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Some Additional Standing Issues Under ERISA

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The author, who previously wrote "Some Standing Issues Under ERISA" for this journal, considers some additional[1] standing[2] issues under the Employee Retirement Income Security Act of 1974.

In *Thole v. US Bancorp.*,[3] the U.S. Supreme Court, in a 5-4 decision, determined that in most if not all instances, participants in a defined benefit plan lacked Article III standing to maintain an action for breach of fiduciary duty under ERISA. While the possible ramifications of that decision for defined contribution plans[4] and welfare plans[5] will be a matter for district courts to consider, there are also some traditional standing issues,[6] although less frequently raised in litigation, of which practitioners should be cognizant.

NON-ENUMERATED PARTIES

In the early years after ERISA, there was a circuit split regarding the issue of implied standing under ERISA Section 502.[7] In *Fentron Industries, Inc. v. National Shipmen Pension Fund*,[8] the U.S. Court of Appeals for the Ninth Circuit stated, "We do not believe that Congress,

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in enacting ERISA, intended to prevent employers from suing to enforce its provisions.[9] In view of the intent of Congress to protect employer employee relations, we hold that the statute does not prevent employers[10] from suing to enforce its provisions." It then set forth a three-part test under which non-enumerated parties, such as employers, have an implied right to sue under ERISA.[11]

First, the matter must be a matter related to the operation of an ERISA plan that threatens direct injury to the party.

Second, the injury must fall within the zone of interests that ERISA was designed to protect.

Third, ERISA itself must not preclude the suit.[12]

The approach of the Ninth Circuit in *Fentron* was rejected by the U.S. Court of Appeals for the Second Circuit in *Pressroom Union Printers League Income Security Fund v. Continental Assurance Co.*,[13] stating, "In our view, the *Fentron* court applied an inappropriate standard in resolving this issue. We focus not on whether Congress intended to prevent actions by employers or other parties, but instead on whether there is any indication that the legislature intended to grant subject matter jurisdiction over suits by employers, funds, or other parties not listed in 1132(e)."[14]

However, a series of U.S. Supreme Court cases cast serious doubt upon the holding of the Ninth Circuit in *Fentron*.[15]

In *Franchise Tax Board of California v. Construction Laborers Vacation Trust*,[16] the Supreme Court stated that "ERISA clearly enumerates the parties entitled to seek relief under 502; it does not provide anyone other than participants, beneficiaries,[17] or fiduciaries[18] with an express cause of action."[19]

In *Mass. Mutual Insurance Co. v. Russell*,[20] the Supreme Court stated that "the assumption of inadvertent omission is rendered especially suspect upon close consideration of ERISA's interlocking, interrelated, and interdependent remedial scheme, which is in turn part of a comprehensive and reticulated statute."[21]

As a result of those Supreme Court decisions, while *Fentron* has not been overruled in the Ninth Circuit,[22] it has been called into question in the Ninth Circuit[23] and generally not followed by district courts in the Ninth Circuit,[24] including the holding in *Kalifano v Sierra Health and Life Ins. Co.* in March 2020.[25]

Currently, therefore, there is agreement among the courts that ERISA's standing requirements are to be strictly construed[26] and "absent a valid assignment of a claim, non-enumerated parties lack standing under ERISA, even if they have a direct stake in the outcome of the litigation."[27] That is why, for example, that a health care provider with no assignment has no standing.[28]

However, there remain areas in which the courts are divided and nuances of which practitioners should be aware.

FORMER FIDUCIARIES

Since standing is determined at the time of the lawsuit rather than at the date of the alleged ERISA violations,[29] and must be maintained through all stages of a litigation,[30] the vast majority of cases conclude that former fiduciaries lack standing,[31] even if the reason that they are removed as fiduciaries is to deprive them of standing under ERISA Section 502.[32] However, there are three qualifications to this general rule.

First, in *Trujillo v. American Bar Association*,[33] the U.S. Court of Appeals for the Seventh Circuit noted, but did not need to determine, a potential circuit court split on the issue, based upon decisions from the Fourth[34] and Ninth[35] Circuits that assumed, without discussion, that a former fiduciary could bring a suit or retaliation under ERISA Section 1132.

Second, in *Chitkin v. Lincoln National Life Insurance Co.*,[36] the Ninth Circuit held, without any specific discussion of ERISA's standing requirements, that a fiduciary's responsibilities do not end when he or she ceases to serve in that capacity. Rather, those responsibilities continue until all outstanding claims and issues between the plan's fiduciary and plan beneficiaries have been resolved.

Third, in Long Island Head Start *Child Development Services, Inc. v. Economic Opportunity Co. of Nassau County, Inc.*,[37] the Second Circuit distinguished its prior holdings with respect to a former fiduciary's standing and held that Long Island Head Start had a continuing interest in protecting plan assets which consisted in part of funds that it contributed while it had been a participant.

FORMER PARTICIPANTS

A former participant does not have standing to assert claims based on alleged misconduct that occurred after his or her retirement.[38] However, several circuit courts have found standing for plaintiffs who would have been participants in an ERISA plan "but for the alleged malfeasance of a plan fiduciary."[39]

The U.S. Court of Appeals for the Tenth Circuit[40] has consistently rejected that standing analysis. As the court of appeals explained in *Raymond* in criticizing the decision of the U.S. Court of Appeals for the Fifth Circuit in *Christopher*: "The *Christopher* Court's "but for" standing analysis – 'but for the employer's conduct alleged to be in violation of ERISA, the employee would be a current employee with a reasonable expectation of receiving benefits' – amounts to the kind of analysis rejected by the Supreme Court in *Firestone*: "to

say that a participant is any person who claims to be one begs the question of who is a participant and renders the definition set forth in 1002(7) superfluous." To say that but for Mobil's conduct, plaintiffs would have standing is to admit that they lack standing and to allow those who merely claim to be participants to be deemed as such."[41]

In *Felix*, the Tenth Circuit explained that that circuit courts of appeal that had applied the "but for" analysis were improperly focusing upon applying traditional notions of standing, rather than focusing upon ERISA's jurisdictional rules.[42] That same panel added that [t]he express grant of federal jurisdiction in ERISA is limited to suits brought by certain parties outlined in 502."[43]

UNIONS

"A plan participant suing under ERISA must establish both statutory standing and constitutional standing, meaning the plan participant must identify a statutory endorsement of the action and assert a constitutionally sufficient injury arising from the breach of a statutorily imposed duty."[44] The treatment of unions under ERISA illustrates the necessity of separately analyzing these different types of standing. From an Article III constitutional perspective, unions have standing as an association to bring actions on behalf of their members.[45] However, the issues of standing under ERISA Section 502 are issues of statutory standing,[46] rather than Article III standing, and unlike an issue of Article III standing, statutory standing goes beyond the question of whether a court has the power to hear a case and reaches the merits of the case.[47]

As a further distinction from Article III standing, which ordinarily should be determined before reaching the merits of the case, statutory standing may be assessed for the purposes of deciding whether plaintiff otherwise has a viable cause of action.[48] As the Supreme Court expressed this point in *Lexmark International, Inc. v. Static Control Components, Inc.*, "determination whether a statute permits a plaintiff to assert a claim is an issue that requires [courts] to determine . . . whether a legislatively conferred cause of action encompasses a particular plaintiff's claim."[49]

In *Southern Illinois Carpenters Welfare Fund v. Carpenters Welfare Fund of Illinois*,[50] Judge Posner, in holding that a union had standing to sue on the basis of associational standing, stated, "We do not think that by confining the right to sue under section 1132(a)(1) to plan participants and fiduciaries Congress intended to prevent unions from suing on behalf of participants. The Union in such a case is not asking anything for itself the real plaintiffs' interest are plan participants."[51]

However, other courts have disagreed with that analysis.[52] In *Society of Professional Engineering Employees in Aerospace IFPTE Local 2001 v. The Boeing Company*,[53] in rejecting the associational theory of standing under ERISA, the district court commented that "the fact that Congress expressly included unions in certain statutory provisions of ERISA but did not include them in 1132(a) supports the conclusion that Congress did not intend for unions to bring claims under ERISA as representatives for participants."

Similarly, in *Systems Council EM-3 v. AT & T*,[54] a district court in the District of Columbia rejected the statement in a footnote in *Communication Workers of America v. AT & T*[55] that "Once CWA represented employees have exhausted their administrative remedies under the plan, CWA will acquire representational standing to sue on their behalf."[56]

THIRD PARTY STATUTORY STANDING

In *American Psychiatric Association v. Anthem Health Plans*,[57] the Second Circuit did not follow the holding of the Third Circuit in *Pennsylvania Psychiatric Society v. Green Spring Health Services, Inc.*,[58] which had implicitly acknowledged third party statutory standing under ERISA.

PLANS

ERISA Section 502(d) provides that employee benefit plans may sue and be sued under this Title, presenting the obvious question of the relationship between this Section and ERISA Section 502(a).[59] In a leading early case, the Second Circuit interpreted the section narrowly, restricting it to legal capacity, not standing to sue. In its opinion, ERISA Section 502(d) does not imply that pension plans "may bring actions under ERISA: it merely authorizes suits to be brought by funds in other situations where there would probably be jurisdiction."[60] The Ninth Circuit[61] and Third Circuit[62] have agreed with the Second Circuit, while the Sixth Circuit[63] and Seventh Circuit[64] have held that plans do have standing.

PRO SE

Pro se litigants have a somewhat ambiguous status under American law and present a different type of standing issue. Generally, the Supreme Court has recognized a constitutional right to come into

federal court and sue. [65] Commenting upon this aspect of our jurisprudence, a district court stated in *NAACP v. Meese* that: "one of the basic principles, one of the glories of the American system of justice, is that the courthouse door is open to everyone."[66]

While pro se litigants are required to comply with the Federal Rules of Civil Procedure,[67] the Supreme Court has held that pro se complaints are held to less stringent standards than formal pleadings drafted by lawyers.[68]

In *Hall v. Berman*, the Tenth Circuit elaborated upon that standard: "I believe the rule means that if the court can reasonably read the proceedings to state a valid claim on which the plaintiff could prevail, it should do so, despite plaintiff's failure to cite proper legal authority, his confusion of various legal theories, his poor syntax and sentence construction, or his unfamiliarity with pleading requirements. At the same time, we do not believe that it is the proper function of the District Court to assume the role of advocate for the pro se litigant." Right to proceed pro se in federal courts is explicitly provided for in 28 U.S.C. § 1654, which provides that parties "may plead and conduct their own cases personally or by counsel in the federal courts."[69]

Thus, there are no standing issues under ERISA Section 502 if a plan participant wants to file a claim on his or her own behalf. However, while an individual may represent himself or herself pro se, a non-attorney may not represent another person in federal court,[70] even if that other party is also a pro se litigant.[71] Thus, in *Boilermaker Blacksmith National Pension Fund v. Tank Maintenance and Tech Co.*,[72] the Kansas district court struck a pro se motion on behalf of the defendant after its counsel withdrew, even though the corporation was financially unable to retain counsel.[73]

In *Simon v. Hartford*,[74] the Ninth Circuit affirmed a district court ruling that a pro se litigant is not authorized to proceed with a cause of action for breach of fiduciary duty under ERISA Section 409(a).[75] The court of appeals focused upon the language in 28 U.S.C. § 1654 that limits the authorization of civil litigants to "plead and conduct their own cases personally." The court explained that "it is well established that the privilege to represent one self pro se . . . is personal to the litigant and does not extend to other parties or entities. Even a party's status as a trustee does not include the right to present pro se arguments in federal court.[76] This holding is consistent with *Mass. Mutual Life Ins. Co. v. Russell*,[77] in which the Supreme Court held that a plaintiff filing a claim under ERISA Section 409(a) is doing so in a representative capacity; claims that he would be bringing were claims on behalf of the plan. While participants are authorized to file breach of fiduciary claims under ERISA Section 1132, they cannot do so when proceeding pro se.

Although the Ninth Circuit reached its holding on the basis of statutory construction, it also indicated that there were significant policy considerations that would be implicated in the event a pro se litigant were permitted to represent the interests of the plan. It indicated that other participants would be affected by the judgment in the case, and accountability was therefore a serious concern. Any judgment would also have a binding effect upon the plan itself, as well as on participants and beneficiaries. It stated that "this underscores our reluctance to approve the prosecution of an action of this sort pro se absent specific Congressional authorization."

Under the procedural rules governing pro se litigants, a suit cannot be filed by a non-lawyer even if the non-lawyer has a valid power of attorney. Because providing a person with a power of attorney is not the equivalent of an assignment of ownership, standing alone, a power of attorney does not allow a party to assert a claim in his or her own name.[78]A power of attorney will allow an attorney in fact to bring a claim in a representative capacity, but it does not allow a non-lawyer acting pro se to litigate on behalf of family members or others in federal court.[79]

CONCLUSION

Although the standing issues discussed in this article are less frequently raised in ERISA civil litigation than Article III standing issues which has attracted considerable attention since the Thole decision, since plaintiffs must have both Article III standing and standing to sue under the ERISA, practitioners, in addition to being aware of circuit splits on some basic standing issues, should also be aware of their existence as possible defenses in ERISA civil litigation.

NOTES

1. I considered primarily Article III constitutional issues in "Some Standing Issues Under ERISA," 30 *Benefits Law Journal* 1 (Spring 2017).

2. Technically, the issues discussed in this article are not standing issues, but rather statutory right to sue issues, as discussed more fully at n. 43, *infra*. However, since older cases employ standing terminology, as well as some more recent cases, the article retains the standing terminology with which practitioners may be more familiar.

3. 140 S. Ct. 1615, 2020 WL 2814294 (June 1, 2020). *Cf. Sasson Plastic Surgery v United Health Care of New York, Inc.*, 2021 WL 1224883, fn. 3 (E.D.N.Y. March 31, 2021) (court avoids referring to "statutory standing" other than quoting or referring to prior opinions that used that term). This article focuses upon whether a party has standing to bring suit under ERISA, and does not address statutory standing issues in terms

of permissible causes of action. Thus, in the recent Seventh Circuit case of *Central Illinois Pipe Traders Health and Welfare Fund v. Prather Plumbing and Heating, Inc*., 3 F.4th 954 (7th Cir. July 7, 2021), the court found that an ERISA fund, which clearly had constitutional standing under Article III, had no federal cause of action when it sought to successor liability to collect on a judgment when the successor company had not violated ERISA. ERISA does not provide an enforcement mechanism for collecting judgments, and the court would not create a private cause of action not provided for under the statute.

4. The issue that has been raised in several class action lawsuits in whether a participant who did not invest in a particular fund offered under a plan has standing to bring a cause of action for breach of fiduciary duty.

5. *See, e.g., Winsor v. Sequoia Benefits LLC*, 2021 BL 202053 (N.D. Cal. June 2, 2021) and *Scott v. United Health Group*, 2021 WL 2018839 (D. Minn. May 20, 2021); *Fuente v. Preferred Home of New York, LLC*, 2021 WL 2308786 (2d Cir. June 7, 2021).

6. The ERISA standing requirement is narrower than the Article III constitutional standing. *Bank America Pension Plan v. McMath*, 2001 WL 263290 (N.D. Cal. March 5, 2001).

7. 29 U.S.C. § 1132.

8. 674 F. 2d 1300 (9th Cir. 1982).

9. The Pension Protection Act of 2006 provided employers with causes of action under 29 U.S.C. §1132(a)(10) and 1451(e)(1). *See Keyes Fibre Corp. v. Pace Industry Union Management Pension Fund*, 2017 WL 4641798 (M.D. Tenn. October 17, 2017); *WestRock RKT Co. v. Pace Industrial Union Management Pension Fund*, 856 F. 3d 1320 (10th Cir. 2017). Those standing issues are not addressed in this article. *Cf. Ely v. Board of Trustees of Pace Industries Union Management Pension Fund*, 2020 WL 7038540 (D. Idaho, November 11, 2020) (participant lacks both Article III and statutory standing in challenging an exit fee as not being a reasonable method to emerge from critical status or to forestall possible insolvency).

10. Prior to the decision of the Supreme Court in *Yates, Md. P.C. Profit Sharing Plan v. Herndon*, 541 U.S. 1 (2004), there was a clear circuit split as to whether certain individuals could be treated as both employers and employees under ERISA. *See* Scott Kording, Slicing Through the Gordian Knot: "Employers," Standing and Remedies under ERISA, 2005 University of Illinois Law Rev. No. 5 p. 1257. In *Yates*, the Supreme Court held that the working owner of either an incorporated or unincorporated association can be both an employer and an employee eligible to participate in an ERISA plan and thus be a beneficiary so long as there is at least one common law employee covered under the plan in addition to the employee and his spouse.

11. The three-part test was based upon the Supreme Court's decision in *Association of Data Processing Services v. Camp*, 397 U.S. 150 (1970).

12. Although no circuit court agreed with the *Fentron* analysis, some district courts did. *See, e.g., International Union of Bricklayers v. Menard & Co*., 619 F. Supp. 1457, 1460 (D. R.I. 1985); *Airco Industrial Gases v. Teamsters Health and Welfare Pension Fund*, 618 F. Supp. 943 (D. Del. 1985); *Building Serv. Employees Pension Trust v. Horsemen's Quarter Horse Raising Association*, 98 F.R.D. 458, 461 (N.D. Cal. 1983); *Michigan United Food and Commercial Workers Union v. Baerwaldt*, 572 F. Supp. 943 (E.D .Mich. 1983) (fund had standing to sue to obtain a declaratory judgment that a Michigan insurance statute was preempted by ERISA) *rev'd on other grounds*, 767 F. 2d 305 (6th Cir. 1985).

13. 700 F. 2d 889(2d Cir. 1983), *cert. den*. 464 U.S 845 (1983). *See also*, *Park v. The Trustees of the 1199 HealthCare Employees' Pension Fund*, 418 F. Supp. 343 (S.D.N.Y. 2005).

14. *Id*. at 702. The position of the Second Circuit has been followed by most circuit courts. *See Provident Life & Accident Ins. Co. v. Waller*, 906 F. 2d 785 (4th Cir. 1990); *Herman Hospital v. MEBA Medical and Benefits Plan*, 845 F. 2d 1286 (5th Cir. 1985); *De Marco v. C & L Masonry, Inc*., 891 F 2d 1236 (6th Cir. 1989); *Giordano v. Jones*, 867 F. 2d 409 (7th Cir. 1989); *Grand Union Co. v. Food Employers Labor Relations Association*, 808 F. 2d 66 (D.C. Cir. 1987); *Mitchell v. Mobil Oil Corp*., 896 F. 2d 463 (10th Cir. 1990); and *Gulf Life Ins. Co. v. Arnold*, 809 F. 2d 1520 (11th Cir. 1987). There is a narrow exception for health care providers who are neither participants nor beneficiaries but have received a valid assignment from plan participants in exchange for the receipt of medical services. *See Sasson Plastic Surgery v. United Health Care of New York*, *supra*, n. 3.

15. *Simon v. Cyrus Minerals Health Care Plan*, 107 F. Supp. 2d 1263 (D. Colo. 2000) ("The United States Supreme Court has noted the care Congress took in drafting ERISA, and has held that the statutory list of persons entitled to sue is exclusive.") A person in one of the enumerated categories has the burden of proof of establishing its standing. *Kim v. United Behavioral Health*, 420 F. Supp. 3d 1207 (D. Utah, Sept. 27,2019). Consequently, if a plaintiff's complaint does not allege that he or she is a participant, beneficiary, or fiduciary, the complaint can be dismissed. *David S. v. United Healthcare Ins. Co*., 2019 WL 4393341 (D. Utah Spt. 3, 2019) and *Anne M. v. United Behavioral Health*, 2019 WL 1989644 (D. Utah May 6, 2019).

16. 463 U.S. 1 (1983).

17. Even if an individual is a beneficiary under a plan, to have standing to sue, the person must be the beneficiary claiming benefits under the plan. *Wedekind v. United Behavioral Health*, 2008 WL 204474 at *4 (D. Utah, January 24, 2008) and *Kim v. United Behavioral Health*, 420 F. Supp. 3d 1207 (D. Utah, Sept. 27, 2019).

18. While it is correct that the list is a short list, it is also true that Congress intended ERISA's definition of fiduciary to be broadly construed. *LoPresti v. Terwilliger*, 126 F. 3d 34 (2d Cir. 1997). Therefore, an employer seeking to establish standing under ERISA Section 502 will seek to characterize itself as a fiduciary. However, the sponsor of an ERISA plan, without more, is not a fiduciary. *Conemaugh Star Plan Welfare Benefit Plan and Trust v. Benefit Plan Advisors, LLC*, 2008 WL 544733 (D. Conn. Feb. 26,2008). *See also*, *Beck v. Pace International Union*, 127 S. Ct. 2310 (2007) (holding that the sponsor and administrator of ERISA plan only acted as a fiduciary when acting as an administrator, not plan sponsor); *Hughes Air Craft Co. v. Jacobson*, 525 U.S. 432 (1999) ("without exception, plan sponsors who alter the terms of a plan do not fall into the category of fiduciary."). An employer seeking to establish standing will therefore seek to characterize itself as a fiduciary. Further, even if an employer can establish that it was acting in a fiduciary capacity, a fiduciary has standing only to bring claims related to the fiduciary duty it possesses, *i.e.*, a fiduciary does not have standing to sue for all purposes. *Coyne & Delany Co. v. Selman*, 98 F. 3d 1457, 1465. (4th Cir. 1991). Thus, merely appointing a plan administrator is insufficient to make an employer a fiduciary with respect to participant claims. *Gelardi v. Pertec Computer Corp*., 761 F. 2d 1323, 1325 (9th Cir. 1985); *Warren v. Oil, Chemical, and Atomic Workers Union Industry Pension Fund*, 72 F. Supp. 563 (E.D. Mich. 1989). Note also that while fiduciaries are one of the enumerated parties under ERISA Section 502(a)(3), the only relief that fiduciaries can seek is equitable relief. *Memorial Hospital for Cancer and Allied Diseases v. Empire Blue Cross and Blue Shield*, 1994 WL 132151 (S.D.N.Y. April 12,1994) and

Oxford Health Insurance v. Motherly Love Home Care Services, Inc., 237 F. Supp. 3d 25 (E.D.N.Y. Feb. 27, 2017).

19. 463 U.S. 1, 27 (1983).

20. 473 U.S. 134 (1985).

21. *Id.* at 146 The Supreme Court also stated in that case that the complex remedial scheme of ERISA "provide[s] strong evidence that Congress did not intend to authorize other remedies." *See also*, *Harris Trust and Savings Bank v. Salomon Smith Barney*, 530 U.S 238, 247 (2000), contrasting the lack of textual instructions on permissible defendants under ERISA Section 502(c) with its detailed list of possible plaintiffs and implying that Congress therefore intended to create an exclusive list of plaintiffs.

22. The reason that the *Fentron* decision has not been overruled in the Ninth Circuit is likely a procedural issue. Ordinarily, only an en banc panel can overrule a circuit court decision. *United States v. Aguon*, 851 F. 2d 1158, 1175 (9th Cir. 1988), cited in *Pilkington LLC v. Perelman*, 1993 WL 786870 (C.D. Cal. March 17, 1993), *aff'd* 72 F. 3d 1396 (9th Cir. 1995).

23. *See, e.g., Cripps v. Life Insurance Company of North America*, 980 F. 2d 1261, n. 3 (9th Cir. 1992) ("The reasoning of *Fentron* has twice been repudiated by the United States Supreme Court" and "has also been uniformly repudiated by other circuits and by commentators") and *Pilkington, LLC v. Perelman*, 72 F. 3d 1396, 1401 (9th Cir. 1995) ("*Fentron* has been largely undermined by subsequent Supreme Court authority"). *See also*, *Bank America Pension Plan v. McMath*, *supra*, n. 6.

24. *Chassan v. The Garrett Group*, 2007 WL 173927 at 4 (S.D. Cal. January 28, 2007) ("The reasoning in *Fentron* has been severely questioned by both this circuit and other circuits."). *See also*, *Tool v. National Employee Benefit Services*, 957 F. Supp. 1114, 1117-18 (N.D. Cal. 1996); *Beck v. Pace International Union*, 2003 US Dist. LEXIS 2283 (N.D. Cal. January 10, 2003) remanded by Ninth Circuit to consider a new theory of standing under ERISA Section 4070 (9th Cir. 2005); *Bel-Aire Heating and Air Conditioning v. Sheet Metal Workers National Pension Fund*, 1995 US Dist. LEXIS 17338 (W.D. Wash. June 7, 1995).

25. 2020 WL 1434281 (D. Nev. March 24, 2020).

26. *Rallis v. Trans World Music Corporation*, 1994 WL 52753 (E.D. Pa. February 22, 1994) (courts have interpreted ERISA Section 1132 literally thus denying standing to parties not specified therein); *Farm Bureau General Insurance Co. of Michigan, v. Blue Cross Blue Shield of Michigan*, 656 Fed. Appx. 483 (6th Cir. 2016).

27. *McCullough Orthopaedic Surgical Services PLLC v. Aetna, Inc.*, 857 F. 3d 145, 157 (2d Cir 2017), quoting *Connecticut v. Physicians Health Services of Conn., Inc.*, 287 F. 3d 110, 121 (2d Cir 2002).

28. Where both the participant and beneficiary have died prior to filing a claim, courts have held a third party acting as a successor representative to the beneficiary to have standing under a derivative standing theory. *Cottie v. Metropolitan Life Ins., Co.*, 1993 WL 8201(N.D. Ill., 1993); *Yarde v. Pan American Life Ins. Co.*, 67 F. 3d 298 (4th Cir. 1995); *Hirsch for Estate of Hirsch v. National Mall Serv., Inc.*, 989 F. Supp. 977 (N.D. Ill. 1997); *Clark v. Ford Motor Company*, 01-c-0961 (E.D. Wisc. 2004); *Gustafson v. Kennametal*, 2001 WL 25722 (S.D.N.Y. January 10, 2001); *McKinnon v. Blue Cross Blue Shield of Alabama*, 691 F. Supp. 1314 (N.D. Ala. 1988); *James v. Louisiana Laborers Health Welfare Fund*, 766 F. Supp. 530, 534 (E.D. La. 1991). *Cf. Alderman v. Central Pension Fund of the International Union of Operating Engineers and Participating Employers*, 2016 WL 183552 (N.D. Ind. January 4, 2016).

29. *Donohue v. Teamsters Local 282 Welfare, Pension Annuity, Job Training and Vacation and Sick Leave Trust Funds*, 12 F. Supp. 2d 273 (E.D.N.Y. 1998); *Raymond v. Mobil Oil*, 983 F 2d 1528-35 (10th Cir. 1992); *Yarbary v. Martin*, 2016 WL 1273027 (10th Cir April 1, 2016); *Crawford v. Lamantia*, 34 F. 3d 28, 32 (1st Cir. 1994); *Harris v. Provident Life & Accident Ins. Co.*, 26 F. 3d 930, 933 (9th Cir. 1994); *Nechis v. Oxford Health Plans, Inc.*, 421 F. 3d 96 (2d Cir. 2005); *Katzoff v. Eastern Wire Product Co.*, 808 F. Supp. 96 (D.R.I. 1992); *Chemung Canal Trust Co. v. Sovran Bank*, 939 F. 2d 12 (2d Cir. 1991); *Hernandez v. Grisham*, 494 F. Supp. 3d 1044 (D. New Mex. 2020); *Lujan v. Defs. of Wildfire*, 504 U.S. 555,571, n. 4 (1992) ("The existence of federal jurisdiction ordinarily depends on the facts as they exist when the complaint is filed."). *Cf. Brink v. DaLesio*, 667 F. 2d 420 (4th Cir. 1981) (in suit to recover funds on behalf of a plan, the relevant time for determining standing is the time of intervention, rather than the time that the suit was filed).

30. *Corbin v. Blankenberg*, 39 F. 3d 650 (6th Cir. 1994).

31. *Gilbert v. National Employee Benefit Companies, Inc.*, 466 F. Supp. 2d 928 (N.D. Ohio 2006); *Williams v. Provident Ins. Counsel, Inc.*, 279 F. Supp. 2d 894 (N.D. Ohio 2003); *Chemung Canal Trust Co. v. Sovran Bank Md.*, 939 F. 2d 12, 15 (2d Cir. 1991), cert. den. 112 S. Ct. 3014 (1993); *Blackmar v. Lichtenstein*, 603 F. 2d 1306 (8th Cir. 1979); *Miller v. Retirement Funding Corp.*, 953 F. Supp. 180 (W.D. Mich. 1996); *Jones v. Trevor Stewart Burton and Jacobsen, Inc.*, 1992 WL 252137 (N.D. Ga. August 21, 1992); *Corbin v. Blankenberg*, 39 F. 3d 650, 652-653 (6th Cir. 1994) ("if a trustee had not been a fiduciary when the lawsuit was originally filed, he would have had no authority to bring the action under ERISA in the first place."); *Ossey v. Mandola*, 1997 WL 223070 (N.D. Ill. April 28, 1997); *Roncone v. Liguroti*, 1993 WL 321737 (N.D. Ill. April 20, 1993); *Donohue v. Teamsters Local 282 Welfare Pension, Annuity, Job Training and Vacation and Sick Leave Trust Fund*, 12 F. Supp. 2d 273 (E.D.N.Y. 1998); *Ello v. Singh*, 531 F. Supp. 2d 552, 564 (S.D. N.Y. 2007); and *H & R Convention & Catering Corp. v. Somerstein*, 2013 WL 1911335 (E.D.N.Y. May 8, 2013); *In re: Vantage Benefits Administrators, Inc. v. Matrix Trust Co.*, 2021 WL 1815065 (Bkrty. N.D. Tex. May 5, 2021). *Cf. Santaniello v. Duncan*, 900 F. Supp. 547 (D. Mass. 1995) (while former fiduciaries cannot bring contractual counterclaims under ERISA, they may seek contribution for the direct claims asserted against them).

32. *Blacker v. Lichtenstein*, 603 F. 2d 1306 (8th Cir. 1979).

33. 706 Fed. Appx. 868 (7th Cir. 2017).

34. *Trujillo v. Landmark Media Enterprises, LLC*, 689 Fed. Appx. 176, 178-79 (4th Cir. 2017).

35. *Hashimoto v. Bank of Hawaii*, 999 F. 2d 408, 411-12 (9th Cir. 1993).

36. 15 F. 3d 1083 (9th Cir. 1993).

37. 710 F. 3d 57 (2d Cir. 2013).

38. *Piazza v. EBSCO Industries*, 273 F. 3d 1341 (11th Cir. 2001); *Dupree v. Prudential Insurance Company*, 2007 WL 2263892 (S.D .Fla. August 8, 2007).

39. *Leuthner v. Blue Cross Blue Shield of N.E. Pa.*, 454 F. 3d 120, 129 (3d Cir. 2006). *See also*, *Swinney v. General Motors, Corp.*, 46 F. 3d 512, 518-19 (6th Cir. 1995); *Adamson v. Armco, Inc.*, 44 F. 3d 650, 654-55 (8th Cir. 1995); *Mullins v. Pfizer, Inc.*, 23 F. 3d. 663,667-68 (2d Cir. 1994); *Vartanian v. Monsanto Co.*, 14 F. 3d 697, 702 (1st Cir. 1994); *Christopher v. Mobil Oil Corp.*, 950 F. 2d. 1209, 1220-23 (5th Cir. 1992).

40. *Raymond*, 983 F. 2d 1528 (10th Cir. 1992); *Felix v. Lucent Technologies*, 387 F. 3d 1146, cert. den. 545 U.S. 1149 (2005); *Chastain v. AT & T*, 558 F. 3d 1177 (10th Cir. 2009); *Hansen v. Harper Excavating Corp.,* 641 F. 3d (10th Cir. 2011).

41. 983 F. 2d 1536.

42. *Felix*, 387 F. 3d 1160, n.14.

43. *Id*. The U.S. Courts of Appeals for the Fourth and Eleventh Circuits also have rejected "but for" standing. *See Stanton v. Gulf Oil Corp*., 792 F. 2d 432,434 (4th Cir. 1986) and *Sanson v. General Motors Corp*., 966 F. 2d 618 (11th Cir. 1992).

44. *Kendall v. Employees Retirement Plan of Avon Products*, 561 F. 3d 112, 118 (2d Cir. 2010). Until the Supreme Court's decision in *Lexmark International, Inc. v. Static Control Components*, 572 U.S. 117 (2014), courts occasionally indicated that three types of standing needed to be satisfied – constitutional standing, statutory standing, and prudential standing. *See, e.g., Leuthner v. Blue Cross and Blue Shield of N.E. Pa*., *supra*, n. 38. Prudential standing, unlike statutory standing and constitutional standing, is a "judicially self-imposed limitation on the exercise of federal jurisdiction." *Selers v. New York Thruway Authority*, 584 F. 3d. 82, 91 (2d Cir 2009), "founded in concern about the proper-and properly limited-role of the Courts in a democratic society," *Warth v. Seldin*, 422 U.S. 490, 498 (1975), which Congress could override and some courts thought that Congress had. *See, e.g., Fin. Insurance Retirement Fund v. Office of Thrift Supervision*, 964 F. 2d 142 (2d Cir. 1992). *Cf. Miller v. Rite Aid Corp*., 334 F. 3d 335, 341 (3d Cir. 2003) ("the zone of interests inquiry under the prudential standing analysis for 502(a)(1) claims is inextricably tied to the question of whether a plaintiff can meet the definition of either a 'participant' or a beneficiary"). Prudential standing was regarded as having three components. One component was whether a particular matter falls within the zone of interests protected or regulated by the statutory provision. *See, e.g., Bennett v. Spear*, 520 U.S. 154, 162 (1997). A second component dealt with generalized grievances, which the Supreme Court subsequently concluded was a component of Article II constitutional standing. The third component was third-party standing, a component which the Supreme Court questioned in Lexmark, but did not decide because third-party standing was not an issue before the Court. *See Cell Science Systems v. Lauren Health Services*, 804 Fed. Appx. 260 (5th Cir. 1980). As a result, the terminology in pre-*Lexmark* decisions will use terminology acceptable at that time, but post-Lexmark, use of the "prudential standing" or "statutory standing" terminology would have been a "misnomer." The takeaway in *Lexmark* was that prudential standing and statutory standing are misnomers for questions of statutory interpretation about who has the right to sue, not Constitutional limits on a court's power to adjudicate the case.

45. *Warth v. Seldin*, 422 U.S. 490 (1975).

46. Statutory standing, when that terminology was still accepted, terminology is determined by "whether a statute creating a private right of action authorizes a particular plaintiff to avail himself of that right of action." *Rasha A. Patchak*, Statutory Standing and The Tyranny of Labels, 62 Oklahoma Law. Rev. 89, 91 (2009), cited in *H & R Convention & Construction Corp v. Somerstein*, 2013 WL 1911335 (E.D.N.Y. May 8, 2013).

47. *Bond v. United States*, 131 S. Ct. 2355 (2011); *Katz v. Pershing, LLC*, 672 F. 3d 64,75 (1st Cir. 2012).

48. *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 94-95 (1998). *See also*, *Lerner v. Fleet Bank, N.A*., 318 F. 3d 113, 127 (2d Cir. 2003), cert. den. 540 U.S. 1012 (2003).

49. 134 S. Ct. 1377 (2014). *See also, Graden v. Conexant Systems, Inc*., 496 F. 3d 291, 295 (3d Cir. 2007) (Statutory standing is simply a matter of statutory interpretation, asking "whether Congress has accorded this injured plaintiff the right to sue the defendant to redress his injury.").

50. 326 F. 3d 919 (7th Cir. 2003) and *Teamsters Local Union No. 705 v. Burlington Northern Sante Fe, LLC*, 741 F. 3d 819, fn. 1 (7th Cir. 2014).

51. *Id*. at 922. In *International Association of Bridge, etc. v. Douglas*, 646 F. 2d 1211(7th Cir 1981), the court concluded, without analysis, that a union had standing to sue in a representative capacity.

52. There is no disagreement that a union suing on its own behalf does not have standing under ERISA. *New Jersey State AF of L CIO v.State of New Jersey*, 747 F. 2d 891 (3d Cir. 1984); *International Union, United Aerospace and Agricultural Implement Workers, et. al. v. Auto Glass Employees Federal Credit Union*, 858 F. Supp. 711 (M.D. Tenn. 1994). *Cf. Licensed Division District No. 1 MEBA/NMU AF of LCIO v. DeFries*, 943 F. 2d 474 (4th Cir. 1991) (union that appointed one half of a board's trustees was held to be a fiduciary with standing to sue, but only for the purpose of challenging any act or practice which pertains to the appointing or replacement of trustees). That is, for a union to have standing to sue as a fiduciary, the action that the union brings must be within its fiduciary authority. Generally, unions are considered as plan fiduciaries only to the extent that they are plan administrators. *Reap v. Plumbers and Pipefitters National Pension Fund*, 2014 WL 334121 (M.D. Pa. January 29, 2014). *See also*, *Cataldo v. US Steel Corp*., 676 F. 3d 542, 552-553 (6th Cir. 2012) (union officials' explanation of plan benefits and assurances to those considering retirement benefits failed to transform union into a fiduciary); *Hozier v. Midwest Fasteners, Inc*., 908 F. 2d. 115 (3d Cir. 1990); *Rosen v. Hotel and Restaurant Employees and Bartenders Union of Philadelphia, Bucks, Montgomery, and Delaware Counties*, 637 F. 2d 592, 599, n. 10 (3d Cir. 1981).

53. 2007 WL 9723617 (D. Kan. January 8, 2007).

54. 972 F. Supp. 21 (D.D.C. 1987).

55. 40 F. 3d 926, 934, fn. 2 (D.C. Cir. 1984).

56. The analysis in *Communication Workers of America v. AT & T*, *supra*, was also rejected in *Communication Workers of America v. SBC Disability Income Plan*, 80 F. Supp. 2d 631 (W.D. Tex. 1999) (collecting cases). Other cases holding that Unions have no standing to sue under ERISA include *International Brotherhood of Local Workers Local 106 v. Marker Electrical Contracting, Inc*., 2018 WL 4327815 (W.D.N.Y. September 10, 2018); *UAW v. Harper-Row*, 576 F. Supp. 1468 (S.D.N.Y. 1983); *Boyle v. SEIU Local 200 United Benefit Fund*, 2016 WL 3823007 (N.D.N.Y. July 12, 2016); *United Food and Commercial Workers Local 204 v. Harris-Teeter Super Markets, Inc*., 716 F. Supp. 1551 (W.D.N.C. 1989) and *International Union, United Mine Workers of America v. Consolidated Energy, Inc*., 465 F. Supp. 3d 556 (S.D. W.Va. 2020).

57. 2014 WL 4823875 (D. Conn. September 25, 2014), *aff'd* 521 F. 3d 352 (2d Cir. 2016).

58. 280 F. 3d 278 (3d Cir. 2002).

59. A plan might also seek to avoid the issue of statutory construction by claiming it had status as a fiduciary. Such a claim was rejected in *Conemaugh Star Plan Welfare Benefit Plan and Trust v. Benefit Plan Advisors, LLC*, 2008 WL 544733 (D. Conn. February 26, 2008).

60. *Pressroom Union Printers League Income Security Fund v. Continental Assurance Co.*, *supra*, n. 13. For a contemporaneous analysis critical of the Second Circuit analysis, *see* Constance Bauer, ERISA: To Sue or Not to Sue, 19 University of Michigan Journal of Law Reform 239, 254 (1985). *Pressroom* has been followed in *International Brotherhood of Electrical Workers v. Marker Electrical Contracting, Inc.*, 2018 WL 4327815 (W.D.N.Y. September 16, 2018); *Metal Lathers Local 46 Pension Fund v. River Avenue Contracting Corp.*,954 F. Supp. 2d 250 (S.D.N.Y. 2013); *E. States Health and Welfare Fund v. Phillip Morris, Inc.,* 11 F. Supp. 2d 384 (S.D.N.Y. 1998).

61. *Local 159, 342, 343, and 444 v. Norcal Plumbing, Inc.*, 185 F. 3d 978 (9th Cir. 1999).

62. *Northeast Department ILGWU Health and Welfare Fund v. Teamsters Local Union No. 229 Pension Fund*, 764 F. 2d 147, 150 (3d Cir. 1985).

63. *Saramar Aluminum Company v. Pension Plan for Employees of Aluminum Industries*, 782 F.2d 577 (6th Cir. 1986) (holding that plans can be treated as fiduciaries and thus have standing).

64. *Peoria Union Stock Yard Co. v. Penn Mutual Life Ins Co.*, 698 F. 2d 320 (7th Cir. 1983); *Line Construction Benefit Fund v. Allied Electrical Contractors, Inc.*, 502 F. 3d 740 (7th Cir. 2007).

65. *California Motor Trans. Co. v. Trucking Unlimited*, 404 US 508, 513 (1972), recognizing the right of access to the courts stemming from the First Amendment right to petition the government.

66. *NAACP v. Meese*, 615 F. Supp. 200, 205-206 (D.D.C. 1985). *See also*, *Osie-Afriyie v. Medical College of Pennsylvania*, 937 F. 2d 876, 882 (3d Cir. 1989), quoted in *Cheung v. Youth Orchestra Fund of Buffalo, Inc.*, 906 F. 2d 59, 61 (2d Cir. 1990) ("The statutory right to proceed pro se reflects respect for the choice of an individual to plead his own cause."). Both cases are cited in Kelsey Whitt, Split on Sanctioning Pro Se Litigants under 28 USC 1927: Choose Wisely When Picking A Side, The Eighth Circuit, 73 Missouri Law Rev. 1365-1366 (2008).

67. *DiCesare v. Stuart*, 12 F. 3d 973, 979 (10th Cir. 1993).

68. *Haines v. Kerner*, 404 US 519, 520 (1972) (per curiam); *Erickson v. Pardu*, 551 US 89, 94 (2007). Illustrative cases include *Hall v. Berman*, 935 F. 2d. 1106, 1110 (10th Cir. 1991) (court should consider the merits of arguments presented by a pro se party, even if the argument is not artfully made); *Oxendine v. Kaplan*, 241 F. 3d 1272, 1275 (10th Cir. 2001) (dismissal of pro se claims is only appropriate when it is clear that the plaintiff cannot prevail on the facts he has alleged and it would be futile to give him an opportunity to amend.); *Cripps v. Life Insurance Company of North America*, *supra*, n. 23 (pro se litigant should not have his case dismissed for failure to comply with local rules of form for pleading); *Yuhasz v. Williams Health Plans of New Jersey, Inc.*, 2019 WL 4200901 (D. N.J. September 5, 2019) and 2020 WL 1616812 (D.N.J. April 1, 2020); *Duikos v. Strasberg*, 321 F. 3d 365 (3d Cir. 2003) (courts should apply the relevant legal principle even if the pro se complaint has not named it); *Davis v. United Health Care Ins. Co. Ltd.*, 2014 WL 12575723, fn. 1 (E.D. Tex. July 30, 2014) (in light of the deference due to a pro se litigant and the absence of harm to defendants, the court treated a late filed claim as timely filed); *Raya v. Barka*, 2021 BL 206755 (S.D. Cal. 2021). However, a complaint of a pro se litigant must still allege facts to demonstrate that the court has jurisdiction. *See Kelley v. Secretary, U.S. Dept. of Labor*, 812 F. 2d 1378, 1380 (Fed. Cir. 1987) (leniency is shown to pro se litigants with respect to mere formalities, but a court cannot take a liberal view of jurisdictional requirements)

and *Mala v. Crown Bay Marina*, 704 F. 3d 239, 245 (3d Cir. 2013) (pro se complainant must still allege sufficient facts to support his or her claim).

69. *See Rose v. Wilson*, 2019 WL 2407495 (E.D. Pa. June 6, 2019) (Section 1654 thus ensures that a person may conduct his or her own case pro se or retain counsel to do so).

70. *See Rose v. Wilson*, *supra*, n. 69. *See also*, *Collinsgru v. Palmyra Board of Education*, 161 F. 3d 225, 232 (3d Cir. 1998), abrogated on other grounds by *Winkelman ex rel. Winkelman v. Palmyra County School District*, 550 U.S. 516 (2007) ("rule that a non-lawyer may not represent another person in court is a venerable common law rule").

71. *Myers v. Loudon Co. Public School*, 418 F. 3d 395, 401 (4th Cir. 2005).

72. 1997 WL 458411 (D. Kan. July 18,1997). The district court also discussed three exceptions to the general rule that a corporation can only appear in court through an attorney, but those exceptions are too limited for purposes of this article.

73. *See Boilermakers-Blacksmith National Pension Fund v. Tank Maintenance and Technology, Inc.*, *supra*, n. 72. *See also, Richdel, Inc. v. Sunspool Corp.*, 699 F. 2d 1366 (Fed. Cir. 1983) and *Mid-Central/Sysco Food Services, Inc. v. Regional Food Services, Inc.*, 755 F. Supp. 367 (D. Kan. 1991) and *Algonac Mfg. Co. v. US*, 198 Ct. Cl. 258, 458 F. 2d. 1373 (Ct. Cl. 1972). If a pro se complainant lacks funds to obtain counsel, he or she can request counsel be appointed in forma pauperis under 28 U.S.C. § 1915, but that is the sole purpose for which pro se complainant can proceed under 28 U.S.C. § 1915. *Stewart v. Pennsylvania Department of Corrections*, 2014 WL 7157363 (W.D. Pa. December 6, 2014) quoted in *Robinson v. Derrick, Sr. and Laneko Engineering*, 2017 WL 2242865 (E.D. Pa. May 23, 2017).

74. 546 F. 3d 661 (9th Cir. 2008).

75. The decision of the Ninth Circuit in *Simon v. Hartford* was followed in *Probst v. Kalamarides*, 2013 WL 2953638, 55 EBC 2365 (9th Cir. June 17, 2013); *Trujillo v. American Bar Association*, 706 Fed. Appx. 868 (7th Cir. 2017); *Chang v. Wells Fargo & Co.*, 2010 WL 582157 (N.D. Cal. February 11, 2010); *In re Radogna*, 331 Fed. Appx. 962,964 (3d Cir. 2008); and *Robinson v. Laneko Engineering Co., Inc.*, 2016 WL 535780 (3d. Cir. February 11, 2016) (non-lawyer appearing pro se could not represent his mother in her claim for benefits).

76. *C.E. Pope Equity Interest v. United States*, 818 F. 2d 696, 697 (9th Cir. 1987).

77. 473 U.S. 134, 140 (1985).

78. *Roby v. Ocean Power Techs, Inc.*, 2015 WL 1334320 (D. N.J. March 17, 2015).

79. *Yoder v. Good Will Steam Fire Engine No. 1*, 740 Fed. Appx. 27,28 (3d Cir. 2016); *In re Radogna*, 331 Fed. Appx. 962 (3d Cir. 2009); and *Yuhasz v. Wellcare Health Plans of New Jersey, Inc.*, *supra*, n. 68.