

# Fifth Circuit Holds Participants Lack Standing To Challenge Plan Investment Options

**Employee Benefits & Executive Compensation Blog** on August 5, 2021

The Fifth Circuit affirmed the dismissal, for lack of standing, of a fiduciary breach representative action against American Airlines and its 401(k) plan investment committee. *Ortiz v. American Airlines, Inc.*, No. 20-10817, 2021 WL 3030550 (5th Cir. July 19, 2021). As discussed in an [earlier post](#), two former American Airlines employees brought this suit in 2016 on behalf of the American Airlines 401(k) plan, alleging that the plan fiduciaries' investment decisions breached their fiduciary duties of loyalty and prudence and violated ERISA's prohibited transaction rules. In particular, plaintiffs alleged the defendants imprudently selected and retained a demand-deposit fund—sponsored and managed by American Airlines Federal Credit Union—as a plan investment option instead of a stable value fund, which had a higher rate of return. Both named plaintiffs invested in the credit union fund but did not invest in a stable value fund that was added to the plan's investment menu during the relevant statutory period.

Last year, a judge in the Northern District of Texas dismissed the case, holding that plaintiffs lacked Article III standing to pursue their claims. In so holding, the court explained that any harm from defendants' failure to offer a stable value fund was speculative since: (i) plaintiffs did not show they would have invested in a stable value fund had it been available to them; and (ii) even when it did become available, plaintiffs did not invest in it.

The Fifth Circuit agreed with the district court's conclusion that the plaintiffs lacked standing to bring their claims, but employed slightly different reasoning. At the outset, the Court rejected the application of a recent Supreme Court case, *Thole v. U.S. Bank N.A.*, 140 S. Ct. 1615 (2020), to the issue of whether plaintiffs suffered a cognizable injury for purposes of Article III standing. The Court wrote that the defendants could not rely on *Thole* to argue that plaintiffs did not suffer a concrete injury because the Supreme Court "explicitly drew a distinction" between the defined benefit plan at issue there—in which participants' entitlements to benefits are fixed independent of fiduciaries' investment decisions—and defined contribution plans such as the American Airlines 401(k) plan, in which participants' benefits are tied to their account value and thus to plan fiduciaries' investment decisions.

The Fifth Circuit's decision instead focused on the causation prong of the Article III standing analysis. Unlike the district court, the Court did not focus only on whether plaintiffs would have invested in a stable value offering if one was available, but on whether plaintiffs would have done so if, counterfactually, the plan never offered the demand-deposit option at all. Here, because plaintiffs did not transfer out of the demand-deposit fund even when a stable value option became available, the Court found it unlikely that plaintiffs would have invested in a stable value option even if the demand-deposit fund was *never* available. Accordingly, the Court held that to the extent plaintiffs suffered injuries, those injuries were caused by their own investment decisions and not by defendants.

#### Proskauer's Perspective

*Ortiz* is notable because it appears to be the first appellate court to consider whether *Thole's* holding applies in the defined contribution plan context. The decision is also notable for its causation analysis for purposes of determining Article III standing. This could prove to be significant in light of the Supreme Court's ruling in *CIGNA Corp. v. Amara*, 563 U.S. 421 (2011), which held that plaintiffs seeking plan reformation to remedy a misleading plan communication need not prove detrimental reliance on the communication. *Ortiz* suggests that, in spite of *Amara*, defendants may be able to effectively reinstate a detrimental reliance requirement by arguing that, in the absence of detrimental reliance, there is no showing of causation and harm sufficient to satisfy constitutional standing requirements.

[View Original](#)

**Related Professionals**

---

- **Myron D. Rumeld**  
Partner
- **Sydney L. Juliano**  
Associate