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Some Standing Issues under ERISA

Barry L. Salkin

The US Supreme Court has defined standing as "whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues."[1] Subject matter jurisdiction in ERISA litigation involves both constitutional limits on federal courts[2] and prudential limitations[3] on its exercise.[4] Even if a plaintiff has a cause of action arising under a given statute, "federal courts… have only the power that is authorized by Article III,"[5] which enforces the Constitution's case or controversy requirement."[6]

With respect to claims arising under the Employee Retirement Income Security Act (ERISA), plaintiffs are not absolved from showing that the requirements of Article III are satisfied.[7] Thus, in a case arising under ERISA, a plaintiff "must show some injury or deprivation of a specific right that arose from a violation of [an ERISA] duty in order to meet the injury-in-fact requirement of Article III."[8] Consequently, a breach of fiduciary duty in and of itself does not constitute an injury in fact sufficient to show Article III standing."[9]

Subject matter jurisdiction in ERISA litigation, as in every federal court case, is a threshold question[10] and a matter of which employee benefit practitioners need to be cognizant, because "lawyers have a professional obligation to analyze subject matter jurisdiction before

Barry L. Salkin is Of Counsel at The Wagner Law group. He is a fellow of the American College of Employee Benefits Counsel, and is the author of numerous articles and book chapters dealing with employee benefits issues.

judges need to question the allegations."[11] Although there may be a point of no return,[12] and an attorney can be sanctioned if he or she holds back a challenge to subject matter jurisdiction hoping for a decision on the merits,[13] subject matter jurisdiction, the existence of which is determined at the time a complaint is filed,[14] is so important that federal courts permit any party to challenge, or the court to question *sua sponte* its existence at any time and at any stage of the proceeding.[15]

The reason for this heightened level of concern is that federal courts are courts of limited jurisdiction, and they possess "only that power authorized by Constitution or statute, which is not to be expanded by judicial decree."[16] As a result, Article III courts have an independent obligation to determine whether subject matter jurisdiction exists[17] whenever the existence of such jurisdiction is fairly in doubt,[18] even in the absence of a challenge from any party,[19] or whether the parties "either overlook or agree not to press the issue,"[20] or attempt to consent to a court's jurisdiction.[21] Thus, no agreement or action of the parties,[22] such as stipulating that there is standing[23] or seeking in some fashion to waive jurisdictional objections,[24] can establish the jurisdiction of a federal court if jurisdiction does not otherwise exist.

Although whether a disputed matter concerns jurisdiction or the merits (or occasionally both) is sometimes a close question,[25] the US Supreme Court has stated that "the bright line rule for deciding such questions turns on Congressional intent."[26] Not surprisingly, although a rule's jurisdictional nature is to be based on congressional intent, "there are no magic words that Congress must use. Rather, the text, context, and relevant historical treatment are all relevant."[27] If Congress has not spoken clearly on an issue, then a court should treat any restriction as nonjurisdictional in nature.[28]

In an ERISA context, the Anti-Injunction Act, when applicable, is an example of a law divesting a court of subject matter jurisdiction.[29] The Supreme Court has also noted three consequences of subject matter jurisdiction. First, as noted previously, subject matter jurisdiction can never be forfeited or waived.[30] Second, if a court lacks subject matter jurisdiction, it must dismiss the case in its entirety and cannot exercise plenary jurisdiction. Third, a trial judge may resolve contested facts relating to subject matter jurisdiction.[31]

There are two types of subject matter jurisdiction challenges: facial attacks and factual attacks.[32] A facial attack goes to the question of whether the plaintiff has alleged a basis for subject matter jurisdiction,[33] and the court takes the allegations of the complaint as true.[34] In contrast, in a factual attack, the facts in a complaint supporting jurisdiction are questioned,[35] no presumption of truthfulness attaches to the plaintiff's jurisdictional allegations,[36] the requisite facts must be established by the preponderance of the evidence,[37] and the court is

free to weigh the evidence and satisfy itself as to the existence of its power to hear the case.[38]

Constitutional and prudential challenges to subject matter jurisdiction are brought under Federal Rules of Civil Procedure (FRCP Section 12(b)(1),[39] although jurisdiction challenges based on "statutory standing" are brought under FRCP 12(b)(6).[40] Procedurally, a defendant might file a 12(b)(6) motion as well as a 12(b)(1) motion.[41] The standard of review under 12(b)(6) and 12(b)(1) is effectively the same;[42] however, the court will give closer scrutiny to the 12(b)(1) motion.[43] If a matter can be dismissed under both 12(b)(1) and 12(b)(6), the court will dismiss only on jurisdictional grounds, without addressing the merits.[44] As noted previously, in reviewing a motion under 12(b)(1), depending upon whether the challenge is a facial challenge or a factual challenge, a court may consider (1) the complaint alone; (2) the complaint supplemented by undisputed facts evidenced in the record; or (3) the complaint supplemented by undisputed facts plus the court's resolution of disputed facts.[45]

The burden of establishing subject matter jurisdiction rests upon the party asserting it,[46] generally the plaintiff,[47] and "each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at the successive stages of the litigation."[48] Thus, in the ERISA context, the party seeking recovery under ERISA Section 502(a) has the burden of establishing standing,[49] even if the defendant has removed the case to federal court.[50] If a defendant asserts that a claim should be removed to federal court because of complete preemption under ERISA, and the other party is neither a participant nor a beneficiary, the defendant has the burden of proving derivative standing.[51] Questions about subject matter jurisdiction present legal issues, which courts review *de novo*.[52]

The Supreme Court has indicated that a dismissal for lack of subject matter because of the inadequacy of the federal claim is proper only when the claim is "so insubstantial, implausible, foreclosed by prior decisions of the Supreme Court or otherwise completely devoid of merit as not to involve a federal controversy."[53] In another Supreme Court case, the Court indicated that a case can be dismissed for lack of subject matter jurisdiction when the alleged claim under the Constitution or federal statute is made solely for the purpose of obtaining jurisdiction.[54]

A recent case from the Sixth Circuit, *Haltunen v. City of Livonia,*[55] provides a rare example of such a successful challenge. The Court first held in that case that a plan established by the City of Livonia was a governmental plan, and thus exempt from ERISA. The Court explained, however, that such a finding did not necessarily end the inquiry. The Court indicated that in those instances in which standing

and merit-based claims merge, federal courts should assume jurisdiction and hear the case on its merits.

Nonetheless, citing *Bell v. Hood,* the Court noted that there is an exception if the case appears immaterial and filed solely for the purpose of obtaining jurisdiction." In proceeding to dismiss the case on subject matter jurisdiction grounds, the Court explained that "Haltunen's claim that the City is not a plausible subdivision has no plausible foundation … Haltunen's claim is little more than an attempt to obtain jurisdiction, and we will not permit his bald, wholly insubstantial allegations to force jurisdiction upon this court."[56]

Thus, in "extreme cases"[57] when a claim is "patently insubstantial"[58] or "utterly frivolous,"[59] dismissal for lack of subject matter jurisdiction may be proper. However, as the US Court of Appeals for the Sixth Circuit stated in *Primax Recoveries, Inc. v. Gunter,*[60] "An ERISA claim can be non-frivolous (or sufficiently substantial) even if it is unsuccessful and possibly verging on the foolhardy in light of prior precedent barring the relief sought."[61]

In recent years, the Supreme Court has stressed the importance of keeping standing distinct from statutory coverage[62] and controlling "drive-by jurisdictional rulings."[63] In *Steel Co. v. Citizens for a Better Environment*,[64] the Court stated: "It is firmly established in our cases that the absence of a valid (as opposed to arguable) cause of action does not implicate subject matter jurisdiction, i.e., the court's statutory or constitutional power to adjudicate the case."[65]

Thus, consistent with those Supreme Court holdings in most ERISA cases, the standing issue presented is not of the "subject-matter jurisdictional doctrine of justiciability which considers injury, traceability to the defendant and redressability."[66] As the US Court of Appeals for the Seventh Circuit expressed this point in 2015, "The issue … is not whether [health care providers] have standing but whether their claim comes within the zone of interests regulated by a specific statute …. [W]hether a plaintiff comes within the zone of interests is an issue that requires us to determine, using traditional tools of statutory interpretation, whether a legislatively conferred cause of action encompasses a particular plaintiff's claim."[67] Thus, in the ERISA context, the following are all nonjurisdictional:

- Whether a plan is an employee benefit plan,[68] a governmental plan,[69] or a church plan[70]
- An individual is a participant[71]
- A person or entity is a beneficiary[72]
- Whether a party has derivative standing[73]

- Whether an action is for equitable relief[74]
- Whether declaratory judgment was appropriate[75]
- Whether ERISA's exhaustion requirements have been satisfied[76]
- Whether a statutory numerical limit has been satisfied[77]

There is, however, a split of authority on the issue of whether a statute of repose is jurisdictional.[78]

Civil actions under ERISA can be brought only by participants and beneficiaries,[79] and there is a split of authority among the circuit courts as to the availability of "but for" standing—that is, standing for plaintiffs who would have been participants in an ERISA plan "but for the alleged malfeasance of a plan fiduciary."[80] This theory of standing has been recognized by the First,[81] Second,[82] Third,[83] Fifth,[84] Sixth,[85] and Eighth Circuits,[86] but has been consistently rejected by the Tenth Circuit.[87]

A beneficiary is a person designated by a participant, or by the terms of an employee benefit plan, who is or may become entitled to a benefit thereunder.[88] Thus, ERISA does not on its face explicitly reject the possibility that a provider of medical services could be a beneficiary with standing,[89] but courts have uniformly rejected that statutory interpretation.[90] In *Rojas v. Cigna Health and Life Insurance Co.*,[91] the US Court of Appeals for the Second Circuit summarized the logic behind these holdings:

> Beneficiary, as it is used in ERISA, does not without more encompass health care providers. Although the term "benefit" is not defined in ERISA, we are persuaded that Congress did not intend to include doctors in the category of "beneficiaries." Benefits to which a beneficiary is entitled are bargained for goods, such as "medical, surgical, or hospital care," … rather than a right to payment for medical services rendered …. While [the provider] may indeed be entitled to a benefit *qua* benefit through operation of the plan—i.e., payment for medical services—[this case] confuses the issue. The "benefit" the plan provides belongs to [the provider's patients]; [the provider's] claim to payment for covered services is a function of how [the insurer] reimburses health care providers under the Benefit Plan. That right to payment does not a beneficiary make.[92]

Third-party beneficiaries do not have standing under ERISA.[93]

In addition to direct standing under ERISA, there is derivative standing, which can arise in two ways:[94] on an assignment of a claim[95] or as a successor in interest.[96] As a subrogee of an ERISA participant

whose claim he had paid, a participant also has derivative standing.[97] When derivative standing is predicated upon an assignment of benefits under an ERISA plan, "failure to establish that an appropriate assignment exists is fatal to standing."[98] An employee organization does not have derivative standing as an assignee of participants,[99] although the US Court of Appeals for the Fourth Circuit, in affirming the decision, observed that "it may be that in the proper case assignees other than health care providers have derivative standing under ERISA."[100] Similarly, shareholder derivative standing is not recognized under ERISA.[101]

There is a split of authority among the circuits as to whether assignees of health care providers have derivative standing. In *Clinical Partners, Inc. v. Guardian Life Insurance Company of America*,[102] the US District Court for the Eastern District of New York recognized that "[t]o bar assignments completely … would prevent plan members with limited finances from receiving medical care."[103] However,

> [P]ermitting assignments to third parties would undermine ERISA's purpose. If health care providers, as assignees, could assign their legal rights regardless of the terms of ERISA plans, they could inflate their charges, collect the usual and customary payment for services under the plans, and then sell causes of action to unrelated third parties such as the plaintiff. Neither the employees nor health care providers would have an incentive to prevent overbilling, while employers would be faced with the enormous variable of potential litigation.[104]

Similarly, in *Simon v. Value Behavioral Health, Inc.*,[105] the US Court of Appeals for the Ninth Circuit reached a similar conclusion. The court explained that granting derivative standing to healthcare providers simplified the billing structure among the patient, his care provider, and his benefit plan in a way that enhanced employee health benefit plan coverage. However,

> [T]o grant Simon standing would be tantamount to transforming health benefit claims into a freely tradable commodity. It could lead to endless reassignment of claims, and it would allow third parties with no relationship to the beneficiary to acquire claims solely for the purpose of litigating them. We do not see how such a result would further ERISA's purpose. Our review of the statutory text of Section 502, relevant precedent, and the legislative history of ERISA also revealed no indication that Congress intended for plaintiffs in Simon's position to sue under ERISA. We therefore decline to extend derivative standing to Simon.[106]

In contrast, the US Court of Appeals for the Fifth Circuit, in *Tango Transport v. Healthcare Financial Services, LLC*,[107] without referencing *Simon*, reached precisely the opposite conclusion. It indicated that

> [G]ranting derivative standing to the assignees of health care providers helps plan participants and beneficiaries by encouraging providers to accept participants who are unable to pay up front. Conversely, to bar health care providers from assigning their rights under ERISA, and shifting the risk of nonpayment to a third party, would chill health care providers' willingness to accept a patient. Third parties like Healthcare will only be willing to purchase an assignment from a health care provider if they can be assured they will be afforded standing to sue for reimbursement. We need not reach whether all assignees or subassignees of plan participants have standing to sue.[108] In this case, however, rather than harming participants of ERISA-governed welfare plans, extending *Hermann I*[109] will almost surely benefit them.[110]

With respect to the scope of derivative standing, most courts have concluded that when a patient assigns payment of insurance benefits to a healthcare provider, the provider gains standing to sue for that payment under ERISA Section 502(a).[111] As the US District Court for the District of Massachusetts indicated in *I.V. Services of America, Inc v. Inn Development and Management, Inc.*:[112] "the right to receive benefits would be hollow without such enforcement capabilities."[113] In a similar vein, the US Court of Appeals for the Eleventh Circuit observed that "an assignment furthers ERISA's purposes only if the provider can enforce the right to payment."[114]

If a party has derivative standing and the assignment clearly provides, an assignee may file a claim for breach of fiduciary duty,[115] as well as penalties for nondisclosure under Section 502 of ERISA.[116] However, if an assignment does not include a right to assert non-benefit claims, then the assignee of a payment claim cannot assert them.[117] However, in *American Psychiatric Association v. Anthem*,[118] the US Court of Appeals for the Second Circuit held that the plaintiff did not have a cause of action for an alleged violation of the Mental Health Parity and Equity Addiction Act. Citing its earlier decision in *Montefiore Medical Center v. Teamsters Local 272*,[119] the court stated that the "exception to the [ordinary] ERISA standing requirement for health care providers to whom a beneficiary has assigned his claim in exchange for benefits is narrow."[120] Also, while anti-assignment clauses are generally valid,[121] unlike constitutional standing, the doctrines of waiver[122] and estoppel[123] may be applicable.

NOTES

1. *Warth v. Seldin,* 422 U.S. 490, 498 (1975). Historically, courts had stated that an ERISA plaintiff must allege facts showing that he or she has both statutory and constitutional standing [*Mendoza v. Goff,* 2014 WL 10748573 (N.D. Cal. April 16, 2014); *Soehnlen v. Fleet Owners Insurance Fund,* 2016 WL 7383993 (6th Cir. December 21, 2016)] or constitutional, prudential, and statutory standing. *Leuthner v. Blue Cross and Blue Shield of NE Pennsylvania,* 454 F.3d 120, 125 (3rd Cir. 2007); *Miller v. Rite Aid Corp.,* 334 F.3d 335, 340 (3rd Cir. 2003); *Baldwin v. University of Pittsburgh Medical Center,* 636 F.3d 69, 74 (3rd Cir. 2011). *See also* Zanglein and Stabile, *ERISA Litigation 400* (2nd ed. 2005) and Radha A. Pathak, "Statutory Standing and the Tyranny of Labels" 62 *Oklahoma Law Review* 89 (2009), fns. 81, 104. Although all three of these concepts were termed standing, courts recognized that there were important differences between them. For example, in *Graden v. Conexant Systems, Inc.,* 496 F.3d. 291 (3rd Cir. 2007) and quoted in *CGM, LLC v. Bell South Telecommunications,* 664 F.3d. 46, 52 (4th Cir. 2011), the US Court of Appeals for the Third Circuit explained that "Constitutional and prudential standing are about, respectively, the constitutional power of a court to resolve a dispute and the wisdom of so doing.... Statutory standing is simply statutory interpretation: the question it asks is whether Congress has accorded the injured plaintiff the right to sue the defendant to redress his injury." However, in *Lexmark International, Inc. v. Static Control Components, Inc.,* 134 S. Ct. 1377 (2014), the Supreme Court clarified that what has been called statutory standing is not in fact a standing issue but simply a question of whether a particular plaintiff has a cause of action under the statute. *See also Soehnlen v. Fleet Owners Insurance Fund,* 2016 WL 7383993 (6th Cir. December 21, 2016). The inquiry "does not belong" to the family of standing inquiries, because "the absence of a valid ... cause of action does not implicate subject matter jurisdiction, i.e., the court's statutory or constitutional power to adjudicate the case." *Id.* at 1386–1387, n.4. In light of the fact that the concept of "statutory standing" is both "misleading" and a "misnomer," some courts of appeal have indicated that they will cease using that terminology. *See, e.g., American Psychiatric Association v Anthem Health Plans, Inc.,* 2016 WL 2772853 (2d Cir. May 13, 2016); *City of Miami v. Bank of America Corp.,* 800 F.3d 1262, 1273 (11th Cir. 2015); and *Lesye v. Bank of America National Association,* 804 F.3d. 316, 320 (3rd Cir. 2015). For a fuller discussion of the concept of statutory standing in the ERISA context, *see also* Pathak, "Statutory Standing" at 106 and following. This change in terminology should have little effect upon the results of ERISA litigation. For example, in *Leuthner v. Blue Cross and Blue Shield of Northeast Pennsylvania,* 454 F.3d 120, 126 (3rd Cir. 2007), the US Court of Appeals for the Third Circuit indicated that " ERISA's statutory standing requirements are a codification of the "zone of interest" analysis typically used to determine prudential standing."

2. Constitutional standing is a question of a federal court's power to resolve a dispute under Article III of the Constitution, the section of the Constitution authorizing the judiciary to adjudicate cases and controversies. *Graden v. Conexant Systems, Inc., supra* n.1 at 295, cited in *Estate of Michael Burkland v. Dorleen Burkland,* 2012 WL 13550 (E.D. Pa. January 3, 2012). There is a three-part judicially created test for constitutional standing: A plaintiff must show (1) an injury in fact; (2) a causal connection between the injury and the complained-of conduct; and (3) that the injury is likely to be redressed by a favorable decision. *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560–561 (1992). This article does not discuss the injury-in-fact element of Article III standing, as considered last year by the US Supreme Court in *Spokeo, Inc. v Robbins,* 136 S. Ct. 1540 (2016), 194 L. Ed. 2d 635, 2016 WL 28324447 (May 16, 2016) and addressed by the US Court of Appeals for the Fifth Circuit on remand from the Supreme Court in *Lee v. Verizon Communications,* 2016 WL 4926159 (5th Cir. 2016). *See also Soehnlen v Fleet Owners Insurance Fund, supra* n.1.

3. Prudential standing "encompasses the general prohibition on a litigant's raising another person's legal rights; the rule barring adjudication of generalized grievances more appropriately addressed to the representative branches; and the requirement that a plaintiff's complaint fall within the zone of interests protected by the law involved." *Allen v. Wright,* 468 U.S. 737, 751 (1984), discussed in Pathak, "Statutory Standing," p. 91; *Elk Grove United School District v. Newdow,* 542 U.S. 1 (2004); *Hotze v Sebelius,* 991 F.Supp. 2d 864 (S.D. Tex. 2014); *St Paul Fire and Marine Insurance Co. v. Labuyan,* 579 F.3d 533, 539 (5th Cir. 2009), cited in *Encompass Office Solutions, Inc. v. Connecticut General Life Ins. Co.,* 2013 WL 1194392 (N.D. Tex. March 25 2013). One of the purposes of prudential standing is to "limit access to the federal courts to those best suited to assert a particular claim." *Freeman v. Corzine,* 629 F.3d. 146, 154 (3rd. Cir. 2010). With respect to prudential standing, the Supreme Court has stated that these "judicially self-imposed limitations on the exercise of federal jurisdiction are founded in a concern about the proper and properly limited role of courts in democratic society." *Bennett v. Spear,* 520 U.S. 154, 162 (1997). Cases that were dismissed because of prudential limitations include *Perelman v Perelman,* 919 F.Supp. 2d. 512 (E.D. Pa. 2013) (plaintiff was not the party best suited permanently to enjoin a person from serving as a fiduciary) and *Joint Apprenticeship and Training Committee of the Plumbing and Pipefitting Industry of San Mateo, et al. v. Division of Apprenticeship Standards, State of California,* 1996 WL 449176 (N.D. Cal. August 1, 1996) (a challenge to the approval of an apprenticeship program falls outside of the zone of interests that ERISA sought to protect).

4. *Bennett v. Spear, supra* n.3. In *Joint Apprenticeship and Training Committee of the Plumbing and Pipefitting Association of San Mateo v. Division of Apprenticeship Standards, supra*. n.3, the district court observed that "the requirements of constitutional standing are rigorously applied, prudential considerations are more flexible and are balanced on a case by case basis."

5. *Bender v. Williamsport Area School District,* 475 U.S. 534, 541 (1986); *Hein v. Freedom From Religion Fdn.*, 551 U.S. 587, 597–598 (2007).

6. *Hein v. Freedom from Religion Fdn., supra* n.5

7. *Loren v. Blue Cross and Blue Shield of Michigan,* 505 F.3d. 598, 606–607 (6th Cir. 2007).

8. *Kendall v. Employees Retirement Plan of Avon Products,* 561 F.3d 112, 121 (2nd Cir. 2009), quoted in *Trustees of the Upstate New York Engineers Pension Fund v. Ivy Asset Management,* 843 F.3d 561 (2nd Cir. 2016).

9. *Id.*

10. *In Re Principal US Property Account ERISA Litigation,* 51 EBC 1770 (S.D. Iowa May 17, 2011).

11. *Heinen v Northrop Grunman Corp.,* 671 F.3d 669, 670 (7th Cir. 2012).

12. Once a case has gone through a final judgment and all appellate remedies have been exhausted, subject matter jurisdiction can no longer be challenged or reversed. *In re Brand Names Prescription Drug Antitrust Litigation,* 248 F.3d 668, 669 (7th Cir, 2001).

13. *Enridge Pipeline (Illinois) LLC v. Moore,* 633 F.3d 602, 606 (7th Cir. 2011).

14. *Carney v. Resolution Trust Co.,* 19 F.3d 950, 954 (5th Cir. 1994), cited in *Smith v. Regional Transportation Authority*, 756 F.3d 340, fn.7 (5th Cir. 2014); *AJ, a Minor v. UNUM,* 696 F.3d 788 (8th Cir. 2012). *See also In re Enron Corporation Securities, Derivatives and ERISA Litigation,* 2011 WL 5967239 (S.D. Tex. November 29, 2011)

(the party seeking to invoke federal jurisdiction bears the burden of showing that standing exists at the time that the lawsuit was filed). Although this is a general proposition, a number of courts have confirmed that standing to sue under ERISA is assessed as of the time that the claim is filed. *See Hansen v. Harper Excavating, Inc.,* 641 F.3d 1216, 1225 (10th Cir. 2011); *Yarbury v. Martin,* 2016 WL 1273027 (10th Cir. April 1, 2016); and *Donobo v. Blue Cross and Blue Shield of Kansas, Inc.,* 2012 WL 3059419 (D. Kan. July 26, 2012). *Cf. Edmonson v. Lincoln National Life Ins. Co.,* 2011 WL 1234889 (E.D. Pa. April 1, 2011) (not clear that a participant must have statutory standing at the time that a lawsuit is filed).

15. *Craig v. Ontario Corp.,* 543 F.3d 872, 875 (7th Cir. 2008). *See Swinney v. General Motors Corp.,* 46 F.3d. 512, 518 (6th Cir. 1985) (considering for the first time on appeal the issue of whether plaintiffs qualified as participants within the meaning of ERISA because standing is necessary to a court's exercise of jurisdiction). *Alexander v. Anheuser Busch Cos., Inc.*, 990 F.2d 536, 538 (10th Cir. 1993) (raising *sua sponte* the issue of whether the plaintiff is a participant because the issue of standing is jurisdictional in nature.) *McClellan v. E.I. DuPont DeMours and Company,* 2006 WL 3751583 (W.D.N.Y. December 19, 2006) (a standing issue is jurisdictional, so it can be raised *sua sponte*); *Buss v. Wamu Pension Plan,* (W.D. Wash. July 24, 2008), Docket # CO7-0903 MJP (court is obligated to examine jurisdictional issue such as standing *sua sponte*; *Adams ex. Rel D.J. W. v Astrue,* 659 F.3d 1297, 1299 (10th Cir. 2011) (courts can address prudential standing *sua sponte*); *Sommers v. Drug Store Co. Employee Profit Sharing Plan v. Corrigan,* 883 F.3d 345, 348 (5th Cir. 1989) (rejecting plaintiff's claim that defendant had waived a challenge to plaintiff's standing as a participant, because lack of standing can be raised at any time by a party or by the court).

16. *Kokkonen v. Guardian Life Ins. Co. of America,* 511 U .S. 375, 377 (1994); *Liberty University v. Geithner,* 671 F.3d 391 (4th Cir. 2011). As early as 1861, in *Rice v. Railroad Co.,* 66 U.S. [1 Black] 358, 374, the Supreme Court stated that "It is beyond dispute only Congress is empowered to grant and extend the subject matter jurisdiction of the federal judiciary, and that courts are not to infer a grant of jurisdiction absent a clear legislative mandate, " cited in *Pressroom Unions-Printers League Income Security Fund v. Continental Assurance Co.,* 700 F.2d 889, 892 (2nd Cir.), *cert. den.* 104 S. Ct. 148 (1983). *See also Dalehite v. United States,* 346 U.S. 15, 30–31 (1953).

17. *Arbaugh v. Y & H Corp,* 546 U.S. 500, 514 (2006); *Kokkonen v. Guardian Life Ins. Co. of America,* 511 U .S. 375, 377 (1994); *Liberty University v. Geithner, supra* n.16; *Fw/PBS, Inc. v City of Dallas,* 493 U.S. 215, 231 (1990); *Buchel-Ruepegger v. Buchel,* 576 F.3d. 451, 453 (7th Cir. 2009); *Ruhrgas AG v. Marathon Oil Co.,* 526 U.S. 574, 583 (1999); *Cartez v. Teachers Retirement Board,* 2009 WL 8747195 (S.D.N.Y. 2009).

18. *Ashcroft v. Iqbal,* 129 S. Ct. 1937 (2009); *Arbaugh v. Y & H Corp, supra* n.17; *Burke v. Lash Work Environment, Inc.,* 48 EBC 2534, 2010 WL 1186336 (W.D. N.Y. March 24, 2010).

19. *Ruhrgas v. Marathon Oil Co., supra* n.17; *Cartez v. Teachers Retirement Board, supra* n.17; *Harold H. Higgins Realty, Inc. v. FNC,* 634 F.3d 787, 795 (5th Cir. 2011) ("even if a party does not allege plaintiff lacks Article III standing, courts have an independent obligation to ensure that jurisdiction exists by examining the Constitutional dimensions of standing before deciding whether plaintiff has prudential standing.").

20. *Henderson ex. Rel. Henderson v. Shinseki,* 131 S. Ct. 1197, 1202 (2011).

21. *Sosna v. Iowa,* 419 U.S. 393, 398 (1975). *See also In re Rini,* 782 F.2d 603, 608 (6th Cir. 1986); *Insurance Corp of Ireland, Ltd. v Compagnie Des Bauxites de Guinee,* 456 U.S. 694, 702 (1982); *MHA, LLC v. Aetna Health, Inc.,* 2013 WL 544022 (D.N.J. February 7, 2013); *Mitchell v. Maurer,* 293 U.S. 237, 244 (1934).

22. *Waxman v. Luna,* 881 F.2d. 237 (6th Cir. 1989); *Carr v. Tillery*, 591 F.3d 909, 917 (7th Cir. 2010) (parties cannot by agreement authorize a federal court to decide a case that does not belong in federal court).

23. *United States v. Tittjung,* 235 F.3d 330, 335 (7th Cir. 2000).

24. *In Re Rini, supra* n.21; *Insurance Corp of Ireland, Ltd. v Compagnie Des Bauxites de Guinee, supra* n.21; *United States v. Cotton,* 535 U.S. 625, 630 (2002); *Dexra Credit Local v. Rogan,* 602 F.3d 879, 883 (7th Cir. 2010). *Cartez v. Teachers Retirement Board, supra* n.17; *Burke v. Lash Work Environment, Inc., supra* n.18; *Spinedex Physical Therapy USA, Inc. v. United Healthcare Arizona,* 2012 WL 8169880 (D. Ariz. October 15, 2012), *aff'd* 2014 WL 5651325 (9th Cir. 2014); *MHA, LLC v. Aetna Health Care, Inc., supra* n.21; *Mitchell v. Maurer, supra* n.21; *Sommers Drug Store Company Employees Profit Sharing Plan, supra* n.15. However, objections with respect to prudential standing limitations are subject to waiver. *Finstein v. Crutcher,* 496 F.3d 1139, 1147 (10th Cir. 2007) and *Care-First Surgical Center v. ILWU PMA Welfare Plan,* 2014 WL 6603761 (C.D. Cal. July 28, 2014) ("Unlike Article III standing, the issue of a party's prudential standing can be waived if nor raised in a timely manner.").

25. *DaSilva v. Kinsko International Corp.,* 229 F.3d 358, 361 (2nd Cir. 2000).

26. *Henderson ex. Rel. Henderson v. Shinseki, supra* n.20.

27. *Reed Elsevier v. Muchnick,* 555 U.S. 154, 166 (2010).

28. *Sebelius v. Auburn Regional Medical Center,* 133 S. Ct. 817, 824 (2013), cited in *Perez v. PBI Bank,* 2014 WL 6606088 (N.D. Ind. November 20, 2014).

29. *Enochs v. Williams Packing and Navigation Co.,* 370 U.S. 1, 5 (1962); *Liberty University v. Geithner, supra* n.16.

30. There can be no subject matter jurisdiction against the United States, unless it waives jurisdiction. *Law Offices of Scott E. Combs,* 767 F.Supp. 2d 758 (D. Mich. 2011); *Lockett v. Marsh USA, Inc.,* 354 Fed. App'x 984 (6th Cir. 2009); *McGuinness v. United States,* 90 F.3d 143, 145 (6th Cir. 1996). However, because sovereign immunity can be waived, it has been held that the defense is not jurisdictional. *Gray v. United States,* 723 F.3d 395 (7th Cir. 2013).

31. *Cartez v. Teachers Retirement Board, supra* n.17 (if subject matter jurisdiction turns on contested facts, the trial judge may be authorized to review the evidence and resolve the dispute on his or her own); *Smith v. Regional Transit Authority,* 2013 WL 1953726 (E.D. La. May 10, 2013), *rev'd on other grounds* 756 F.3d 340 (5th Cir.2014) (In deciding a motion to dismiss for lack of subject matter jurisdiction, "the district court is free to weigh the evidence and resolve factual disputes in order to satisfy itself that it has the power to hear the case."); *Burke v. Lash Work Environments, Inc., supra* n.18 (courts must consult factual submissions if resolution of a factual issue may result in dismissal of a claim for lack of jurisdiction); *Tackett v. M & G Polymers USA, LLC* 561 F.3d 478 (6th Cir. April 3, 2009) (when Congress establishes jurisdictional requirements, a district court may admit extrinsic evidence and resolve disputed facts to decide if the asserted claim satisfies the jurisdictional prerequisites) *Herbert v. National Academy of Sciences,* 974 F.2d 192, 197 (D.C. Cir. 1992); *Alliance for Democracy v. Federal Election Comm.,* 362 F.Supp. 2d 138, 142 (D.D.C. 2005); *Oliver v. Black Knight Asset Management LLC*, 812 F.Supp 2d 2 (D.D.C. 2011) (to determine whether it has jurisdiction, a court may consider materials outside of the pleadings where necessary to resolve disputed jurisdictional facts).

32. *Golden v. Gorno Bros., Inc.,* 410 F.3d 879, 881 (6th Cir. 2005); *Law Offices of Scott E. Combs, supra.* n.30. *See also United States v. Ruthie,* 15 F.3d 592, 598 (6th Cir. 1994)

(A 12(b)(1) motion can focus solely on the pleadings so that it is a facial attack, "or may probe deeper into the underlying facts of the case, which is a factual attack.") *Edmonson v. Lincoln National Life Ins Co., supra.* n.14.

33. *Cartwright v. Garner,* 751 F.3d 752, 759 (6th Cir. 2014), cited in *Weigandt v. Farm Bureau General Ins. Co. of Michigan,* 2014 WL 5092905 (E.D. Mich. October 9, 2014); *In re Blue Water Endeavors, LLC,* 2011 WL52525 (E.D. Tex. January 6, 2011), citing *Rodriguez v. Commission of Arts,* 992 F.Supp. 2d 872, 878–879 (N.D. Tex.1998), aff'd 199 F.3d 279 (5th Cir. 1999) (in a facial attack, the allegations of the complaint are insufficient to invoke federal jurisdiction).

34. *North Jersey Bank and Spine Center v. Aetna,* 801 F.3d. 369 (3rd Cir. 2015) (when standing is challenged on the basis of the pleadings, a court accepts as true all material allegations in the complaint); *Saraw Partnership v. United States,* 67 F.3d 567, 569 (5th Cir. 1995), cited in *In re Blue Water Endeavors, LLC, supra* n.33; *Burke v. Lash Work Environments, Inc., supra* n.18; *AJ v. UNUM, supra* n.14; *Illinois Bell Telephone Co., Inc. v. Global Maps Illinois, Inc.,* 551 F.3d 587, 590 (7th Cir. 2008) (when jurisdictional challenges are raised at the pleading stage, the court accepts as true all factual allegations and draws all reasonable inferences in plaintiff's favor); *Evans v. Tubbs,* 657 F.2d 661, 663 (5th Cir. 1981); *Cartwright v. Garner, supra* n.33. *Cf. Patterson v. Weinberger,* 644 F.2d 521, 523 (5th Cir. 1981) (A facial attack occurs when a defendant challenges subject matter jurisdiction with a 12(b)(1) motion without accompanying evidence).

35. *Cartwright v. Garner, supra* n.33; *In re Blue Water Endeavors, supra* n.33.

36. *Evans v. Tubbs, supra* n.34.

37. *Illinois Bell Telephone Co., Inc. v. Global Maps, supra* n.34.

38. *Id. See* also *In re* Enron, *supra* n.14 (In a factual attack, a court may consider items outside the pleadings, such as affidavits, testing, and documents); *Nichols v. Muskingon College,* 318 F.3d 674 (6th Cir. 2003, cited in *Law Offices of Scott E. Combs, supra* n.30 (a court may consider items outside of the pleadings to resolve factual disputes concerning jurisdiction, and both parties are free to supplement the record with affidavits) *Cf. Burke v. Lash Work Environments, Inc, supra* n.18 (Courts may consider affidavits and other evidence outside of the pleadings to resolve the jurisdictional issue, but may not rely upon conclusory or hearsay statements in affidavits).

39. *North Jersey Brain and Spine Center v Aetna, supra* n.34 (12(b)(1) governs a motion to dismiss for lack of standing, because standing is jurisdictional); *Burke v. Lash Work Environments, Inc., supra* n.18 (A case is properly dismissed under 12(b)(1) when the court lacks the constitutional or statutory authority to hear it); *Makarova v. United States,* 201 F.3d. 110 (2nd Cir. 2000); *Weigandt v. Farm Bureau, supra* n.33 (FRCP 12(b)(1) provides for dismissal of an action for lack of subject matter jurisdiction); *In re Enron, supra* n.14.

40. *Freight Drivers and Helpers Local Union No. 557 Pension Fund v. Penske Logistics. LLC,* 56 EBC 1235, 2013 WL 389501 (D. Md. July 25, 2013); *Harold H. Huggins Realty, Inc., supra* n.19 at 795, cited in *Encompass Office Solution, Inc. v. Connecticut General Life, supra* n.3.

41. *In re Enron, supra* n.14.

42. *North Jersey Brain and Spine Center, supra* n.34; *Smith v. Regional Transit Authority, supra* n.14.

43. *Macharia v United States,* 334 F.3d 61, 64, 69 (D.C. Cir. 2003), cited in *Oliver v. Black Knight Asset Management, LLC, supra* n.31.

44. *Crenshaw-Logal v. City of Abilene,* 2011 WL 3363872 (5th Cir. 2011), cited in *In Re Enron, supra* n.14; *Tendercare v. Dana Corp.,* 2002 WL 31545992 (E.D. Mich. October 18, 2002); *Rothstein v. American International Group,* 837 F 3d 195 (2nd Cir. 2016).

45. *Williams v. Tucker,* 645 F.2d 404, 413 (5th Cir. 1981), cited in *In Re Enron, supra* n.14; *Smith v. Regional Transport Authority, supra* n.14.

46. *Muscarello v. Ogle County Board of Commerce,* 610 F.3d 416, 425 (7th Cir. 2010); *Potter v. Blue Shield of California Life and Health Ins. Co.,* 2014 WL 6910498 (C.D. Cal. November 26, 2014); *Smith v. Regional Transport Authority, supra* n.14; *In re Enron, supra* n.14.

47. *Brown v. BlueCross BlueShield of Tennessee,* 2016 WL 3606686, fn.3 (6th Cir. March 17, 2016); *Soehnlen v. Fleet Owners Ins. Fund, supra* n.1; *Cypress Medical Center Operating Company, Ltd. v. Medical Solutions, Inc.,* 2010 WL 4702298 (S.D. Tex. November 10, 2010); *Cartez v. Teachers Retirement Board, supra* n.17; *Banyai v. Mazur,* 2007 WL 959066 (S.D.N.Y. 2007). *Makarova v. United States, supra* n.39; *Law Offices of Scott E. Combs, supra* n.30; *Moh v. Greater Cleveland Regional Transit Authority,* 895 F.2d 266, 269 (6th Cir. 1990); *Oliver v. Black Knight Asset Management, LLC, supra* n.31; *Lujan v. Defenders of Wildlife, supra* n.2; *Burke v. Lash Work Environments, Inc., supra* n.18; *DLX, Inc. v. Commonwealth of Kentucky,* 381 F.3d 511, 516 (6th Cir. 2004); *Cartwright v. Garner, supra* n.33; *Weigandt, supra* n.33; *Kokkonen v. Guardian Life Ins. Co., supra* n.16 (court will presume a lack of subject matter jurisdiction until plaintiff proves otherwise in a motion to dismiss).

48. *FOCUS v. Allegheny Court of Common Pleas,* 75 F.3d 834, 838 (3rd Cir. 1996), quoting *Lujan v. Defenders of Wildlife, supra* n.2, quoted in *Cohen, M.D. v. Horizon Blue Cross Blue Shield of New Jersey,* 2015 WL 6082299 (D.N.J. October 15, 2015); *Robinson v. Laneko Engineering Co.,* 2015 WL 4000145 (E.D. Pa. July 1, 2015).

49. *Franco v. Connecticut General Life Ins. Co.,* 818 F.Supp. 2d 792, 810 (D.N.J. 2011); *Cohen, M.D. v. Horizon Blue Cross Blue Shield, supra* n.48; *Professional Orthopedic Association P.A. v. Excellus Blue Cross Blue Shield, Inc.,* 2015 WL 4387891 (D.N.J. July 15, 2015).

50. *Specialty Surgery of Middleton v. Aetna,* 2014 WL 2861311 (D.N.J. June 24, 2014).

51. *Hobbs v. Blue Cross Blue Shield of Alabama,* 276 F.3d 1236, 1241 (11th Cir. 2009); *Adventist Health Systems, Inc. v. Blue Cross Blue Shield of Florida, Inc.,* 2009 WL 723003 (M.D. Fla. March 18, 2009).

52. *Russell v. Catholic Healthcare Partners Employee LTD Plan,* 577 Fed.App'x 390 (6th Cir. 2014); 2015 WL 3540997 (6th Cir. June 8, 2015); *Leeson v. TransAmerica Disability Income Plan,* 51 EBC 2889, 2012 WL 171598 (9th Cir. January 23, 2012); *Graden v. Conexant Systems, supra* n.1 at fn.2.; *AJ, a Minor v. Unum, supra* n.14; *Prescott v. Little Six, Inc, ,* 387 F.3d 753 (8th Cir. 2004); *Oakley v. US Airways Pilots Disability Income Plan*, 723 F.3d 227 (D.C. Cir. 2013); *North Jersey Brain & Spine Center v. Aetna, supra* n.34 (plenary review of a denial of a claim for lack of standing); *Waxman v. Luna. supra* n.22 (when a district court applies ERISA statutory law to the facts of a case, the holding becomes a conclusion of law to be reviewed *de novo*); *Brown v. Blue Cross Blue Shield of Tennessee, supra* n.47 at fn.3 (a dismissal for lack of subject matter jurisdiction is reviewed *de novo*, but the court will accept any factual findings made by the district court unless clearly erroneous). *Cf. Mikulski v Centerion Energy Corp.,* 501 F.3d. 555 (6th Cir. 2007) (when a decision on subject matter jurisdiction concerns a pure question of law or application of law to facts, review is *de novo*, but when a jurisdictional ruling was based upon resolution of a factual dispute, it is reviewed for clear error).

53. *Steel Co. v. Citizens for a Better Environment,* 523 US 83, 89 (1998); *Smith v. Regional Transportation Authority, supra* n.14; *Metropolitan Life Ins. Co. v. Price,* 501 F.3d 271 (3rd Cir. 2007); *Alfonso v. Resource Center*, 2015 WL 12564326 (S.D. Fla. October 23, 2015) (claim dismissed for lack of subject matter jurisdiction when it was "totally implausible" and "devoid of merit").

54. *Bell v. Hood,* 327 U.S. 678, 682–683 (1946).

55. *Haltunen v. City of Livonia,* 2016 WL 6832971 (6th Cir. November 21, 2016).

56. *Id.* at *p2.

57. *Harzewski v. Guidant Corp,* 489 F.3d. 799, 803–804 (7th Cir. 2007).

58. *Tooley v. Napolitano,* 586 F.3d 1006, 1009 (D.C. Cir. 2009).

59. *Carr v. Tillery, supra* n.22); *Crowley Cutlery Co. v. United States,* 849 F.2d. 273, 276 (7th Cir. 1988).

60. *Primax Recoveries, Inc. v. Gunter,* 433 F.3d 515 (6th Cir. 2006).

61. *Id.* at 519.

62. *See, e.g.*, *Lexmark International, Inc. v. Static Control Component, Inc., supra* n.1, cited in *Pennsylvania Chiropractic Association v. Independence Hospital Indemnity Plan,* 802 F.3d 926 (7th Cir. 2015).

63. *Reed Elsevier v. Muchnick, supra* n.27.

64. *Steel Co. v. Citizens for a Better Environment, supra* n.53.

65. *Id.* at 89.

66. *Physicians Multispecialty Group v. Health Care Plan of Horton Homes,* 371 F.3d 1291, 1293 (11th Cir. 2004). *See also Bridges v. American Electric Power Co., Inc.,* 498 F.3d 442, 444 (6th Cir. 2007), cited in *Scott v. Regions Bank,* 702 F.Supp. 2d 921 (E.D. Tenn.2010); *Lanfear v. Home Depot, Inc,* 536 F.3d 1217, 1221–1222 (11th Cir. 2008) (statutory standing under ERISA involves the merits of the action, not subject matter jurisdiction); *Vaughn v. Bay Environmental Management, Inc.,* 567 F.3d 1021, 1024 ("a dismissal for lack of statutory standing is properly viewed as a dismissal for failure to state a claim rather than a dismissal for lack of subject matter jurisdiction"); *New Page Wisconsin System v. UAW,* 651 F.3d 775, 777 (7th Cir. 2011) (whether a claim is good differs from the question of whether a federal court has jurisdiction, a matter of adjudicatory competence). *But see* AJ v. UNUM, *supra* n.14 (standing to sue under ERISA is a jurisdictional issue).

67. *Pennsylvania Chiropractic Association, supra* n.62, citing *Lexmark International, supra* n.1.

68. *Carlson v. Principal Financial Group,* 320 F.3d. 301, 307 (2nd Cir. 2003) (the question of whether a plan qualifies as an employee benefit plan under ERISA "is irrelevant to the question of whether the District Court has subject matter jurisdiction"); *Lewez v. Butterwort Timberframe, LLC,* 2006 WL 2599101 (D. Mont. September 11, 2006); *Russell v. Catholic Healthcare Partners Employee LTD Plan, supra* n.52; *Holzer v. Prudential Equity Group, LLC,* 520 F.Supp. 2d 922 (N.D. Ill. 2007) (a determination that a plan is not an ERISA plan is a determination on the merits, not subject matter jurisdiction); *Daniels-Hall v. National Educational Association,* 629 F.3d 992, 997 (9th Cir. 2010) ("To ask whether the alleged plan is subject to ERISA is a merits question."); *Daft v. Advest, Inc.,* 2011 WL 4430852, 658 F.3d. 583 (6th Cir. 2011) (the existence of an ERISA claim is a nonjurisdictional element of plaintiff's ERISA claim);

Solis v. Koresko, 2009 WL 2776630 at *pg.5 (E.D. Pa. August 31, 2009); *Dahl v. Charles F. Dahl, P.C.,* 744 F.3d. 623, 629 (10th Cir. 2014) ("Recent Supreme Court decisions compel the conclusion that the existence of a benefit plan subject to ERISA is not a jurisdictional requirement, but an element of a claim under ERISA."); *Ries v. City of Del Rio, Texas,* 444 F.3d 417, 425, n.8, quoted in *Smith v. Regional Transportation Authority, supra* n.14 (when a plaintiff pleads that the plan is not an ERISA plan, the question of whether this is correct does not affect the court's jurisdiction to adjudicate the claim). *Cf. DB Healthcare v. Blue Cross Blue Shield of Arizona, Inc.,* 2014 WL 3349920 (D. Ariz. July 9, 2014) (when a provider was neither an assignee of a participant or beneficiary, the case would be dismissed for lack of statutory standing rather than a lack of subject matter jurisdiction). *Cf. Prescott v. Little Six, Inc., supra* n.52 (when a tribal court concluded that no plan had been adopted, a district court had no jurisdiction to hear ERISA claims). *But see* Campbell v. Sussex County Federal Credit Union, 2011 WL 2532403 at *pg.3 (D. Del. June 24, 2011) (adhering to the view that the existence of an ERISA-governed plan is an essential precursor to federal jurisdiction).

69. *Smith v. Regional Transit Authority, supra* n.14 and 2015 WL 6442337 (E.D.La. October 23, 2015). *But see* Koval v. Washington County Redevelopment Authority, 574 F.3d 238, 244 (3rd Cir. 2009) (dismissing a claim for lack of subject matter jurisdiction where plan was exempt from ERISA).

70. *Russell v. Catholic Healthcare Partners Employeee LTD Plan, supra* n.52 (whether defendant plan was a church plan was a substantive element of a claim and not a jurisdictional issue and can be waived).

71. *Harzewski v. Guidant Corp., supra* n.57 at 803–804 (whether an ERISA plaintiff is a participant entitled to recover benefits under the act should be treated as a question of statutory interpretation fundamental to the merits of the suit rather than a question of the plaintiff's right to bring the suit); *Leeson v. Transamerica Disability Income Plan, supra* n.52 ("The issue of participant status goes to the merits of his claim and not to the subject matter jurisdiction of the District Court").

72. *Grasso Enterprises, et al., v. Express Scripts,* 2016 WL 104494 (8th Cir. January 11, 2016) (whether a health care provider is a beneficiary under ERISA is not a matter of Article III standing).

73. *North Jersey Brain & Spine Center v. Aetna, supra* n.34.

74. *Primax Recoveries, Inc. v. Guntner, supra* n.60; *ACS Recovery Services, Inc. v. Griffin,* 723 F.3d 518, 523 (5th Cir. 2013 *en banc*) (whether an action for equitable relief under ERISA Section 502(a)(3) has been stated is within the federal court's jurisdiction, irrespective of the claim's ultimate merit).

75. *Rodriguez v. Tennessee Laborers Health & Welfare Fund,* 463 F.3d 473 (6th Cir. 2006).

76. *Metropolitan Life Ins. Co. v. Price, supra* n.53.

77. *Thomas v. Miller,* 489 F.3d 293 (6th Cir. 2007) (statutory numerical limits such as COBRA's 20 employee limit, are nonjurisdictional); *McGiver v. Tenacity,* 2008 WL 513320 (S.D. Ind. Feb. 22, 2008) (insufficient number of employees for an ADA claim is not jurisdictional).

78. *Compare Perez v. PBI Bank, supra* n.28 (statute of repose does not present a question of subject matter jurisdiction) *with Harris v. Bruster,* 2013 WL 6805155 (S.D. Miss. 2013) (ERISA's statute of repose acts as a jurisdictional bar).

79. ERISA § 502(a)(1)(B).

80. *Leuthner v. Blue Cross and Blue Shield of N.E. Pa., supra* n.1.

81. *Vartanian v. Monsanto Co.,* 14 F.3d 697, 702 (1st Cir. 1994).

82. *Mullins v. Prizer, Inc.,* 23 F.3d 663, 667–668 (2nd Cir. 1994).

83. *Leuthner v. Blue Cross and Blue Shield of N.E. Pa., supra* n.1. *See also Bixler v. Central Pennsylvania Teamsters Health & Welfare Fund,* 12 F.3d 1292 (3rd Cir. 1993) (a narrow exception to standing under ERISA § 502(a)(1) and § 502(a)(3) exists when a plaintiff can plead that (1) he was a plan beneficiary and (2) he would still be a plan beneficiary were it not for the alleged misconduct of the plan administrator.) *Bixler* was distinguished on this issue in *Sacchi v. Luciani* (D. N.J. February 18, 2015).

84. *Christopher v. Mobil Oil Corp.,* 950 F.2d 1209, 122–123 (5th Cir. 1992).

85. *Swinney v. General Motors Corp., supra* n.15.

86. *Adamson v. Armco, Inc.,* 44 F.3d 650, 654–655 (8th Cir. 1995).

87. *Chastain v. AT&T,* 558 F.3d. 1177, 1181 (10th Cir. 2009); *Hansen v. Harper Excavating, supra* n.14; *Yarbury v. Martin,* supra n.14; *Felix v. Lucent Technologies, Inc.,* 387 F.3d 1146, 1151 (10th Cir. 2004); *Raymond v. Mobil Oil Corp.,* 983 F.2d 1528 (10th Cir. 1993); *Woolf v. Nuncor Building Systems Utah, LLC,* 2015 WL 1886853 (D. Utah, April 24, 2015); *Donobo v. Blue Cross Blue Shield of Kansas, Inc.,* 2012 WL 3059419 (D. Kan. July 21, 2012); *Reamy v. Ferguson Pontiac, GMC,* 2010 WL 2640089 (N.D. Okla. June 29, 2010).

88. ERISA § 3 (8).

89. *Bloom v. Independence Blue Cross,* 2015 WL 4598016 (E.D. Pa. July 31, 2015).

90. *DB Healthcare LLC v. Blue Cross Blue Shield of Arizona, Inc., supra* n.68; *Brown v. Blue Cross Blue Shield of Tennessee, supra* n.47; *Ward v. Alternative Health Delivery Systems, Inc.,* 261 F.3d 624, 627 (6th Cir. 2001); *Pennsylvania Chiropractic Association v. Independence Hospital Indemnity Plan, Inc., supra* n.62; *Pascack Valley Hospital v. Local 469A UFCW Welfare Reimbursement Plan,* 388 F.3d 393, 400 (3rd Cir. 2004); *Hobbs v. Blue Cross Blue Shield of Alabama, supra* n.51.

91. *Rojas v. Cigna Health and Life Insurance Co.,* 793 F.3d 253 (2nd Cir. 2015)

92. *Id.* at 257–258, quoted in *Brown v. Blue Cross Blue Shield of Tennessee, Inc., supra* n.47 at *pg.2.

93. *Dallas County Hospital District v. Association Health and Welfare Plan,* 293 F.3d 282, 289 (5th Cir. 2002); *Scott v. Regions Bank et al., supra* n.66; *Morales v. Pan-American Life Insurance Co.,* 914 F.2d. 83, 89 (5th Cir. 1990); *Medical University Hospital Authority\Medical Center of the Medical University of South Carolina v. Oceana Resorts, LLC,* fn.3, 2012 WL 683938 (D.S.C. March 2, 2012). On occasion, third-party beneficiary language is used imprecisely when a court is referring to an assignee. *See, e.g.*, *Albert Einstein Medical Center v. National Benefit Fund for Hospital and Health Care Employees,* 740 F.Supp. 343 (E.D. Pa. 1989).

94. *Scott v. Regions Bank, supra* n.66.

95. *Vermont Agency of Natural Resources v. United States ex. Rel. Stevens,* 529 U.S. 765 (2000) (a plaintiff may obtain standing through assignment of a cause of action); *Gables Insurance Recovery v. Blue Cross and Blue Shield of Florida,* 813 F.3d 1333 (11th Cir. 2015); *Hobbs v. Blue Cross Blue Shield of Alabama, supra* n.51 (derivate standing is available "only when the health care provider had obtained a written assignment of claims from a patient who had standing to sue under ERISA as a participant or beneficiary"); *Connecticut State Dental Association v. Anthem Health Plans,* 591 F.3d 1337, 1351 (11th Cir. 2009); *Medicomp. Inc. v. United Healthcare Ins. Co.,* 2014 WL 1304639 (M.D. Fla. April 1, 2014) and cases cited therein.

96. *James v. Louisiana Laborers Health and Welfare Benefits Fund*, 766 F.Supp. 530 (E.D. La. 1991); *Estate of Prince v. Aetna Life Ins. Co.,* 2008 WL 4327049 (M.D. Fla. September 18, 2008) (a deceased participant's estate had derivative standing under ERISA to bring a claim to clarify its rights to the deceased's ERISA plan benefits); *Cottle v. Metropolitan Life Ins. Co.,* 1993 WL 8201 (N.D. Ill. January 13, 1993) (trustee of testamentary trust set up by beneficiary who had died had derivative standing as deceased beneficiary's successor in interest to bring a claim for healthcare benefits that she had received); *Dudley v. Nisource Corp. Services Co.,* 2006 WL 1044457 (E.D. Ky. April 18, 2006) (estate of deceased plan participant may bring a claim for the participant's ERISA benefits); *Scott v. Regions Bank, supra* n.66 (when a trust is named as beneficiary under an ERISA plan, beneficiaries of the trust have derivative standing); *Yates v. Pan American Life Ins,* 67 F.3d 298 (4th Cir. 1991) (recognizing derivative standing in allowing a brother as the participant as the sole heir of the estate of the mother to maintain a claim); *Clarke v. Ford Motor Company,* 220 F.R.D. 568 (E.D. Wisc. 2004) (estate of a deceased participant or beneficiary has derivative standing to bring suits for pre-death benefits); *Hirsch for Estate of Hirsch v. National Mall and Services, Inc,* 989 F.Supp. 977, 982–983 (N.D. Ill. 1997) (deceased participant's spouse had ERISA standing because she stood in the participant's shoes); *Estate of J.D. Boss v. Boss,* 2011 WL 482874 (W.D. Ky. February 4, 2011) ("At the time of his death, J.D. Boss., Jr. was an ERISA participant. The estate therefore has derivative standing as a successor in interest."); *Tolton v. American Biodyne, Inc.,* 48 F.3d. 937, 941 (6th Cir. 1995); *Estate of Casella v. Hartford Life Ins. Co.,* 2009 WL 2488054 (D.N.J. September 11, 2009); *Shea v. Esensten,* 107 F.3d 625, 628 (8th Cir. 1997). *Gustafson v. Kinnemetal, Inc,* 2001 WL 25722 (S.D.N.Y. January 10, 2001) (to deny standing to personal representatives would be to deny any recovery at all); *McKinnon v. Blue Cross-Blue Shield of Alabama,* 691 F.Supp. 1314 (N.D. Ala. 1988), aff'd 874 F.2d 820 (11th Cir. 1989) (daughter allowed to bring ERISA claims for plan benefits as the personal representative of her deceased father); *Pitts by and through Pitts v. American Security Life*, 931 F.2d 351 (5th Cir. 1991 (father allowed to bring an ERISA action on behalf of his disabled son). A person may have derivative standing even if he or she would not be entitled to any benefit. *In re Estate of Burkland*, 2012 WL 13550 (E.D. Pa. January 3, 2012); *Box v. Goodyear Tire & Rubber,* 2014 WL 4926825 (N.D. Ala. October 1, 2014). *Cf. Carl v. Rightchoice Managed Care,* 2014 WL 4792934 (W.D. Mo. September 25, 2014) (plaintiff given leave to amend complaint to show that he had derivative standing under ERISA § 502 to prove an ERISA claim for his deceased wife's benefit).

97. *Potter v. Blue Shield of California Life and Health Ins. Co., supra* n.46; *Wills. v. Regence Blue Cross Blue Shield of Utah,* 2008 WL 4693581 (D.Utah October 23, 2008).

98. *Cmty. Medical Center v. Local 464A UFCW Welfare Reimbursement Plan,* 143 Fed. App'x 433, 436 (3rd Cir. 2005), quoted in *Specialty Surgery of Middletown v. Aetna, supra* n.50; *Pascack Valley Hospital, Inc. v. Local 464A UFCW Welfare Reimbursement Plan, supra* n.90 at 393, 400; *Hobbs v. Blue Cross Blue Shield, supra* n51; *Adventist Health System, Inc. v. Blue Cross Blue Shield of Florida, Inc., supra* n.51.

99. *Brown v. Sikora & Associates Inc.,* 2007 WL 1068241 (D.S.C. March 30, 2007).

100. *Brown v. Sikora & Associates, Inc.,* 311 Fed.App'x 568, 571 (4th Cir. 2008).

101. *Schrader v. Hamilton,* 959 F.Supp. 1205, 1212 (C.D. Cal. 1997); *Merriam v. Demoulas SuperMarket, Inc.,* 53 EBC 2526, 2012 WL 931347 (D. Mass. March 20, 2012).

102. *Clinical Partners, Inc. v. Guardian Life Insurance Company of America,* 1996 WL 294361 (E.D.N.Y. May 30, 1996).

103. *Protocare of Metropolitan New York v. Mutual Association Administration, Inc.,* 866 F.Supp. 757, 762 (S.D.N.Y. 1994).

104. *Id.* at fn.91.

105. *Simon v. Value Behavioral Health, Inc.,* 208 F.3d. 1073 (9th Cir. 2000).

106. *Id.* at 1081–1082.

107. *Tango Transport v. Healthcare Financial Services, LLC,* 322 F.3d 388 (5th Cir. 2003).

108. The US Court of Appeals for the Eleventh Circuit, which acknowledged the contrary view in *Simon* but followed *Tango Transport,* also cabined the decision by stating that "We need not decide whether all assignees or subassignees of plan participants have standing to sue." *Gables Ins. Co. v. Blue Cross and Blue Shield of Florida, supra* n.95.

109. *Hermann Hospital v MEBA Medical & Benefits Plan,* 845 F.2d 1286 (5th Cir. 1988).

110. *Tango Transport v. Healthcare Financial Services, LLC, supra* n.107.

111. *North Jersey Brain and Spine Center v, Aetna, supra* n.34; *I.V. Services of America, Inc. v. Inn Development and Management,* 182 F.3d 51 (1st Cir. 1999); *Connecticut State Dental Association v. Anthem Health Plans, Inc., supra* n.95; *Tango Transport, supra* n.107; *Cromwell v. Equicor–Equitable HCA Corp.,* 944 F.2d. 1272 (6th Cir. 1991); *Misc v. Building Services Employees Health & Welfare Trust,* 789 F.2d 1374, 1378–1379 (9th Cir. 1986) (*per curiam*).

112. *I.V. Services of America, Inc. v. Inn Development and Management, Inc.,* 7 F.Supp 2d 79 (D. Mass. 1998), *aff'd* 182 F.3d 51 (1st Cir. 1999).

113. *Id.* at 84.

114. *Connecticut State Dental Association v. Anthem Health Plans, Inc., supra* n.95.

115. *Care First Surgical Center v. IUWU-PMA Welfare Plan, supra* n.24; *Texas Life Accident and Hosp. Services Ins. Assn. v. Gaylord,* 105 F.3d 210, 215 (5th Cir. 1997) ("allowing derivative standing to assignees in breach of fiduciary duty claims does not frustrate ERISA's purposes"); *North Cypress Medical Center Operating Company v. MedSolutions, Inc.,* 2010 WL 4702298 (S.D. Texas November 10, 2010). *But see* Griffin v. Lockheed Martin Corp., 2016 WL 1397707 (11th Cir. April 11, 2016) (assignment of right to recover benefits did not provide for a claim for breach of fiduciary duty).

116. *CareFirst Surgical Center, supra* n.24; *Protocare of Metropolitan NewYork, Inc. v. Mutual Association Administrators, supra* n.103; *University of Tennessee William F. Bould Hospitals v. Walmart Stores,* 951 F.Supp. 724, 725, n.1 (W.D. Tenn.1996); *DeBartolo v. Blue Cross Blue Shield of Illinois,* 2001 WL 1403012 (N.D. Ill. November 9, 2001), and cases cited therein. *But see* Elite Center for Minimally Invasive Surgery, 2016 WL 6236238 (S.D. Tex. October 24, 2016) ("far from certain that Fifth Circuit would recognize an assignment of statutory rights to request information under 104(b)(4) or to pursue a claim for civil penalties under 502(c)" and *Quality Infirm Care, Inc v. Aetna Life Ins. Co.,* 2006 WL 3487248 (S.D. Tex. December 1, 2006).

117. *Romano Woods Dialysis Center v. Admiral Linen Service, Inc.,* 2014 WL 3533479 (S.D. Tex. July 15, 2014); *MidTown Surgical Center LLP v. Humana Health Plan of Texas, Inc.,* 2014 WL 1653085 (S.D. Tex. 2014).

118. *American Psychiatric Association v. Anthem, supra* n.1.

119. *Montefiore Medical Center v. Teamsters Local 272,* 642 F.3d 321 (2nd Cir. 2011).

120. *Id.* at 329.

121. *See, e.g., Special Surgery of Middletown v. Aetna, supra* n.50.

122. *Bilyeu v. Morgan Stanley Long Term Disability Plan,* 683 F.3d 1083, 1090 (9th Cir. 2012) (in an ERISA case, "[u]nlike constitutional standing which is jurisdictional, we presume that statutory standing may be waived"); *North Jersey Brain and Spine Center v. St. Peter's University Hospital,* 2013 WL 5366400 at *pg.7 (D.N.J. September 25, 2013) (plan waived its right to enforce an anti-assignment clause, so motion to dismiss for lack of standing is dismissed); *Care First Surgical Center, supra*. n.24 (finding defendant's argument that standing is jurisdictional and cannot be waived "unpersuasive.").

123. *Riverview Health Institute, LLC v. Medical Mutual of Ohio,* 601 F.3d 505, 521–522 (6th Cir. 2010); *Hermann Hospital v. MEBA Medical Benefits Plan, supra* n.109; *.Productive, M.D. LLC v. Aetna Health, Inc,* 969 F.Supp 2d. 901, 918–923 (M.D. Tenn. 2013); *North Jersey Brain and Spine Center v. St. Peters University Hospital, supra* n.122; *Gregory Surgical Services, LLC v. Horizon Blue Cross Blue Shield of New Jersey, Inc.,* 2007 WL 4570323 (D.N.J. December 26, 2007).