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Standards of review vary for an ERISA civil action

A recent federal court opinion issued by a court in Oklahoma addressed an issue of basic federal civil procedure applicable to ERISA cases — are such cases decided based on the parties' submission of briefs and the underlying "administrative record" or should the court issue a standard scheduling order providing for an evidentiary hearing or bench trial as sought by the plaintiff?

In *Remer v. Hartford Life and Accident Insurance Co.*, 2014 U.S.Dist.LEXIS 178300 (N.D. Okla. Dec. 30, 2014), Jim Lee Remer, a former American Airlines employee, sought disability benefits under a policy covering members of the Transport Workers Union of America. Remer's claim was denied, and when his appeal was unsuccessful, he filed suit seeking an evidentiary hearing and trial based on the Supreme Court's decision in *Kappos v. Hyatt*, 132 S.Ct. 1690 (2012). The plaintiff alleged that the ruling in *Kappos*, which analyzed the nature of a federal "civil action," entitled him to a trial.

The Employee Retirement Income Security Act empowers aggrieved benefit claimants to "bring a civil action" to recover benefits due. 29 U.S.C. Section 1132(a)(1)(B). However, the statute does not expressly indicate what evidence may be presented to the court in such a proceeding.

The 10th U.S. Circuit Court of Appeals has consistently ruled that ERISA litigation entails a court's review of an "administrative record" — i.e., "the materials compiled by the administrator in the course of making his decision" (citing *Foster v. PPG Industries Inc.*, 693 F.3d 1226, 1231 (10th Cir. 2012), and *Bigley v. CIBER Inc. Long Term Disability Coverage*, 570 F. App'x 756, 761 (10th Cir. 2014) (rejecting plaintiff's argument that she was entitled to a "bench trial on the merits so that she could present evidence")).

The court examined the *Kappos* ruling, which addressed the nature of a proceeding challenging the denial of a patent application. The Supreme Court held that the civil action authorized by 35 U.S.C. Section 145 contains no limitations on a patent applicant's ability to present evidence beyond the limitations of the Federal Rules of Civil Procedure and the Federal Rules of Evidence.

The court further ruled that "if new evidence is presented on a disputed question of fact, the district court must make de novo factual findings that take account of both the new evidence and the administrative record before the PTO." 132 S.Ct. at 1700-01.

The plaintiff argued that *Kappos* compels a similar procedure with respect to ERISA claims. The court disagreed.

First, the district court found that *Kappos* could not be extended beyond its applicability to Section 145 of the Patent Act. The court also expressed concern that extending *Kappos* to ERISA cases "would work a drastic change in long-standing procedures."

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The court further noted that the 10th Circuit had issued rulings subsequent to *Kappos* that failed to adopt that ruling and that since *Kappos*, the 10th Circuit had issued two non-precedential rulings explicitly holding that claimants in ERISA cases are barred from presenting evidence outside the administrative record. Finally, the court pointed out that no other ruling had extended *Kappos* to ERISA cases. Therefore, the court declined to do so in this case.

Contrary to the conclusion reached here, Congress' authorization of benefit claimants' right to bring a civil action under ERISA supports the applicability of *Kappos* to ERISA litigation. The Federal Rules of Civil Procedure explicitly provide in Rule 2: "There is one form of action — the civil action." And Rule 1 pronounces the applicability of the rules to "all civil actions and proceedings in the United States district courts" without any exclusion for ERISA cases.

Nor is *Kappos* the only Supreme Court case defining the nature of the civil action. In *Chandler v. Roudebush*, 425 U.S. 840 (1976), the Supreme Court resolved a circuit split on the issue and held that discrimination claims brought by federal employees pursuant to Section 717(c) of the Civil Rights Act invoked plenary trial procedures.

"Nothing in the legislative history," the court observed, "indicates that the federal-sector 'civil action' was to have this chameleon-like character, providing fragmentary de novo consideration of discrimination claims where 'appropriate' and otherwise providing record review."

The court added that when Congress "intends review to be confined to the administrative record, it so indicates, either expressly or by use of a term like 'substantial evidence,' which has become a term of art to describe the basis on which an administrative record is to be judged by a reviewing court." 425 U.S. at 862 n.37.

The ERISA statute lacks any terminology implying administrative review. Quite the contrary; ERISA's legislative history explains that actions brought under 29 U.S.C. Section 1132(a) "are to be regarded as arising under the laws of the United States in similar fashion to those brought under section 301 of the Labor-Management Relations Act of 1947." H.R. Conf. Rep. 93-1280, 93d Cong., 2d Sess. 327 (1974). Such actions provide for plenary hearings and even jury trials, according to *Chauffeurs, Teamsters and Helpers, Local No. 391 v. Terry*, 494 U.S. 558 (1990).

The 7th Circuit stands alone in recognizing that ERISA claims adjudicated under the de novo standard require trials. In *Krolnik v. Prudential Insurance Company of America*, 570 F.3d 841, 843 (7th Cir. 2009), the court ruled that where evidence conflicts, "there must be a trial," although the court maintained that where the adjudication standard is deferential, a record review proceeding remains appropriate.

Ultimately, the Supreme Court will need to address this issue — and even consider whether review proceedings are proper regardless of the standard of review, since the provenance of utilizing administrative law procedures in any ERISA action is itself questionable. But in the meantime, it is evident that litigants are finally recognizing the quagmire into which ERISA litigation has sunk and are challenging the status quo.

WORKPLACE ISSUES

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