

**Labor and Employment Law—Distinction Between Damages and Benefits Allowed for Past Employees Under ERISA Claim for Fiduciary Breaches—*Evans v. Akers*, 534 F.3d 65 (1st Cir. 2008)**

Congress passed the Employee Retirement Income Security Act (ERISA) as a means to govern employee-benefit plans.<sup>1</sup> ERISA provides a cause of action to plan participants whose vested benefits were miscalculated or reduced by alleged employer misconduct.<sup>2</sup> In *Evans v. Akers*,<sup>3</sup> the Court of Appeals for the First Circuit considered whether former employees have standing to sue their employer under ERISA for alleged fiduciary breaches that decreased the value of their retirement benefits account.<sup>4</sup> The court determined that the former employees had standing to sue under ERISA because their claim was for benefits, not extra contractual damages.<sup>5</sup>

While employed at W.R. Grace Co. (Grace), Keri Evans and Timothy Whipps individually participated in Grace’s defined contribution retirement plan (Plan) into which both the employees and Grace made contributions.<sup>6</sup> Grace policy allowed employees to direct the investments made from their contributions; however, all company contributions were automatically invested in the Grace Common Stock Fund (Fund).<sup>7</sup> In January 2001, Plan administrators stopped investing employer contributions into the Fund due to mounting financial pressures and falling Grace stock prices.<sup>8</sup> In April 2003, the

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1. See generally Employee Retirement Income Security Act (ERISA) §§ 2-4402, 29 U.S.C. §§ 1001–1461 (2000). ERISA protects employee benefit plans and pensions by setting forth certain general fiduciary duties regarding management and administration. *Id.*

2. See 29 U.S.C. §§ 1109, 1132 (2000) (describing civil enforcement of liabilities under ERISA).

3. 534 F.3d 65 (1st Cir. 2008).

4. See *Evans v. Akers*, 534 F.3d 65, 67 (1st Cir. 2008). Fiduciaries include those administrators who exercise discretionary authority or control over the disposition, administration, and management of the plan. See 29 U.S.C. § 1002(21)(A) (2000) (defining persons considered fiduciaries); Lori G. Feldman, *Class Actions Involving ERISA and Subprime Claims*, A.L.I.-A.B.A. 231, 234-35 (2008) (enumerating fiduciary duties under ERISA).

5. See 534 F.3d at 73, 76 (concluding claims for extra-contractual damages outside scope of ERISA).

6. *Evans v. Akers*, 466 F. Supp. 2d 371, 373 (D. Mass. 2006) (introducing details of “W.R. Grace & Co. Savings and Investment Plan”), *rev’d*, 534 F.3d 65, 76 (1st Cir. 2008). The Plan complied with the definition of an “individual account plan” or “defined contribution plan” under ERISA. See 29 U.S.C. § 1002(34); 534 F.3d at 67-68 (setting forth plan conditions). Under such plans, the amount of a participant’s pension is the balance of his or her individual account, which is directly dependent on the performance of the investments that Plan administrators made with the contributions. See 29 U.S.C. § 1002(34) (2000) (providing definition of defined contribution plan). An employee’s benefits are “based solely upon the amount contributed to the participant’s account, and any income, expenses, gains and losses.” *Id.*

7. 534 F.3d at 68 (describing distribution of contributions). The Plan offered a “menu of investment options” for employees to choose from, including the Fund. *Id.* The Fund itself consisted mainly of Grace stock. *Id.* According to Fund rules, employees could not transfer any of Grace’s Fund contributions to other investment options until they reached the age of fifty. *Id.*

8. *Id.* (highlighting decline of Grace stock as reason Plan stopped investing employer contributions in

Fund stopped accepting new contributions from any source; however, Grace did not redirect past Fund contributions into other investments unless the participants specifically changed their investment preferences.<sup>9</sup> Approximately one year later, Plan administrators, acting in their fiduciary capacity, announced that any further investment in Grace stock was “clearly imprudent,” and they subsequently dissolved the Fund.<sup>10</sup>

Evans and Whipps terminated their employment with Grace in 2001 and 2002, respectively, each receiving lump-sum distributions from their Plan accounts.<sup>11</sup> When the Fund dissolved, Evans and Whipps filed a class-action suit (the Evans Action) against the Plan administrators, alleging that they had breached their duties of loyalty and care, particularly with regard to the Plan’s significant holding of Grace stock.<sup>12</sup> Evans and Whipps claimed that the large investment in Grace stock caused the value of their individual accounts to be less than it would have been had the administrators invested in more prudent funds.<sup>13</sup> The employees based their claim on ERISA, which permits retirement-fund participants to sue plan administrators for any breach of fiduciary duty.<sup>14</sup>

The district court dismissed the Evans action, finding the plaintiffs were not “participants” with standing to bring suit.<sup>15</sup> The court determined that Evans

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Fund). Employees were still able to choose the Fund as an investment option. *Evans v. Akers*, 466 F. Supp. 2d 371, 374 (D. Mass. 2006), *rev’d*, 534 F.3d 65 (1st Cir. 2008). Employees were not advised to move their savings out of the Fund and into other investments. *Id.*

9. *See* 534 F.3d at 68 (noting Grace filed for bankruptcy protection fifteen days prior to decision to close fund).

10. *Id.* (tracing Fund’s dissolution).

11. *Id.* at 67 (describing plaintiff’s termination of employment). In defined contribution plans, benefit levels are based upon the total of accumulated monies in each participant’s individual account at the termination of employment; however, in a defined benefit plan, benefits are determined by adherence to a formula written into the plan instrument. *See* Regina L. Readling, Comment, *Rethinking “The Plan”: Why ERISA Section 502(A)(2) Should Allow Recovery to Individual Defined Contribution Pension Plan Accounts*, 56 BUFF. L. REV. 315, 320-22 (2008) (describing difference between defined benefit plans and defined contribution plans).

12. *Evans v. Akers*, 466 F. Supp. 2d 371, 374 (D. Mass. 2006) (outlining plaintiff’s causes of action), *rev’d*, 534 F.3d 65 (1st Cir. 2008). The complaint specifically alleged that the Plan administrators breached their fiduciary duties by (1) continuing to offer Grace stock as a Plan investment option, (2) utilizing Grace securities for employer contributions to the Plan, and (3) maintaining the Plan’s deep investment in Grace securities even though the stock was no longer considered a prudent investment. *Id.*

13. *See* 534 F.3d at 71 (elaborating upon employee’s claims against former employer).

14. *See id.* at 68 (naming ERISA as source for plaintiff’s cause of action); *see also* 29 U.S.C. § 1109 (2000) (describing fiduciary liability for breach of responsibilities); 29 U.S.C. § 1132(a) (2000) (entitling Secretary of Labor, or participant, beneficiary, or fiduciary to bring civil action). The *Evans* action was partially consolidated with another suit challenging the actions of Plan fiduciaries (the Bunch action). *See* 534 F.3d at 68 (clarifying separate intentions of the consolidated cases). The Bunch action asserted a claim against different fiduciaries and based its action on the theory that those fiduciaries had imprudently eliminated Grace stock from the Plan. *See id.* It is notable that the First Circuit did not differentiate between the seemingly contradictory claims in determining whether each group of plaintiffs had a colorable claim for benefits. *Id.*; *see also infra* note 18 (discussing First Circuit’s interpretation of the consolidation).

15. *See Evans v. Akers*, 466 F. Supp. 3d 371, 377-78 (D. Mass. 2006) (rejecting plaintiff’s “expansive”

and Whipps were not “participants” under *Firestone Tire & Rubber Co. v. Bruch*<sup>16</sup> because they were bringing a claim for damages, as opposed to vested benefits; therefore, they had no standing under ERISA.<sup>17</sup> The First Circuit, however, concluded that Evans and Whipps were participants with standing to sue under ERISA and remanded the case for further proceedings.<sup>18</sup> The First Circuit held that former employees who allege that fiduciary breaches reduced their retirement plan lump-sum distributions retain standing to sue as “participants” under ERISA.<sup>19</sup>

Congress passed ERISA to protect the interests of participants in employment benefit plans by codifying traditional fiduciary standards of conduct for plan administrators and by providing a remedial structure for breaches of those standards.<sup>20</sup> In order to combat previous abuses of discretion

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approach to standing), *rev'd*, 534 F.3d 65 (1st Cir. 2008). Evans and Whipps based their arguments on the Supreme Court’s interpretation of “participant” in *Firestone Tire & Rubber Co. v. Bruch*. See *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 117 (1989) (allowing former employees participant status); *Evans v. Akers*, 466 F. Supp. 2d 375-76, *rev'd*, 534 F.3d 65 (1st Cir. 2008).

16. 489 U.S. 101 (1989) (interpreting term “participant” in context of ERISA). In *Firestone* the Supreme Court interpreted the term “participant” to include an employee or former employee with either “a reasonable expectation of returning to covered employment” or “a colorable claim to vested benefits.” See *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 117 (1989) (quoting *Saladino v. I.L.G.W.U. Nat’l Ret. Fund*, 754 F.2d 473, 476 (2d Cir. 1985)). The Supreme Court further concluded that former employees who did not have a “reasonable expectation of returning to covered employment” or a “colorable claim to vested benefits” did not fit within the definition of a participant. *Id.* at 118 (citing *Saladino v. I.L.G.W.U. Nat’l Ret. Fund*, 754 F.2d 473, 476 (2d Cir. 1995)).

17. See *Evans v. Akers*, 466 F. Supp. 2d 371, 378 (D. Mass. 2006) (concluding plaintiffs lacked standing), *rev'd*, 534 F.3d 65 (1st Cir. 2008). In *Evans*, the District Court for the District of Massachusetts decided that *Vartanian v. Monsanto Co.* created a narrow exception to *Firestone*’s definition of “participant” for former employees who would have still been part of their benefit plans but for their employer’s malfeasance. See *Evans v. Akers*, 466 F. Supp. 2d 371, 376 (D. Mass. 2006), *rev'd*, 534 F.3d 65 (1st Cir. 2008); *Vartanian v. Monsanto Co.* 14 F.3d 697,702 (1st Cir. 1994) (opening participant class to employees affected by employer misconduct). The court found that Evans and Whipps did not fit into the narrow exception created by *Vartanian* and determined that they would be “subject to the general rule that former employees, who have received the full benefits to which plan documents entitled them, cannot be participants of a plan.” See *Evans v. Akers*, 466 F. Supp. 2d 371, 376 (D. Mass. 2006) (quoting *LaLonde v. Textron, Inc.*, 418 F. Supp. 2d 16, 19-20 (D.R.I. 2006)), *rev'd*, 534 F.3d 65 (1st Cir. 2008). Utilizing the second test from *Firestone*, the court determined Evans and Whipps did not have a colorable claim to vested benefits because they had already received all of the money that was in their individual accounts. See *Evans v. Akers*, 466 F. Supp. 2d 371, 367-77 (D. Mass. 2006), *rev'd*, 534 F.3d 65 (1st Cir. 2008). Because Evans and Whipps claimed that they were entitled to more than what they had received, the court reasoned that their claim must be beyond the amount specified by the plan as benefits and therefore must be defined as damages. See *id.* at 377-78.

18. 534 F.3d at 76 (concluding plaintiffs have standing under ERISA). On appeal, Grace argued that the plaintiffs could not appeal the dismissal because the district court had consolidated the Evans and Bunch matters. See 28 U.S.C. § 1291 (2000) (defining appeals court’s jurisdiction); 534 F.3d at 69 (presenting defendant’s argument). The First Circuit rejected Grace’s argument, reasoning that the district court consolidated the two cases for the purpose of judicial efficiency and not “for all purposes”; therefore, dismissal of one of the consolidated cases is a final appealable judgment. See 534 F.3d at 69; *Global Naps, Inc. v. Verizon New England, Inc.*, 396 F.3d 16, 22 (1st Cir. 2005) (utilizing principle behind consolidation to allow appeal).

19. 534 F.3d at 67 (describing conclusion of First Circuit).

20. See 29 U.S.C. § 1132 (2000); H.R. REP. NO. 93-533, at 11 (1973), as reprinted in 1974 U.S.C.C.A.N.

by plan administrators, Congress instituted three specific fiduciary duties: the duty of loyalty, the duty to act for the “exclusive purpose” of providing benefits to plan beneficiaries, and the duty to exercise the “care, skill, prudence and diligence” of a “prudent man acting in a like capacity.”<sup>21</sup> ERISA empowers the Secretary of Labor, plan participants, plan beneficiaries, and plan fiduciaries to bring a civil class-action suit in the name of the plan for breach of any of these fiduciary responsibilities.<sup>22</sup>

Close to ten years after Congress passed ERISA, the Supreme Court decided *Massachusetts Mutual Life Insurance v. Russell*,<sup>23</sup> where it clarified the scope of lawsuits that participants could bring against plan fiduciaries.<sup>24</sup> The Court concluded that ERISA was not designed as a means for plaintiffs to sue for damages above and beyond what was articulated by their plan as a benefit, reasoning that the statute contains its own comprehensive and integrated scheme for relief.<sup>25</sup> In the pivotal case of *Firestone Tire & Rubber Co. v.*

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4639, 4639-40; JOSEPH R. SIMONE & STEFANIE KASTRINSKY, *Fiduciary Responsibility and Prohibited Transactions Under ERISA*, PRAC. LAW INST. 33, 37 (2008) (providing historical background of ERISA). Congress first attempted to reduce suspect practices surrounding employee benefit plans by enacting the Welfare Pension Plans Disclosure Act (WPPDA). Melissa Elaine Stover, Note, *Maintaining ERISA's Balance: The Fundamental Business Decision v. the Affirmative Fiduciary Duty to Disclose Proposed Changes*, 58 WASH. & LEE L. REV. 689, 694-96 (describing pre-ERISA attempts to regulate employee benefit plans). The WPPDA created a framework for providing plan participants with detailed information about their plans; however, it did not create a remedial structure to enforce the benefits. *See id.*

21. *See* 29 U.S.C. 1104(a)(1) (2000) (requiring fiduciary to discharge duties solely in interest of beneficiary). Instead of explicitly enumerating all of the powers and obligations of a plan fiduciary, Congress drew upon the well-developed fiduciary standards found in the common law of trusts to define the scope of fiduciary authority and responsibilities under ERISA. *See* *Varity Corp. v. Howe*, 516 U.S. 489, 496 (1996) (illuminating codification of trust principals). “The fiduciary responsibility section [of ERISA], in essence, codifies and makes applicable to these fiduciaries certain principles developed in the evolution of the law of trusts.” H.R. REP. NO. 93-533, at 11 (1973), *as reprinted in* 1974 U.S.C.C.A.N. 4639, 4649. For example, plan administrators hold employer and participant contributions for the benefit of the participants and he or she is expected to manage those assets with the same deference to the duties of prudence and loyalty as a trustee would under a common-law trust. *See* 29 U.S.C. § 1104(a)(1)(B) (2000) (establishing prudent-man standard of care for plan fiduciaries).

22. *See* 29 U.S.C. §§ 1109, 1132(a)(1)-(2) (2000) (describing ERISA claimants and potential breaches); *see also* 29 U.S.C. § 1002(7)-(8), (21)(A) (2000) (defining “participant,” “beneficiary,” and “fiduciary”). *See generally* 29 U.S.C. §§ 1109, 1132 (2000) (codifying process for bringing suit for breach of fiduciary duties). The statute requires that the plan administrator distribute any damages recovered to the plan itself as opposed to the individual plaintiff. *See* 29 U.S.C. § 1109(a) (2000) (restricting recovery to the plan itself). The Court in *Massachusetts Mutual Life Insurance Co. v. Russell* determined that the drafters of the statute were primarily concerned with stemming possible misuses of plan assets and with shaping remedies that would protect the plan as a whole, rather than with protecting the rights of individual beneficiaries. *See* *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 142 (1985).

23. 473 U.S. 134 (1985).

24. *See* 29 U.S.C. § 1132(a) (2000) (defining plaintiffs entitled to bring civil action); *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 144 (1985) (noting support for providing private right of action for compensatory or punitive relief); *see also* Roy F. Harmon, III, *Equitable Relief Claims Under ERISA Section 502(a)(3)*, 20 BENEFITS L.J. 33, 34-38 (2007) (providing historical review of Supreme Court cases addressing ERISA).

25. *See* *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 146-47 (1985) (demonstrating lack of congressional intent to authorize additional remedies). The Court further held that judicial interference, such as allowing for extra-contractual damages, should be minimal. *Id.* The Court’s determination that the ERISA was

*Bruch*,<sup>26</sup> the Supreme Court expanded the scope of eligible plaintiffs by determining that a “participant” includes those “former employees who have . . . a colorable claim to vested benefits.”<sup>27</sup> Even after *Firestone*,<sup>28</sup> many jurisdictions held that once an employee had received a lump-sum distribution of benefits, he or she no longer had a colorable claim and therefore no longer had standing to sue as a participant.<sup>29</sup> Exceptions to this rationale emerged, such as in *Vartanian v. Monsanto*<sup>30</sup> wherein the First Circuit determined that an employee who was deliberately misinformed by his employer regarding his retirement plan had standing to sue under ERISA even though he had already taken a lump-sum distribution of his benefits.<sup>31</sup> The court reasoned that employees have participant status if they can prove that they would have been entitled to greater benefits had the employer not breached its fiduciary duty.<sup>32</sup>

The federal circuit courts are currently considering whether recovery for fiduciary breaches in cases where a participant has already taken a lump-sum distribution of his defined contribution plan can be considered a “vested benefit” as defined in *Firestone*.<sup>33</sup> As discussed above, plaintiffs can seek restitution for vested benefits they should be entitled to under their retirement plan, but cannot use ERISA as a framework for seeking other damages such as extra-contractual relief.<sup>34</sup> Three jurisdictions, including the Sixth Circuit in

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integrated and comprehensive legislation requiring little amplification by the judiciary set the tone for future interpretation of the statute. *Id.* at 148; *see also* *Gulf Life Ins. Co. v. Arnold*, 809 F.2d 1520, 1524 (11th Cir. 1987) (collecting cases limiting actions under ERISA to parties and actions specifically enumerated in statute).

26. 489 U.S. 101 (1989).

27. *See Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 117 (1989) (quoting *Saladino v. I.L.G.W.V. Nat'l Ret. Fund*, 754 F.2d 473, 476 (2d Cir. 1985) and *Kuntz v. Reese*, 785 F.2d 1410, 1411 (9th Cir. 1986) (per curiam)) (defining participant under ERISA § 1132). The Court also reasoned that a currently covered employee or a former employee who has a reasonable expectation of returning to covered employment is also a “participant” under ERISA. *Saladino v. I.L.G.W.V. Nat'l Ret. Fund*, 754 F.2d 473, 476 (2d Cir. 1985).

28. 489 U.S. 101 (1989).

29. *See Raymond v. Mobil Oil Corp.*, 983 F.2d 1528, 1535-36 (10th Cir. 1993) (enumerating cases holding plaintiffs who received lump-sum payments were not participants).

30. 14 F.3d 697 (1st Cir. 1994).

31. *See Vartanian v. Monsanto Co.*, 14 F.3d 697, 702-03 (1st Cir. 1994).

32. *Vartanian v. Monsanto Co.*, 14 F.3d 697, 699 (1st Cir. 1994) (discussing plaintiff's standing to sue for breach of fiduciary duty). Soon after *Vartanian*, the First Circuit revisited a similar issue involving employer misconduct in *Crawford v. Lamantia*; however, the court denied the plaintiff's ERISA standing by making the distinction that the fiduciary breach must have a direct effect on the plaintiff's benefits in order for him or her to have standing as a “participant.” *See Crawford v. Lamantia*, 34 F.3d 28, 33 (1st Cir. 1994) (concluding fiduciary breaches directly affecting benefits create valid standing).

33. *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989); *see, e.g., Bridges v. Am. Elec. Power Co.*, 498 F.3d 442, 445 (6th Cir. 2007) (allowing participant status even though employee had sold plan holdings); *Graden v. Conexant Sys. Inc.*, 496 F.3d 291, 294 (3d Cir. 2007) (characterizing cashed-out employee as participant); *Harzewski v. Guidant Corp.*, 489 F.3d 799, 804 (7th Cir. 2007) (allowing former cashed-out employees participant status for benefit claim).

34. *See supra* note 25 and accompanying text (describing prior court's rejection of extra-contractual damages under ERISA); *see, e.g., Fraser v. Lintas*, 56 F.3d 722, 725 (6th Cir. 1995) (declining to allow participant status in claim for failure to advise of tax consequences); *Reinking v. Phila. Am. Life Ins. Co.*, 910 F.2d 1210, 1220 (4th Cir. 1990) (refusing to allow participant status for claim of emotional distress stemming

*Bridges v. American Electric*,<sup>35</sup> the Third Circuit in *Graden v. Coexant*,<sup>36</sup> and the Seventh Circuit in *Harzewski v. Guidant*,<sup>37</sup> have concluded that these former employees have standing to sue as participants because they are making a colorable claim for vested benefits.<sup>38</sup>

In *Evans v. Akers*, the First Circuit concurred with its sister circuits, determining that a participant who took a lump-sum distribution of his or her defined contribution benefit plan may sue for benefits he or she would have received had the administrators of the plan not breached their fiduciary duties.<sup>39</sup> While the district court agreed with Grace's argument that Evans and Whipps were stating a claim for damages instead of benefits, the First Circuit concluded that legislative intent allows claims for additional plan benefits even though monetary damages for extra-contractual relief are not supported under ERISA.<sup>40</sup> The First Circuit reasoned that the full benefit Evans and Whipps were entitled to was the value of their accounts "unencumbered by any fiduciary impropriety" and that their participant status was therefore based on the plan administrator's failure to remove plan assets from the failing Fund which allegedly reduced their account values.<sup>41</sup>

The First Circuit rejected Grace's four arguments supporting the district court's conclusion that Evans and Whipps were making a claim for damages as opposed to benefits because they did not fall within the exception to *Firestone* found in *Vartanian*.<sup>42</sup> First, the court refused to distinguish between suits for benefits and those for money damages, reasoning that money damages can represent additional plan benefits.<sup>43</sup> Second, the court dismissed Grace's

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from alleged plan failure); *Sommers Drug Stores Co. Employee Profit Sharing Trust v. Corrigan*, 883 F.2d 345, 349-50 (5th Cir. 1989) (distinguishing "benefits" from "damages").

35. 498 F.3d 442 (6th Cir. 2007).

36. 496 F.3d 291 (3d Cir. 2007).

37. 489 F.3d 799 (7th Cir. 2007).

38. See *Bridges v. Am. Elec. Power Co., Inc.*, 498 F.3d 442, 445 (6th Cir. 2007) (defining colorable claim to benefits as full receipt of plan benefit); *Graden v. Conexant Sys. Inc.*, 496 F.3d 291, 297 (3d Cir. 2007) (declaring claim alleging account's value reduction due to fiduciary mismanagement as valid); *Harzewski v. Guidant Corp.*, 489 F.3d 799, 804 (7th Cir. 2007) (determining judgment for plan benefits valid participant claim).

39. 534 F.3d at 76 (concurring with Third, Sixth, and Seventh Circuits).

40. See *id.* at 73-74 (supporting plaintiff's claim for additional benefits as opposed to damages); *Vartanian v. Monsanto Co.*, 14 F.3d 697, 702 (1st Cir. 1994) (observing intent to construe ERISA broadly to facilitate enforcement of remedial provisions).

41. See 534 F.3d at 70 (establishing plan benefits as including entitlement to prudent management); see also *Graden v. Conexant Sys. Inc.*, 496 F.3d 291, 297 (3d Cir. 2007) (defining participant benefits as account balance absent fiduciary impropriety).

42. See 534 F.3d at 72-75 (discussing appellee's arguments distinguishing damages from benefits); see also *supra* note 17 (discussing *Vartanian* exception to *Firestone*).

43. See *id.* at 72-73 (disallowing appellee's distinction between "benefits" and "money damages"). Grace argued that a suit brought under ERISA § 502(a)(2), which allows participants to recover for fiduciary breaches, is really an action for damages, whereas a suit brought under ERISA § 502(a)(1)(B), which permits parties to bring suit "to recover benefits due to him under the terms of his plan," is the only claim for benefits. See 29 U.S.C. §§ 1132(a)(1)(B), 1132(a)(2) (2000); 534 F.3d at 71. The court refused to draw a bright line

argument that the recovery sought by the plaintiffs was too speculative to be considered damages by noting that Evans and Whipps were only required to state a “colorable” claim for benefits, the precise amount of which could be easily ascertained at a later date.<sup>44</sup> Third, the court held that Evans and Whipps had presented a concrete injury redressible by a court because any recovery they made would be distributed by the plan administrators to all individual accounts injured by the breach.<sup>45</sup> Finally, the court quelled Grace’s concern that adopting a broad view of the term “participants” would require costly disclosures to every former employee by suggesting that only those asserting a colorable claim would be entitled to such disclosures.<sup>46</sup> In sum, the First Circuit found that Evans’s and Whipps’s claim for the full benefit payment due to them was colorable and therefore granted them standing as participants to sue under ERISA.<sup>47</sup>

The First Circuit correctly dismissed the strained distinction made by other courts regarding the difference between damages and benefits.<sup>48</sup> The court agreed with the Seventh Circuit in concluding that the true distinction should be made between suits seeking “relief to which a participant is entitled under ERISA and relief which is not authorized by that Act.”<sup>49</sup> ERISA clearly entitles a participant to the full amount of his or her benefit plan encumbered by fiduciary mismanagement.<sup>50</sup> Normal investment gains or losses are to be anticipated; however, the plan administrator’s fiduciary duty to invest prudently will insulate participants from extreme losses.<sup>51</sup> The First Circuit correctly concluded that when a fund diminishes in value due to fiduciary improprieties, a suit is not one for extra-contractual damages, but instead for recovery of what was originally owed to the participants as a plan benefit.<sup>52</sup> This important

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between suits brought under the two sections, noting that under either section, the underlying nature of the plaintiff’s claim is for benefits. 534 F.3d at 73. The court reasoned that while both are used as a remedy to recover benefits, use of § 502(a)(1)(B) would force fiduciaries to use money already allocated to others’ accounts as a means of compensating the injured parties, bringing a host of difficulties not found when using § 502(a)(1). *Id.* at 72-73.

44. *See* 534 F.3d at 74 (discussing ERISA’s lack of liquidated damage requirement).

45. *See id.* at 74-75 (holding ERISA’s duty of care requires allocation of recovered benefits to individual accounts).

46. *See id.* at 75 (evaluating increase in administration costs based on mandated disclosure to participants).

47. *See id.* at 76 (summarizing court’s holding).

48. *See* 534 F.3d at 73 (invalidating distinction between benefits and damages); *Sommers Drug Stores Co. Employee Profit Sharing Trust v. Corrigan*, 883 F.2d 345, 349-50 (5th Cir. 1989) (distinguishing between “benefits” and “damages”).

49. *See* 534 F.3d at 83 (allowing claim for authorized benefits); *Harzewski v. Guidant Corp.*, 489 F.3d 799, 804 (7th Cir. 2007) (disallowing relief under ERISA for non-contractual damages).

50. *See* *Graden v. Conexant Sys. Inc.*, 496 F.3d 291, 297 (3d Cir. 2007) (holding ERISA entitles participant to what should be in account absent fiduciary misconduct).

51. *See* 29 U.S.C. 1104(a) (2000) (describing fiduciary prudent-man standard of care); 534 F.3d at 70-71 (defining “benefit” as contemplated in ERISA).

52. *See* 534 F.3d at 70-71 (allowing fiduciary breach as cause for reduction of benefits).

distinction allows for employees to recover what is due to them without running into the Supreme Court's refusal to allow suits under ERISA for "damages."<sup>53</sup>

The court prudently rejected Grace's argument that even if Evans and Whipps were successful in their suit, the plan administrator could distribute the recovery at his or her discretion, thereby eliminating Evans's and Whipps's remedy and constitutional standing.<sup>54</sup> Constitutional standing to bring suit must be based upon a concrete injury that is redressible by the court.<sup>55</sup> Grace's argument that Evans and Whipps had no judicial remedy could have been correct in the context of a defined benefit plan where, hypothetically, the fiduciary has one large account to manage and may choose not to distribute recovery by the plan to former employees.<sup>56</sup> As the court correctly noted, however, in a defined contribution plan, the plan administrator manages an individual account for each participant and therefore has a fiduciary duty to distribute recovery to each account that suffered actual injury, thereby creating a remedy for participants such as Evans and Whipps.<sup>57</sup> The court rightly agreed with its sister circuits that former employees have constitutional as well as statutory standing to sue.<sup>58</sup>

In a final statement, the First Circuit made its own pronouncement regarding the importance of allowing former employees to make claims against plan fiduciaries under ERISA.<sup>59</sup> It is possible that if former employees were unable to make such claims, employers may be tempted to conceal any fiduciary breaches until the affected employee had been terminated or had taken his or her lump-sum distribution.<sup>60</sup> The court was prudent in determining that Congress did not intend such unjust results.<sup>61</sup> In making the determination that former employees have the same rights to pursue remedies under ERISA as current employees, the First Circuit has strengthened the employee protections intended by ERISA's drafters.<sup>62</sup>

In *Evans v. Akers*, the First Circuit considered whether former employees who took lump-sum distributions of their retirement benefits had standing to

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53. See *id.* at 73 (describing potential overlap between money damages and entitled benefits).

54. See *id.* at 74 (allowing allegation of fiduciary mismanagement as colorable claim).

55. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (articulating three-part test for constitutional standing).

56. Cf. *Reading*, *supra* note 11, at 317 (explaining defined-contribution plans provide individual accounts and inferring defined-benefit plans do not).

57. 534 F.3d at 74.

58. See *id.* at 75 (refusing to draw arbitrary distinctions between current and former employees); *Graden v. Conexant Sys. Inc.*, 496 F.3d 291, 295 (3d Cir. 2007) (distinguishing constitutional and statutory standing); *Harzewski v. Guidant Corp.*, 489 F.3d 799, 803 (7th Cir. 2007) (finding ERISA plaintiffs meet statutory and constitutional standing requirements).

59. See 534 F.3d at 75 (upholding ERISA framework by providing standing to former employees).

60. See *id.* (upholding rationale discouraging employers from keeping fiduciary breaches secret).

61. See *id.* (recognizing benefit in supporting employee's rights).

62. See *id.*

sue under ERISA for alleged fiduciary breaches by their plan administrators. The facts of this case and holdings of other circuits supported the court's determination that wronged former employees were entitled to bring actions against their prior plan administrators. The court further strengthened precedent in its support of the right of every employee to his or her full plan benefit. The court's analysis will aid in curbing employers' questionable motives in hiding possible fiduciary breaches until the affected employees are terminated or cashed out from their plans and will support the rights of all employees invested in defined contribution retirement plans.

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