requirement is analogous to ERISA's requirement to exhaust administrative remedies prior to pursuing litigation. *See supra* text accompanying note 29.

CONCLUSION

Courts have been trending towards the unequal treatment of private plaintiffs under ERISA § 502(a)(2) by interpreting and applying the Article III standing requirements in a way that causes suits involving Defined-Benefit Plans to be dismissed for a lack of standing. This shift is explainable in part because of the shift away from analogizing to trust law, and it demonstrates courts' policy goals of reducing judicial resources spent on claims without any concrete individualized harm. The majority in *Thole* not only emphasized this shift but also demonstrated the controversy among the Justices regarding standing because of the differing interpretations of what constitutes an Article III injury in ERISA cases. The dissent recognized that injury could include harm to the plan, especially when that harm results in a risk of harm to the plaintiffs' entitled benefits. This current precedent has many undesirable consequences[234] and creates inconsistencies between what ERISA expressly permits and courts' interpretation of an Article III case or controversy. This would be resolved if the dissent's argument in *Thole* had become the precedent,[235] but to achieve the same result there needs to be a method of allowing private plaintiffs in Defined-Benefit Plans to establish standing that would allow them to successfully exercise the rights conferred upon them in the statute and remedy harm caused by the fiduciary misconduct. With the dissent in *Thole* taking a step in the right direction, this Note proposes new theories that would further substantiate a finding of standing and create new precedent that aligns with the intent and purpose of ERISA.

---

234. *See supra* Part II.E.

235. *See generally* Thole v. U.S. Bank, N.A., 140 S. Ct. 1615, 1623–37 (2020) (Sotomayor, J., dissenting). However, this would also have unintended consequences as they are inevitable with any new law, but a new law would provide better policy and increased consistency moving forward with ERISA litigation.