VOL. 35, NO. 1 SPRING 2022

BENEFITS LAW JOURNAL

Reimagining ERISA Civil Procedure

Mark D. DeBofsky

Claimants seeking benefits brought under the Employee Retirement Income Security Act ("ERISA") have been authorized to bring a "civil action" to seek redress. Although the term "civil action" is supposed to have identical meaning under the Federal Rules of Civil Procedure regardless of the type of claim being brought, ERISA claim litigation differs dramatically from ordinary civil procedure. Courts have invented rules that lack any statutory or other support. Such rules include an "administrative exhaustion" requirement, a denial of the Seventh Amendment right to trial by jury, an administrative review framework applied to the adjudication of claims, a standard of review that deviates from the one the Supreme Court prescribed in Firestone v. Bruch, *and a replacement of final judgments with "remands" of ERISA claims to the "plan administrator."*

For years, no court questioned the quasi-administrative law regime to which ERISA claims have been relegated. However, in a quartet of recent appellate rulings, courts have started to question the status quo.

Mark D. Debofsky is the founding member of the law firm of DeBofsky Sherman Casciari Reynolds P.C. located in Chicago, IL. He concentrates his practice in the representation of claimants and plaintiffs in employee benefit claim dispute involving disability insurance, life, health, retirement, long-term care, other employment and employee benefit-related matters. In addition to his full-time practice, Mr. DeBofsky also serves as an adjunct professor at the University of Illinois-Chicago School of Law.

This article begins with a discussion of how ERISA cases came to differ from other civil actions and then analyzes the cases that have begun to address these issues. The article concludes with a prediction as to the future course of ERISA litigation.

Everything you think you know about ERISA civil procedure is probably wrong. Although ERISA § 502(a)(1)(B)[1] authorizes claimants seeking benefits to bring a "civil action" to recover benefits, ERISA civil actions are conducted in a dramatically different manner from other civil actions heard in federal court. For example, a prerequisite to filing an ERISA benefit lawsuit is exhaustion of administrative remedies. In addition, claimants seeking benefits are not permitted jury trials or even trials for that matter, with the exception of the U.S. Court of Appeals for the Seventh Circuit[2] since ERISA cases are generally adjudicated under a sui generis form of administrative review. The standard of court review for cases heard deferentially has been transformed from an abuse of discretion standard into an arbitrary and capricious standard, which has placed a burden on claimants to prove that a claim decision was not only wrong, but essentially irrational. And finally, even if the claimant succeeds in convincing a court that a claim was wrongly decided, rather than receiving an award of benefits, the matter is usually remanded to the party that denied the claim initially for a redo.

All of the foregoing has become established doctrine in ERISA claims adjudication without any thought given to why these practices are permitted or why ERISA cases are adjudicated differently than other civil actions. More than 30 years since the U.S. Supreme Court issued *Firestone,*[3] the case that launched the current regime, courts are finally beginning to reassess how we got here and whether there is any justification for the current status quo.

The following discussion will recap how the transformation of the ERISA case from an ordinary civil action to a quasi-administrative review proceeding came about, then will discuss the recent cases that have begun to question current litigation procedures, and will conclude with a preview as to what may be coming next.

HOW DID WE GET HERE?

There is only one provision of ERISA that enumerates potential claims and causes of action that may be brought seeking benefits claimed to be owed. Section 502(a)(1)(B) of ERISA states:

> (a) Persons empowered to bring a civil action A civil action may be brought –

> (1) by a participant or beneficiary –
>
> (B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan.

Reading that provision, the first question that arises is what is a "civil action"? Rule 2 of the Federal Rules of Civil Procedure, states, "There is one form of action – the civil action."[4] In addition, Rule 1 states that the Rules apply to "all civil actions and proceedings in the United States district courts, except as stated in Rule 81."[5] Moreover, ERISA's legislative history explained 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."[6] Section 301 actions are viewed as plenary in nature and even encompass jury trials, according to *Chauffeurs, Teamsters & Helpers, Local No. 391 v. Terry*.[7]

The Supreme Court has also clarified the meaning of the term civil action with respect to the type of proceeding that a court is to conduct. In *United States v. First City National Bank,*[8] which dealt with the Bank Merger Act of 1966,[9] the Court held that despite the statute's use of the word "review," that did not connote a record review proceeding but meant instead that courts are to conduct a plenary review; i.e., hold a trial.

The Supreme Court next took up the meaning of the term "civil action" in *Chandler v. Roudebush*,[10] which was a case brought under amendments to Title VII of the Civil Rights Act of 1964[11] that expanded the scope of the law to protect federal workers who were originally not covered.[12] Although it was clear that private litigants enjoyed the right to a trial in a discrimination lawsuit, the Supreme Court was called upon to resolve a circuit split as to whether discrimination claims brought by federal employees were administrative proceedings. The Court determined the use of the term civil action in the statute meant that aggrieved claimants were entitled to a trial, pointing out that "nothing 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."[13] The Court further elaborated:

> 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."[14]

Maintaining consistency, in *Kappos v. Hyatt*,[15] the Supreme Court ruled that a provision of the Patent Act permitting individuals whose patent applications have been denied to challenge the denial by bringing a civil action in federal district court against the Director of the Patent and Trademark Office ("PTO")[16] created a right to trial rather than an administrative review proceeding. The Court observed that "§ 145 neither imposes unique evidentiary limits in district court proceedings nor establishes a heightened standard of review for factual findings by the PTO."[17] The Court further determined that district courts lacked the authority to remand such matters to the PTO; instead, district courts are to consider new evidence to allow the court to render a final judgment.

Viewed within the context of these Supreme Court rulings, it is difficult to understand how ERISA litigation has been transformed into an administrative review regime. Taking a lead from the Supreme Court's analysis, the word "review" is nowhere to be found in the ERISA statute. Nor is the term "substantial evidence" used in the law's wording. Finally, the ERISA statute is silent as to the applicable standard of review as the Supreme Court noted in *Firestone* before pronouncing the default standard to be de novo, but then holding the review standard could be transformed into a deferential standard if the benefit plan says so.

SO, WHAT HAPPENED?

In addition to *Firestone,* several other cases (although none from the Supreme Court) slowly transformed ERISA proceedings from the typical norm of other civil actions. One obvious explanation for how ERISA cases became quasi-administrative law cases is the statute's use of the term "administrator" in the definitional provisions of ERISA.[18] The use of the word "administrator" allowed other administrative law terminology, such as "administrative record," to creep into use in ERISA cases. Another way in which ERISA litigation went in its own direction was the adoption of an administrative exhaustion doctrine, which is derived from Section 503 of ERISA,[19] which mandates a "full and fair review" of a claim denial. That provision was read by the U.S. Court of Appeals for the Ninth Circuit in *Amato v. Bernard*[20] as a mandate for an exhaustion requirement; and other courts quickly followed suit.

Firestone was truly the inflection point, though. Shortly after the Supreme Court issued that ruling, the U.S. Court of Appeals for the Sixth Circuit, in *Perry v. Simplicity Engineering*,[21] found that ERISA benefit adjudications were to be "based on the record before the administrator."[22] The court justified its conclusion by pronouncing:

> 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.[23]

It did not take long thereafter for the Seventh Circuit to conclude in *Perlman v. Swiss Bank Corp.*[24] that "deferential review of an administrative decision means review on the administrative record."[25] Neither conclusion by either court cited any precedent or other authority; and the Seventh Circuit may have cast doubt on its own finding by later ruling that under the de novo standard courts are to hold trials if the evidence is disputed, explaining:

> For what *Firestone* requires is not "review" of any kind. . . . 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.[26]

The Seventh Circuit stands alone on that position, though. Other circuits adhere to the proposition that even under the de novo standard, courts are to conduct a record review.[27] When courts view their function as limited to reviewing a record, it is no surprise that jury trials are not permitted.

It was also inevitable that courts applying an administrative law paradigm to ERISA litigation would deem it appropriate to "remand" disputes as they do in administrative proceedings. Courts have come to consider remands routines, although no court has ever provided the authority or named the precedent that would justify the practice of "remanding" cases to private litigants. Indeed, neither in the ERISA statute nor in its legislative history is there any language permitting remands, in contrast to the statute governing judicial review of Social Security benefit disputes where remands are authorized in two situations – where there is a lack of substantial evidence supporting the administrative determination or to consider new and material evidence that could not have been presented earlier.[28] Remands are generally permitted for administrative adjudications due to separation of powers concerns according to *SEC v. Chenery Corp.*[29] However, the ERISA law provides for the filing of a civil action, not a complaint for administrative review governed by the Administrative Procedure Act.[30]

What makes the practice of remanding ERISA cases even more confounding is that nearly every court that has considered the issue has found remands to be non-final and thus non-appealable orders.[31] Since Article III of the U.S. Constitution requires federal courts to issue final, conclusive judgments, it is puzzling that until very recently no court had questioned the practice of remands, especially since there is no other context in which a federal court remands a dispute to a private party.

Finally, there is one additional situation where federal courts have deviated from civil procedure norms. In *Firestone,* the standard of review the Supreme Court cited as applicable if there is a reservation of discretion is the "abuse of discretion" standard.[32] The Court cited the Restatement (Second) of Trusts § 187, which looks to the following factors to determine whether an abuse of discretion has occurred –

> (1) the extent of the discretion conferred upon the trustee by the terms of the trust; (2) the purposes of the trust; (3) the nature of the power; (4) the existence or non-existence, the definiteness or indefiniteness, of an external standard by which the reasonableness of the trustee's conduct can be judged; (5) the motives of the trustee in exercising or refraining from exercising the power; (6) the existence or nonexistence of an interest in the trustee conflicting with that of the beneficiaries.

Although the abuse of discretion standard was the only review standard mentioned by the Supreme Court, most federal courts apply an "arbitrary and capricious" standard of review, which the Seventh Circuit explained as follows:

> The "arbitrary or capricious" standard calls for less searching inquiry than the "substantial evidence" standard that applies to Social Security disability cases. Although it is an overstatement to say that a decision is not arbitrary or capricious whenever a court can review the reasons stated for the decision without a loud guffaw, it is not much of an overstatement. The arbitrary or capricious standard is the least demanding form of judicial review of administrative action.[33]

The Seventh Circuit later tempered that explanation of the standard of review somewhat to explain that it "should not be understood as requiring a plaintiff to show that only a person who had lost complete touch with reality would have denied benefits."[34] Instead, the focus should be on "procedural regularity, substantive merit, and faithful execution of fiduciary duties."[35] How courts transitioned from an

abuse of discretion to an arbitrary and capricious standard of review has never been explained, though.

RECENT CASES QUESTIONING THE CIVIL PROCEDURE REGIME USED IN ERISA CASES

As noted above, the Supreme Court has never addressed any of the issues discussed in the previous section. Nor have any courts of appeals. Concerns have been raised for years about the deviance between ordinary federal civil procedure and ERISA civil procedure,[36] but have gained little attention. Until recently.

Wallace v. Oakwood Healthcare, Inc.[37]

The basis for administrative exhaustion of ERISA claim as a prerequisite to suing for benefits was openly questioned in a concurring opinion authored by U.S. Circuit Judge Amul Thapar of the Sixth Circuit in the *Wallace v. Oakwood* case. The case was a garden variety disability benefit claim involving a registered nurse, Cheryl Wallace, who had been denied benefits after she became unable to work due to an illness she contracted while traveling to Belize.

Judge Thapar's discussion of the exhaustion issue in his concurrence is what makes this case remarkable. He began by observing:

> It is troubling to have no better reason for a rule of law than that the courts made it up for policy reasons. Yet that seems to be the case with ERISA's exhaustion requirement. Federal courts should reconsider when – or even whether – it's legitimate to apply this judge-made doctrine.[38]

Judge Thapar was concerned about the absence of any statutory authority for the exhaustion doctrine and pointed out that under the Constitution's separation of powers provisions, Congress, not the judiciary, has the power to "prescribe[] the rules by which the duties and rights of every citizen are to be regulated."[39] While he acknowledged that parties may enter into contracts that regulate their rights and obligations, as to legislatively created claims and causes of action, Judge Thapar maintained: "But when courts stray from the texts of these laws or the terms of these contracts, they wield power that is not rightly theirs."

Consequently, the usurpation of Congress' role by the courts with respect to an exhaustion requirement was disturbing to Judge Thapar, who remarked: "It's hard to square these principles with the ERISA

exhaustion doctrine. Or at the very least, with the way courts talk about the doctrine."[40] The concurrence traced the roots of ERISA's exhaustion doctrine to ERISA Section 503,[41] which promotes a "full and fair review" of benefit denials, but neither that provision, nor any other section of ERISA mandates "administrative exhaustion." Nonetheless such a requirement has been created and uniformly enforced by all federal courts.

One of the seminal exhaustion cases, *Denton v. First National Bank of Waco,* justified an exhaustion requirement as consistent with the authority of courts "(1) to uphold Congress's desire that ERISA trustees be responsible for their actions, not the federal courts; (2) provide a sufficiently clear record of administrative action if litigation should ensue; and (3) assure that any judicial review of fiduciary action (or inaction) is made under the arbitrary and capricious standard, not de novo."[42] Judge Thapar deemed such goals commendable but nevertheless extra-statutory and inconsistent with Congress' authorization of the right to file a civil action. He explained, "The statute is the procedural scaffolding, the plan documents the source of substantive rights."[43] The concurrence further explained: "ERISA requires *plans* to offer fair and reasonable internal-review procedures for claims they deny. 29 U.S.C. § 1133(2). But the statute nowhere says *claimants* must take advantage of those procedures as a precondition to enforcing their rights in court."[44]

Judge Thapar thus concluded that the exhaustion requirement was created "in an era of unabashed purposivism," and based on "policy judgments, legislative-history tea-reading, and an unexplained analogy to the Taft-Hartley Labor Management Relations Act."[45] However, despite what may have been good intentions, the concurrence expressed the following concern:

> It should bother us that such a ubiquitous doctrine, one that has thwarted many an employee's efforts to enforce his benefit rights, rests on such shaky foundations. Maybe there are better arguments waiting to be made. But if there are, they've been waiting a long time.[46]

Judge Thapar's focus on the text of the ERISA statute addressed only one of the many court-created procedures regularly employed in ERISA litigation. Unsurprisingly, his opening salvo has led to more judicial skepticism about what has been settled dogma.

In re Caudill[47]

The second domino to fall was the Sixth Circuit's questioning of why jury trials are disallowed in ERISA cases. *In re Caudill* reached

the Court of Appeals after a jury trial demand was stricken by a district court within the Sixth Circuit and the plaintiff sought a writ of mandamus to reinstate the jury demand. The writ was denied based on the standards for granting mandamus which require a finding of a "clear and indisputable right to a jury trial in actions for recovery of benefits under § 502."[48] However, while the court declined to issue a writ, it also remarked that it was not "definitively resolv[ing] Caudill's claim that he is entitled to a jury trial under ERISA § 502(a)(1)(B)[49] or the Seventh Amendment."[50]

A district court case that followed, *Phillips v. Sun Life Assur. Co. of Canada*,[51] has kept open the question of whether jury trials are permitted in ERISA cases. *Phillips* was initially filed in state court and removed by the defendant to federal court, followed by the filing of a motion to dismiss the non-ERISA claims. Rather than responding, the plaintiff filed a new complaint alleging ERISA claims, and also filed a jury demand. The defendant then sought to strike the jury demand. Finding the motion to dismiss was mooted by the filing of an amended complaint, the court deferred a ruling on whether to permit the jury demand.

The plaintiff asserted a right to a jury trial pursuant to the Seventh Amendment because "he is seeking solely money damages, which is a form of legal relief, meaning this is a 'suit at common law' for Seventh Amendment purposes."[52] Sun Life responded by arguing that ERISA claims are equitable and not subject to jury trials. The defendant's argument was based on *Daniel v. Eaton Corp.,*[53] which explicitly held that "in actions for recovery of benefits under section 502, there is no right to a jury trial." (internal quotations omitted). However, the claim that ERISA cases are equitable is open to challenge based on rulings that view claims for payment of benefits as contractual in nature. For instance, *Larson v. United Healthcare Ins. Co.*,[54] 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.

The Supreme Court ruled more than 30 years ago that claims for breach of contract that seek contractual remedies are subject to trial by jury under the Seventh Amendment.[55] Consistent with that ruling,

and with rulings in other cases deeming ERISA claims contractual, the *Daniel* decision rests on a questionable underpinning.

Indeed, a convincing argument in favor of jury trials in ERISA cases was made by a district court in Michigan only a few years after ERISA was enacted. In *Stamps v. Michigan Teamsters Joint Council No. 43*,[56] the court upheld a jury demand after finding that a benefit claim was no different than a contract action seeking damages.[57] The court distinguished fiduciary breach claims, which it acknowledged were equitable, but pointed out that "[i]f the court construed subsection [ERISA § 502](a)(1)(B) to also create a cause of action for equitable relief, it would be superfluous to subsection [502](a)(3)."[58]

Although the right to a trial by jury is not enumerated in ERISA, it is also not excluded; and since the *Terry* decision found a jury trial right under the Labor Management Relations Act, the description in ERISA's statutory history explaining that ERISA litigation should follow that law should compel a similar conclusion permitting jury trials.

Michael J. P. v. Blue Cross and Blue Shield of Texas[59]

The next eruption in the growing judicial skepticism about the status quo in ERISA litigation came from an unlikely quarter – a recent appointee to the Fifth Circuit Court of Appeals, Judge Andrew Oldham. Although the ruling was issued as non-precedential, Judge Oldham's concurrence in the *Michael J.P.* case, which involved a claim for health benefits, was startling. The concurrence addressed the meaning of the scope of deferential review of an ERISA benefit denial and how the term "substantial evidence" is to be interpreted.

Judge Oldham complained about how the substantial evidence standard in ERISA cases continues to be utilized "even after the Supreme Court told us it lacked a sound justification."[60] He pointed out that the manner in which courts were applying substantial evidence in ERISA cases "is notably more deferential than ordinary substantial-evidence review" in cases arising under administrative law and questioned whether that standard as applied is "justifiable."[61]

Judge Oldham complained that the manner in which courts apply the substantial evidence standard to ERISA claims is based on the Labor Management Relations Act ("LMRA") of 1947[62] and examines whether the plan's trustees "have acted arbitrarily, capriciously or in bad faith; that is, is the decision of the Trustees supported by substantial evidence or have they made an erroneous decision on a question of law."[63] However, in *Firestone Tire and Rubber Co. v. Bruch*,[64] the Supreme Court rejected the use of the LMRA standard as Judge Oldham explained:

> Unlike the LMRA, ERISA explicitly authorizes suits against fiduciaries and plan administrators to remedy statutory violations, including breaches of fiduciary duty and lack of compliance with benefit plans. Thus, the *raison d'être* for the LMRA arbitrary and capricious standard – the need for a jurisdictional basis in suits against trustees – is not present in ERISA. Without this jurisdictional analogy, LMRA principles offer no support for the adoption of the arbitrary and capricious standard insofar as § 1132(a)(1)(B) is concerned.[65]

According to the concurrence, *Firestone's* recognition that a deviation from the default de novo standard of review would occur only where plans grant discretionary authority to render claim determinations meant that in such instances, plan decisions would be reviewed for "abuse of discretion."[66]

According to Judge Oldham, although some courts used the phrase "abuse of discretion" following *Firestone,* it later became an entirely different review standard – "arbitrary and capricious." Judge Oldham gave an example from another ruling, which recited: "When reviewing for arbitrary and capricious actions resulting in an abuse of discretion, we affirm an administrator's decision if it is supported by substantial evidence."[67] But what especially troubled Judge Oldham was that he deemed that formulation obsolete after *Firestone,* which caused him to remark:

> It's not just how we got here that's strange. Equally odd is the way we apply substantial-evidence review in ERISA cases. Our ERISA cases purport to review a plan administrator's decision for "substantial evidence." But ERISA's 'substantial evidence' is radically different from 'substantial evidence' elsewhere in law."[68]

The concurrence then turned to the seminal case defining the meaning of "substantial evidence" – *Universal Camera Corp. v. NLRB,*[69] which eschewed a view that a decision should be upheld so long as there is some evidence in the record supporting the conclusion reached. *Universal Camera* chose instead to apply a more "holistic" meaning to the term "substantial evidence," requiring a court to "give serious consideration to 'the record as a whole,' 'taking into account contradictory evidence or evidence from which conflicting inferences could be drawn.'"[70]

Judge Oldham was disturbed that instead of following *Universal Camera*, courts:

> often decline to engage in a holistic review of the evidence, because we can readily find that there is *some* – "more than a

> scintilla" even if "less than a preponderance," *ibid.* – evidence that supports the administrator's decision. And once we conclude that the evidence meets this low "substantial evidence" threshold we need not consider how substantial the plaintiff's evidence is, because it doesn't matter – the administrator has carried their burden.[71]

The concurrence attributed the approach taken by the courts as being motivated by a desire by judges to avoid "particularly complex or technical" inquiries into the reasonableness of plan administrator decisions. However, he bemoaned the fact that the result is that:

> In practice, any plan administrator in any case will point to some quantum of evidence which arguably puts their decision on at least the "low end" of a reasonableness spectrum. So in almost every case, we quickly approve the administrator's decision as supported by substantial evidence, without "taking into account contradictory evidence or evidence from which conflicting inferences could be drawn."[72]

The consequence of applying such a minimal level of review is, according to Judge Oldham, that it is "particularly difficult for ERISA beneficiaries to vindicate their rights under the cause of action created by Congress" and that the current regime has "no apparent support in law, logic, or history."[73]

Judge Oldham's concurrence echoes the majority opinion in *Metro. Life Ins. Co. v. Glenn*,[74] which addressed plan administrators' conflicts of interest and also cited *Universal Camera* as a roadmap for how courts should review benefit denials "by taking account of several different, often case-specific, factors, reaching a result by weighing all together."[75] Indeed, *Universal Camera* explicitly recited:

> [C]ourts must now assume more responsibility for the reasonableness and fairness of Labor Board decisions than some courts have shown in the past. Reviewing courts must be influenced by a feeling that they are not to abdicate the conventional judicial function. Congress has imposed on them responsibility for assuring that the Board keeps within reasonable grounds. That responsibility is not less real because it is limited to enforcing the requirement that evidence appear substantial when viewed, on the record as a whole, by courts invested with the authority and enjoying the prestige of the Courts of Appeals. The Board's findings are entitled to respect; but they must nonetheless be set aside when the record before a Court of Appeals clearly precludes the Board's decision from being justified

> by a fair estimate of the worth of the testimony of witnesses or its informed judgment on matters within its special competence or both.

Judge Oldham's concurring opinion suggests a need for courts to re-examine their approach to adjudicating ERISA cases, keeping in mind the law's stated purpose is to protect claimants' rights to receive promised benefits.

Card v. Principal Life Ins. Co.[76]

Returning to the hotbed of reexamination of ERISA litigation, the Sixth Circuit recently issued another major decision – Judge Eric Murphy's concurrence in *Card v. Principal Life.* Judge Murphy openly questioned whether courts have the authority to "remand" ERISA cases. *Card* involved a dispute over disability benefits. Although the plaintiff was unsuccessful in the district court, the Sixth Circuit remanded the case for a redetermination. Following the remand, which went directly to the insurance company that denied the benefit claim, the plaintiff sought the district court's intercession. However, the district court refused to intervene, believing it had no jurisdiction to do so. The plaintiff appealed; and on the second round of litigation, the Sixth Circuit admitted its initial remand order was unclear and explained the district court retained jurisdiction to supervise the remand.

Although the majority opinion resolved the procedural issue at the heart of the appeal, Judge Murphy wrote a concurrence that raised two questions:

> Why do courts have *any* power to "remand" a pending federal lawsuit to one of the private litigants? That strikes me as quite an unusual thing. Why shouldn't the district courts instead oversee any additional litigation compelled by an arbitrary-and-capricious finding using the normal rules of civil procedure?[77]

While the power to "remand" ERISA claims has been assumed, the statute is silent on the issue and the Supreme Court has never addressed it. Nor could Judge Murphy find any other area of civil litigation involving private parties where courts remand the case to one of the litigants.

Like Judge Thapar in *Wallace,* Judge Murphy concluded that the power to remand "seem[s] to rest on paper-thin reasoning" and that courts have "largely assumed its existence without addressing the subject in detail."[78] The concurring opinion concluded as follows:

> In short, I tend to think that the existing caselaw has not adequately justified what seems to me to be a strange procedure – remanding a case to a private litigant for further proceedings rather than completing those proceedings in the court. And if plan administrators ultimately cannot ground this procedure in ERISA's text as interpreted against its historical context, I find it difficult to believe that the Supreme Court would sanction it. Because it is well established in this circuit, though, I concur in the majority opinion explaining how it should be implemented.[79]

Judge Murphy's concurring opinion has now fully opened the debate on how to reform ERISA litigation.

THE FUTURE

The cases discussed above have raised serious concerns about the way in which litigation over benefits governed by ERISA is to be conducted. Courts have simply made up procedures over the years without any thought as to the legitimacy of those doctrines and their consistency with the ERISA statute, Supreme Court precedent, and the Federal Rules of Civil Procedure. It is possible that voices such as those of Judges Thapar, Oldham, and Murphy will simply turn out to be cries in the wilderness.

However, it is far more likely that their complaints will be heard and will ultimately lead to a reassessment of ERISA litigation by the Supreme Court. It is intolerable that a law intended by Congress for the protection of plan participants and their beneficiaries[80] has been transformed into a mechanism that protects ill-founded claim denials from meaningful challenge. Nor is it right that the current state of ERISA litigation perpetuates a regime that offers less protection to claimants than they had before the passage of the ERISA law, despite *Firestone's* concern that such a result would be contrary to Congress' intent.[81] It is thus high time for litigants and the Supreme Court to reimagine ERISA litigation and restore it to its intended purpose.

NOTES

1. 29 U.S.C. § 1132(a).
2. *See Krolnik v. Prudential Ins. Co.*,570 F.3d 841 (7th Cir. 2009).
3. *Firestone Tire & Rubber Co. v. Bruch,* 489 U.S. 101 (1989).
4. Fed. R. Civ. P. 2.

5. 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.

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

7. 494 U.S. 558 (1990).

8. 386 U.S. 361, 368 (1967).

9. 12 U.S.C. §§1828(c)(7)(A), (B) (2012).

10. 425 U.S. 840 (1976).

11. 42 U.S.C. § 2000e-16(c) (2012).

12. 42 U.S.C. § 2000e-16(c) (2012).

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

14. *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)).

15. 566 U.S. 431, 132 S.Ct. 1690 (2012).

16. 35 U.S.C. § 145.

17. 132 S.Ct. at 1696.

18. 29 U.S.C. § 1002(16)(A).

19. 29 U.S.C. § 1133.

20. 618 F.2d 559 (9th Cir. 1980).

21. 908 F.2d 963 (6th Cir. 1990).

22. *Id.* at 967.

23. *Id.* at 966.

24. 195 F.3d 975 (7th Cir. 1999).

25. *Id.* at 981-982.

26. *Krolnik, supra.* 570 F.3d at 843.

27. *See, e.g., Jewell v. Life Insurance Co. of North America*, 508 F.3d 1303 (10th Cir. 2007), and *Orndorf v. Paul Revere Life Insurance Co.,* 404 F.3d 510 (1st Cir. 2005).

28. 42 U.S.C. § 405(g).

29. 318 U.S. 80, 95 (1943).

30. 5 U.S.C. §§500-96.

31. *See, e.g.*, *Stevens v. Santander Holdings USA, Inc.*,799 F.3d 290 (3d Cir. 2015); *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).

32. 489 U.S. at 115.

33. *Pokratz v. Jones Dairy Farm*, 771 F.2d 206, 209 (7th Cir. 1985).

34. *Holmstrom v. Metro. Life Ins. Co.*, 615 F.3d 758, 780 n.5 (7th Cir. 2010).

35. *Id.*

36. DeBofsky, "The Paradox of the Misuse of Administrative Law in ERISA Cases," 37 J. Marshall L. Rev. 727 (2004); DeBofsky, "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," 18 Empl. Rts. & Employ. Pol'y J. 203 (2014).

37. 954 F.3d 879 (6th Cir. 2020).

38. 954 F.3d at 900.

39. Citing The Federalist No. 78, at 523 (Alexander Hamilton) (J. Cooke ed., 1961).

40. 954 F.3d at 900.

41. 29 U.S.C. § 1133

42. *Denton v. First Natl. Bank of Waco*, 765 F.2d 1295, 1300 (5th Cir. 1985); *see, also, Amato v. Bernard*, 618 F.2d 559, 568 (9th Cir. 1980).

43. 954 F.3d at 900.

44. *Id.* at 901.

45. *Id.*

46. *Id.*

47. No. 20-3834, 2020 U.S. App. LEXIS 34464, 2020 WL 6748203 (6th Cir. Oct. 30, 2020) (unsigned order).

48. *Id.* at *2.

49. 29 U.S.C. § 1132(a)(1)(B).

50. *Id.* at *3.

51. 2021 U.S. Dist. LEXIS 168649, 2021 WL 4066807 (S.D. Ohio September 7, 2021).

52. 2021 U.S. Dist. LEXIS 16849 *5.

53. 839 F.3d 263, 268 (6th Cir. 1988).

54. 723 F.3d 905, 911 (7th Cir. 2013).

55. *Chauffeurs, Teamsters & Helpers, Local No. 391 v. Terry,* 494 U.S. 558, 564-65 (1990).

56. 431 F. Supp. 745 (E.D. Mich. 1977).

57. *Id.* at 746.

58. *Id.* at 457.

59. 2021 U.S. App. LEXIS 28704, 2021 WL 4314316 (5th Cir. September 22, 2021) (non-precedential).

60. 2021 U.S.App.LEXIS 28704 *21.

61. *Id.*

62. 29 U.S.C. § 186(c).

63. *Danti v. Lewis*, 312 F.2d 345, 348, 114 U.S. App. D.C. 105 (D.C. Cir. 1962); *see, also, Giler v. Bd. of Trustees of Sheet Metal Workers Pension Plan of S. Cal.*, 509 F.2d 848, 849 (9th Cir. 1974); *Brune v. Morse*, 475 F.2d 858, 860 n.2 (8th Cir. 1973); *Miniard v. Lewis*, 387 F.2d 864, 865, 128 U.S. App. D.C. 299 (D.C. Cir. 1967); *Kosty v. Lewis*, 319 F.2d 744, 747, 115 U.S. App. D.C. 343 (D.C. Cir. 1963).

64. 489 U.S. 101, 109 S. Ct. 948, 103 L. Ed. 2d 80 (1989).

65. *Firestone*, 489 U.S. 953-54 (citations omitted).

66. *Id.* at 957; *see, also,* Kathryn J. Kennedy, Judicial Standard of Review in ERISA Benefit Claim Cases, 50 Am. U.L. Rev. 1083, 1096-1107 (2001) (discussing the various standards of review applied to ERISA claims).

67. *Meditrust Fin. Servs. Corp. v. Sterling Chemicals, Inc.*, 168 F.3d 211, 215 (5th Cir. 1999).

68. 2021 U.S. App. LEXIS 28704 *24.

69. 340 U.S. 474, 71 S. Ct. 456, 95 L. Ed. 456 (1951).

70. Citing *Universal Camera* at 487, 490; *accord Dish Network Corp. v. NLRB*, 953 F.3d 370, 377-78 (5th Cir. 2020).

71. 2021 U.S.App.LEXIS 28704 *26.

72. Citing *Universal Camera*, 340 U.S. at 487.

73. 2021 U.S. App. LEXIS 28704 *27.

74. 554 U.S. 105 (2008).

75. 554 U.S. at 117.

76. 2021 U.S. App. LEXIS 32599, 2021 WL 5074692 (6th Cir. November 2, 2021).

77. 2021 U.S. App. LEXIS 32599 *13.

78. *Id.* at *16.

79. *Id.*

80. 29 U.S.C. § 1001(b).

81. 489 U.S. at 114.