

A CRITICAL APPRAISAL OF THE CURRENT STATE OF  
ERISA CIVIL PROCEDURE – AN EXAMINATION OF HOW  
COURTS TREAT “CIVIL ACTIONS” BROUGHT UNDER THE  
EMPLOYEE RETIREMENT INCOME SECURITY ACT

BY  
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## I. INTRODUCTION

The Employee Retirement Income Security Act of 1974 (ERISA)<sup>1</sup> authorizes an aggrieved claimant to bring a “civil action” to recover benefits due under the terms of an employee benefit plan.<sup>2</sup> Despite the explicit language of Rule 2 of the Federal Rules of Civil Procedure, stating, “There is one form of action – the civil action,”<sup>3</sup> and notwithstanding the applicability of Rule 1 to “all civil actions and proceedings in the United States district courts, except as stated in Rule 81,”<sup>4</sup> ERISA cases are uniquely adjudicated using procedures that deviate markedly from the Federal Rules of Civil Procedure. Surprisingly, since the Supreme Court has defined the meaning of “civil action” on several occasions, ERISA cases are adjudicated more like administrative proceedings than other civil actions. Discovery is generally disallowed, and trials are essentially unheard of, while jury trials are simply out of the question. Instead, even under the *de novo* standard of adjudication, an ERISA proceeding often consists of nothing more than a review of a so-called “administrative record.” And under the abuse of discretion or arbitrary and capricious standard of review, courts have imposed such a lenient regime that judges often treat their role as little more than a rubber stamp. Moreover, even when claimants “prevail,” victory is often hollow because rather than awarding benefits outright, courts generally remand claims for reconsideration by the same administrator that was found to have arbitrarily denied benefits. Neither the ERISA statute itself, nor the United States Constitution authorizes remands of ERISA cases; and the practice has proven problematic with respect to appellate review. Yet remands are today the norm in ERISA litigation.

This article will explore these issues and will formulate a proposal to restore ERISA litigation to the same status as all other civil actions brought in federal court.

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1. 29 U.S.C. §§ 1001-1461 (2012).

2. *Id.* § 1132(a)(1)(B).

3. FED. R. CIV. P. 2.

4. FED. R. CIV. P. 1. Rule 81 excludes prize proceedings in admiralty, bankruptcy (to the extent proceedings are covered by the Federal Rules of Bankruptcy Procedure), proceedings for admission to citizenship, and certain other enumerated laws that encompass their own procedures. FED. R. CIV. P. 81.

## II. HISTORICAL BACKGROUND

Before ERISA's enactment, disputes over pension benefits, as well as what the ERISA law characterizes as welfare benefits,<sup>5</sup> were decided primarily in the state courts in the same manner as any other breach of contract action; and the courts applied contract law to resolve employee benefits disputes.<sup>6</sup> Even benefit cases involving funds held in trust were often resolved through plenary trial proceedings irrespective of whether the trust instrument triggered deferential review.<sup>7</sup> So what happened?

### *A. The Transformation of ERISA Litigation into Quasi-Administrative Adjudications*

The broad scope of ERISA preemption<sup>8</sup> federalized employee benefits litigation regardless of whether the benefits were funded through trusts or insurance.<sup>9</sup> However, the ERISA statute is silent about how ERISA cases are to be adjudicated, although the law's preamble provides that participants<sup>10</sup> in employee benefit plans and their beneficiaries<sup>11</sup> shall be afforded "appropriate remedies, sanctions, and ready access to the Federal courts."<sup>12</sup> To that end,

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5. 29 U.S.C. § 1002(1) (statutorily defining welfare benefits to include claims for health, life, and disability insurance, regardless of whether self-funded or insured).

6. See Brief for the United States as Amicus Curiae in Support of Respondent at 5 n.7 *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989) (No. 87-1054), 1988 WL 1025997; see also *Antram v. Stuyvesant Life Ins. Co.*, 287 So. 2d 837 (Ala. 1973) (employer sponsored disability benefit claim accorded plenary civil procedure); *Cox v. Wash. Nat'l Ins. Co.*, 520 S.W.2d 76 (Mo. App. 1974) (same).

7. See, e.g., *Matthews v. Swift & Co.*, 465 F.2d 814 (5th Cir. 1972) (plenary bench trial of pension and disability claim despite arbitrary and capricious standard of review); *Phelps Dodge Corp. v. Brown*, 540 P.2d 651 (Ariz. 1975) (jury trial conducted); *Barnett v. Ross*, 3 A.2d 923, 925 (Pa. 1939) (in an action for breach of implied trust by fiduciary, plaintiff beneficiary may seek a bill of discovery in equity to support a claim of existence of trust and misconduct of alleged trustee).

8. 29 U.S.C. § 1144.

9. See *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41 (1987) (finding that insured benefit claim and all state law causes of action were preempted by ERISA).

10. A "participant" in an employee benefit plan

means any employee or former employee of an employer, or any member or former member of an employee organization, who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer or members of such organization, or whose beneficiaries may be eligible to receive any such benefit.

29 U.S.C. § 1002(7).

11. ERISA defines "beneficiary" as "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." *Id.* § 1002(8).

12. *Id.* § 1001(b).

Congress authorized aggrieved participants in employee benefit plan and their beneficiaries the right to institute a civil action “to recover benefits due . . . under the terms of [a] plan, to reinforce . . . rights under the terms of the plan, or to clarify . . . rights to future benefits under the terms of the plan.”<sup>13</sup> In the last twenty-five years, as this author pointed out in an earlier article,<sup>14</sup> ERISA cases have taken on a unique procedural means of adjudication. Instead of plenary procedures, courts apply an administrative law paradigm in conducting ERISA benefits litigation.

That transformation occurred despite warnings of the danger of utilizing an administrative mechanism in place of trials to resolve benefits disputes. In *Brown v. Blue Cross & Blue Shield of Alabama, Inc.*,<sup>15</sup> a case challenging the denial of hospitalization benefits, the U.S. Court of Appeals for the Eleventh Circuit warned that despite the regime of deferential review that resulted from the Supreme Court’s ruling in *Firestone Tire & Rubber Co. v. Bruch*,<sup>16</sup> courts should be wary of how the arbitrary and capricious standard of review is applied to ERISA benefit cases:

Because we have restated the standard as arbitrary and capricious, the temptation exists to consult precedent regarding the use of that standard to review administrative agency decisions. We express caution, however, at wholesale importation of administrative agency concepts into the review of ERISA fiduciary decisions. Use of the administrative agency analogy may, ironically, give too much deference to ERISA fiduciaries. Decisions in the ERISA context involve the interpretation of contractual entitlements; they “are not discretionary in the sense, familiar from administrative law, of decisions that make policy under a broad grant of delegated powers.”<sup>17</sup>

Yet another admonition about the potential misuse of administrative law procedures was issued in *Herzberger v. Standard Insurance Co.*,<sup>18</sup> a case involving disability insurance benefits, where the U.S. Court of Appeals for the Seventh Circuit observed:

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13. *Id.* § 1132(a)(1)(B).

14. Mark DeBofsky, *The Paradox of the Misuse of Administrative Law in ERISA Benefit Claims*, 37 J. MARSHALL L. REV. 727 (2004).

15. 898 F.2d 1556 (11th Cir. 1990).

16. 489 U.S. 101 (1989). Although *Firestone* determined that the de novo standard of adjudication should be the norm in ERISA litigation, by permitting a deferential standard of review to apply where the plan contains discretion-granting language, *Firestone* triggered near-universal adoption of a deferential standard of review in ERISA benefits litigation after plans either adopted such language or were able to successfully point to already existing language as sufficient to trigger deferential review.

17. *Brown*, 898 F.2d at 1564 n.7.

18. 205 F.3d 327 (7th Cir. 2000).

What may have misled courts in some cases is the analogy between judicial review of an ERISA plan administrator's decision to deny disability benefits and judicial review of the denial of such benefits by the Social Security Administration. . . . Judicial review of the latter sort of denial is of course deferential, and it is natural to suppose that it should be deferential in the former case as well. But the analogy is imperfect, quite apart from its having been implicitly rejected by the Supreme Court in *Bruch* when it determined that the default standard of review in ERISA cases is plenary review, and quite apart from the fact that the social security statute specifies deferential ("substantial evidence") review. The Social Security Administration is a public agency that denies benefits only after giving the applicant an opportunity for a full adjudicative hearing before a judicial officer, the administrative law judge. The procedural safeguards thus accorded, designed to assure a full and fair hearing,<sup>19</sup> are missing from determinations by plan administrators.

Despite those warnings, the U.S. Court of Appeals for the Sixth Circuit led the way in transforming ERISA civil actions into quasi-administrative claims. In *Perry v. Simplicity Engineering*,<sup>20</sup> a disability benefits dispute, the court pronounced that ERISA cases are to be resolved as a review of "the record before the administrator."<sup>21</sup> The court found:

In the ERISA context, the role of the reviewing federal court is to determine whether the administrator or fiduciary made a correct decision, applying a de novo standard. Nothing in the legislative history suggests that Congress intended that federal district courts would function as substitute plan administrators, a role they would inevitably assume if they received and considered evidence not presented to administrators concerning an employee's entitlement to benefits. Such a procedure would frustrate the goal of prompt resolution of claims by the fiduciary under the ERISA scheme.<sup>22</sup>

The Seventh Circuit essentially reiterated that holding a few years later in *Perlman v. Swiss Bank Corp. Comprehensive Disability Protection Plan*,<sup>23</sup> which pronounced, "[d]eferential review of an administrative decision means review on the administrative record."<sup>24</sup> By the time *Perlman* was issued, the administrative review paradigm had quickly gained broad judicial acceptance, with the Seventh Circuit noting in its opinion, "[s]ix courts of appeals have held that

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19. *Id.* at 332 (citing 42 U.S.C. § 405(g) (1994)).

20. 900 F.2d 963 (6th Cir. 1990); *see also* discussion of *Perry*, *infra* note 57 and accompanying text.

21. *Perry*, 900 F.2d at 967.

22. *Id.* at 966.

23. 195 F.3d 975 (7th Cir. 1999).

24. *Id.* at 981-82.

when review under ERISA is deferential, courts are limited to the information submitted to the plan's administrator."<sup>25</sup>

*B. Adjudication of ERISA Claims Under the De Novo Standard*

Although much of the discussion in the previous section relates to ERISA's deferential standard of review, most courts utilize the same record-review approach even under the de novo standard of adjudication. For example, both *Jewell v. Life Insurance Co. of North America*<sup>26</sup> and *Orndorf v. Paul Revere Life Insurance Co.*<sup>27</sup> ruled that even under the de novo standard, the litigation should be restricted to a record-review proceeding.<sup>28</sup> The Ninth Circuit said essentially the same thing in its en banc ruling in *Kearney v. Standard Insurance Co.*, which determined, "[i]f a court reviews the administrator's decision, whether de novo as here, or for abuse of discretion, the record that was before the administrator furnishes the primary basis for review."<sup>29</sup> While the de novo standard has been found to permit some liberality in allowing for consideration of extra-record evidence, according to those courts, admission of additional evidence beyond the administrative record should be the exception rather than the norm.<sup>30</sup>

The Seventh Circuit presents the only dissenting viewpoint. Beginning with *Diaz v. Prudential Insurance Co.*,<sup>31</sup> that court recognized:

The district court's task in engaging in *de novo* consideration of the decision of the plan administrator is not the same as its job in reviewing administrative determinations on the basis of the record the agency compiled under the substantial evidence rule, as it might do in a Social Security benefits case. Some of the confusion in this area may be attributable to the common phrase "de novo review"

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25. *Id.* at 982 (listing *Wilkins v. Baptist Healthcare Sys., Inc.*, 150 F.3d 609, 617-20 (6th Cir. 1998); *DeFelice v. Am. Int'l Life Assurance Co.*, 112 F.3d 61, 65 (2d Cir. 1997); *Donatelli v. Home Ins. Co.*, 992 F.2d 763, 765 (8th Cir. 1993); *Quesinberry v. Life Ins. Co. of N. Am.*, 987 F.2d 1017, 1021-27 (4th Cir. 1993) (en banc); *Sandoval v. Aetna Life & Casualty Ins. Co.*, 967 F.2d 377, 380 (10th Cir. 1992); *Luby v. Teamsters Health, Welfare, & Pension Trust Funds*, 944 F.2d 1176, 1184-85 (3d Cir. 1991)).

26. 508 F.3d 1303 (10th Cir. 2007).

27. 404 F.3d 510 (1st Cir. 2005).

28. *Jewel*, 508 F.3d at 1308; *Orndorf*, 404 F.3d at 517.

29. 175 F.3d 1084, 1090 (9th Cir. 1999) (en banc).

30. *See Quesinberry v. Life Ins. Co. of N. Am.*, 987 F.2d 1017 (4th Cir. 1993) (enumerating circumstances under which additional evidence may be considered by court under de novo standard of review); *see also Hall v. UNUM Life Ins. Co.*, 300 F.3d 1197 (10th Cir. 2002) (collecting cases on whether, and under what circumstances, additional evidence may be submitted in court); *Chambers v. Family Health Plan Corp.*, 100 F.3d 818 (10th Cir. 1996).

31. 499 F.3d 640 (7th Cir. 2007).

used in connection with ERISA cases. In fact, in these cases the district courts are not *reviewing* anything; they are making an independent decision about the employee's entitlement to benefits.<sup>32</sup>

The Seventh Circuit went even further in *Krolnik v. Prudential Insurance Co. of America*,<sup>33</sup> which explained:

*Firestone* holds that “*de novo* review” is the norm in litigation under ERISA. Cases such as this show that “*de novo* review” is a misleading phrase. The law Latin could be replaced by an English word, such as “independent.” And the word “review” simply has to go. For what *Firestone* requires is not “review” of any kind; it is an independent *decision* rather than “review” that *Firestone* contemplates. The Court repeatedly wrote that litigation under ERISA by plan participants seeking benefits should be conducted just like contract litigation, for the plan and any insurance policy are contracts. In a contract suit the judge does not “review” either party's decision. Instead the court takes evidence (if there is a dispute about a material fact) and makes an independent decision about how the language of the contract applies to those facts.<sup>34</sup>

However, in the same ruling, the Seventh Circuit reiterated its position that claims subject to the arbitrary and capricious standard of review are conducted as record-review proceedings, where the court is limited to reviewing an “administrative” record pertaining to the claim compiled by the claim administrator.<sup>35</sup> In an earlier decision, that same court also wrote, without citing any precedent in support, “Where an insurance plan gives discretionary authority to a plan administrator, ERISA provides a limited Article III review,”<sup>36</sup> and further found that “[l]ike a suit to challenge an administrative decision, a suit under ERISA is a review proceeding, not an evidentiary proceeding.”<sup>37</sup> However, the lack of any statutory or binding precedential support for such sweeping statements highlights the absence of any basis for a distinction between the civil procedure applicable to ERISA cases decided under the *de novo* standard and the arbitrary and capricious standard of review. Indeed, there is no support whatsoever for utilizing a record review paradigm in any type of ERISA litigation, a method of adjudication that is fraught with danger since such an approach denies plan participants and their

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32. *Id.* at 643 (emphasis in original).

33. 570 F.3d 841 (7th Cir. 2009).

34. *Id.* at 843 (citation omitted).

35. *Id.*

36. *Semien v. Life Ins. Co. of N. Am.*, 436 F.3d 805, 813 (7th Cir. 2006).

37. *Id.* at 815 (citing *Doe v. Blue Cross & Blue Shield United of Wis.*, 112 F.3d 869, 875 (7th Cir. 1997)).

beneficiaries the same due process protections<sup>38</sup> afforded by trial-type procedures before agencies that have appointed neutral factfinders to determine disputes, and where claimants are given a right to subpoena witnesses and present evidence.<sup>39</sup> Nor is a record review consistent with the right to bring a “civil action” authorized by Congress.

### *C. What is the Meaning of the Term “Civil Action”*

The Supreme Court has afforded considerable guidance in assessing whether a statutorily authorized civil action connotes a review proceeding rather than the right to an evidentiary hearing. For example, in *United States v. First City National Bank*,<sup>40</sup> which construed the nature of the civil action permitted by the Bank Merger Act of 1966,<sup>41</sup> the Court ruled that although the statute provided that courts are to “review *de novo* the issues presented,” the statute’s incorporation of the word “review” still meant that a plenary trial was necessary. Unlike the statute at issue in *First City*, there is no terminology in either the ERISA statute, nor in its legislative history, that uses the word “review,” thus raising serious doubt as to the basis for a review proceeding.

The Supreme Court’s later guidance in *Chandler v. Roudebush*<sup>42</sup> is even more revealing. *Chandler* involved a discrimination suit brought by a federal employee pursuant to section 717(c) of Title VII,<sup>43</sup> added by section 11 of the Equal Employment Opportunity Act of 1972 which broadened the scope of protection to federal employees.<sup>44</sup> While private sector employees had enjoyed the right to a plenary hearing of their discrimination claims since the passage of Title VII, prior to *Chandler*, the lower courts were divided as to whether courts were to merely review the administrative proceedings determining the rights of the federal employees or whether those aggrieved individuals had the right to proceed to a trial. The Supreme Court resolved the circuit split by finding that federal employees were entitled to the same rights as private sector litigants. The Court

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38. See Mark DeBofsky, *What Process Is Due in the Adjudication of ERISA Claims*, 40 J. MARSHALL L. REV. 811 (2007).

39. See Administrative Procedure Act, 5 U.S.C. § 553 (2012).

40. 386 U.S. 361, 368 (1967).

41. 12 U.S.C. §§ 1828(c)(7)(A), (B) (2012).

42. 425 U.S. 840 (1976).

43. 42 U.S.C. § 2000e-16(c) (2012).

44. Pub. L. No. 92-261, 86 Stat. 103, 111 (1972).



pointed out that “[n]othing in the legislative history 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.”<sup>45</sup> The Court further explained:

In most instances, of course, where 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.”<sup>46</sup>

Even more recently, a patent law ruling issued by the Supreme Court has cast further illumination upon what the right to bring a civil action entails. In *Kappos v. Hyatt*,<sup>47</sup> the Supreme Court reviewed a provision of the Patent Act of 1952<sup>48</sup> that permits an unsuccessful patent applicant to challenge the patent’s rejection by either filing a direct appeal to the Court of Appeals for the Federal Circuit or, pursuant to 35 U.S.C. § 145, to bring a civil action against the Director of the Patent and Trademark Office (PTO) in federal district court. The Supreme Court was asked to determine the contours of what the § 145 civil action entails, including the scope of adjudication. Although the Supreme Court determined that a direct appeal to the Federal Circuit would be decided as a typical agency review matter, the Court further held that a § 145 civil action entitled the aggrieved patent-seeker to trial proceedings limited only by the Federal Rules of Evidence and the Federal Rules of Civil Procedure, with no deference accorded to the administrative finding.<sup>49</sup>

The Court pointed out that § 145 authorizes a patent applicant whose claims are denied a “remedy by civil action against the Director.”<sup>50</sup> The Court noted that “[b]y its terms, § 145 neither imposes unique evidentiary limits in district court proceedings nor establishes a heightened standard of review for factual findings by the

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45. *Chandler*, 425 U.S. at 861.

46. *Id.* at 862 n.37 (citing *United States v. Carlo Bianchi & Co.*, 373 U.S. 709, 715 (1963), 5 U.S.C. § 706 (governing the Administrative Procedure Act), 12 U.S.C. § 1848 (governing certain orders of the Board of Governors of the Federal Reserve System), 15 U.S.C. § 21(c) (covering certain orders of the Interstate Commerce Commission, the Federal Communications Commission, the Civil Aeronautics Board, the Federal Reserve Board, and the Federal Trade Commission), and 21 U.S.C. § 371(f)(3) (governing certain orders of the Secretary of Health, Education, and Welfare)).

47. 132 S. Ct. 1690 (2012).

48. c. 950, 66 Stat. 797 (codified as amended at 35 U.S.C. §§ 1-390 (2012)).

49. *Kappos*, 132 S. Ct. at 1700.

50. 35 U.S.C. § 145 (2012).

PTO.”<sup>51</sup> Rejecting the PTO Director’s argument that the statute should be read in light of “traditional principles of administrative law,”<sup>52</sup> mandating a review proceeding in which the PTO’s findings are granted deference, the Supreme Court found instead that the statute requires the district court to serve as a factfinder, which “must make its own findings *de novo*” rather than act as a “reviewing court” as envisioned by the Administrative Procedures Act.<sup>53</sup> The Patent Act was also found to bar the district court from remanding the case to the PTO to consider new evidence. Instead, the trial court was directed to consider *de novo* any new evidence presented, even if it had not been submitted to the PTO during the application process, and even if such evidence was readily available during the PTO proceeding.

*Kappos* is entirely consistent with the earlier Supreme Court rulings discussed above. Following those rulings, the only guidance as to the nature of the civil action afforded by 29 U.S.C. § 1132(a) is contained in ERISA’s legislative history which simply remarked that ERISA actions “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.”<sup>54</sup> Section 301 actions are deemed plenary and even encompass jury trials, according to *Chauffeurs, Teamsters & Helpers, Local No. 391 v. Terry*.<sup>55</sup>

Nor can an administrative law regime be justified by one line from ERISA’s legislative history that has been repeatedly cited – that ERISA affords “a method for workers and beneficiaries to resolve disputes over benefits inexpensively and expeditiously.”<sup>56</sup> That language not only fails to directly implicate a review proceeding, the quotation is also entirely misplaced. *Semien v. Life Insurance Co. of North America* and *Perry v. Simplicity Engineering*’s “inexpensive[ ] and expeditious[ ]” reference is taken from the report accompanying the Senate’s version of a pension reform bill that ultimately became the ERISA law.<sup>57</sup> The Senate proposed to create a mechanism for pension claimants to pursue an administrative grievance or

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51. *Kappos*, 132 S. Ct. at 1696.

52. *Id.*

53. *Id.*

54. H.R. Rep. No. 93-1280, at 5107 (1974) (Conf. Rep.).

55. 494 U.S. 558 (1990).

56. S. Rep. No. 93-383 (1973), 1974 U.S.C.C.A.N. 4639, 5000.

57. *Semien*, 436 F.3d 805, 815 (7th Cir. 2006) (citing *Perry*); *Perry*, 900 F.2d 963, 967 (7th Cir. 1990) (citing S. Rep. No. 93-383).

arbitration proceeding before the Secretary of Labor. However, that proposal was eliminated from the final legislation,<sup>58</sup> leaving benefit claimants without any mechanism for seeking formal administrative redress. Instead, as enacted, the sole avenue for recovery of benefits under ERISA's legislative scheme is for aggrieved benefit claimants to file a civil action in court in accordance with ERISA section 502(a).

Likewise, the ERISA statute's inclusion of a provision permitting a "full and fair review" of claim determinations<sup>59</sup> is no substitute for a trial, given the non-existence of subpoena and cross-examination powers and the absence of a neutral fact-finder overseeing the claim review process. The differences between pre-litigation claim appeals brought pursuant to ERISA section 503 and administrative adjudications is ever more acutely evident by comparing ERISA's claim regulations<sup>60</sup> to other ERISA provisions such as 29 C.F.R. §§ 2560.502i-1, 2570.7, and 2570.11 (2013),<sup>61</sup> that explicitly provide for administrative hearings before the Secretary of Labor in ERISA disputes such as prohibited transaction claims. Thus, in the words of Professor Jay Conison, an early critic of how the ERISA law has been misapplied by the courts:

Yet even if there were some basis for believing that the treatment of a benefit suit as an evidentiary proceeding would interfere with "prompt resolution of claims by the fiduciary," the rationale would still fail. For it to be plausible, one would have to add two premises: that "prompt resolution of claims" is something Congress intended for the protection of sponsors and fiduciaries; and that such protection of sponsors and fiduciaries is more important than protection of the participants' right to receive benefits due. Merely to state these premises is to reveal their untenability.<sup>62</sup>

The *Firestone* case itself further eliminates any rationale for disallowing plenary hearings in ERISA cases. There, the Court explained, "Unlike the LMRA, ERISA explicitly authorizes suits

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58. Senator Jacob Javits, one of ERISA's main sponsors, explained that opposition was raised "on grounds it might be too costly to plans and a stimulant to frivolous benefit disputes, and at their insistence it was dropped in conference." 3 SUBCOMM. ON LABOR OF THE COMM. ON LABOR & PUB. WELFARE, U.S. SENATE, LEGISLATIVE HISTORY OF THE EMPLOYEE RETIREMENT INCOME SECURITY ACT 4769 n.4 (1976).

59. 29 U.S.C. § 1133 (2012).

60. 29 C.F.R. § 2560.503-1 (2013).

61. Also contrast 20 U.S.C. § 1415 (2012) (Individuals with Disabilities Education Act – IDEA) where despite the existence of an explicit administrative hearing procedure, courts may consider new evidence de novo. While a new trial de novo is not to be held, courts are not required to give extreme deference to the administrative determination and may consider extrinsic evidence. *Alex R. v. Forrestville Valley Cmty. Unit Sch. Dist. # 221*, 375 F.3d 603, 611-12 (7th Cir. 2004).

62. Jay Conison, *Suits for Benefits Under ERISA*, 54 U. PITT. L. REV. 1, 59 (1992).

against fiduciaries and plan administrators to remedy statutory violations, including breaches of fiduciary duty and lack of compliance with benefit plans.”<sup>63</sup> The Court also made it clear that the threat of increased litigation is not a valid basis for subjecting ERISA claims to an arbitrary and capricious review when it pronounced, “the threat of increased litigation is not sufficient to outweigh the reasons for a *de novo* standard.”<sup>64</sup>

#### *D. What Are The Implications of a Record Review Regime?*

From the foregoing discussion, it is undeniable that the present regime of record review proceedings in ERISA cases deviates from other civil actions authorized by Congress. Such limited procedures also raise questions about whether the current civil procedure accorded ERISA claims violates the due process rights of the millions of Americans who participate in employee benefit plans. At the very least, the misapplication of administrative law is contrary to the Supreme Court’s expressed position in *Firestone*, where the Court remarked that benefit claimants should not receive less protection “than they enjoyed before ERISA was enacted.”<sup>65</sup>

Although ERISA claims involve private rights established by the terms of benefit plans offered by employers, the statute was enacted to impose safeguards in order to protect those rights. Even though the Supreme Court’s *Firestone* ruling allowed benefit plans to incorporate clauses giving discretion to plan administrators’ decisions, courts retain a responsibility to ascertain that plans have given claimants a “full and fair review.”<sup>66</sup> With a judicial process that denies claimants a full opportunity to challenge the basis for adverse claim decisions, the civil action authorized by section 502 of ERISA is often rendered meaningless, and court proceedings are turned into what could be

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63. *Firestone Rubber & Tire Co. v. Bruch*, 489 U.S. 101, 110 (1989) (citing 29 U.S.C. §1132 (a), (f) (1988)). Proceedings under 29 U.S.C. § 186 of the LMRA are quite different from cases brought under the statutory section immediately preceding. Cases such as *Beam v. Int’l Org. of Masters, Mates and Pilots*, 511 F.2d 975, 980 (2d Cir. 1975) have characterized LMRA proceedings as seeking review of trustees’ determinations; however, such actions are based on disputes arising under benefit trusts where both management and labor appoint equal numbers of trustees. In contrast, the decisionmaker in many ERISA claims is often an insurer. Hence, the court marked the distinction with non-union benefit plans by explaining that “review in this case is not the examination of a dispute between an insurance company with a boilerplate contract on one hand and a consumer on the other.” *Id.*

64. *Firestone*, 489 U.S. at 115.

65. *Id.* at 114; *see also supra* note 8 (citing cases permitting trials of employee benefits claims prior to ERISA’s enactment).

66. 29 U.S.C. § 1133 (2012).

characterized as little more than a rubber stamp. The closest the Supreme Court has come to addressing this issue within the context of ERISA is in a decision addressing the due process rights of employers charged with withdrawal liability under the Multiemployer Pension Plan Amendments Act of 1980.<sup>67</sup> In *Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust for Southern California*,<sup>68</sup> the Supreme Court upheld an assessment of pension withdrawal liability, finding the law constitutional because a challenge to an assessment may be brought before an arbitrator. However, the court acknowledged that without an arbitral remedy, the assessment of withdrawal liability would deny employers due process because of the possibility of trustee bias in adjudicating claims, despite ERISA's fiduciary duty of loyalty.<sup>69</sup>

While there are many contexts in which courts defer to agencies or other institutions, the Supreme Court has consistently been protective of litigants' statutory rights. Most recently, in a bankruptcy case, *Stern v. Marshall*, the Court made it clear that even a bankruptcy court may not usurp an Article III court's obligation to adjudicate statutory rights.<sup>70</sup> Likewise, courts are reluctant to disturb educational institutions' findings with respect to academic qualification standards; however, courts have recognized and protected statutory rights that may trump academic considerations.<sup>71</sup> Thus, even in matters involving disputes between private parties, constitutional due process is implicated if a statutory right is impaired. An example is *Logan v. Zimmerman Brush Co.*,<sup>72</sup> which found a due process violation where an employment discrimination claimant was deprived of the opportunity to present his grievance before a court because the state agency charged with processing his charge failed to complete its investigation within the statutorily allotted time frame. The Court found a denial of due process, finding "[a] claimant has more than an abstract desire or interest in redressing his grievance."<sup>73</sup> Indeed, the Court determined that the cause of action itself was a substantially protected property interest.

An argument can thus be made that deference to plan

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67. Pub. L. No. 96-364, 94 Stat. 1208.

68. 508 U.S. 602 (1993).

69. *Id.* at 620-24; *see also* 29 U.S.C. § 1104(a)(1) (describing the fiduciary duty).

70. 131 S. Ct. 2594, 2609-10 (2011).

71. *See Zukle v. Regents of the Univ. of Cal.*, 166 F.3d 1041 (9th Cir. 1999).

72. 455 U.S. 422 (1982).

73. *Id.* at 431.

administrators' findings, coupled with a denial of ordinary civil procedures denies employee benefit claimants due process. However, no court has agreed with that proposition; and there is at least one court ruling that explicitly rejected the notion that ERISA procedures deny claimants their right to due process.<sup>74</sup> Further, the Affordable Care Act's<sup>75</sup> provisions with respect to independent external reviews<sup>76</sup> establish claim procedures somewhat similar to ERISA's, especially with respect to medical benefit claims, although the reviews obtained by ERISA plan administrators in disability benefit claims are not subject to the same guidelines relating to reviewer independence. Nonetheless, ERISA civil procedure, where court proceedings lack the procedural safeguards attendant to other civil actions, such as the right to call and cross-examine witnesses, certainly demonstrate unfairness and plainly encourage self-interested decisionmaking that would be impossible if broad-ranging discovery and trials were available.

### III. HOW ERISA CASES SHOULD BE ADJUDICATED

#### A. ERISA's Limitations on Discovery (Pre-Glenn)

All federal civil actions are initiated by the filing of a complaint.<sup>77</sup> After the complaint is filed and served, the defendant is required to file an answer or motion to dismiss the complaint, or seek the filing of a more definite statement.<sup>78</sup> Assuming the filing of an answer, the issues are joined, and discovery typically commences. The Federal Rules of Civil Procedure prescribe various means (interrogatories, requests for production of documents, requests to admit, and oral and written depositions) for litigants to undertake discovery

regarding any nonprivileged matter that is relevant to any party's claim or defense – including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter. For good cause, the court may order discovery

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74. *Black v. Unumprovident Corp.*, 245 F. Supp. 2d 194, 199 (D. Me. 2003) (asserting that “ERISA does not delegate any adjudicative functions to an otherwise private party”).

75. Pub. L. No. 111-148, 124 Stat.119 (2010).

76. 42 U.S.C. § 300gg-19 (2012); see also *Affordable Care Act Regulations and Guidance – Internal Claims and Guidance and External Review*, U.S. DEP'T OF LABOR, <<http://www.dol.gov/ebsa/healthreform/regulations/internalclaimsandappeals.html>> (last viewed July 20, 2014).

77. FED. R. CIV. P. 3.

78. FED. R. CIV. P. 12.

of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence. All discovery is subject to the limitations imposed by Rule 26(b)(2)(C).<sup>79</sup>

Although the court has the inherent power to curtail discovery, the Federal Rules of Civil Procedure specify the limited circumstances under which discovery is to be curtailed:

- (i) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive;
- (ii) the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or
- (iii) the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.<sup>80</sup>

The discovery rules are not limited to certain types of cases; instead, they broadly apply to all civil actions. Moreover, nowhere in the Federal Rules of Civil Procedure, nor in the ERISA statute, are there any limits placed upon discovery in ERISA cases. Yet the courts have reduced discovery available to claimants to the point where it is essentially non-existent.

Taking the Seventh Circuit's approach to discovery in ERISA cases as an example, in *Perlman v. Swiss Bank Corp. Comprehensive Disability Protection Plan*,<sup>81</sup> the court imposed an absolute bar to seeking discovery into the underlying basis for the claim determination, concluding:

It follows from the conclusion that review of UNUM's decision is deferential that the district court erred in permitting discovery into UNUM's decision-making. There should not have been any inquiry into the thought processes of UNUM's staff, the training of those who considered Perlman's claim, and in general who said what to whom within UNUM – all of which Perlman was allowed to explore at length by depositions and interrogatories, and on some of which the district judge relied. Deferential review of an administrative decision means review on the administrative record.<sup>82</sup>

The court then made the following remarkable statement:

[W]hen there can be no doubt that the application was given a

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79. FED. R. CIV. P. 26(b)(1).

80. FED. R. CIV. P. 26(b)(2)(C).

81. 195 F.3d 975 (7th Cir. 1999).

82. *Id.* at 981-82.

genuine evaluation, judicial review is limited to the evidence that was submitted in support of the application for benefits, and the mental processes of the plan's administrator are not legitimate grounds of inquiry any more than they would be if the decisionmaker were an administrative agency.<sup>83</sup>

What is startling about that pronouncement is the court's willingness to inherently accept the neutrality of the insurer that denied Perlman's claim for disability benefits, equating a private company with an administrative agency. The Third Circuit recognized just the opposite a few years earlier, though, in *Luby v. Teamsters Health, Welfare & Pension Trust Funds*, in which it had observed:

Plan administrators are not governmental agencies who are frequently granted deferential review because of their acknowledged expertise. Administrators may be laypersons appointed under the plan, sometimes without any legal, accounting or other training preparing them for their responsible position, often without any expertise in or understanding of the complex problems arising under ERISA, and, as this case demonstrates, little knowledge of the rules of evidence or legal procedures to assist them in factfinding.<sup>84</sup>

Furthermore, another problem with the Seventh Circuit's reasoning is in its circularity. How would a court know whether "the application was given a genuine evaluation"<sup>85</sup> in the absence of discovery? Yet the Seventh Circuit repeated the same syllogism in *Semien v. Life Insurance Co. of North America*,<sup>86</sup> where the court pronounced:

A claimant must demonstrate two factors before limited discovery becomes appropriate. First, a claimant must identify a specific conflict of interest or instance of misconduct. Second, a claimant must make a prima facie showing that there is good cause to believe limited discovery will reveal a procedural defect in the plan administrator's determination.<sup>87</sup>

A district court within the Seventh Circuit characterized the Court of Appeals' approach as having "the flaw of circularity, somewhat akin to asking the person who hasn't had access to the inside of the black box to state which of its contents he or she want[s] to see."<sup>88</sup> Obviously so, since it is impossible to meet the stated preconditions to

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83. *Id.* at 982.

84. 944 F.2d 1176, 1183 (3d Cir. 1991).

85. *Perlman*, 195 F.3d at 982.

86. 436 F.3d 805 (7th Cir. 2006).

87. *Id.* at 815.

88. *Barrett v. Life Ins. Co. of N. Am.*, No. 11 C 6000, 2012 U.S. Dist. LEXIS 115696, at \*10-11 (N.D. Ill. Aug. 16, 2012).



taking discovery without first having taken the discovery necessary to make the required *prima facie* showing.

A somewhat different approach, however, has been taken with respect to discovery sought under the de novo standard of adjudication. The seminal ruling in *Quesinberry v. Life Insurance Co. of North America*<sup>89</sup> opened the door to consideration of evidence outside the claim record in cases adjudicated under the de novo standard “because of concerns about impartiality and ERISA’s interest in providing protection for employees and their beneficiaries.”<sup>90</sup> *Quesinberry* proposed that discovery be permitted in the presence of “exceptional circumstances,” which were catalogued to include:

claims that require consideration of complex medical questions or issues regarding the credibility of medical experts; the availability of very limited administrative review procedures with little or no evidentiary record; the necessity of evidence regarding interpretation of the terms of the plan rather than specific historical facts; instances where the payor and the administrator are the same entity and the court is concerned about impartiality; claims which would have been insurance contract claims prior to ERISA; and circumstances in which there is additional evidence that the claimant could not have presented in the administrative process.<sup>91</sup>

Likewise, the Ninth Circuit ruled in *Mongeluzo v. Baxtor Travenol Long Term Disability Benefit Plan*<sup>92</sup> that under the de novo standard, “new evidence may be considered under certain circumstances to enable the full exercise of informed and independent judgment.”<sup>93</sup> However, that court maintained that even under the de novo standard, the courts should limit their *review* to the evidence that was before the plan administrator.<sup>94</sup> In a later ruling, the Ninth Circuit admonished a lower court for permitting the introduction of additional evidence in the absence of exceptional circumstances.<sup>95</sup>

The danger inherent in limiting discovery is best illustrated by *Bedrick v. Travelers Insurance Co.*,<sup>96</sup> a case that overturned a health insurer’s finding that certain therapies prescribed to a child suffering

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89. 987 F.2d 1017 (4th Cir. 1993).

90. *Id.* at 1026.

91. *Id.* at 1027.

92. 46 F.3d 938 (9th Cir. 1995).

93. *Id.* at 943.

94. *Id.* at 943-44.

95. *Opeta v. Nw. Airlines Pension Plan*, 484 F.3d 1211, 1217 (9th Cir. 2007).

96. 93 F.3d 149 (4th Cir. 1996).

from cerebral palsy were not medically necessary. Because the court permitted discovery, the plaintiff was able to establish, by taking the depositions of defendant's consultants, that the consultants lacked relevant expertise; thus, the denial of benefits was ultimately found an abuse of discretion.<sup>97</sup> Without that discovery, though, the wrongful benefit denial would undoubtedly have been upheld.

*B. Metropolitan Life Insurance Co. v. Glenn and Its Impact on ERISA Discovery*

The scope of permissible discovery in ERISA benefit cases is currently undergoing a reassessment on account of the Supreme Court's ruling in *Metropolitan Life Insurance Co. v. Glenn*, a case that recognized the conflict of interest inherent in situations where the plan administrator both determines claimants' eligibility to receive benefits and also provides the funding for payment of benefits.<sup>98</sup> The Supreme Court acknowledged that where an "employer . . . both funds the plan and evaluates the claims[,] [i]n such a circumstance, 'every dollar provided in benefits is a dollar spent by . . . the employer; and every dollar saved . . . is a dollar in [the employer's] pocket.'"<sup>99</sup> *Glenn* resolved an issue left dangling from the *Firestone* ruling where the Court had remarked without elaboration, "Of course, if a benefit plan gives discretion to an administrator or fiduciary who is operating under a conflict of interest, that conflict must be weighed as a 'facto[r]' in determining whether there is an abuse of discretion."<sup>100</sup> *Glenn's* finding of the existence of a conflict of interest and its command that "conflicts are but one factor among many that a reviewing judge must take into account"<sup>101</sup> has opened the door to claimants' pursuit of discovery aimed at demonstrating that the inherent conflict has infected the claim decision, which could prove decisive in a court's evaluation of the propriety of the claim determination.

*Glenn* essentially compelled opening the door to discovery since, as the Seventh Circuit recognized in *Marrs v. Motorola, Inc.*, "an opportunity for short-run economies may dominate decision making

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97. *Id.* at 155.

98. 554 U.S. 105, 106 (2008).

99. *Id.* at 112 (quoting *Bruch v. Firestone Tire & Rubber Co.*, 828 F.2d 134, 144 (3d Cir. 1987), *aff'd, in part, rev'd in part*, 489 U.S. 101 (1989)) (alteration in original).

100. *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 115 (1989) (citing RESTATEMENT (SECOND) OF TRUSTS § 187 cmt. d (1959)) (alteration in original).

101. *Glenn*, 554 U.S. at 116.

by benefits officers.”<sup>102</sup> Hence, immediately following the issuance of the Supreme Court’s *Glenn* ruling, courts that were previously resistant to allowing discovery began permitting some discovery into the financial motivation behind claim determinations.<sup>103</sup> Using the Seventh Circuit as an example due to its longstanding opposition to permitting any discovery under a deferential standard of review, an ongoing discussion has begun in which several district courts have questioned the continued viability of the *Semien* ruling.<sup>104</sup> That debate was somewhat put to rest by *Dennison v. MONY Life Retirement Income Security Plan for Employees*,<sup>105</sup> where the Seventh Circuit finally acknowledged that *Glenn* and other rulings from around the country, “suggest a softening, but not a rejection, of the standard announced in *Semien*.”<sup>106</sup> *Dennison* nonetheless urged caution and insisted upon the continuation of limited discovery, but failed to offer any guidance to the lower courts on how “to trace out the contours of permissible discovery under ERISA.”<sup>107</sup> Since *Dennison*, two district courts have concluded that discovery should not be permitted in the ordinary “run of the mill” ERISA cases, but should be reserved only for cases in which there has either been a demonstrated history of biased adjudications or where a credible assertion can be made that bias impacted the claim process.<sup>108</sup>

Around the country, though, courts have been allowing “conflict” discovery on topics such as whether claim handlers were incentivized to deny claims through bonuses, or whether management’s perception of overly generous claim approvals was reflected in critical performance appraisals.<sup>109</sup> Additional topics of approved permissible discovery relate to whether vendors hired to

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102. 577 F.3d 783, 788 (7th Cir. 2009).

103. See *Murphy v. Deloitte & Touche Grp. Ins. Plan*, 619 F.3d 1151 (10th Cir. 2010).

104. See *Gessling v. Grp. Long Term Disability Plan for Employees of Sprint/United Mgmt. Co.*, No. 1:07-cv-0483-DFH-DML, 2008 U.S. Dist. LEXIS 96623 (S.D. Ind. Nov. 26, 2008) (finding *Semien* to have been superseded by *Glenn*); accord *Hall v. Life Ins. Co. of N. Am.*, 265 F.R.D. 356 (N.D. Ind. 2010); *Baxter v. Sun Life Assurance Co. of Canada*, 713 F. Supp. 2d 766 (N.D. Ill. 2010) (permitting limited discovery).

105. 710 F.3d 741 (7th Cir. 2013).

106. *Id.* at 747.

107. *Id.*

108. *Gebert v. Thrivent Fin. for Lutherans Grp. Disability Income Ins. Plan*, No. 13-C-170, 2013 U.S. Dist. LEXIS 181658 (E.D. Wis. Dec. 30, 2013); *Warner v. Unum Life Ins. Co. of Am.*, No. 12 C 2782, 2013 U.S. Dist. LEXIS 105067, at \*7 (N.D. Ill. July 26, 2013).

109. See *Klein v. Nw. Mutual Life Ins. Co.*, 806 F. Supp. 2d 1120 (S.D. Cal. 2011) (cataloguing topics of permitted conflict discovery); *Bird v. GTX, Inc.*, No. 08-2852-JPM-cgc, 2009 U.S. Dist. LEXIS 106301 (W.D. Tenn. Nov. 13, 2009) (listing permissible and impermissible discovery topics).

conduct claim reviews may have been biased in favor of claim denials.<sup>110</sup> Other courts, though, have disallowed discovery requests characterized as a “batting average” approach<sup>111</sup> that looks at the frequency of claim approvals and denials by particular individuals.

### C. Discovery Under the De Novo Standard

Paradoxically, the expansion of discovery under the deferential standard of review has, in some instances, led to a contraction of permitted discovery under the de novo standard. Indeed, in the case of *Rowell v. Avinza Technology Health & Welfare Plan*, after the issuance of an order granting broad conflict-related discovery, the defendant stipulated to de novo review in order to limit discovery.<sup>112</sup> Most courts have found that conflict discovery is irrelevant under the de novo standard since the court is weighing the evidence rather than examining the motivation behind a claim denial, although the potential bias of consultants hired to help evaluate claims has often been accepted by courts as an appropriate rationale for permitting discovery.<sup>113</sup> Discovery under the de novo standard has also been permitted to clarify discrepancies in the evidence<sup>114</sup> or to help resolve complex medical issues.<sup>115</sup> However, most courts have been reluctant

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110. See, e.g., *Walker v. Metro. Life Ins. Co.*, 585 F. Supp. 2d 1167 (N.D. Cal. 2008).

111. See *Warner*, No. 12 C. 2782, 2013 U.S. Dist. LEXIS 105067, at \*18-19:

As for the statistical information concerning other claims reviews, the Court is reluctant to go down the route of what other courts have characterized as “batting average” statistics for similar claims or to permit Warner to review the claims files for a discrete number of other benefits applicants, an alternative that Warner suggested in her briefs and at oral argument. The Seventh Circuit has warned, “*Glenn* does not invite a ‘batting average’ approach, assessing conflict by comparing the number of benefits decisions affirmed and reversed in federal court. (The sampling problems with that approach would be daunting.)” *Holmstrom v. Metro. Life Ins. Co.*, 615 F.3d 758, 767-768 (7th Cir. 2010). Judge Feinerman in *Garvey v. Piper Rudnick LLP Long Term Disability Ins. Plan*, 2012 U.S. Dist. LEXIS 44356, 2012 WL 1079966 (N.D. Ill. Ma[r.] 30, 2012), also refused to use a similar batting average approach in assessing structural conflicts. “The Seventh Circuit has warned that sampling problems render useless this type of ‘batting average approach,’ in which prior adverse court decisions are used to infer bias on the part of a plan administrator.”

112. No. C 10-5656 PSG, 2012 U.S. Dist. LEXIS 16957, at \*2-3 (N.D. Cal. Feb. 10, 2012).

113. See *Gavin v. Life Ins. Co. of N. Am. & Corn Prods. Int’l*, No. 12 C 6178, 2013 U.S. Dist. LEXIS 71908 (N.D. Ill. May 21, 2013) (permitting discovery relating to consultant physicians); *Borich v. Life Ins. Co. of N. Am.*, No. 12 C 734, 2013 U.S. Dist. LEXIS 56974 (N.D. Ill. Apr. 25, 2013) (same).

114. *Patton v. MFS/Sun Life Fin. Distribs., Inc.*, 480 F.3d 478 (7th Cir. 2007).

115. *Bailey v. Am. Heritage Life Ins. Co.*, No. 1-11cv15 SNLJ, 2011 U.S. Dist. LEXIS 127211 (E.D. Mo. Nov. 3, 2011).

to permit depositions of claim adjusters.<sup>116</sup> While courts that have rejected such discovery apply the rationale that what the adjuster did or thought is irrelevant to the court's consideration of the evidence, such discovery still has potential relevance as to a number of other issues. For example, *Glenn's* recognition that ERISA's fiduciary obligations impose on insurers a requirement to utilize "higher-than-marketplace quality standards" to insure accurate claim decisions<sup>117</sup> should permit some discovery into whether that benchmark was met. Relatedly, all contracts contain an implied covenant of good faith and fair dealing; and under comment d to section 205 of the *Restatement (Second) of Contracts*, the drafters recognize:

Subterfuges and evasions violate the obligation of good faith in performance even though the actor believes his conduct to be justified. But the obligation goes further: bad faith may be overt or may consist of inaction, and fair dealing may require more than honesty. A complete catalogue of types of bad faith is impossible, but the following types are among those which have been recognized in judicial decisions: evasion of the spirit of the bargain, lack of diligence and slacking off, willful rendering of imperfect performance, abuse of a power to specify terms, and interference with or failure to cooperate in the other party's performance.<sup>118</sup>

One of the *Restatement's* drafters, E. Allan Farnsworth, further remarked in a leading treatise on contract law:

[I]f a party has conditioned a duty to pay on honest satisfaction with the other party's performance, the condition is excused if the party to be satisfied refuses to look at the performance. Such a refusal would amount to a breach that would excuse the conditions and make the duty of pay unconditional.<sup>119</sup>

Thus, while the Seventh Circuit was no doubt correct in noting in *Krolnik* that in a suit claiming a breach of contract, the court considers evidence in order to make a "decision about how the language of the contract applies to those facts,"<sup>120</sup> there are other considerations that would be appropriate subjects for discovery relevant to the court's decision as to whether the benefits were denied in contravention of the terms of the contract.

Another potential basis for permitting discovery into the

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116. *But see* Charles v. UPS Nat'l Long Term Disability Plan, No. 12-06223, 2013 U.S. Dist. LEXIS 164218 (E.D. Pa. Nov. 19, 2013) (insured was permitted to depose the claim adjuster, irrespective of which standard of review applied).

117. Metro. Life Ins. Co. v. Glenn, 554 U.S. 105, 115 (2008).

118. RESTATEMENT (SECOND) OF CONTRACTS § 205 cmt. d (1980).

119. 2 E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS 454 (3d ed. 2004).

120. 570 F.3d 841, 843 (7th Cir. 2009).

circumstances surrounding the claim determination arises if a disgorgement remedy is claimed. A recent Sixth Circuit ruling that was vacated pending rehearing, *Rochow v. Life Insurance Co. of North America*, recognized such a remedy in order to allow an aggrieved participant to remedy the plan administrator's unjust enrichment.<sup>121</sup> The court deemed the disgorgement remedy "appropriate equitable relief" available under ERISA section 502(a)(3) in addition to the benefits due.<sup>122</sup> However, the Sixth Circuit ruling admonished that not every case would permit a disgorgement remedy, although the circumstances that would justify such a remedy were not spelled out.<sup>123</sup> Nonetheless, in order for a court to ascertain whether the denial was sufficiently unjust to trigger a disgorgement remedy, discovery into how the claim was processed would be a relevant consideration.

Similarly, evaluations of entitlement to ERISA attorneys' fees<sup>124</sup> may trigger additional discovery. Although *Hardt v. Reliance Standard Life Insurance Co.* ruled that the threshold eligibility to receive a fee award is triggered by achieving "some degree of success on the merits,"<sup>125</sup> most courts continue to require a more detailed analysis that necessitates an examination into the defendant's "culpability or bad faith."<sup>126</sup> Thus, allowing depositions of the individuals who rendered the claim decision will later inform the court's determination as to whether the claim was evaluated honestly and fairly.

#### *D. How Courts Decide the Merits of ERISA Cases*

As pointed out in an earlier section, under the *Krolnik* paradigm, ERISA cases brought under the de novo standard should be decided following bench trials.<sup>127</sup> Another approach is to utilize bench trials "on the papers" in accordance with Rule 52 of the Federal Rules of Civil Procedure,<sup>128</sup> where the court enters findings of fact and

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121. 737 F.3d 415, 425-26 (6th Cir. 2013), *vacated, reh'g granted*, No. 12-2074, 2014 U.S. App. LEXIS 3158 (6th Cir. Feb. 19, 2014).

122. *Id.* at 423, 425-26. The Sixth Circuit cited *Nickel v. Bank of Am.*, 290 F.3d 1134, 1138 (9th Cir. 2002), for the proposition that "if you take my money and make money with it, your profit belongs to me." *Rochow*, 737 F.3d at 429.

123. *Rochow*, 737 F.3d at 426-27.

124. 29 U.S.C. § 1132(g) (2012).

125. 560 U.S. 242, 254 (2010) (citing *Ruckelshaus v. Sierra Club*, 463 U.S. 680 (1983)).

126. *Id.* at 249 n.1.

127. See *Diaz v. Prudential Ins. Co.*, 499 F.3d 640, 643 (7th Cir. 2007).

128. Rule 52 governs bench trials and requires the district court to enter findings of fact and

conclusions of law.<sup>129</sup> The Ninth Circuit, in *Kearney v. Standard Insurance Co.*,<sup>130</sup> explicitly mandates the use of that procedure, deeming such an approach an appropriate mechanism to retain a limitation upon the scope of the court's review of the evidence considered by the plan administrator and to minimize litigation expenses. The court explained:

Although Rule 43(a) [of the Federal Rules of Civil Procedure] requires that "testimony" be taken in open court, the record should be regarded as being in the nature of exhibits, in the nature of documents, which are routinely a basis for findings of fact even though no one reads them out loud. . . . This is vastly less expensive to all parties, accomplishes the policies enacted as part of the statute, and also gives significance, which would otherwise largely evaporate, to the administrator's internal review procedure required by the statute.<sup>131</sup>

The pitfall in the utilization of such an approach is in its practical finality. Rule 52(a)(6) states: "Findings of fact, whether based on oral or other evidence, must not be set aside unless clearly erroneous, and the reviewing court must give due regard to the trial court's opportunity to judge the witnesses' credibility."<sup>132</sup> The clearly erroneous standard of review presents a huge challenge to any party seeking to overturn a judgment entered under Rule 52.<sup>133</sup> Hence, the likelihood of overturning a district court decision in the court of appeals is nearly impossible.

So how should ERISA cases be adjudicated? The summary judgment paradigm is utilized by most courts, but is inapt for a number of reasons. And other courts have outright barred the use of summary judgment to decide ERISA cases. For example, local rules in the Northern and Southern Districts of Iowa recite:

**Actions for Judicial Review Based on Administrative Record.**

Ordinarily, motions for summary judgment are not appropriate in actions for judicial review based on an administrative record, such

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conclusions of law. *See* FED. R. CIV. P. 52.

129. *See, e.g., Hess v. Hartford Life & Accident Ins. Co.*, 274 F.3d 456, 461 (7th Cir. 2001) (describing procedure as "akin to a bench trial"); *see also Crespo v. Unum Life Ins. Co. of Am.*, 294 F. Supp. 2d 980, 991-92 (N.D. Ill. 2003) (commending the use of such a proceeding for resolution of ERISA cases).

130. 175 F.3d 1084 (9th Cir. 1999) (en banc).

131. *Id.* at 1094-95; *see* FED. R. CIV. P. 43(a).

132. FED. R. CIV. P. 52(a)(6).

133. In order to reverse a lower court decision under the clearly erroneous standard, the Seventh Circuit has remarked, "We will not reverse [a] determination unless it strikes us as wrong with the force of a 5-week-old, unrefrigerated, dead fish." *Citizens First Nat'l Bank of Princeton v. Cincinnati Ins. Co.*, 200 F.3d 1102, 1108 (7th Cir. 2000) (citation omitted).

as Social Security benefits cases or claim-review cases brought under the Employee Retirement Income Security Act of 1974.<sup>134</sup>

Despite the utilization of the term “administrative record” in ERISA cases, that phrase is a misnomer; and since the Federal Rules of Civil Procedure are applicable to all civil cases, it is questionable whether a district court possesses the authority to exempt ERISA cases from one of the Federal Rules. Nor is it clear what Rule may be invoked to resolve an ERISA dispute when trials are not permitted and summary judgment is eliminated.

Other courts have retained the term “summary judgment,” but admittedly deviate from Rule 56 of the Federal Rules of Civil Procedure. Both the First and Tenth Circuits promote the utilization of a form of summary judgment to resolve ERISA cases, which those courts describe as the “vehicle” to resolve ERISA benefit disputes. In the recently decided *Gross v. Sun Life Assurance Co. of Canada*<sup>135</sup> ruling, the court pronounced:

Both in the district court and on appeal, however, the summary judgment analysis in ERISA benefits cases differs from the ordinary summary judgment inquiry “in one important aspect.” In these cases, “where review is based only on the administrative record before the plan administrator and is an ultimate conclusion as to disability to be drawn from the facts, summary judgment is simply a vehicle for deciding the issue.” The non-moving party in an ERISA benefits case is thus not entitled to the usual inferences in its favor.<sup>136</sup>

Other than citing prior precedent, however, the First Circuit’s assertion is inconsistent with Rule 56, which explicitly states: “The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled

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134. N.D. & S.D. IOWA CIV. R. 56(i).

135. 734 F.3d 1 (1st Cir. 2013), *vacating* No. 09–11678–RWZ, 2012 WL 29061 (D. Mass. Jan. 6, 2012).

136. *Id.* at 16-17 (citing *Orndorf v. Paul Revere Life Ins. Co.*, 404 F.3d 510, 517 (1st Cir. 2005)). The Tenth Circuit has borrowed the same conclusion. In *LaAsmar v. Phelps Dodge Corp. Life, Accidental Death & Dismemberment & Dependent Life Ins. Plan*, 605 F.3d 789 (10th Cir. 2010), the court observed:

Where, as here, the parties in an ERISA case both moved for summary judgment and stipulated that no trial is necessary, “summary judgment is merely a vehicle for deciding the case; the factual determination of eligibility for benefits is decided solely on the administrative record, and the non-moving party is not entitled to the usual inferences in its favor.”

*Id.* at 796 (citing *Bard v. Boston Shipping Ass’n*, 471 F.3d 229, 235 (1st Cir. 2006)).

The Ninth Circuit, in *Nolan v. Heald College*, 551 F.3d 1148 (9th Cir. 2009), has also described summary judgment as a “vehicle” to decide an ERISA case where the court reviews an “administrative” record; however, the court further ruled that traditional summary judgment principles apply to the court’s consideration of evidence outside the record. *Id.* at 1154.



to judgment as a matter of law.”<sup>137</sup> Moreover, the Supreme Court has declared that in ruling on summary judgment, “[t]he evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor.”<sup>138</sup> And on cross-motions for summary judgment, each motion is viewed separately and the court draws “all reasonable inferences in favor of the respective non-moving party.”<sup>139</sup>

That paradigm is nearly impossible to utilize in ERISA benefits cases, though, which usually involve marked disputes with contested evidence presented by both sides; and even when a court defers to the plan administrator’s decision, if inferences were to be drawn against the administrator, summary judgment would be ruled out in nearly every case. Recognizing that paradox, a judge in Massachusetts pointed out:

Often a court will encounter a situation where it could resolve the case if acting as a “neutral factfinder,” but cannot resolve the case if it evaluates each of the cross motions for summary judgment under the ordinary standard. There is thus a temptation to “cheat” a little – to apply the summary judgment standard more loosely than is appropriate in order to resolve these cases. Professor Arthur R. Miller has made a persuasive argument that federal courts in general have gotten too aggressive in using summary judgment and dismissal to dispose of cases, at the expense of litigants’ right to their day in court and to a jury trial. This Court shares Professor Miller’s concerns.

Rather than risk creating bad summary judgment precedent that might bleed into other areas of the law, courts should urge the parties in ERISA benefits cases to agree to treat their case as a case stated. This permits a court to decide a case based on a stipulated record, without applying the summary judgment standard. The court simply draws such inferences as are reasonable from the facts. Even in this case, where the parties did not agree about the scope of the record, they were able to agree that the summary judgment standard would not apply.<sup>140</sup>

The Second Circuit has likewise indicated its awareness of the problem. In *O’Hara v. National Union Fire Insurance Co.*,<sup>141</sup> the court

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137. FED. R. CIV. P. 56(a).

138. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

139. *Roman Catholic Bishop v. City of Springfield*, 724 F.3d 78, 89 (1st Cir. 2013).

140. *Radford Trust v. First Unum Life Ins.Co. of Am.*, 321 F. Supp. 2d 226, 239-40 (D. Mass. 2004), *appeal dismissed in part, rev’d in part*, 491 F.3d 21 (1st Cir. 2007) (citing Arthur R. Miller, *The Pretrial Rush to Judgment: Are the “Litigation Explosion,” “Liability Crisis,” and Efficiency Cliches Eroding Our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. REV. 982 (2003) and *Boston Five Cents Savings Bank v. Sec’y of Dep’t of Housing & Urban Dev.*, 768 F.2d 5, 11-12 (1st Cir. 1985)).

141. 642 F.3d 110 (2nd Cir. 2011).

correctly stated the summary judgment paradigm and noted the problematic manner in which ERISA cases have been resolved:

[T]he district court's task on a summary judgment motion – even in a nonjury case – is to determine whether genuine issues of material fact exist for trial, not to make findings of fact. Sometimes in ERISA cases parties make a “motion for judgment on the administrative record,” which we have observed is “a motion that does not appear to be authorized in the Federal Rules of Civil Procedure.” If such a motion is treated as a summary judgment motion, the district court must limit its inquiry to determining whether questions of fact exist for trial. In some circumstances, it may be appropriate for the district court to treat such a motion as requesting “essentially a bench trial ‘on the papers’ with the District Court acting as the finder of fact.” In that scenario, the district court may make factual findings, but it must be clear that the parties consent to a bench trial on the parties' submissions, and the district court must “make explicit findings of fact and conclusions of law” pursuant to Federal Rule of Civil Procedure 52(a).<sup>142</sup>

The viewpoint offered by *O'Hara* is undoubtedly a proper expression of civil procedure, but it raises a new question – what if one of the parties refuses to consent to a trial on the papers? The usual disposition of civil cases is by trial, whether by jury or by the court.<sup>143</sup> That rule provides that even as to matters not subject to trial of right by a jury, the court may empanel an advisory jury. Regardless, the Federal Rules of Civil Procedure require the taking of testimony in open court.<sup>144</sup> And the admission of evidence in all civil trials is governed by the Federal Rules of Evidence.<sup>145</sup> Without a stipulation by the parties as to admissibility, much of what is included in an ERISA claim record is plainly hearsay.<sup>146</sup> Thus, a trial is essential, especially in relation to medical and vocational opinions offered in health and disability benefits disputes.

### *E. Jury Trials*

Although some cases, such as the Seventh Circuit ruling in

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142. *Id.* at 116 (citing *Vona v. Cnty. of Niagara*, 119 F.3d 201, 205 n.4 (2d Cir. 1997) and *Burke v. PriceWaterHouseCoopers LLP*, Long Term Disability Plan, 537 F. Supp. 2d 546, 548 (S.D.N.Y. 2008) (parties consented to “summary trial” on stipulated administrative record, waiving right to call witnesses), *aff'd*, 572 F.3d 76, 78 (2d Cir. 2009), and quoting *Muller v. First Unum Life Ins. Co.*, 341 F.3d 119, 124 (2d Cir. 2003)).

143. FED. R. CIV. P. 39.

144. FED. R. CIV. P. 43.

145. FED. R. EVID. 1101.

146. FED. R. EVID. 801(c).

*Krolnik*,<sup>147</sup> recommend bench trials of ERISA benefit disputes, jury trials are generally disallowed in ERISA cases.<sup>148</sup> The primary reason advanced for disallowing jury trials is that ERISA benefit cases are equitable in nature.<sup>149</sup> However, the courts have also characterized claims brought under ERISA section 502(a)(1)(B) as contractual in nature.<sup>150</sup> Actions for breach of contract are viewed as legal claims; and the Supreme Court made it clear in *Chauffeurs, Teamsters & Helpers, Local No. 391 v. Terry* that parties seeking a contractual remedy are entitled to a trial by jury under the Seventh Amendment.<sup>151</sup>

*Terry's* analysis focused on a comparison between the action brought in federal court to claims that were available in 18th century English courts before the merger of the courts of law and equity and whether jury trials were permitted as to such claims. *Terry* further emphasized that a court should “examine the remedy sought and determine whether it is legal or equitable in nature.”<sup>152</sup> Since juries in eighteenth century England heard breach of contract actions and awarded contractual relief, the Court ruled that a suit for breach of a collective bargaining agreement was also subject to trial by jury.

Both the right to bring suit to recover benefits due under the terms of an employee benefit plan and the contractual remedies available under section 502(a)(1)(B)<sup>153</sup> of ERISA are indistinguishable from common law actions for breach of contract. That conclusion was

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147. *Krolnick v. Prudential Ins. Co. of Am.*, 570 F.3d 841 (7th Cir. 2009).

148. *O'Hara v. Nat'l Union Fire Ins. Co.*, 642 F.3d 110, 116 (2d Cir. 2011); *Graham v. Hartford Life & Accident Ins. Co.*, 589 F.3d 1345 (10th Cir. 2009) (collecting cases); see also Donald T. Bogan, *ERISA: Re-Thinking Firestone in Light of Great-West – Implications for Standard of Review and the Right to a Jury Trial in Welfare Benefit Claims*, 37 J. MARSHALL L. REV. 629 (2004).

149. See *Thomas v. Or. Fruit Prods. Co.*, 228 F.3d 991 (9th Cir. 2000) (holding that due to the type of remedy involved and the lack of a constitutional requirement, there is no right to a jury trial in ERISA claims).

150. See, e.g., *Larson v. United Healthcare Ins. Co.*, 723 F.3d 905, 911 (7th Cir. 2013). In that case, the court pronounced:

An ERISA § 502(a)(1)(B) claim is “essentially a contract remedy under the terms of the plan.” The Supreme Court has explained that the remedy provided in § 1132(a)(1)(B) is designed “to protect contractually defined benefits,” and in keeping with its contract-law foundations, the cause of action offers typical contract forms of relief, including recovery of benefits accrued or otherwise due, declaratory judgments to clarify plan benefits, and injunctions against future denial of benefits. The claim is governed by a federal common law of contract keyed to the policies codified in ERISA.

*Id.* (citations omitted).

151. 494 U.S. 558, 564-65 (1990).

152. *Id.* at 565 (quoting *Tull v. United States*, 481 U.S. 412, 417-18 (1987)).

153. 29 U.S.C. § 1132(a)(1)(b) (2012).

drawn in a case decided shortly after ERISA's passage, *Stamps v. Michigan Teamsters Joint Council No. 43*.<sup>154</sup> *Stamps* found suits for benefits due under a collectively bargained pension plan are subject to a jury trial by recognizing that such a claim "is essentially a contract action for damages."<sup>155</sup> *Stamps* recognized that actions alleging breach of fiduciary duty brought under section 502(a)(3)<sup>156</sup> of ERISA are equitable in nature, but the court rejected such a finding as to a section 502(a)(1)(B) claim, reasoning, "If the court construed subsection (a)(1)(B) to also create a cause of action for equitable relief, it would be superfluous to subsection (a)(3)."<sup>157</sup> The court added that its construction of section 502 was consistent with ERISA's legislative history, stating that section "502 actions should be guided by the case law developed under section 301 of the Labor-Management Relations Act of 1947."<sup>158</sup>

However, while some courts have expressed dissatisfaction with the absence of jury trials in ERISA benefit cases,<sup>159</sup> the current state of the law was summarized in a recent district court opinion that thoughtfully aired out the issue and the constitutional rights at stake,<sup>160</sup> concluding:

The parties agree ERISA does not expressly provide the right to a jury trial. Accordingly, if Plaintiffs have a right to a jury trial, it must flow from the Seventh Amendment. The Seventh Amendment provides: "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . ." The Supreme Court has interpreted the phrase "suits at common law" to mean suits in which legal rights were to be ascertained, as opposed to suits in which equitable rights were recognized and equitable remedies were administered. The Court must both compare the action to eighteenth century actions brought in the courts of England prior to the merger of courts of law and equity and examine the remedy to determine whether it is legal or equitable in nature. The second stage of the analysis is more important than the first.

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154. 431 F. Supp. 745 (E.D. Mich. 1977).

155. *Id.* at 746.

156. 29 U.S.C. § 1132(a)(3).

157. *Stamps*, 431 F. Supp. at 747.

158. *Id.* (citing 29 U.S.C. § 185 (1988) and H.R. REP. NO. 93-1280, at 5107 (1974) (Conf. Rep.) ("All such actions in Federal or State courts 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.")).

159. See *Radford Trust v. Unum Life Ins. Co. of Am.*, 321 F. Supp. 2d 226, 240-42 (D. Mass. 2004), *appeal dismissed in part, rev'd in part*, 491 F.3d 21 (1st Cir. 2007).

160. *Bauer-Ramazani v. Teachers Ins. & Annuity Ass'n of Am.-College Ret. & Equities Fund*, No. 1:09-CV-190, 2013 U.S. Dist. LEXIS 169261 (D. Vt. Nov. 27, 2013).

Legal remedies traditionally involve money damages. Equitable remedies are typically coercive, enforceable directly on the person or thing to which they are directed, and discretionary.<sup>161</sup>

Following that discussion, the court concluded that even claims brought under section 502(a)(1)(B) seeking monetary relief were equitable in nature, particularly in view of the expansion of equitable remedies resulting from the Supreme Court's ruling in *CIGNA Corp. v. Amara*,<sup>162</sup> which permitted monetary remedies falling within the equitable doctrine of "surcharge." Thus, at present, the law regarding jury trials in ERISA cases does not appear likely to change.

#### *F. The Evidence Considered*

Other than the rules limiting the admissibility of evidence set forth in the Federal Rules of Evidence, in civil actions, parties are generally able to present any "relevant" evidence, which the Rules define as evidence that "has any tendency to make a fact more or less probable than it would be without the evidence" and "the fact is of consequence in determining the action."<sup>163</sup> The principal restriction on admissibility of relevant evidence is set forth in Federal Rule of Evidence 402, which reads:

Relevant evidence is admissible unless any of the following provides otherwise:

- the United States Constitution;
- a federal statute;
- these rules; or
- other rules prescribed by the Supreme Court.

Irrelevant evidence is not admissible.<sup>164</sup>

Although nothing in the ERISA statute restricts the admissibility of relevant evidence, courts routinely limit the evidence considered to the so-called "administrative record." But what is the administrative record? In addition to the term being a misnomer, since, as discussed above, ERISA does not compel an administrative procedure, the most clear-cut definition of what evidence comprises the ERISA administrative record was set forth in *Vega v. National Life Insurance Services, Inc.*,<sup>165</sup> which ruled:

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161. *Id.* at \*31-32 (citations omitted).

162. 131 S. Ct. 1866 (2011).

163. FED. R. EVID. 401.

164. FED. R. EVID. 402.

165. 188 F.3d 287 (5th Cir. 1999).

We hold today that the administrative record consists of relevant information made available to the administrator prior to the complainant's filing of a lawsuit and in a manner that gives the administrator a fair opportunity to consider it. Thus, if the information in the doctors' affidavits had been presented to National Life before filing this lawsuit in time for their fair consideration, they could be treated as part of the record.<sup>166</sup>

Other courts, though, have deemed *Vega* an "outlier" and have refused to consider any evidence submitted after the issuance of the plan administrator's final claim determination following submission of a pre-litigation appeal.<sup>167</sup> In some circumstances, the failure to submit evidence during the claim proceedings is the fault of the claimant; and courts have barred evidence that might have been obtained and submitted earlier, such as medical and vocational reports.<sup>168</sup> However, in other circumstances, the courts routinely exclude evidence that could not have been obtained earlier. For example, in *Majeski v. Metropolitan Life Insurance Co.*,<sup>169</sup> a case that involved a dispute over entitlement to disability benefits, a pending concurrent claim for Social Security disability was not decided until after the claim appeals were exhausted and litigation had begun. Although the Social Security determination provided a relevant, objectively-based benchmark against which the insurer's denial of disability benefits could be judged, the court excluded the evidence. The court's rationale was that in conducting a deferential review of the insurer's claim determination, the insurer could not be faulted for reaching a conclusion that failed to consider evidence that was not even in existence when the determination was reached.<sup>170</sup> While true, that begs the question of the ultimate issue raised in an ERISA benefit dispute – should the court be deciding the plaintiff's entitlement to benefits, or is the court's function to review deferentially the claim determination?<sup>171</sup>

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166. 188 F.3d at 300.

167. See, e.g., *Majeski v. Metro. Life Ins. Co.*, 590 F.3d 478, 483 (7th Cir. 2009).

168. *Alford v. DCH Found. Grp. Long-Term Disability Plan*, 311 F.3d 955, 959 (9th Cir. 2002).

169. 590 F.3d 478 (7th Cir. 2009).

170. *Id.* at 483.

171. See *Evans v. Eaton Corp. Long Term Disability Plan*, 514 F.3d 315, 323 (4th Cir. 2008) ("Under no formulation, however, may a court, faced with discretionary language like that in the plan instrument in this case, forget its duty of deference and its secondary rather than primary role in determining a claimant's right to benefits."). The Fourth Circuit's elevation of form over substance brings to mind the musing of Grant Gilmore, who wrote:

Law reflects but in no sense determines the moral worth of a society. The values of a reasonably just society will reflect themselves in a reasonably just law. The better the society, the less law there will be. In heaven there will be no law, and

Recently, *Majeski's* exclusionary rule has been softened in other jurisdictions. For example, in *Melech v. Life Insurance Co. of North America*,<sup>172</sup> the Eleventh Circuit ruled that a disability insurer should have obtained and considered a Social Security evidentiary record due to its relevance and remanded the case for consideration of such evidence. And in *Helton v. AT&T Inc.*,<sup>173</sup> the Fourth Circuit ruled that the scope of review encompasses both the administrative record, as well as evidence that was known to or should have been known to the plan administrator.

Under the *de novo* standard, as noted above, the evidentiary restrictions are relaxed, but to return to the main theme of this article, a policy imposing restrictions on the admission of evidence other than those stated in the Federal Rules of Evidence is inconsistent with Congress's authorization permitting aggrieved claimants to bring a *civil action*. Given the importance of employee benefits, which, in the case of medical insurance and the denial of treatment, may mean the difference between life and death, placing artificial restrictions on the evidence to be considered by the court may ultimately produce an unwarranted death sentence.

### G. ERISA Judgments

Yet another aspect of ERISA civil procedure that varies from the norm is the practice by courts of deferring a final determination on the merits of the claim presented and remanding an ERISA benefit dispute to the plan administrator/insurer. In *Majeski*, the court pronounced, "When a plan administrator fails to provide adequate reasoning for its determination, our typical remedy is to remand to the plan administrator for further findings or explanations."<sup>174</sup> The court failed, though, to cite any statutory or precedential authority in support of remands. Nowhere in the ERISA statute or in its legislative history is there any language permitting remands, in contrast to the statute governing judicial review of Social Security benefit disputes, which explicitly authorizes remands in two situations – where the administrative determination is unsupported by

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the lion shall lie down with the lamb. The values of an unjust society will reflect themselves in an unjust law. The worse the society, the more law there will be. In Hell there will be nothing but law, and due process will be meticulously observed.

GRANT GILMORE, *THE AGES OF AMERICAN LAW* 110 (1977).

172. 739 F.3d 663 (11th Cir. 2014).

173. 709 F.3d 343 (4th Cir. 2013).

174. *Majeski v. Metro. Life Ins. Co.*, 590 F.3d 478, 484 (7th Cir. 2009) (citations omitted).

substantial evidence and where new and material evidence needs to be considered.<sup>175</sup> In *SEC v. Chenery Corp.*,<sup>176</sup> the Supreme Court approved the practice of permitting courts to remand administrative decisions heard on judicial review. However, ERISA is not subject either to the Social Security Act<sup>177</sup> or to the Administrative Procedure Act.<sup>178</sup>

Moreover, a decisive circuit split exists on the question of whether the issuance of a remand order in an ERISA case is final and appealable. The majority of circuits hold that ERISA remand orders are non-appealable<sup>179</sup> because they fail to constitute final judgments, the pre-requisite for appellate jurisdiction.<sup>180</sup> Only the Seventh<sup>181</sup> and Ninth Circuits<sup>182</sup> deem remand orders appealable.

The circuit split on the question of whether remand orders are appealable and the absence of statutory authority permitting remands of ERISA cases, should, but has so far failed to, provoke a judicial inquiry as to the basis for a procedure that lacks statutory authority. Nor has any court examined whether ERISA remands are even constitutionally permitted. Although there may be some resemblance between ERISA cases and contractually-mandated arbitration where a court may remand a matter pursuant to the Federal Arbitration Act,<sup>183</sup> the Department of Labor forbids mandatory binding arbitration of ERISA cases.<sup>184</sup> Nor are there any other statutory

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175. 42 U.S.C. § 405(g) (2012).

176. 318 U.S. 80, 95 (1943).

177. 42 U.S.C. §§ 401-1397mm (2012).

178. 5 U.S.C. §§ 500-96 (2012).

179. See, e.g., *Dickens v. Aetna Life Ins. Co.*, 677 F.3d 228 (4th Cir. 2012); *Young v. Prudential Ins. Co. of Am.*, 671 F.3d 1213 (11th Cir. 2012); *Gerhardt v. Liberty Life Assurance Co. of Boston*, 574 F.3d 505 (8th Cir. 2009); *Graham v. Hartford Life & Accident Ins. Co.*, 501 F.3d 1153 (10th Cir. 2007); *Bowers v. Sheet Metal Workers' Nat'l Pension Fund*, 365 F.3d 535 (6th Cir. 2004). *But see* *Spradley v. Owens-Ill. Hourly Emps. Welfare Benefit Plan*, 686 F.3d 1135 (10th Cir. 2012) (since the remand order was limited to directing the district court to perform the ministerial task of awarding benefits, the remand order is appealable).

180. *Mead v. Reliastar Life Ins.Co.*, 768 F.3d 102 (2d Cir. 2014) (identifying the decisive circuit split on the issue of appealability of ERISA remand orders and concluding that such orders are non-final and therefore non-appealable); See *Papotto v. Hartford Life & Accident Ins. Co.*, 731 F.3d 265, 269 (3d Cir. 2013) (finding ERISA remand orders unappealable because they fail to comply with the requirements for appellate jurisdiction: “[f]ederal appellate courts have jurisdiction predominantly over appeals from ‘final decisions of the district courts of the United States.’” (quoting 28 U.S.C. § 1291 (2012))).

181. *Perlman v. Swiss Bank Corp. Comprehensive Disability Protection Plan*, 195 F.3d 975 (7th Cir. 1999).

182. *Hensley v. Nw. Permanente P.C. Retirement Plan & Trust*, 258 F.3d 986, 993 (9th Cir. 2001).

183. See 9 U.S.C. § 10 (2012).

184. 29 C.F.R. § 2560.503-1(c)(4) (2013).



contexts where a federal court would remand a civil action to a private, self-interested party.

One case where a federal appellate court questioned its authority to remand ERISA benefit claims was *Perlman v. Swiss Bank Corp. Comprehensive Disability Protection Plan*,<sup>185</sup> where the court remarked, “[a]lthough it is doubtful as an original matter that a district court may ‘remand’ ERISA claims, as if to administrative agencies, we have held that courts may treat welfare benefit plans just like administrative law judges implementing the Social Security disability-benefits program.”<sup>186</sup> Yet the Seventh Circuit never resolved its doubt; nor did it explain why courts have treated ERISA cases like Social Security disability benefits cases or whether such treatment is appropriate or even lawful.<sup>187</sup>

Other courts have expressed skepticism about the utility of remands, observing that “[i]t would be a terribly unfair and inefficient use of judicial resources to continue remanding a case to the Committee to dig up new evidence until it found just the right support for its decision to deny an employee her benefits.”<sup>188</sup> A district court likewise refused to remand a benefit claim, explaining that allowing remands to the plan administrator to become “routine . . . would pose a serious risk of simply allowing ‘Mulligans’ to sloppy plan administrators – at the expense of both the courts and plan participants and beneficiaries.”<sup>189</sup> Despite those expressed concerns, the practice of remanding ERISA cases to the plan administrator or insurer continues on a regular basis based on a misapplication of an administrative law paradigm to the adjudication of ERISA benefit disputes.

Absent specific statutory authority in ERISA’s language or its legislative history, the imposition of an administrative-law type review of benefit claim denials is an entirely inappropriate regime for ERISA practice, a point noted in the academic literature<sup>190</sup> as well as

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185. 195 F.3d 975 (7th Cir. 1999).

186. *Id.* at 978 (citing *Quinn v. Blue Cross & Blue Shield Ass’n*, 161 F.3d 472, 476-78 (7th Cir. 1998) and *Schleibaum v. Kmart*, 153 F.3d 496, 503 (7th Cir. 1998)).

187. The only rationale given was the explanation that “[r]emands to plan administrators serve the same functions as remands to the Commissioner [of Social Security],” *id.* at 979, yet the *Perlman* decision failed to note that remands to the Commissioner are statutorily authorized while ERISA remands are not.

188. See *Dabertin v. HCR Manor Care, Inc.*, 373 F.3d 822, 832 (7th Cir. 2004) (citing *Vega v. Nat’l Life Ins. Servs., Inc.*, 188 F.3d 287, 302 n.13 (5th Cir. 1999) (en banc)).

189. *Fleet v. Indep. Fed. Credit Union*, No. 1:04-cv-00507-DFH-TAB, 2005 U.S. Dist. LEXIS 11778, at \*8 (S.D. Ind. May 18, 2005).

190. See John H. Langbein, *Trust Law as Regulatory Law: The Unum/Provident Scandal*

by this author.<sup>191</sup> The similarity between Social Security disability claims and disability claims arising under ERISA and the ubiquity of remands in Social Security cases has obviously been the source of a similar approach in ERISA cases and was identified as such in *Perlman*.<sup>192</sup> However, without any provision in the ERISA statute comparable to the fourth and sixth sentences of 42 U.S.C. § 405(g) (2012), which specifically authorize remands as a remedy whether the court retains jurisdiction or not, remands in civil actions are without legislative authority, and the practice raises a serious question of whether remands of ERISA cases comport with the scope of judicial authority set forth in Article III of the United States Constitution, which bars the issuance of advisory judicial opinions and mandates that federal courts issue decrees of conclusive character.

The requirement of finality of judgments was driven home by the Supreme Court nearly forty years ago in *Aetna Life Insurance Co. v. Haworth*,<sup>193</sup> which, like many ERISA benefits cases, involved a dispute over disability insurance benefits. There, the Court determined that a declaratory judgment resolving a dispute over entitlement to benefits constituted a final judgment because it resulted in an “immediate and definitive determination of the legal rights of the parties in an adversary proceeding upon the facts alleged”<sup>194</sup> even in the absence of a monetary judgment. Remands of ERISA benefit disputes without deciding the issues presented fails to meet that constitutional requirement.

Courts may be wary of deciding ERISA benefits cases involving medical or disability issues due to their lack of medical, vocational, and other technical expertise; however, courts hold trials and issue judgments in complex cases every day. Moreover, as discussed above, unlike administrative agencies that possess specialized qualifications, as *Luby v. Teamsters Health, Welfare and Pension Trust Funds* points out, ERISA plan administrators lack such expertise.<sup>195</sup>

And as a district judge in *Crocco v. Xerox Corp.*,<sup>196</sup> a health benefit case, observed on this point:

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and *Judicial Review of Benefit Denials Under ERISA*, 101 Nw. U. L. REV. 1315, 1331-33 (2007).

191. See Debofsky, *supra* note 14.

192. *Perlman v. Swiss Bank Corp. Comprehensive Disability Protection Plan*, 195 F.3d 975, 978-79 (7th Cir. 1999).

193. 300 U.S. 227, 241 (1937).

194. *Id.* at 241.

195. 944 F.2d 1176, 1183 (3d Cir. 1991).

196. 956 F. Supp. 129 (D. Conn. 1997), *aff'd*, 137 F.3d 105 (2nd Cir 1998).

The court is not impressed by Nazemetz's claim that she lacked the medical knowledge to make an independent review of Crocco's case. The fact of the matter is she did make a medical decision: She listened to the medical opinion of one side, decided that "all the facts . . . seemed to point out that medical necessity was not proven," and denied the claim. There is no reason why she could not have sought similar information from Crocco and her psychiatrist and then made an informed and fair "medical" decision, as required by ERISA. It is exactly this type of choice, between the conflicting opinions of experts, that judges, juries, and patients must make every day in courtrooms and hospitals.<sup>197</sup>

Remands of ERISA claims are therefore of questionable legality. It is the obligation of federal courts, consistent with Article III, to determine the merits of each dispute and issue a final decree of conclusive character.

#### IV. CONCLUSION

As pointed out at the outset of this article, Congress passed ERISA in 1974 with a number of salutary goals in mind:

It is hereby declared to be the policy of this Act to protect interstate commerce and the interests of participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts.<sup>198</sup>

Despite those lofty promises and the authorization of the rights of participants and their beneficiaries to bring civil actions to recover benefits due<sup>199</sup> or seek appropriate equitable relief,<sup>200</sup> the courts have created a *sui generis* civil procedure that advantages no one but self-interested plan administrators.<sup>201</sup> Without congressional authorization and with no approval by the Supreme Court, the lower federal courts have run amok, creating rules that deviate from the well-established framework provided by the Federal Rules of Civil Procedure and Federal Rules of Evidence.

As demonstrated above, the Supreme Court has repeatedly

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197. *Id.* at 140 (citation omitted).

198. 29 U.S.C. § 1001(b) (2012).

199. *Id.* § 1132(a)(1)(B).

200. *Id.* § 1132(a)(3).

201. *See Metro. Life Ins. Co. v. Glenn*, 554 U.S. 105, 108 (2008) (recognizing that the dual role of plan administrator and funder of benefit payments creates an inherent self-interested bias).

reaffirmed the proposition that there is but one form of civil action and that all civil actions are governed by the Federal Rules. Yet that instruction has been ignored, leading to a quasi-administrative law regime that protects plan administrators and insurers that administer benefits rather than the parties on whose behalf the ERISA law was passed. And the result has placed benefit claimants at a huge procedural disadvantage. ERISA claimants lack the right to take discovery, are denied plenary proceedings, are limited in the evidence they are permitted to present, and are barred from receiving the same right to trial with cross-examination of witnesses that other civil litigants enjoy. And to further the insult, even when claimants “win,” defeat is frequently snatched from the jaws of victory when the court remands the matter to the plan administrator. Even worse, in most federal judicial circuits, there is no means to challenge the remand because of the recognition by the majority of the courts of appeals that remand orders, regardless of whether jurisdiction is retained, are not final judgments.

There is unquestionably a need for reform. Given the polarization of Congress, legislative action is unlikely, leaving the Supreme Court as the only realistic venue in which to seek a remedy for the abusive and unfair manner in which ERISA cases are adjudicated. Perhaps the circuit split on the appealability of remands will be the vehicle to obtain comprehensive Supreme Court review. The division on the question of whether ERISA actions are review proceedings or entitled to plenary hearings may also attract the Court’s attention. But even if the Supreme Court were to reexamine the current regime, the result may be to continue in the present course. The *Firestone* case unleashed a genie that may be impossible at this point to put back in its bottle.

Employees value benefits and the protections promised by their employers in the event of sickness, disability, or death, as well as protection of their economic well-being in retirement. As one court noted nearly thirty years ago,

[[e]mployee benefit] rights are too important these days for most employees to want to place them at the mercy of a biased tribunal subject only to a narrow form of “arbitrary and capricious” review, relying on the company’s interest in its reputation to prevent it from acting on its bias.<sup>202</sup>

That paternalistic concern now seems quaint, as courts became

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202. *Van Boxel v. The Journal Co. Emps. Pension Trust*, 836 F.2d 1048, 1052 (7th Cir. 1987) (alteration in original).

exceptionally lenient in upholding benefit denials, which led to an inevitable scandal as documented by Professor John Langbein of Yale University, who wrote:

Broadly speaking, there are two plausible interpretations of the Unum/Provident scandal. Unum could be such an outlier that the saga lacks legal policy implications. On this view, a rogue insurance company behaved exceptionally badly, it got caught and was sanctioned, and its fate should deter others. The other reading of these events is less sanguine: For reasons discussed below in Part III, conflicted plan decisionmaking is a structural feature of ERISA plan administration. The danger pervades the ERISA-plan world that a self-interested plan decisionmaker will take advantage of its license under Bruch to line its own pockets by denying meritorious claims.<sup>203</sup>

Professor Langbein concentrated on a misapplication of trust law, while this article focuses upon the misuse of basic civil procedure, but both roads lead to the same conclusion: “The Unum/Provident scandal, by underscoring the dangers that arise when conflicted decisionmakers deny claimed benefits, demonstrates that impartial judicial review in such cases is an essential safeguard against self-serving conduct.”<sup>204</sup> Since the occurrence of the Unum/Provident scandal documented by Professor Langbein, affiliates of CIGNA Corporation were caught engaging in similar misconduct and subjected to regulatory action and penalties.<sup>205</sup> The need for reform becomes more acute every day; but only by giving ERISA claimants the same judicial process afforded in all other civil actions will necessary change be achieved.

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203. Langbein, *supra* note 190, at 1321.

204. *Id.* at 1342.

205. See *In Re Life Ins. Co. of N. Am., Regulatory Settlement Agreement* (Mar. 14, 2013) (memorializing agreement between CIGNA and regulators in Maine, Massachusetts, Connecticut, Pennsylvania, and California on claim handling processes), available at <[http://www.maine.gov/pfr/insurance/Admin\\_Enforcement\\_Actions/RSA\\_2013/CIGNA\\_RSA.pdf](http://www.maine.gov/pfr/insurance/Admin_Enforcement_Actions/RSA_2013/CIGNA_RSA.pdf)>; see also *CIGNA Enters into Regulatory Settlement Agreement*, DEBOFSKY & ASSOCS. (July 29, 2013), <<http://www.debofsky.com/2013/07/29/cigna-enters-into-regulatory-settlement-agreement/>>.