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**Employment Law: The Tenth Circuit's Stance on the Evidentiary Scope of a De Novo Review in ERISA Benefits Suits**

# EMPLOYMENT LAW: THE TENTH CIRCUIT'S STANCE ON THE EVIDENTIARY SCOPE OF A "DE NOVO" REVIEW IN ERISA BENEFITS SUITS

## INTRODUCTION

The Employee Retirement Income Security Act ("ERISA")<sup>1</sup> regulates most aspects of the administration of employee benefits plans.<sup>2</sup> Rather than addressing all of the issues encompassed in ERISA, this survey focuses solely on the United States Court of Appeals for the Tenth Circuit's recent decision in *Hall v. UNUM Life Insurance Co. of America*.<sup>3</sup> Specifically, this paper will discuss an issue of first impression in the circuit: whether evidence not included in the record of an administrator of an employee benefits plan is admissible evidence in a suit under ERISA that is commenced in federal court.<sup>4</sup>

Part I of this survey provides a framework for understanding ERISA benefits suits. Part II describes the events leading up to the conflict surrounding the scope of evidentiary review in cases under ERISA. Next, Part III of this survey introduces the Tenth Circuit's decision in *Hall* and discusses three approaches circuit courts take when deciding whether to admit facts absent from the administrative record.<sup>5</sup> Finally, Part IV analyzes the decision in *Hall* and suggests that it is appropriate on policy grounds.

### I. ERISA: GENERAL CONCEPTS AND SCOPE OF THIS SURVEY

#### A. *Concepts: Pension Benefit Plans and Welfare Benefit Plans*

Under ERISA, participants or beneficiaries of an employee benefit plan may bring a civil action in federal court when those obligated under the employee benefit plan breach either a fiduciary obligation or an obligation to provide benefits due under the plan.<sup>6</sup> Employee benefit plans

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1. Employee Retirement Income Security Act of 1974 (ERISA), Pub. L. No. 93-406, 88 Stat. 829 (codified as amended in 29 U.S.C. §§ 1001-1461 and in scattered sections of Titles 5, 18, 26, 31, and 42 U.S.C.).

2. Robert Mason Hogg, Note, *The Evidentiary Scope of De Novo Review in ERISA Benefits Litigation After Firestone Tire & Rubber Co. v. Bruch*, 78 MINN. L. REV. 1575, 1578-79 (1994).

3. 300 F.3d 1197 (10th Cir. 2002). *Hall* was decided on August 20, 2002. *Hall*, 300 F.3d at 1197. In order to be included in this survey a decision by the Tenth Circuit had to be made between September 1, 2001 and August 31, 2002.

4. *Id.* at 1201.

5. *Id.*

6. 29 U.S.C. § 1132(a) (2000). A "participant" is defined as "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." *Id.* § 1002(7). A "beneficiary" is "a

are divided into two categories under ERISA: 1) employee "welfare benefit plans"<sup>7</sup> and 2) employee "pension benefit plans."<sup>8</sup> Welfare benefit plans, whether provided by an employer or maintained through an insurance policy, provide medical, disability, death, and other similar benefits.<sup>9</sup> Pension benefit plans provide retirement income for employees.<sup>10</sup>

In addition to authorizing civil actions, courts generally interpret ERISA as requiring employee benefit plans to establish an "internal claim-review procedure."<sup>11</sup> This interpretation is based on 29 U.S.C. § 1133, which states:

In accordance with regulations of the Secretary [of Labor], every employee benefit plan shall-

(1) provide adequate notice in writing to any participant or beneficiary whose claim for benefits under the plan has been denied, setting forth the specific reasons for such denial, written in a manner calculated to be understood by the participant, and

(2) afford a reasonable opportunity to any participant whose claim for benefits has been denied for a full and fair review by the appropriate named fiduciary of the decision denying the claim.<sup>12</sup>

Thus, recovering benefits under ERISA is generally a two step process.<sup>13</sup> First, an employee must avail herself of any administrative processes for challenging the denial of a claim set forth in the controlling employee benefit plan.<sup>14</sup> Second, after exhausting administrative procedures, the employee may seek redress in federal court.<sup>15</sup> Employing this two-step process, courts generally treat ERISA benefit suits as an "appellate-type" procedure and review a plan's administrative process<sup>16</sup> and record of events with federal appellate procedures.<sup>17</sup>

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).

7. Jay Conison, *Foundations of the Common Law of Plans*, 41 DEPAUL L. REV. 575, 575 n.2 (1992) [hereinafter Conison I] (citing 29 U.S.C. § 1002(1)).

8. *Id.* (citing 29 U.S.C. § 1002(2)).

9. 29 U.S.C. § 1002(1)(A); *see also* Hogg, *supra* note 2, at 1578 n.20 (noting that "[e]mployee welfare benefit plans include health, accident, disability, death, unemployment, vacation, job training benefits, day care, legal services, or [even] scholarship funds").

10. 29 U.S.C. § 1002(2)(A)(i); *see also* Conison I, *supra* note 7, at 575 n.2.

11. Jay Conison, *Suits for Benefits Under ERISA*, 54 U. PITT. L. REV. 1, 21 (1992) [hereinafter Conison II].

12. 29 U.S.C. § 1133.

13. Conison II, *supra* note 11, at 21.

14. *Id.*

15. *Id.*

16. Employee benefit plans have "plan administrators" or "plan sponsors" who provide the rights to notice that a claim has been denied and to review of the denial conferred by 29 U.S.C. § 1133. *See* 29 U.S.C. §§ 1002(16)(A)-(B), 1025.

17. *See* Conison II, *supra* note 11, at 21.

*B. Scope: Participant and Beneficiary Civil Actions*

ERISA authorizes civil suit by a number of parties, including participants and beneficiaries of employee benefit plans, in several circumstances.<sup>18</sup> Under 29 U.S.C. §1132(a):

A civil action may be brought—

(1) by a *participant or beneficiary*—

(A) for the relief provided for in subsection (c) of this section, or

(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 . . . .

. . . .

(3) by a *participant, beneficiary*, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan . . . .<sup>19</sup>

Under § 1132(a)(1), a participant or beneficiary may avail herself of both legal and equitable remedies because “[r]ecovery of benefits promised under the plan is monetary in nature, whereas injunctive or declaratory relief regarding such benefits is equitable in nature.”<sup>20</sup>

ERISA also authorizes courts to grant plan participants “appropriate equitable relief” in § 1132(a)(3)(B).<sup>21</sup> However, the United States Supreme Court has held that monetary damages are not equitable relief as contemplated under this cause of action, thus, greatly limiting the relief permitted under § 1132(a)(3)(B).<sup>22</sup> Additionally, pursuant to § 1132(a)(3), ERISA authorizes a cause of action for a breach of fiduciary duties *to the plan*.<sup>23</sup> However, this particular cause of action does not help a participant or beneficiary whose claim has been denied because this relief is not intended to benefit an individual.<sup>24</sup> Instead, this type of action is “intended to benefit the plan as a whole.”<sup>25</sup>

18. 29 U.S.C. § 1132(a)-(c).

19. *Id.* § 1132(a)(1), (3) (emphasis added).

20. Kathryn J. Kennedy, *Judicial Standard of Review in ERISA Benefit Claim Cases*, 50 AM. U. L. REV. 1083, 1092 (2001) [hereinafter Kennedy I].

21. 29 U.S.C. § 1132(a)(3)(B).

22. Kennedy I, *supra* note 20, at 1092 (citing *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 256-58 (1993)). According to several federal courts, punitive damages are also generally not considered equitable relief as contemplated by 29 U.S.C § 1132(a)(3). See Karla S. Bartholomew, Note, *ERISA Preemption of Medical Malpractice Claims in Managed Care: Asserting a New Statutory Interpretation*, 52 VAND. L. REV. 1131, 1146 & n.111 (1999).

23. 29 U.S.C. § 1132(a)(3).

24. Kennedy I, *supra* note 20, at 1092.

25. *Id.*

Two practical considerations arise from the federal courts' interpretation of ERISA. First, a participant or beneficiary is most likely to succeed in a suit under ERISA when availing herself of the protection granted by section 1132(a)(1)(B).<sup>26</sup> Second, ERISA only authorizes civil actions against plans provided by private organizations.<sup>27</sup> Consequently, government agencies and also a few types of private organizations are exempt from actions brought pursuant to ERISA.<sup>28</sup>

## II. HISTORICAL SETTING

### A. Employer Abuses Necessitating Congressional Intervention

Abuses surrounding the administration of employee benefit plans peaked as early as the 1960s.<sup>29</sup> These plans provided employees an opportunity to set aside earnings from their jobs for retirement and, in other situations, provided disability benefits and other medical benefits.<sup>30</sup> However, because of the complexities involved in the administration of these plans, many employees were left without pensions after plan administrators failed to adequately manage employee funds.<sup>31</sup> Moreover, absent federal regulation of employee benefit plans, plan administrators were not subject to any apparent standardized procedures holding them accountable for abusing their discretion.<sup>32</sup>

### B. Congress's Response

In reaction to the funding failures, fiduciary abuses, and vesting inequities that plagued employee benefit plans into the 1970s, Congress enacted ERISA.<sup>33</sup> Congress primarily sought to establish a uniform body of law governing employee benefit plans, while seeking to prevent administrative and funding abuses of employees.<sup>34</sup> By providing uniform employee benefit laws, ERISA was designed to eliminate the disparities among the various state and local regulations.<sup>35</sup> The Act, therefore, preempted state laws relating to "any employee benefit plan,"<sup>36</sup> and granted federal courts the authority to create a body of federal common law.<sup>37</sup> In

26. *Id.* at 1093.

27. Conison I, *supra* note 7, at 575 n.2 (noting that government plans as defined by the Act, are not covered by ERISA).

28. *Id.* (listing the exemptions granted under 29 U.S.C. § 1003(b)).

29. See Bartholomew, *supra* note 22, at 1136 n.29 (noting that Senator Jacob Javits initially presented the bill for ERISA in 1967); Rebecca S. Fellman-Caldwell, Note, New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Co.: *The Supreme Court Clarifies ERISA Preemption*, 45 CATH. U. L. REV. 1309, 1320 (1996).

30. See 29 U.S.C. § 1002(1) (2000).

31. *Id.* § 1001(a).

32. See Bartholomew, *supra* note 22, at 1137.

33. Colleen E. Medill, *The Individual Responsibility Model of Retirement Plans Today: Conforming ERISA Policy to Reality*, 49 EMORY L.J. 1, 5 (2000).

34. Bartholomew, *supra* note 22, at 1137.

35. *Id.* at 1137 & n.36.

36. 29 U.S.C. § 1144(a).

37. *Scott v. Gulf Oil Corp.*, 754 F.2d 1499, 1502 (9th Cir. 1985).

order to prevent administrative and funding abuses, Congress established standards and procedural guidelines for administering employee benefit plans.<sup>38</sup>

### 1. Federal Common Law and State Law Preemption

Although ERISA's language explicitly grants participants and beneficiaries a right to bring a civil action, the statute itself is silent about "important procedural aspects necessary to *enforce* a claimant's substantive rights."<sup>39</sup> This omission was apparently the intent of Congress.<sup>40</sup> Congress did not establish specific procedures because it contemplated that federal courts would "fashion a body of federal common law to govern ERISA suits."<sup>41</sup>

ERISA preempts state law claims that "relate to" employee benefit plans.<sup>42</sup> The United States Supreme Court has interpreted the vague term "relates to" as applying to plans where there is a "connection" or "reference to" an ERISA plan<sup>43</sup> that is not "tenuous, remote, or peripheral."<sup>44</sup> Thus, in determining the outcome of ERISA benefits suits, federal judges are not restricted by state laws.<sup>45</sup>

### 2. Obligations Created by ERISA

ERISA sets forth rules affording participants and beneficiaries rights "at the plan level" and prior to adjudication in federal court.<sup>46</sup> Specifically, a participant or beneficiary is entitled to:

- (1) a clear explanation of the specific reasons for the denial [of benefits],
- (2) the right to appeal that decision internally with the plan administrator, and
- (3) a full and fair review of the claim on internal appeal. [Additionally,] [t]he courts generally require the participant to exhaust these internal remedies before proceeding to litigation.<sup>47</sup>

38. 29 U.S.C. §§ 1021-1461; *see also* Bartholomew, *supra* note 22, at 1137 (stating that Congress met its goal of preventing abuses by "establishing standards for the administration of employee benefit plans").

39. Kathryn J. Kennedy, *The Perilous and Ever-Changing Procedural Rules of Pursuing an ERISA Claims Case*, 70 UMKC L. REV. 329, 332 (2001) [hereinafter Kennedy II] (emphasis added).

40. *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 56 (1987).

41. *Scott*, 754 F.2d at 1502; Kennedy II, *supra* note 39, at 332. A claimant asserting a denial of ERISA benefits claim faces procedural hurdles that appear inconsistent with ERISA's intent. *Id.* at 332-33. Recall that ERISA seeks to protect participants and beneficiaries from abuses under employee benefit plans. *See id.* at 331. Procedural hurdles that differ from one circuit court to the next do not create a uniform body of law. *See id.* at 332. Moreover, such procedural hurdles conflict with the policy of protecting participants and beneficiaries. *See id.* at 333.

42. 29 U.S.C. § 1144(a).

43. *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96-97 (1983).

44. *Shaw*, 463 U.S. at 100 n.21.

45. *See* 29 U.S.C. § 1144(a).

46. Kennedy I, *supra* note 20, at 1091.

47. *Id.*; *see* 29 U.S.C. § 1133.

The civil actions that ERISA authorizes implicate three types of obligations or *duties* of organizations responsible for the administration of employee benefit plans.<sup>48</sup> First, there is a statutory duty to participants and beneficiaries to pay benefits provided for in the plan.<sup>49</sup> Second, there is a statutory duty whereby persons who are fiduciaries may be held personally liable for breach of "any of the responsibilities, obligations, or duties imposed upon fiduciaries" under ERISA.<sup>50</sup> That duty is owed to the plan.<sup>51</sup> Lastly, federal common law imposes duties that are not statutory.<sup>52</sup> After an individual exhausts remedies at the plan level and a federal court finds that an employer breached a duty, the court may grant relief developed in federal common law or as set forth in ERISA.<sup>53</sup>

### C. Judicial Interpretation of ERISA's Language

Federal courts have struggled over the applicable standard of judicial review for ERISA benefits suits.<sup>54</sup> Conflicting interpretations arose even though the United States Supreme Court directed federal courts to create a consistent body of "federal common law" to protect participants in ERISA plans.<sup>55</sup>

#### 1. Conflict Surrounding the Standard of Review for Administrative Decisions

Federal courts encountered several obstacles in developing a consistent standard to apply when reviewing administrative proceedings involving employee benefit plans.<sup>56</sup> Without specific guidelines in ERISA, the majority of the circuits reviewed such administrative proceedings under the *arbitrary and capricious* standard.<sup>57</sup> Under the *arbitrary and capricious* standard of review, a court may only overturn an administrative decision if it is "arbitrary, capricious or made in bad faith, not supported by substantial evidence, or erroneous on a question of law."<sup>58</sup> Other circuits, however, favored the *de novo* standard of

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48. See Conison II, *supra* note 11, at 14 (emphasis added).

49. *Id.*

50. 29 U.S.C. § 1109(a).

51. Conison II, *supra* note 11, at 14.

52. *Id.* Although these duties are not explicit in ERISA, the legislative intent to forge a federal common law creates an implicit duty. See *id.*; see also *supra* note 41 and accompanying text.

53. Conison II, *supra* note 11, at 12-14.

54. Hogg, *supra* note 2, at 1576.

55. Kennedy I, *supra* note 20, at 1094.

56. *Id.* at 1108.

57. *Id.* at 1108-09; see, e.g., *Atkinson v. Sheet Metal Workers' Trust Funds S. Cal. & Nev.*, 833 F.2d 864, 865 (9th Cir. 1987); *Holland v. Burlington Indus.*, 772 F.2d 1140, 1148 (4th Cir. 1985); *Johnson v. Franco*, 727 F.2d 442, 447 (5th Cir. 1984); *Miles v. N.Y. State Teamsters Conference Pension & Ret. Fund Employee Pension Benefit Plan*, 698 F.2d 593, 599 (2d Cir. 1983).

58. *Rehmar v. Smith*, 555 F.2d 1362, 1371 (9th Cir. 1977). Arbitrary means "founded on prejudice or preference rather than on reason or fact." BLACK'S LAW DICTIONARY 100 (7th ed. 1999) (defining arbitrary).



review, which allowed a court to review the record without deference to the rulings of the administrator.<sup>59</sup>

In support of the *arbitrary and capricious* standard of review, several courts likened the administrative proceedings of employee benefit plans to those of administrative agencies.<sup>60</sup> Federal courts have also adopted the standard from the Labor Management Relations Act ("LMRA").<sup>61</sup> One party supported this practice by pointing to Congress's intent to incorporate most of LMRA's fiduciary law into the Act and to the fact that both acts "impose[] a duty of loyalty on fiduciaries . . . ."<sup>62</sup> However, a growing number of circuit courts criticized the *arbitrary and capricious* standard.<sup>63</sup> The circuits split over whether to apply the arbitrary and capricious standard when the decision-maker had a conflict of interest and was not necessarily impartial.<sup>64</sup> The United States Supreme Court granted certiorari in 1989 to resolve this divergence among the circuits in *Firestone Tire & Rubber Co. v. Bruch*.<sup>65</sup>

## 2. Developing a Consistent Judicial Standard of Review Under Federal Common Law

Since the advent of employee benefit plans, courts have struggled to find the appropriate judicial standard of review for claims asserting a denial of employee benefits.<sup>66</sup> Before ERISA and *Firestone*, federal courts turned to contract, labor, and trust laws for standards of review.<sup>67</sup> As a result, courts turned to these areas of law to form a federal common law for ERISA benefits suits.<sup>68</sup> It is therefore instructive to examine the justifications courts give for preferring the standard of review of one source to another.<sup>69</sup>

Courts used contract law to develop a standard of review for employee benefit claims before federal statutes protected benefits.<sup>70</sup> Reasoning that employee benefit plans are unilateral contracts, courts looked to the terms of the plan to determine whether the employer had a contrac-

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59. See *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 112-13 (1989) (stating that the *de novo* standard of review of trust law "is consistent with the judicial interpretation of employee benefit plans prior to the enactment of ERISA," and that in those pre-enactment decisions courts did not defer to the employer or administrator but decided the case "as it would have any other contract claim.").

60. See, e.g., *Van Boxel v. Journal Co. Employees' Pension Trust*, 836 F.2d 1048, 1050 (7th Cir. 1987) (noting that "[t]he *arbitrary and capricious* standard is familiar from administrative law, where it is used to guide judicial review of discretionary decisions by administrative agencies.").

61. *Firestone*, 489 U.S. at 109.

62. *Id.*

63. Kennedy I, *supra* note 20, at 1109.

64. *Id.* at 1097, 1109-10.

65. *Firestone*, 485 U.S. at 105.

66. Kennedy I, *supra* note 20, at 1096.

67. *Id.* at 1096, 1101, 1107.

68. *Id.* at 1094-95.

69. *Id.* at 1096.

70. *Id.*

tual obligation.<sup>71</sup> Early cases focused more on whether an enforceable contract existed than on what was the appropriate judicial standard of review.<sup>72</sup>

Once federal labor laws controlled employee benefit rights of *union* employees, courts began to rely on labor law for claims challenging denials of employee benefits, even to *non-union* employees.<sup>73</sup> Since federal labor laws emphasized collective bargaining between an employer and its employees, the courts began to reject the notion that employee benefit plans should be reviewed under contract law because they could no longer view benefit plans as gratuities.<sup>74</sup> Moreover, federal labor laws, such as the LMRA, were silent about the appropriate scope of judicial review for cases where participants or beneficiaries sued plan trustees.<sup>75</sup> On these grounds, the federal courts developed the *arbitrary and capricious* judicial standard of review and applied it in the context of ERISA benefits suits.<sup>76</sup>

After labor laws were enacted that protected employee benefits, trusts began to serve as "funding vehicles for plan assets."<sup>77</sup> Further, when ERISA was enacted, trust vehicles became mandatory for funding retirement plans.<sup>78</sup> Federal courts began interjecting principles of trust law into ERISA benefit suits once plan administrators used trusts to fund employee benefit plans.<sup>79</sup> Under trust law, trustees may be granted, *at the discretion of the settlor*,<sup>80</sup> either discretionary or non-discretionary authority.<sup>81</sup> When a trustee is only found to have non-discretionary authority, the courts generally review the case *de novo*.<sup>82</sup> However, if the trustee has discretionary authority, courts apply a more deferential standard of review.<sup>83</sup>

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71. *Id.* at 1096-97.

72. *Id.* Under contract law, a *gratuity* from an employer does not create contractual rights that are enforceable by an employee. *See id.* at 1096 (citing *Menke v. Thompson*, 140 F.2d 786, 790 (8th Cir. 1944)). However, if a contract existed courts "focused on the terms of the plan or promise by the employer . . ." *Id.* at 1096-97 (citations omitted). Courts generally subject the interpretation of the contract to a "reasonableness standard." *Id.* at 1099.

73. *Id.* at 1097 (emphasis added).

74. *Id.* at 1100-01.

75. *Id.* at 1101.

76. *Id.*

77. *See id.* at 1104.

78. 29 U.S.C. § 1103.

79. Kennedy I, *supra* note 20, at 1107.

80. A *settlor* is the entity or person who creates a trust. BLACK'S LAW DICTIONARY 1378 (7th ed. 1999). Significantly, under ERISA, the plan sponsor or administrator, who in essence, acts as the settlor of trusts and the trustee can be one and the same. Kennedy I, *supra* note 20, at 1104.

81. Kennedy I, *supra* note 20, at 1105.

82. *Id.*

83. *Id.*

### 3. The Supreme Court Chooses *De Novo* Review of Administrative Proceedings

In *Firestone Tire and Rubber Co. v. Bruch*,<sup>84</sup> the United States Supreme Court held that, “[c]onsistent with established principles of trust law,” the *de novo* standard of review applies when courts hear claims under section 1132(a)(1)(B).<sup>85</sup> However, if the employee benefit plan confers discretionary authority upon the plan administrator, the *de novo* standard of review is not applicable.<sup>86</sup> In resolving this issue, the Court addressed the sources of the conflict over the judicial standard of review for ERISA benefits cases.<sup>87</sup>

First, the Court noted that the “*wholesale* importation of the *arbitrary and capricious* standard [from the LMRA] into ERISA is unwarranted.”<sup>88</sup> The *arbitrary and capricious* standard of review under the LMRA was developed in order to provide courts jurisdiction over employees suing trustees.<sup>89</sup> Since ERISA explicitly granted employees the right to bring a civil action in federal court, the same standard of review was not necessary to establish jurisdiction.<sup>90</sup> Consequently, the Court found the analogy between labor law and ERISA unpersuasive.<sup>91</sup>

The Court then turned to trust law and found that several provisions of the Act and the legislative history of ERISA indicate that “ERISA abounds with the language and terminology of trust law.”<sup>92</sup> Moreover, the Court noted that “[t]he trust law *de novo* standard of review is consistent with the judicial interpretation of employee benefit plans prior to the enactment of ERISA.”<sup>93</sup> The Court, therefore, directed lower courts to interpret the appropriate standard of review of employee benefit plans based upon what authority was conveyed to the administrator or fiduciary under the plan.<sup>94</sup> Under trust law precedent, the Court held that a *de novo* standard of review applies in ERISA benefits suits where the benefit plan does not confer authority on the plan administrator “to determine eligibility for benefits or to construe the terms of the plan.”<sup>95</sup>

Although the United States Supreme Court solved the quandary over the standard of review for ERISA benefits suits, the Court did not address whether lower courts may review facts outside of the plan ad-

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84. 489 U.S. 101 (1989).

85. *Firestone*, 489 U.S. at 115. The Court limited its holding to the suits arising under 29 § 1132(a)(1)(B). *Id.* at 108, 115.

86. *Id.* at 115.

87. *See id.* at 108-12.

88. *Id.* at 109.

89. *Id.*

90. *Id.* at 110.

91. *Id.*

92. *Id.*

93. *Id.* at 112.

94. *Id.* at 115.

95. *Id.*

ministrator's record.<sup>96</sup> Prior to *Firestone*, under the *arbitrary and capricious* standard of review, federal courts denied litigants the opportunity to admit evidence that had not been presented to the plan administrator.<sup>97</sup> Some courts favored such a rule because of practical considerations.<sup>98</sup> Some of those considerations were conserving judicial resources and minimizing litigation costs.<sup>99</sup> Further, under the LMRA, federal courts limited the admissibility of evidence outside of the record.<sup>100</sup> Some courts adopted labor law and applied the rule under ERISA.<sup>101</sup> Finally, courts favored the rule limiting admissibility of such evidence because plan fiduciaries were given "primary responsibility for claim processing" under ERISA.<sup>102</sup>

However, in *Firestone*, the Court withdrew the initial deference that many circuits gave to plan administrators.<sup>103</sup> Moreover, since the Court rejected the "wholesale" adoption of LMRA principles in ERISA benefits suits, a comparison to the LMRA now seemed questionable.<sup>104</sup> Thus, with little direction on this issue, the circuit courts have had to reinterpret ERISA in light of the decision in *Firestone*.<sup>105</sup>

### III. CIRCUIT SPLIT ON ADMISSIBILITY OF FACTS OUTSIDE THE ADMINISTRATIVE RECORD

Since *Firestone*, most of the circuits have faced the issue of whether evidence outside of the administrative record is admissible.<sup>106</sup> With deference to administrators moderately withdrawn,<sup>107</sup> the circuit courts faced the decision whether to allow litigants to admit facts unheard in the administrative proceeding.<sup>108</sup> Some circuit courts have opted to allow claimants to introduce evidence outside of the administrative record.<sup>109</sup> Others, however, have refused to admit such evidence.<sup>110</sup> Finally, other

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96. See *id.* at 104-05; see Hogg, *supra* note 2, at 1581 & n.37.

97. Hogg, *supra* note 2, at 1576.

98. See, e.g., *Taylor v. Bakery & Confectionary Union & Indus. Int'l Welfare Fund*, 455 F. Supp. 816, 820 (E.D.N.C. 1978).

99. *Taylor*, 455 F. Supp. at 820.

100. See, e.g., *Phillips v. Kennedy*, 542 F.2d 52, 55 & n.10 (8th Cir. 1976); *Danti v. Lewis*, 312 F.2d 345, 349 (D.C. Cir. 1962).

101. *Kennedy I*, *supra* note 20, at 1097.

102. *Challenger v. Local Union No. 1*, 619 F.2d 645, 649 (7th Cir. 1980).

103. See *Firestone*, 489 U.S. at 115.

104. *Id.* at 109-10.

105. Hogg, *supra* note 2, at 1584.

106. See cases cited *infra* notes 109-12.

107. See *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 115 (1989).

108. Hogg, *supra* note 2, at 1575.

109. See, e.g., *Kirwan v. Marriott Corp.*, 10 F.3d 784, 789 (11th Cir. 1994); *Luby v. Teamsters Health, Welfare, & Pension Trust Funds*, 944 F.2d 1176, 1184 (3d Cir. 1991); *Moon v. Am. Home Assurance Co.*, 888 F.2d 86, 89 (11th Cir. 1989).

110. See, e.g., *S. Farm Bureau Life Ins. Co. v. Moore*, 993 F.2d 98, 102 (5th Cir. 1993); *Pierre v. Conn. Gen. Life Ins. Co./Life Ins. Co. of N. Am.*, 932 F.2d 1552, 1558 (5th Cir. 1991); *Perry v. Simplicity Eng'g*, 900 F.2d 963, 965 (6th Cir. 1990). *But see VanderKlok v. Provident Life & Accident Ins. Co.*, 956 F.2d 610, 617 (6th Cir. 1992) (allowing the district court to admit evidence where the plan administrator failed to give proper notice and due process).

circuit courts have chosen a “multi-factor” approach, reviewing evidence outside the administrative record under certain circumstances.<sup>111</sup>

A. *Tenth Circuit: Hall v. UNUM Life Insurance Co.*<sup>112</sup>

1. Facts

On June 5, 1993, Russana H. Hall (“Hall”) dislocated her left shoulder after falling from a bicycle.<sup>113</sup> At the time she was employed as the Regional Vice President of Sales for Nova Information Systems, Inc. (“Nova”).<sup>114</sup> As an employee of Nova, Hall participated in a long-term disability insurance plan.<sup>115</sup> Under this plan, Hall was entitled to benefits from the issuer of the insurance policy, UNUM Life Insurance Company of America (“UNUM”).<sup>116</sup>

After Hall’s administrative appeals to the plan administrator were exhausted, Hall continued to experience pain in her shoulder.<sup>117</sup> Ultimately, almost five years after her first surgery, Hall subjected herself to two more surgeries in 1998.<sup>118</sup> Hall appealed the administrative decision to the United States District Court for the District of Colorado.<sup>119</sup> At issue in the district court was whether Hall was disabled and could not perform her regular duties at Nova when UNUM terminated her benefits and whether that disability continued through the time of trial and “[could] reasonably be expected to continue for the indefinite future.”<sup>120</sup> The district court found in favor of Hall, citing the two surgeries undergone by Hall as “persuasive proof of disability.”<sup>121</sup>

UNUM appealed this decision to the Tenth Circuit Court of Appeals, asserting that the district court erred in considering evidence outside the administrative record.<sup>122</sup> First, UNUM noted that the trial court included depositions, medical records, and testimony of witnesses that were not included in the administrative record.<sup>123</sup> Most importantly, UNUM emphasized that the two surgeries Hall underwent in 1998 ap-

111. See, e.g., *DeFelice v. Am. Int’l Life Assurance Co. of N.Y.*, 112 F.3d 61, 66-67 (2d Cir. 1997); *Mongeluzo v. Baxter Travenol Long Term Disability Benefit Plan*, 46 F.3d 938, 943-44 (9th Cir. 1995); *Casey v. Uddeholm Corp.*, 32 F.3d 1094, 1098-99 (7th Cir. 1994); *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, 1026-27 (4th Cir. 1993).

112. 300 F.3d 1197 (10th Cir. 2002).

113. *Hall v. UNUM Life Ins. Co. of Am.*, No. 97-CV-1828, 1999 WL 33485551, at \*1 (D. Colo. Nov. 1, 1999).

114. *Hall*, 1999 WL 3348551, at \*1.

115. *Id.*

116. *Id.*

117. *Id.* at \*7.

118. *Id.*

119. *Id.* at \*8.

120. *Id.* at \*7. Hall filed suit under 29 U.S.C. § 1132 (a)(1)(B) and § 1132(a)(3); however, neither party denied that *Firestone* applied. *Hall*, 300 F.3d at 1200 n.2.

121. *Hall*, 1999 WL 33485551, at \*8.

122. *Hall*, 300 F.3d at 1200.

123. *Id.* at 1204.

peared to be significant evidence in the eyes of the district court.<sup>124</sup> This evidence was never part of the administrative record because Hall's final appeal was exhausted in 1997.<sup>125</sup>

## 2. Decision

The Tenth Circuit rejected UNUM's assertion that evidence outside of the administrative record could not be considered by a federal court reviewing an ERISA case *de novo*.<sup>126</sup> Although the court rejected a rule that allowed a federal court to consider *any* evidence on review, it noted that a district court could review such evidence in limited circumstances.<sup>127</sup> Relying primarily on case law from the Fourth Circuit, the Tenth Circuit ruled that evidence outside of the record might be admissible in the following circumstances:

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>128</sup>

The court cautioned that district courts are not *required* to admit evidence outside of the administrative record in those circumstances.<sup>129</sup> Moreover, the court directed lower courts to "only admit the additional evidence if the party seeking to introduce it can demonstrate that it could not have been submitted to the plan administrator at the time the challenged decision was made."<sup>130</sup>

In reaching this conclusion, the Tenth Circuit rejected two other approaches to the issue.<sup>131</sup> One approach prohibits the inclusion of facts outside of the administrative record.<sup>132</sup> The other view allows a claimant to freely introduce evidence not previously admitted before the plan administrator.<sup>133</sup> The court rejected both rules because "[a]llowing a district

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124. *Id.* at 1206-07.

125. *See id.* at 1200.

126. *Id.* at 1202-03, 1207.

127. *Id.* at 1202.

128. *Id.* at 1203 (quoting *Quesinberry*, 987 F.2d at 1027).

129. *Id.*

130. *Id.*

131. *Id.* at 1201.

132. *Id.*

133. *Id.*

court to exercise its discretion to admit additional evidence in certain circumstances best reconciles [the] competing purposes [of ERISA].”<sup>134</sup>

The court gave three reasons that the Fourth Circuit’s approach was preferable to the others.<sup>135</sup> First, the court noted that unless it allows supplemental evidence into the record under special circumstances, “we run the risk of providing employees fewer procedural rights than they had prior to the enactment of ERISA.”<sup>136</sup> Second, admitting evidence outside of the administrative record protects employee substantive rights “in those limited circumstances where extra-record evidence is relevant and necessary.”<sup>137</sup> Finally, the court emphasized that due to inconsistencies in the extent of administrative records and the complex issues involved in some ERISA cases, litigants may proffer additional evidence in appropriate circumstances.<sup>138</sup>

### B. Other Circuits

*Hall* mandates a multi-factor approach to decide whether evidence outside of the administrative record is admissible in the Tenth Circuit.<sup>139</sup> In reaching that decision, the Tenth Circuit addressed the approaches of three other circuits.<sup>140</sup> Because the court adopted one of those approaches and rejected the other two,<sup>141</sup> it is useful to consider each in greater detail.

#### 1. The Fourth Circuit’s Multi-Factor Approach: *Quesinberry v. Life Insurance Co.*<sup>142</sup>

##### a. Facts

The petitioner, Mr. Quesinberry, brought suit against Life Insurance Company of North America (“LINA”) for wrongful denial of benefits under “an accidental death policy.”<sup>143</sup> Mr. Quesinberry’s wife died following preparation for a procedure to confirm a diagnosis of multiple sclerosis.<sup>144</sup> She was given an injection of Renografin to assist the doctors read the results of a computerized tomography scan that they planned to perform.<sup>145</sup> Within minutes Mr. Quesinberry’s wife went into cardiac arrest.<sup>146</sup> She was in a comatose state until she died on June 19,

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134. *Id.* at 1202.

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.* at 1202-03.

139. *Id.* at 1203.

140. *Id.* at 1201-03.

141. *Id.* at 1202.

142. 987 F.2d 1017 (4th Cir. 1993).

143. *Quesinberry*, 987 F.2d at 1019.

144. *Id.* at 1020.

145. *Id.*

146. *Id.*

1983.<sup>147</sup> An autopsy revealed that she had neurosarcoidosis, a disease which may have contributed to her reaction to the injection of Reno-grafin.<sup>148</sup>

Based upon the results of the autopsy, LINA refused to provide Mr. Quesinberry with benefits from his wife's accidental insurance policy.<sup>149</sup> After exhausting all administrative appeals to the plan, Mr. Quesinberry sought redress in a federal district court.<sup>150</sup> Here, he presented evidence that was not reviewed by the plan administrator at LINA.<sup>151</sup> The district court concluded that under the *de novo* standard of review, Mr. Quesinberry was permitted to bring forth *all* admissible evidence, which included evidence that was not before the plan administrator.<sup>152</sup> Moreover, the district court found that LINA wrongfully denied Mr. Quesinberry the benefits promised in the accidental life insurance policy.<sup>153</sup>

#### b. Decision

The Fourth Circuit Court of Appeals rejected LINA's contention that the district court erred when it allowed evidence outside of the administrative record to be heard.<sup>154</sup> The court held that when "conducting *de novo* review of ERISA benefits claims[, courts] should review only the evidentiary record that was presented to the plan administrator or trustee except where the district court finds that additional evidence is necessary."<sup>155</sup>

The court then described the circumstances where admitting evidence outside the administrative record may be appropriate.<sup>156</sup> The examples included cases involving complex medical questions and situations where the evidence does not exist at the time of the administrative proceeding.<sup>157</sup> Even though circumstances may suggest that review of evidence outside of the record is appropriate, a district court may exclude that evidence.<sup>158</sup> Ultimately, the Fourth Circuit's decision in *Quesinberry* directs lower courts to decide whether evidence outside the administrative record should be admitted on a case-by-case basis.<sup>159</sup>

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147. *Id.*  
148. *Id.*  
149. *Id.* at 1020-21.  
150. *Id.* at 1020.  
151. *Id.*  
152. *Id.*  
153. *Id.* at 1021.  
154. *Id.* at 1023, 1032.  
155. *Id.* at 1026.  
156. *Id.* at 1027.  
157. *Id.*  
158. *Id.*  
159. *See id.* at 1032.



2. The Eleventh Circuit's Inclusion of Evidence Outside of the Administrative Record: *Moon v. American Home Assurance Co.*<sup>160</sup>

a. Facts

While taking off from McCollum Airport in Cobb County, Georgia, the airplane in which Robert Moon was riding crashed and he was killed.<sup>161</sup> Moon was a vice president of Day Realty of Atlanta ("Day Realty").<sup>162</sup> Day Realty provided a group travel insurance policy which provided accidental death insurance for officers of the corporation.<sup>163</sup> The defendant, American Home Assurance Company ("American"), denied Moon's widow benefits under the policy based on its belief that Moon was not an officer of Day Realty.<sup>164</sup> Moreover, American asserted that even if Moon qualified as an officer of Day Realty, his widow was not entitled to benefits because the purpose of Moon's trip was not business related.<sup>165</sup> The district court granted the widow's motion for summary judgment and American appealed.<sup>166</sup> On appeal, American argued that the district court did not apply the appropriate standard of review.<sup>167</sup>

b. Decision

The Eleventh Circuit Court of Appeals rejected American's contention that the district court erred in admitting evidence outside of the administrative record.<sup>168</sup> The court found in favor of Moon's widow.<sup>169</sup> The court held that limiting the evidence would be contrary to the notion of *de novo* review.<sup>170</sup> In addition, excluding evidence outside of the administrative record would afford employees less protection than they enjoyed prior to the enactment of ERISA.<sup>171</sup> Therefore, the court concluded that there should not be any restrictions on the evidence courts consider in ERISA cases.<sup>172</sup>

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160. 888 F.2d 86 (11th Cir. 1989).

161. *Moon*, 888 F.2d at 87.

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.* at 88.

168. *Id.* at 89.

169. *Id.*

170. *Id.*

171. *Id.* (quoting *Firestone*, 489 U.S. at 113-14).

172. *See id.*

3. The Sixth Circuit's Exclusion of Evidence Outside of the Administrative Record: *Perry v. Simplicity Engineering*<sup>173</sup>

a. Facts

Max Perry ("Perry") was employed at Simplicity Engineering ("Simplicity") from 1973 through 1985.<sup>174</sup> For roughly ten years Perry's performance was satisfactory.<sup>175</sup> However, in 1982 or 1983, Perry's work performance deteriorated significantly due to alcohol abuse.<sup>176</sup> In fact, Perry was hospitalized twice in 1984 for ailments associated with alcohol abuse.<sup>177</sup> Ultimately, Simplicity became increasingly unsatisfied with Perry's performance and terminated him on April 25, 1985.<sup>178</sup>

After his termination, Perry's alcohol abuse continued and he was again hospitalized in January 1986.<sup>179</sup> Perry filed a claim for long-term disability benefits with Simplicity based on his treatment.<sup>180</sup> After reviewing his claim, the plan administrator denied his claim because Perry was not disabled within the meaning of the plan during his employment at Simplicity.<sup>181</sup> Perry challenged the administrative decision in district court and sought to admit vocational evidence that was not reviewed by the plan administrator.<sup>182</sup> The court granted Simplicity's motion for summary judgment.<sup>183</sup>

b. Decision

The Sixth Circuit Court of Appeals rejected Perry's contention that the district court erred in excluding evidence that was outside of the administrative record.<sup>184</sup> Although the Sixth Circuit noted that it was inappropriate for the district court to apply the *arbitrary and capricious* standard in light of the Supreme Court's subsequent decision in *Firestone*, the court concluded that the error did not warrant remand to the district court.<sup>185</sup> The court emphasized that even under a *de novo* standard of review, the result would be the same.<sup>186</sup>

The court next turned to Perry's assertion that the lower court erred in not admitting vocational evidence that was outside the administrative

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173. 900 F.2d 963 (6th Cir. 1990).

174. *Perry*, 900 F.2d at 964.

175. *Id.*

176. *Id.*

177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.* at 964-65.

182. *Id.* at 965.

183. *Id.*

184. *Id.* at 967.

185. *Id.* at 965-66.

186. *Id.* at 967.

record.<sup>187</sup> Before the Supreme Court decided *Firestone*, the Sixth Circuit limited evidence to the administrative record in cases where it applied the *arbitrary and capricious* standard.<sup>188</sup> However, even in light of *Firestone*, the Sixth Circuit found that “the *de novo* review required by [*Firestone*] is a *de novo* review of the record before the administrator or fiduciary.”<sup>189</sup> As a result, the court concluded that it was appropriate to exclude the vocational evidence.<sup>190</sup>

#### IV. ANALYSIS

The Tenth Circuit’s decision to expand the evidentiary scope of a *de novo* review in certain ERISA benefits suits is a choice based on policy.<sup>191</sup> When courts review evidence outside the record, they honor Congress’s intent to protect employees.<sup>192</sup> However, such a policy burdens federal courts and increases litigation costs.<sup>193</sup> Courts that exclude evidence outside the administrative record provide more expedient proceedings at a lower cost to the litigants.<sup>194</sup> However, this approach conflicts with the holding of *Firestone* and overlooks the possibility that a plan administrator could abuse an employee during the internal appeal.<sup>195</sup> Finally, courts that choose a multi-factor approach try to balance fairness with prudent allocation of judicial resources.<sup>196</sup> The multi-factor approach is flexible;<sup>197</sup> yet, two circuits adopting the standard could treat similarly situated employees disparately. This standard of review, however, is implicitly supported by the language of ERISA, the legislative history of ERISA, and is appropriate as a matter of policy.

ERISA is silent on many issues, and the legislative history reveals that Congress intended to grant federal courts the authority to develop a federal common law.<sup>198</sup> Congress, therefore, gave substantial deference to federal judges. Moreover, circumstances surrounding ERISA benefits claims can vary dramatically, so judges should have the discretion to decide whether to admit evidence outside the administrative record on a case-by-case basis.<sup>199</sup>

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187. See *id.* at 966-67.

188. *Id.* at 965 n.1.

189. *Id.* at 966.

190. *Id.* at 967.

191. See Hogg, *supra* note 2, at 1576.

192. See *Moon v. Am. Home Assurance Co.*, 888 F.2d 86, 89 (11th Cir. 1989); 29 U.S.C. § 1001(a) (2000).

193. Hogg, *supra* note 2, at 1577.

194. See *id.*

195. *Id.* at 1590, 1597.

196. *Hall v. UNUM Life Ins. Co. of Am.*, 300 F.3d 1197, 1202 (10th Cir. 2002).

197. See *Quesinberry v. Life Ins. Co. of N. Am.*, 987 F.2d 1017, 1025-26 (4th Cir. 1993).

198. 120 CONG. REC. 29933 (1974) (statement of Sen. Javits) (“It is also intended that a body of federal substantive law will be developed by the courts to deal with issues involving rights and obligations under private welfare and pension plans.”).

199. *Quesinberry*, 987 F.2d at 1025-26.

A potential rule's impact on judicial resources is often a valuable consideration when deciding whether to adopt it.<sup>200</sup> However, Congress neither explicitly nor implicitly expressed an intention to use the Act to conserve judicial resources.<sup>201</sup> Moreover, the argument that plan administrators are "closer to the facts" and consequently better situated to determine what evidence is relevant<sup>202</sup> is not supported by ERISA or its legislative history. Deference to plan administrators should be approached cautiously. ERISA is primarily created to protect participants and beneficiaries of employee benefit plans from abusive plan administrators.<sup>203</sup> Relying on administrators, therefore, ignores the very purpose of ERISA.

The Sixth Circuit reasoned that considering evidence outside the administrative record "would frustrate the goal of prompt resolution of claims by the fiduciary under the ERISA scheme."<sup>204</sup> In direct conflict with the Sixth Circuit, the Eleventh Circuit held that excluding evidence outside of the administrative record would "require us to impose a standard of review that would afford less protection to employees and their beneficiaries than [they enjoyed] before ERISA was enacted."<sup>205</sup>

Neither the blanket rule excluding all evidence nor the blanket rule admitting all evidence is sound.<sup>206</sup> Although the Sixth Circuit asserts that judicial intervention would result in cumbersome review of administrative records and frustrate the goals of ERISA, the court failed to substantiate its contentions with facts.<sup>207</sup> Moreover, the Sixth Circuit did not give adequate consideration to the fact that ERISA was enacted to protect employees from the funding failures, fiduciary abuses, and vesting inequities that plagued employee benefit plans until the 1970s.<sup>208</sup>

In contrast, the Eleventh Circuit's rule that all evidence outside of the administrative record is admissible emphasizes the protection of employees,<sup>209</sup> but does not adequately address the problem of federal judges usurping the role of plan administrators. This rule may prolong benefits proceedings considerably as claims await federal review.<sup>210</sup> A rule that

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200. Hogg, *supra* note 2, at 1590, 1597.

201. See Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, 1974 U.S.C.C.A.N. 4639, 4999-5001 (codified at 29 U.S.C. § 1001). Congress was actually more concerned with employees receiving inexpensive and expeditious dispute resolution over claims for employee benefits. *Id.* at 4999-5000.

202. *Pierre v. Conn. Gen. Life Ins. Co./ Life Ins. Co. of N. Am.*, 932 F.2d 1552, 1562 (5th Cir. 1991).

203. 29 U.S.C. § 1001(a).

204. *Perry v. Simplicity Eng'g*, 900 F.2d 963, 966 (6th Cir. 1990). Additionally, "[a] primary goal of ERISA was to provide a method for workers and beneficiaries to resolve disputes over benefits inexpensively and expeditiously." *Perry*, 900 F.2d at 967.

205. *Moon*, 888 F.2d at 89 (alteration in original) (quoting *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 114 (1989)).

206. See Hogg, *supra* note 2, at 1576-77.

207. *Id.* at 1597-98.

208. *Medill*, *supra* note 33, at 5.

209. *Moon*, 888 F.2d at 89.

210. Hogg, *supra* note 2, at 1599.

permits courts to review any evidence outside of the administrative record provides a loophole whereby claimants may circumvent the internal review procedures of the particular plan.<sup>211</sup> Finally, if a claimant prevails in federal court and benefits are awarded, plan assets could be significantly diminished by litigation expenses and unexpected benefit payments.<sup>212</sup> Thus, blanket rules admitting evidence or excluding evidence do not adequately reconcile the conflicting interests in protecting employees and preventing burdensome and unnecessary litigation.

The Tenth Circuit found a solution that addresses the inadequacies of both blanket rules. Under *Hall*, “[t]he party seeking to supplement the record *bears the burden* of establishing why the district court should exercise its discretion to admit particular evidence by showing how that evidence is necessary to the district court’s *de novo* review.”<sup>213</sup> That burden is heavy because “it is the unusual case in which the district court should allow supplementation of the record.”<sup>214</sup> Consequently, a claimant who seeks to introduce evidence that did not exist at the time of the administrative proceeding must overcome the burden of establishing the need for the evidence.<sup>215</sup>

Employees are still protected from wrongful denial of benefits by plan administrators under the Tenth Circuit’s approach because it is still possible for the employee to convince the court to admit evidence outside of the administrator’s record.<sup>216</sup> Moreover, the interest in preserving judicial resources is protected because the court need not sift through additional, often sizable and extraneous, evidence if the claimant cannot satisfy the initial burden of proof.<sup>217</sup> Finally, the Tenth Circuit’s rule gives lower courts discretion that is consistent with Congress’s objective of providing guidance to plan administrators through ERISA that will prevent abuses of employees.<sup>218</sup>

The position that the Tenth Circuit took in *Hall* on the admissibility of evidence outside of the administrative record is the view the majority of the circuits have taken.<sup>219</sup> The widespread acceptance and consistent reasoning of a multi-factor approach make it likely that the Tenth Circuit’s decision will remain intact should the United States Supreme Court choose to hear a case that raises the issue.

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211. *Id.* at 1598-99.

212. *Id.* at 1599.

213. *Hall*, 300 F.3d at 1203 (emphasis added).

214. *Id.*

215. *See id.*

216. *Id.* at 1202.

217. *See id.* at 1203.

218. Bartholomew, *supra* note 22, at 1137.

219. *See Hall*, 300 F.3d at 1201-02.

## CONCLUSION

Although *Firestone* established that the *de novo* standard of review is appropriate in ERISA benefits suits, the Court's silence on the evidentiary scope of review has caused a significant split between the circuits.<sup>220</sup> However, the spirit of ERISA and Congress's intent in enacting ERISA suggest that the multi-factor approach is the most appropriate.<sup>221</sup> It is fair and just because it conserves judicial resources, yet preserves the rights of employees. Thus, in order to remain true to the mandates of ERISA, courts should adopt an approach similar to that articulated by the Tenth Circuit.

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220. Hogg, *supra* note 2, at 1582-84.

221. See *Hall*, 300 F.3d at 1202.

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