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Note

The Evidentiary Scope of De Novo Review in ERISA Benefits Litigation After Firestone Tire & Rubber Co. v. Bruch

Robert Mason Hogg

In suits to recover employee benefits1 under the Employee Retirement Income Security Act of 1974 ("ERISA"),2 plaintiffs often seek to introduce evidence that they did not previously present3 to the employee benefit plan administrator.4 Plaintiffs offer such evidence, often expert medical or vocational testimony,5 to demonstrate that they deserve benefits under the

3. Claimants must exhaust the benefit plan's claim review procedures established under 29 U.S.C. § 1133 (1988) before bringing suit in federal court. See infra note 33 and accompanying text. There are many reasons why a claimant would not present evidence to the plan administrator. First, claimants who lack legal representation may not think about presenting expert testimony. See VanderKlok v. Provident Life & Accident Ins. Co., 956 F.2d 610, 612 (6th Cir. 1992) (noting claimant had "sixth grade education"). In addition, claimants may decide that the costs of developing evidence are too great for routine benefit claims. See infra notes 150-152 and accompanying text. Furthermore, claimants may be suspicious that plan administrators will abuse their access to the evidence by attempting to discredit it. See Masella v. Blue Cross & Blue Shield, Inc., 936 F.2d 98, 105 (2d Cir. 1991). Finally, plan administrators may not provide adequate opportunities to submit evidence. VanderKlok, 956 F.2d at 616.
4. This Note uses the term "administrator" to describe the person, committee, or company making benefit decisions, although courts also call them "fiduciaries" or "trustees." See, e.g., Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 113 (1989).
5. E.g., Kirwan v. Marriott Corp., 10 F.3d 784, 790 (11th Cir. 1994) (expert medical testimony); Davidson v. Prudential Ins. Co. of America, 953 F.2d 1093, 1095 (8th Cir. 1992) (vocational expert). In Kirwan, the claimant sought to introduce medical records, expert medical testimony, and Social Security Administration records to show that he became disabled while covered by his employer's disability benefit plan. 10 F.3d at 790.
terms of an employee benefit plan. Whether a federal court admits such evidence, however, depends on the circuit in which the court is located.

After ERISA's enactment, federal courts initially reviewed benefit denials under an arbitrary and capricious standard, limited by the evidence presented to the plan administrator. In Firestone Tire & Rubber Co. v. Bruch, the Supreme Court directed courts to review suits for benefits under a de novo standard unless the plan's administrator has discretion to make benefit decisions. Since Bruch, federal circuits have split over the appropriate evidentiary scope of de novo review in ERISA benefit cases. In some circuits, courts only review evidence that the plan administrator considered, while in other circuits, courts allow claimants to introduce new evidence at trial.

The conflicting rules reflect divergent policy choices. By allowing additional evidence, courts are better able to protect ben-

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6. See, e.g., Masella v. Blue Cross & Blue Shield, Inc., 936 F.2d 98, 105-06 (2d Cir. 1991) (stating that claimant's experts persuaded court to construe plan terms in claimant's favor).

7. The inconsistent circuit rules described in Part II of this Note lead to inconsistent treatment of claimants who sue the same plan administrator. Compare Quesinberry v. Life Ins. Co. of North America, 987 F.2d 1017, 1027 (4th Cir. 1993) (en banc) (upholding trial court's use of evidence not presented to plan administrator) with Scheider v. Life Ins. Co. of North America, 820 F. Supp. 191, 193 (D.N.J. 1993) (excluding offered evidence because administrator's record was "sufficiently developed").

8. See infra notes 35-40 and accompanying text.


10. Id. at 115. Specifically, the Court held that "a denial of benefits challenged under [29 U.S.C.] § 1132(a)(1)(B) is to be reviewed under a de novo standard unless the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan." Id. (emphasis deleted). Earlier, however, the Court said that its opinion was "limited to the appropriate standard of review in § 1132(a)(1)(B) actions challenging denials of benefits based on plan interpretations." Id. at 108 (emphasis added). As a result, federal courts are split over whether Bruch extends de novo review to cases where plan administrators deny benefits based on factual determinations about an individual's claim, such as whether a claimant is disabled, rather than a denial based on plan term interpretations. Compare Pierre v. Connecticut Gen. Life Ins. Co., 932 F.2d 1552 (5th Cir.), cert. denied, 112 S. Ct. 453 (1991) (holding that Bruch does not require de novo review of administrators' factual determinations) with Luby v. Teamsters Health, Welfare, & Pension Trust Funds, 944 F.2d 1176, 1183 (3d Cir. 1991) (holding that Bruch requires de novo review of administrators' factual determinations).


efficiaries' rights under ERISA plans.\textsuperscript{13} Full evidentiary hearings in ERISA benefits litigation, however, burden federal courts, undermine the role of plan administrators, and hurt beneficiaries as a group by imposing unexpectedly high litigation costs on the benefit plan.\textsuperscript{14} To accommodate these competing interests, some circuits have adopted multi-factor discretionary rules to govern the scope of evidence.\textsuperscript{15}

Part I of this Note summarizes the federal judiciary's role within ERISA's regulatory scheme. Part II describes the current federal circuit rules governing the evidentiary scope of de novo review in ERISA benefits litigation and the reasoning behind the rules. Part III critiques the legal reasoning of the federal circuit courts and demonstrates practical shortcomings of the current rules. Part IV proposes that rather than admitting or excluding additional evidence, courts should remand cases to ERISA plan administrators to make new determinations in light of the evidence the claimant seeks to offer to the court. This Note concludes that a liberal remand policy would conserve judicial and benefit plan resources without significantly reducing the level of protection beneficiaries receive under ERISA plans.

\textsuperscript{13} See Quesinberry v. Life Ins. Co. of North America, 987 F.2d 1017, 1025 (4th Cir. 1993) (en banc). Protecting beneficiaries is especially important because employee benefit plans provide many beneficiaries with basic human services such as health care, disability insurance, and death benefits. See, e.g., Weber v. Saint Louis Univ., 6 F.3d 558, 561 (8th Cir. 1993) (disability benefits); Quesinberry, 987 F.2d at 1019 (accidental death benefits); Masella v. Blue Cross & Blue Shield, Inc., 936 F.2d 98, 99 (2d Cir. 1991) (health benefits); cf. Goldberg v. Kelly, 397 U.S. 254, 264 (1970) ("[T]ermination of [government welfare] pending resolution of a controversy over eligibility may deprive an eligible recipient of the very means by which to live while he waits."). Nonetheless, employee benefits provided by ERISA plans are not as significant in the social safety net as government programs because even if a plan administrator erroneously denies benefits, the would-be beneficiary may still be able to obtain governmental assistance. See Perry v. Simplicity Eng'g, 900 F.2d 963, 964 (6th Cir. 1990) (noting that worker received Social Security benefits after plan administrator denied disability benefits); Block v. Pitney Bowes Inc., 952 F.2d 1450, 1455 (D.C. Cir. 1992).

\textsuperscript{14} See infra notes 154-161 and accompanying text (describing practical problems with rule allowing claimants to introduce evidence not presented to plan administrator).

\textsuperscript{15} See Donatelli v. Home Ins. Co., 992 F.2d 763, 765 (8th Cir. 1993) (discretionary "good cause" rule); Quesinberry, 987 F.2d at 1025 ("limited discretion-ary approach").
I. THE JUDICIAL ROLE WITHIN ERISA'S REGULATORY STRUCTURE

A. ERISA's Regulatory Structure

Although employee benefits traditionally were a matter of state contract law, ERISA brought employee benefit plans under federal regulatory authority. ERISA regulates pension plans and aspects of "employee welfare benefit plans," which include health, disability, and death benefit plans. For pension plans, ERISA establishes standards for financial management and participant vesting. For both pension plans and welfare benefit plans, ERISA requires plan administrators to meet fiduciary standards, disclose information fully, and provide fair benefit claim procedures.


17. ERISA regulates only employee benefit plans, not all employee benefits. 29 U.S.C. § 1002(1)-(3) (1988). Parties frequently litigate the issue of whether employee benefits constitute a plan. See, e.g., Fort Halifax Packing Co. v. Coyne, 482 U.S. 1, 12 (1987) (holding that "one-time, lump-sum" severance payment that "requires no administrative scheme" is not plan).

18. For example, ERISA authorizes the Secretary of Labor to promulgate regulations as "necessary or appropriate" to implement ERISA's provisions relating to plan reporting, disclosure, and fiduciary conduct. 29 U.S.C. § 1135 (1988). ERISA also gives regulatory authority to the Internal Revenue Service and the Pension Benefit Guaranty Corporation. See JOHN H. LANGBEIN & BRUCE A. WOLK, PENSION & EMPLOYEE BENEFIT LAW 70 (1990).


23. A plan fiduciary must act "solely in the interest of the participants and their beneficiaries" and perform her duties "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims." 29 U.S.C. § 1104(a)(1)(A)-(B) (1988). A plan administrator is a fiduciary if she "has any discretionary authority or discretionary responsibility in [plan] administration." § 1002(21)(A)(iii).


Under ERISA, plan administrators must provide claimants with a "summary plan description" that describes benefit eligibility and claim procedures. When administrators deny benefits, they must give claimants written notice of the reasons for denial and provide claim review procedures by which claimants may appeal. Finally, ERISA guarantees that claimants may sue for benefits in federal courts, but does not give claimants the right to a jury trial.

26. 29 C.F.R. § 2520.102-3(j)(1)-(2), (t)(2) (1993). When plan summaries include a disclaimer, the information contained therein may not be binding on plan administrators. See de Nobel v. Vitro Corp., 885 F.2d 1180, 1195 (4th Cir. 1989).

27. The written notice must provide "specific reasons" for denial and be "written in a manner calculated to be understood by the participant." 29 U.S.C. § 1133(1) (1988). Conclusory statements will not suffice as notice. See, e.g., Weaver v. Phoenix Home Life Mut. Ins. Co., 990 F.2d 154, 158 (4th Cir. 1993) (rejecting administrator's notice which merely said hospital stay to treat alcohol abuse was "not authorized" beyond twelve days). Even if an administrator has discretion to determine benefit eligibility, she must provide a detailed explanation of the reasons for denial. Id. at 158-59.

One purpose of the notice requirement is to give claimants an opportunity to augment the evidentiary record in their favor. VanderKlok v. Provident Life & Accident Ins. Co., 956 F.2d 610, 616 (6th Cir. 1992). Some courts, however, hold that a plan's written explanation is not necessarily the sole basis for judicial review of a benefit denial and that courts may look at other provisions in the plan to justify the administrator's denial. See, e.g., Weber v. Saint Louis Univ., 6 F.3d 558, 560 (8th Cir. 1993); Farley v. Benefit Trust Life Ins. Co., 979 F.2d 653, 660 (8th Cir. 1992). This practice undermines the function of the notice requirement.

28. A plan must provide claimants with "a reasonable opportunity... for a full and fair hearing by the appropriate named fiduciary of the decision denying the claim." 29 U.S.C. § 1133(2) (1988). A plan administrator must allow a claimant or his representative at least sixty days to examine the administrator's record, request an administrative review by written application, and submit written comments in support of the claimant's position. 29 C.F.R. § 2560.503-1(g)(1), (3) (1993). If the plan administrator violates ERISA's procedural requirements, the court should remand the case to the administrator to provide the requisite review process. Weaver v. Phoenix Home Life Mut. Ins. Co., 990 F.2d 154, 159 (4th Cir. 1993); Jenkinson v. Chevron Corp., 634 F. Supp. 375, 380 (N.D. Cal. 1986). One court even awarded a claimant $50 per day, or $15,775, for the administrator's violation of ERISA's claim review requirements. Garred v. General Am. Life Ins. Co., 774 F. Supp. 1190, 1201 (W.D. Ark. 1991).

29. ERISA provides that, "[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." 29 U.S.C. § 1132(a)(1)(B) (1988).

30. See Kirk v. Provident Life & Accident Ins. Co., 942 F.2d 504 (8th Cir. 1991) (stating that Seventh Amendment argument in favor of jury trial right is "without merit"); Wardle v. Central States, Southeast & Southwest Areas Pension Fund, 627 F.2d 820, 828-30 & n.21 (7th Cir. 1980) (holding that neither
B. ERISA's "Federal Common Law" of Judicial Review

The text of ERISA is silent about how federal courts should review a denial of a plan benefits, but ERISA's legislative history shows that Congress intended courts "to develop a 'federal common law of rights and obligations under ERISA-regulated plans.'" Using federal common law authority, some courts have required claimants to exhaust claim review procedures. Some courts also have imposed a duty on plan administrators to develop all reasonably available evidence that is material to a claim.

After ERISA's enactment, federal courts initially used a deferential "arbitrary and capricious" standard of review. ERISA nor the Constitution provides for jury trial right in ERISA benefits litigation, cert. denied, 449 U.S. 1112 (1981).

31. See Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 109 (1989); Quesinberry v. Life Ins. Co. of North America, 937 F.2d 1017, 1021 (4th Cir. 1993) (en banc). In Bruch the Supreme Court noted that legislation to provide de novo review failed. 489 U.S. at 114.

32. Id. at 110 (quoting Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 56 (1987)). Senator Javits said 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." 120 Cong. Rec. 29,942 (daily ed. Aug. 22, 1974) (remarks of Sen. Javits).


benefits litigation. Because courts saw their role as merely to review the plan administrator's actions, rather than to enforce contractual rights, they limited the scope of their review to the plan administrator's evidentiary record. Consequently, when a plan administrator based a decision on "substantial evidence," courts upheld the decision.

If the administrator's record lacked an evidentiary basis, courts remanded the case to the administrator to develop more evidence. Courts awarded benefits litigation.

35. Van Boxel v. Journal Co. Employees' Pension Trust, 836 F.2d 1048, 1049 (7th Cir. 1987) (reciting "black-letter rule" applying "arbitrary and capricious" standard but noting "growing skepticism" about its use).


37. See Voliva v. Seafarers Pension Plan, 858 F.2d 195, 196 (4th Cir. 1988); Daniels v. Eaton Corp., 839 F.2d 263, 267 (6th Cir. 1988); Crews v. Central States, Southeast & Southwest Areas Pension Fund, 788 F.2d 332, 336 (6th Cir. 1986); Berry v. Ciba-Geigy Corp., 761 F.2d 1003, 1007 (4th Cir. 1985); Wolfe v. J.C. Penney Co., 710 F.2d 388, 394 (7th Cir. 1983); Wardle v. Central States, Southeast & Southwest Areas Pension Fund, 627 F.2d 820, 824 (7th Cir. 1980), cert. denied, 449 U.S. 1112 (1981); Phillips v. Kennedy, 542 F.2d 52, 55 n.10 (8th Cir. 1976); see also Miles v. New York State Teamsters Conference Pension & Retirement Fund Employee Pension Plan, 698 F.2d 593, 599 (2d Cir. 1983) (stating that courts should not conduct a "de novo hearing" in ERISA cases).

Courts used the rule against additional evidence for three reasons. First, limiting evidence was the common practice under the Labor Management Relations Act (LMRA). Phillips v. Kennedy, 542 F.2d 52, 55 & n.10 (8th Cir. 1976) (citing Danti v. Lewis, 312 F.2d 345, 349 (D.C. Cir. 1962)) (limiting evidence under LMRA). Subsequent cases relied on Phillips without noting the LMRA roots of the rule. See Berry v. Ciba-Geigy Corp., 761 F.2d 1003, 1007 (4th Cir. 1985) (citing Phillips); Wardle v. Central States, Southeast & Southwest Areas Pension Fund, 627 F.2d 820, 824 (7th Cir. 1980) (same), cert. denied 449 U.S. 1112 (1981). In addition, courts asserted that Congress intended to give plan fiduciaries "primary responsibility for claim processing." Wolfe v. J.C. Penney Co., 710 F.2d 388, 394 (7th Cir. 1983) (quoting Challenger v. Local Union No. 1, 619 F.2d 645, 649 (7th Cir. 1980)). Finally, courts contended that "practical considerations" also favored limiting evidence to the plan administrator's record. Id. (citing Taylor v. Bakery & Confectionary Union & Indus. Int'l Welfare Fund, 455 F. Supp. 816, 820 (E.D.N.C. 1978)). The practical considerations included reducing litigation over frivolous claims, encouraging private non-adversarial methods of dispute resolution, and promoting uniform administration of benefit plans. Taylor, 455 F. Supp. at 420.

In Phillips v. Kennedy, the plan administrators, not the claimant, sought to introduce new evidence in an effort to justify its benefit denial. Phillips, 542 F.2d at 55. Thus a rule that courts now apply against claimants seeking benefits was initially a method for protecting claimants from abuse by benefit plan administrators.

38. See, e.g., Berry, 761 F.2d at 1007.

39. Id. at 1007; Wardle 627 F.2d at 824; Phillips, 542 F.2d at 55 n.10 (citing Sturgill v. Lewis, 372 F.2d 400, 401 (D.C. Cir. 1966)) (per curiam). One court even favored remand when the claimant sought to introduce "significant" evi-
fits only if the administrator’s original record showed that the claimant deserved them.\(^{40}\)

In *Firestone Tire & Rubber Co. v. Bruch*,\(^ {41}\) the Supreme Court rejected the arbitrary and capricious standard in favor of de novo review except when a plan administrator has discretion\(^ {42}\) to make benefit decisions.\(^ {43}\) *Bruch* also changed the legal
dence “[r]egardless of whether [the plan administrator] based its decision on substantial evidence,” because “the fiduciary [should] make the initial assessment of whether such facts establish an applicant’s eligibility.” *Wolfe* 710 F.2d at 394. Remand is not required, however, if it would be a “useful formality.” *Wardle*, 627 F.2d at 828 (quoting Ruth v. Lewis, 166 F. Supp. 346, 349 (D.D.C. 1958)).

In *Sturgill v. Lewis*, a pre-ERISA case upon which the remand rule is based, see *Phillips*, 542 F.2d at 55 n.10, the District of Columbia Court of Appeals used the remand rule to protect a claimant from the pension trustees’ effort to justify denying benefits on new grounds at trial. *Sturgill*, 372 F.2d at 401. Remanding the case to the trustees, the court reasoned as follows:

Since the Trustees perform their function as such pursuant to an Act of Congress in an area of social concern and importance, . . . the proceedings before the Trustees must conform to at least elemental requirements of fairness, [including] notice, a hearing at which the applicant is confronted by the evidence against him, an opportunity to present evidence in his own behalf, articulated findings and conclusions having a substantial basis in the evidence taken as a whole, and a reviewable record. If the Trustees for some reason are unable or unwilling to comply with these fairness requirements, in the interest of proper and prompt disposition of these pension claims, it may become necessary to reconsider our [rule limiting evidence]. *Id.*

Thus, under labor law, courts used remand on the expectation that pension trustees would provide fair claim review procedures.

\(^{40}\) E.g., *Phillips* 542 F.2d at 54.

\(^{41}\) 489 U.S. 101 (1989). The issue in *Bruch* was whether Firestone’s former employees qualified for termination pay after the company that bought Firestone’s plastics division hired them under a provision of the plan providing benefits for employees “released because of a reduction in work force.” *Id.* at 105-06. The district court granted summary judgment for Firestone applying the arbitrary and capricious standard, but the Third Circuit reversed, holding the arbitrary and capricious standard inappropriate when the plan administrator has a conflict of interest, as Firestone did in *Bruch* because its plan was unfunded. *Id.* at 106-08. Affirming the Third Circuit in part, the Supreme Court rejected conflict of interest as the basis for its decision but said courts should look at conflicts in judging whether an administrator abused his discretion in cases where plans provide for administrative discretion. *Id.* at 115.

\(^{42}\) Whether a plan grants the administrator discretion is now frequently an issue in ERISA benefits litigation. The Eleventh Circuit requires plan instruments to provide discretion in “express language” before granting deferential review. *Moon v. American Home Assurance Co.*, 888 F.2d 86, 88 (11th Cir. 1989). By contrast, the Third Circuit has held that “[d]iscretionary powers may be implied by a plan’s terms even if not granted expressly.” *Luby v. Teamsters Health, Welfare, & Pension Trust Funds*, 944 F.2d 1176, 1180 (3d Cir. 1991). The Fourth Circuit has also noted that there are “no magic words required to trigger the application of one or another standard of judicial review.” *de Nobel v. Vitro Corp.*, 885 F.2d 1180, 1187 (4th Cir. 1989).
reasoning behind ERISA's federal common law. Prior to *Bruch*, federal courts created ERISA common law primarily by borrowing from labor law; but the Supreme Court rejected this “wholesale importation” of labor law into ERISA. Instead, *Bruch* relied on principles of trust law, in which “courts construe terms in trust agreements without deferring to either party’s interpretation.” The Court also held that the standard of review under ERISA must protect beneficiaries at least as

When the plan instrument confers discretion, courts usually review the administrator’s decision using an abuse of discretion or an arbitrary and capricious standard limited to the plan administrator's evidentiary record. See *Sandoval v. Aetna Life & Casualty Ins. Co.*, 967 F.2d 377, 382 (10th Cir. 1992) (excluding reliable evidence of disability because neither claimant nor his counsel presented evidence to administrator); *Block v. Pitney Bowes Inc.*, 965 F.2d 1450, 1455-56 (D.C. Cir. 1992) (excluding from review Social Security Administration records that were “never submitted” to plan administrator); *Jones v. Laborers Health & Welfare Trust Fund*, 906 F.2d 480, 482 (9th Cir. 1990). The Fifth Circuit, however, has held that a reviewing court must look at evidence regarding plan-term interpretation or the administrator's record, to ensure that an administrator's interpretation of plan terms is reasonable. See *Wildbur v. ARCO Chem. Co.*, 974 F.2d 631, 638-39 & 642 n.19 (5th Cir. 1992); see also *Zigel v. Prudential Ins. Co.*, 1994 U.S. Dist. LEXIS 22872, at *7 (E.D.N.Y. Mar. 9, 1994) (admitting expert medical testimony and evidence of administrator's bad faith under arbitrary and capricious standard).

43. *Bruch*, 489 U.S. at 115. *See supra* note 10 (describing circuit split over whether de novo review extends to judicial review of administrator's factual determinations as well as plan term interpretations).


45. *Bruch*, 489 U.S. at 109 (emphasis omitted). Unlike the Labor Management Relations Act, under which courts use an arbitrary and capricious standard as a basis for jurisdiction, ERISA explicitly authorizes claimants to sue for individual benefits, making the arbitrary and capricious standard inappropriate under ERISA. *Id.* at 109-10.

46. The Court found that the “settled principles” of trust law “point to de novo review of benefit eligibility determinations based on plan interpretations.” *Id.* at 112 (emphasis omitted). *But see Wardle v. Central States, Southeast & Southwest Areas Pension Fund*, 627 F.2d 820, 824 (7th Cir. 1980) (stating that arbitrary and capricious standard is “traditional standard of review of the law of trusts”), *cert. denied*, 449 U.S. 1112 (1981).

47. *Bruch*, 489 U.S. at 112. The Supreme Court held that courts should interpret plan terms as they interpret “contractual provisions,” noting that a “trustee who is in doubt as to the interpretation of the instrument can protect himself by obtaining instructions from the court.” *Id.*
much as state contract law protected them prior to ERISA's enactment.48

II. THE CIRCUIT SPLIT OVER EVIDENTIARY SCOPE OF REVIEW

In light of Bruch's de novo review requirement, federal circuit courts have reconsidered whether they should limit the scope of review to the plan administrator's evidentiary record.49 The circuits have split over whether to admit evidence that a claimant50 did not previously present to the plan administrator. Courts have followed three separate rules: per se rules limiting evidentiary review to the plan's administrative record,51 per se rules allowing claimants to introduce new evidence to the court,52 and multi-factor discretionary rules admitting additional evidence under certain circumstances.53

48. Id. at 113-14. The Court also rejected the potential for higher administrative and litigation costs as an argument against de novo review. Id. at 115.


50. The Eighth Circuit recently addressed whether a plan administrator should be able to submit new evidence to the court. Weber v. Saint Louis Univ., 6 F.3d 558 (8th Cir. 1993). The district court excluded such evidence because "it would be unfair to permit [the administrator] to expand the scope of review beyond the facts available to [her] at the time the decision to deny benefits was made." Weber v. St. Louis Univ., 804 F. Supp. 1141, 1146 (E.D. Mo. 1992). The Eighth Circuit reversed, holding that the trial court abused its discretion by excluding such evidence because the evidence of disability in the plan administrator's record was "insufficient" to sustain a decision in favor of either party. Weber, 6 F.3d at 561.

Courts first applied the rule limiting evidence to the plan administrator's record to prevent administrators from changing their rationale for denying benefits after the fact. See, e.g., Phillips v. Kennedy, 542 F.2d 52, 55 (8th Cir. 1976). Thus, Weber turns the rule's history on its head by allowing administrators to develop post hoc rationalizations for denying benefits. Cf. Burlington Truck Lines v. United States, 371 U.S. 156, 168-69 (1962) (holding that "post hoc rationalizations" are inadequate basis for governmental agency decision-making).

51. See infra notes 54-64 and accompanying text.

52. See infra notes 65-75 and accompanying text.

53. See infra notes 76-97 and accompanying text.
A. Rules Excluding Additional Evidence

The Fifth and Sixth Circuit Courts of Appeals prohibit claimants from introducing evidence at bench trial that was not presented to the plan administrator. In Perry v. Simplicity Engineering, the Sixth Circuit ruled that certain hospital records and expert vocational testimony were inadmissible because the disability claimant had not presented this evidence to the plan administrator. The court relied heavily on ERISA's legislative purpose to support its exclusion of the claimant's evidence. According to the Sixth Circuit, Congress did not want federal courts to "function as substitute plan administrators." Instead, the court found that a "primary goal of ERISA was to provide a method for workers and beneficiaries to resolve disputes inexpensively and expeditiously." The court contended that allowing additional evidence would "seriously impair" this goal.

Like the Sixth Circuit, the Fifth Circuit reasoned that admitting additional evidence would contravene Congress's intention to give plan administrators the principal role in resolving factual disputes. The Fifth Circuit contended that because

54. See Southern Farm Bureau Life Ins. Co. v. Moore, 993 F.2d 98, 102 (5th Cir. 1993); see also Pierre v. Connecticut Gen. Life Ins. Co., 932 F.2d 1552, 1558 (5th Cir.) (holding that administrator's factual determinations warrant deferential review), cert. denied, 112 S. Ct. 453 (1991); Goodman v. S & A Restaurant Corp., 821 F. Supp. 1139, 1146 (S.D. Miss. 1993) (rejecting claimant's request to augment evidentiary record at trial). In Wildbur v. ARCO Chemical Co., the Fifth Circuit reiterated its rule against admitting additional evidence that relates to factual determinations, but ruled that certain evidence relating to plan term interpretation or an administrator's bad faith is admissible, because it is unlikely to appear in the administrator's record for an individual claimant. 974 F.2d 631, 642 (5th Cir. 1992).


56. 900 F.2d 963 (6th Cir. 1990).
57. Id. at 965-66
58. Id. at 966.
59. Id. at 967.
60. Id.
plan administrators conduct the "daily and routine administration of plans," they are positioned better than courts to find facts in ERISA benefit disputes. Moreover, the Fifth Circuit posited that plan administrators have "inherent discretion" under trust law to gather evidence. In terms of ERISA's policies, the Fifth Circuit suggested that admitting additional evidence undermines ERISA's protection of beneficiaries as a group because evidentiary hearings will force plans to pay for higher litigation costs.

B. RULES ADMITTING ADDITIONAL EVIDENCE

In direct contrast to the Fifth and Sixth Circuits, the Eleventh Circuit Court of Appeals follows a per se rule allowing claimants to submit additional evidence. In Kirwan v. Marriott Corp., the Eleventh Circuit considered additional evidence such as medical records, expert medical testimony, and Social Security Administration records, which showed that the claimant developed her disability while covered by her employer's disability benefit plan. The Eleventh Circuit reasoned that limiting evidence to the plan administrator's record is "contrary to the concept of de novo review." The Eleventh Circuit also contended that limiting evidence impermissibly contravenes legis-
islative intent by giving claimants less protection than they had prior to ERISA's enactment.  

The Second Circuit also follows a per se rule allowing claimants to introduce new evidence when it relates to the interpretation of plan terms. Thus, in *Masella v. Blue Cross & Blue Shield, Inc.*, the court upheld admission of the claimant's expert medical testimony describing temporomandibular joint dysfunction, a jaw ailment, which supported her interpretations of the terms "medical" and "dental" in the plan instrument. According to the Second Circuit, hearing evidence relating to plan term interpretation does not make courts "substitute plan administrators," as the Sixth Circuit suggested, because administrators have no discretion to interpret plan terms. In *Masella*, the Second Circuit also found that it is unfair to force claimants to present evidence about plan term interpretations to plan administrators against whom they later must litigate.

C. Multi-Factor Discretionary Rules

Three circuits allow claimants to introduce additional evidence under specified circumstances at the discretion of the district court. The Third Circuit generally admits additional evidence, but grants district judges discretion to exclude evi-
idence if the administrator's record is "sufficiently developed." The Third Circuit reasoned that courts are better suited to hear evidence because plan administrators have "little knowledge of the rules of evidence or legal procedures to assist them in factfinding."

The Eighth Circuit follows a discretionary "good cause" rule for admitting additional evidence. In Davidson v. Prudential Insurance Co. of America, the court upheld the exclusion of expert vocational testimony and a psychiatric report offered by a disability claimant. The court rejected the evidence because the claimant failed to present the evidence to the administrator despite "multiple opportunities" to do so during his claim review process. In a later case, however, the Eighth Circuit required the admission of additional evidence because the administrator's record was "insufficient" to make a decision.

The Fourth Circuit, sitting en banc in Quesinberry v. Life Insurance Co. of North America, developed a multi-factor discretionary rule to govern the evidentiary scope of review. In Quesinberry, the court upheld the introduction of claimant's ex-

Pension Trust Funds, 944 F.2d 1176, 1185 (3d Cir. 1991) (granting discretion to exclude evidence if administrator's record is "sufficiently developed").

77. Luby, 944 F.2d at 1185; see also Scheider v. Life Ins. Co. of North America, 820 F. Supp. 191, 193 (D.N.J. 1993) (exercising discretion to limit evidence because record was "sufficiently developed").

78. Luby, 944 F.2d at 1183 ("Plan administrators are not governmental agencies who are frequently granted deferential review because of their acknowledged expertise.").

79. See Donatelli v. Home Ins. Co., 992 F.2d 763, 765 (8th Cir. 1993). In Donatelli, the Eighth Circuit upheld review of a benefit denial on "a somewhat expanded factual record," although the court did not explain what the additional evidence was or what cause the district court found for admitting the evidence. Id.

80. 953 F.2d 1093 (8th Cir. 1992).

81. Id. at 1095.

82. Id. In Davidson, the court noted that the administrator provided benefits and the claimant had legal counsel during the claim review process. Id. at 1094. Some circuits have ignored the quality of the claim review process in judging the proper scope of evidence. See Luby v. Teamsters Health, Welfare, & Pension Trust Funds, 944 F.2d 1176, 1179 (3d Cir. 1991) (making no mention of whether claimant used claim review procedures); Perry v. Simplicity Eng'g, 900 F.2d 963, 965 (6th Cir. 1990) (same). But see Scheider v. Life Ins. Co. of North America, 820 F. Supp. 191, 193-94 (D.N.J. 1993) (relying on Davidson to justify excluding evidence under Third Circuit's discretionary rule).


84. 987 F.2d 1017 (4th Cir. 1993) (en banc).

85. Id. at 1026-27. The Fourth Circuit said it follows a "limited discretionary standard" under which a trial court should limit itself to the administrator's record unless additional evidence is "necessary for resolution of the benefit claim." Id.
pert medical testimony about the cause of his wife’s cardiac arrests and malignant hypothermia to support his claim for accidental death benefits. The court found that admitting this evidence was justified because the evidence related to complex medical questions and plan term interpretation and because the administrator was an insurance company with a potential conflict of interest as the payor of claims. Reasoning beyond the specific facts in Quesinberry, the Fourth Circuit also said that a court may admit additional evidence when the administrator compiles “little or no evidentiary record” or provides “limited” claim review procedures, or when the evidence was not available to the claimant before trial.

According to the Fourth Circuit, a multi-factor discretionary rule provides “flexibility” in addressing the wide variety of cases under ERISA. In Quesinberry, the Fourth Circuit reasoned that its multi-factor discretionary rule “balances” the conflicting goals of ERISA: protecting beneficiary interests versus protecting administration.

86. Id. at 1020.
87. Id. at 1027. The court contended that expert testimony could “facilitate the understanding of complex medical terminology and causation through an exchange of questions and answers between the experts, counsel, and the court.”
88. Id.
89. Id. The court noted that “absent ERISA, denials of insurance claims would not be deferentially reviewed.”
90. Id. at 1026 (citing Moon v. American Home Assurance Co., 888 F.2d 86, 89 (11th Cir. 1989)).
91. Id. at 1027. The court noted that potential bias was a legitimate reason for admitting additional evidence even though the Supreme Court rejected potential bias as a rationale for de novo review in Bruch. Id. at 1026 n.7 (citing Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 115 (1989)).
92. Id. at 1026-27 (citing Davidson v. Prudential Ins. Co of America., 953 F.2d 1093, 1094-95 (8th Cir. 1992)).
93. Id. (citing Luby v. Teamsters Health, Welfare, & Pension Trust Funds, 944 F.2d 1176, 1185 (3d Cir. 1991)).
94. Id. at 1025. The Fourth Circuit contended that ERISA plans vary in terms of the administrator’s impartiality, the quality of the plan’s administrative procedures and factual records, and the complexity of the underlying subject matter.
95. Id.
tecting the independence of plan administrators and providing prompt claim resolution. 97

III. LEGAL AND PRACTICAL SHORTCOMINGS OF CIRCUIT RULES

Under the congressional directive to develop a federal common law for ERISA, 98 federal courts have used three sources of law to guide their rules on the proper evidentiary scope of de novo review: trust law under Bruch, 99 ERISA’s legislative purposes, 100 and pre-Bruch precedent. 101 In addition, federal courts have evaluated potential rules by calculating their practical effects. 102 Federal courts, however, have inadequately evaluated these sources of law and policy.

A. LEGAL REASONING

1. Trust Law from the Supreme Court’s Bruch Decision

In Bruch the Supreme Court relied on trust law to guide its decision in favor of de novo review, 103 but the federal circuits largely ignore the teachings of trust law on the question of the proper evidentiary scope of review. 104 To the extent that the courts mention trust law, their discussions are cursory 105 if not

96. Id. at 1022 (citing Bruch, 489 U.S. 101, 113 (1989)).
97. Id. at 1022 (citing Berry v. Ciba-Geigy Corp., 761 F.2d 1003, 1007 & n.4 (4th Cir. 1985)). In Berry, the Fourth Circuit identified the purposes of ERISA as strengthening plan administration and promoting “informal and non-adversarial” dispute resolution within the plan’s review processes. 761 F.2d at 1007 & n.4. The Fourth Circuit found that these purposes continue to “warrant significant restraints on the district court’s ability to allow evidence beyond what was presented to the administrator.” Quesinberry, 987 F.2d at 1025.
98. See supra note 32 and accompanying text.
99. See infra notes 103-112 and accompanying text.
100. See infra notes 113-125 and accompanying text.
101. See infra notes 126-134 and accompanying text.
102. See infra notes 135-148 and accompanying text.
104. Most courts do not mention trust law in their opinions on the proper evidentiary scope of review. See Donatelli v. Home Ins. Co., 992 F.2d 763, 765 (8th Cir. 1993); Davidson v. Prudential Ins. Co. of America, 953 F.2d 1093, 1095 (8th Cir. 1992); Masella v. Blue Cross & Blue Shield, Inc., 936 F.2d 98, 103-05 (2d Cir. 1991); Perry v. Simplicity Eng’g, 900 F.2d 963, 965-67 (6th Cir. 1990). Two courts found that trust law weighs against finding discretion in plan instruments but did not discuss trust law’s implications for evidentiary scope of review. See Luby v. Teamsters Health, Welfare, & Pension Trust Funds, 944 F.2d 1176, 1180 (3d Cir. 1991); Moon v. American Home Assurance Co., 888 F.2d 86, 89 (11th Cir. 1989).
105. In Quesinberry v. Life Insurance Co. of North America, the claimant argued that the Supreme Court’s reliance on trust law in Bruch precludes
wrong. For instance, the Fifth Circuit cited trust law to support the proposition that trustees have “inherent discretion” to gather evidence and thus concluded that courts should limit the scope of evidence to the plan administrator’s record. The authority cited by the court, however, began “[w]here discretion is conferred,” implying that discretion to find facts is not inherent but must originate in the plan instrument. Thus, relying on the administrator’s “inherent discretion” to limit the evidentiary scope of review is inappropriate.

Even if administrators have discretion to find facts, limiting the evidentiary scope of review seems to conflict with a general rule of trust law favoring admissibility of evidence relating to a
settlor's intent. The key difference in the ERISA context, however, is that there is no settlor whose intentions govern the trust. Without settlors' intentions to divine, courts should look to other sources of law to guide their decisions on the scope of evidence. Another reason to look elsewhere is that ERISA plan administrators, unlike common law trustees, must provide claim review procedures during which the parties may develop an evidentiary record, thus potentially obviating the need to admit additional evidence at a bench trial. Indeed, courts may justifiably look to other sources of law because Bruch did not make trust law the exclusive guide for ERISA's federal common law. Nonetheless, federal courts have failed to analyze thoroughly the implications of Bruch's trust law analogy for the proper scope of evidence under ERISA.

2. ERISA's Broad Legislative Purposes

Instead of relying on trust law, federal circuit courts look primarily to ERISA's legislative purposes to guide their decisions on the evidentiary scope of de novo review. As a source

109. The Second Restatement provides that written terms of a trust instrument should be “interpreted in the light of all the circumstances and such other evidence of the intention of the settlor with respect to the trust as is not inadmissible because of the Statute of Frauds, the parol evidence rule, or some other rule of law.” Restatement (Second) of Trusts § 4 cmt. d (1959); see also John H. Langbein & Lawrence W. Waggoner, Reformation of Wills on the Ground of Mistake: Change of Direction in American Law?, 130 U. Pa. L. Rev. 521, 527 (1982) (noting general “rule of admissibility in the law of nonprobate transfers” to reform mistakes in drafting).

Even when a trustee has discretion, settlor's intent governs what evidence trustees and courts must consider. See, e.g., Restatement (Second) of Trusts § 128 cmt. e (1959) (noting that scope of inquiry under discretionary support trusts is a “question of interpretation” relating to settlor's intent.)


111. See supra note 33 (noting that facilitating judicial review is one rationale for the requirement that claimants exhaust claim review procedures before suing to recover benefits).


113. Following ERISA's purposes is appropriate given that Bruch found support for de novo review in ERISA's purpose to protect plan beneficiaries. Id. at 113-14.
of judicial decision making, legislative intent is inherently subject to judicial manipulation.114 Indeed, federal courts have largely failed to cite relevant portions of ERISA's text or legislative history to support their rulings on the scope of evidence.115 Even when courts have cited legislative history, their interpretations have been incorrect. For instance, to support its rule excluding additional evidence, the Sixth Circuit cited a Senate report that showed Congress's intent to provide a method for quick, low-cost dispute resolution.116 The actual passage, how-

114. See, e.g., Wallace v. Christensen, 802 F.2d 1539, 1559 (9th Cir. 1986) (Kozinski, J., concurring) (stating that "legislative history can be cited to support almost any proposition, and frequently is").

115. Most courts cite no legislative history to support their decisions. See, e.g., Donatelli v. Home Ins. Co., 992 F.2d 763, 765 (8th Cir. 1993); Masella v. Blue Cross & Blue Shield, Inc., 936 F.2d 98, 103-05 (2d Cir. 1991); Pierre v. Connecticut Gen. Life Ins. Co., 932 F.2d 1552, 1556-59 (5th Cir.), cert. denied, 112 S. Ct. 453 (1991). In Pierre, the court stated that, "Congressional intent supports [its] conclusion" in favor of deferential review to an administrator's factual determinations. 932 F.2d at 1558 n.8. The court cited four cases, none of which, however, quoted any legislative history: Makar v. Health Care Corp. of Mid-Atlantic, 872 F.2d 80, 83 (4th Cir. 1989); Daniel v. Eaton Corp., 839 F.2d 263, 267 (6th Cir. 1988); Denton v. First Nat'l Bank, 765 F.2d 1295, 1304 (5th Cir. 1985); Harm v. Bay Area Pipe Trades Pension Plan Trust Fund, 701 F.2d 1301, 1304 n.3 (9th Cir. 1983). Id. For example, in Makar, the court relied on "Congress' apparent intent" to require exhaustion of claim review procedures, noting that it would be "anomalous" for Congress to require such procedures if courts did not require claimants to use them. 872 F.2d at 83 (emphasis added); see also Taylor v. Bakery & Confectionary Union & Indus. Int'l Welfare Fund, 455 F. Supp. 816 (E.D.N.C. 1978) (frequently cited for exhaustion requirement). In Taylor, the court relied on ERISA's fiduciary requirements, 29 U.S.C. §§ 1101-14 (1988), analogies to labor grievance procedures, the "broad managerial discretion granted trustees" under ERISA, and a House Report which indicated that Congress "sought to strike a balance between providing meaningful reform and keeping costs within reasonable limits." 455 F. Supp. at 819-20, (quoting H.R. Rep. No. 807, 93rd Cong., 2d Sess. 15, reprinted in 1974 U.S.C.C.A.N. 4670, 4682). Given the lack of applicable statutory text and legislative history, the Fifth Circuit would have been more accurate if the court had said that sound public policy rather than "Congressional intent" supported its position.

116. Perry v. Simplicity Eng'g, 900 F.2d 963, 967 (6th Cir. 1990). The Senate Report, cited to support the court's assertion that a "primary goal of ERISA was to provide a method . . . to resolve disputes inexpensively and expeditiously," stated the following:

The committee believes that all workers and plan beneficiaries should have the opportunity to resolve any controversy over their retirement benefits under qualified plans in an inexpensive and expeditious manner . . . . Accordingly, the committee has decided to provide that controversies as to retirement benefits are to be heard by the Department of Labor.

The procedures provided by this section of the bill are provided as alternatives to existing procedures that may be available to plan participants or beneficiaries.
ever, refers to a proposal for the U.S. Department of Labor to hear disputes over individuals' claims for pension benefits, a proposal that Congress ultimately rejected. Moreover, the passage explicitly recognized that the Department of Labor hearings, if implemented, would be only one of several methods of dispute resolution available to claimants under ERISA.

Another problem with using legislative intent to guide judicial decisions is its indeterminacy. For instance, to support their decisions in favor of hearing additional evidence, the Fourth and Eleventh Circuits relied on ERISA's purpose to protect participants and beneficiaries. Protecting beneficiaries as a group, however, does not necessarily mean helping each potential beneficiary individually. Indeed, an ERISA plan administrator has fiduciary duties toward the plan's beneficiaries as a whole, not merely to individual beneficiaries. It is in the interests of beneficiaries as a group to limit evidence to reduce litigation costs and preserve funds for the future. In addition, Congress already may have fulfilled its goal of protecting individual beneficiaries through ERISA's other regulatory protections, such as information disclosure requirements and fair


117. Id.


119. See supra note 116 (reproducing passage cited by Sixth Circuit).

120. The Fourth Circuit, which explicitly recognized the "multiple purposes" of ERISA, follows a multi-factor discretionary rule which leaves parties uncertain as to whether a court will hear a claimant's additional evidence. See Quesinberry v. Life Ins. Co. of North America, 987 F.2d 1017, 1025 (4th Cir. 1993) (en banc).

121. Id. at 1025 (citing Moon v. American Home Assurance Co., 888 F.2d 86, 89 (11th Cir. 1989)).

122. See Pierre v. Connecticut Gen. Life Ins. Co., 932 F.2d 1552, 1559 (5th Cir.), (noting that litigation costs may deplete benefit fund), cert. denied, 112 S. Ct. 453 (1991); Perry v. Simplicity Eng'g, 900 F.2d 963, 967 (6th Cir. 1990) (arguing that evidentiary hearings may undermine protections of employees and beneficiaries by impairing use of less costly claim procedures).


claim review procedures, obviating the need for more judicial action to enhance protection.\textsuperscript{125}

3. Reasoning of Pre-Bruch Precedents

Recognizing that \textit{Bruch} did not necessarily undermine all of the reasoning of prior decisions,\textsuperscript{126} several circuits base their rules partly on pre-\textit{Bruch} precedent.\textsuperscript{127} For instance, the Fourth Circuit noted that prior to \textit{Bruch} it excluded additional evidence to “promot[e] internal resolution of claims and encourag[e] informal and non-adversarial proceedings,”\textsuperscript{128} concluding that these goals continue to weigh against admitting evidence even after \textit{Bruch}.\textsuperscript{129} Although this conclusion accurately reflects pre-\textit{Bruch} law,\textsuperscript{130} it ignores other pre-\textit{Bruch} practices,\textsuperscript{131} such as remanding a case to the plan administrator to consider additional evidence\textsuperscript{132} and requiring plan administra-

\textsuperscript{125} See supra notes 21-28 and accompanying text (describing disclosure requirements, claim review guarantees, fiduciary obligations, and other regulatory protections under ERISA).


\textsuperscript{127} The Sixth Circuit concluded that “the reasoning” of its pre-\textit{Bruch} precedent is “still sound.” Perry, 900 F.2d at 966 (citing Crews \textit{v. Central States, Southeast & Southwest Areas Pension Fund}, 788 F.2d 332 (6th Cir. 1986)). Crews actually did not involve much “reasoning;” it rather simply recited the basic rule against de novo factual hearings without discussion. Crews, 788 F.2d at 336 (citing Wardle \textit{v. Central States, Southeast & Southwest Areas Pension Fund}, 627 F.2d 820, 824 (7th Cir. 1980), cert. denied, 449 U.S. 1112 (1981)).

Most circuits, however, have not discussed pre-\textit{Bruch} precedent. See Davidson \textit{v. Prudential Ins. Co. of America}, 953 F.2d 1093, 1095 (8th Cir. 1992); Luby \textit{v. Teamsters Health, Welfare, & Pension Trust Funds}, 944 F.2d 1184-85 (3d Cir. 1991); Masella \textit{v. Blue Cross & Blue Shield, Inc.}, 936 F.2d 98, 103-05 (2d Cir. 1991); Moon \textit{v. American Home Assurance Co.}, 888 F.2d 86, 89 (11th Cir. 1989).

\textsuperscript{128} See Quesinberry, 987 F.2d at 1022 (citing Berry \textit{v. Ciba-Geigy Corp.}, 761 F.2d 1003, 1007 & n.4 (4th Cir. 1985)).

\textsuperscript{129} Id. at 1025.

\textsuperscript{130} See supra note 37 and accompanying text (noting that prior to \textit{Bruch}, federal courts limited judicial review of administrator's decision to evidence in administrator's record).

\textsuperscript{131} The Fifth Circuit did cite two pre-\textit{Bruch} cases requiring exhaustion of claim review procedures to support its rule favoring deferential review of an administrator's factual determinations, but the court did not explain why an exhaustion requirement supports deference. Pierre \textit{v. Connecticut Gen. Life Ins.}, 932 F.2d 1552, 1558 n.8 (5th Cir.) (citing Makar \textit{v. Health Care Corp. of Mid-Atlantic}, 872 F.2d 80, 83 (4th Cir. 1989), cert. denied, 112 S. Ct. 453 (1991)); Denton \textit{v. First Nat'l Bank}, 765 F.2d 1295, 1304 (5th Cir. 1985).

\textsuperscript{132} See supra note 39 and accompanying text. At least two federal district courts have remanded cases to the administrator to avoid the dispute over the
tors to evaluate reasonably available evidence,\textsuperscript{133} which may favor alternative policies on the evidentiary scope of review.\textsuperscript{134}

\textbf{B. Practical Considerations}

In addition to legal considerations, federal courts also examine the practical aspects of allowing claimants to present additional evidence at bench trials. Courts admitting additional evidence question the capacity of plan administrators to gather evidence,\textsuperscript{135} while courts excluding additional evidence question the ability of federal courts to judge ERISA benefit cases.\textsuperscript{136} Favoring admission, the Second Circuit suggested that unlike plan administrators, a court will impartially hear a claimant's expert testimony.\textsuperscript{137} Hearing such evidence may also help the court understand the claim at issue.\textsuperscript{138} The Third Circuit contended that plan administrators are incapable of gathering evidence in a fair manner because they do not use the Federal Rules of Evidence and other evidentiary procedures.\textsuperscript{139} Favoring exclusion, the Fifth Circuit reasoned that plan administrato-
tors are better suited to collect evidence because they have investigatory powers and are "closer to the facts" of each individual claim.¹⁴⁰

These arguments are not compelling. The Second Circuit's faith in expert testimony is misplaced given that such testimony is often biased and confusing to courts,¹⁴¹ and the Third Circuit overrates the value of evidentiary formalities, which governmental agencies often disregard.¹⁴² Indeed, some evidentiary formalities may interfere with accurate decision making.¹⁴³ In recognizing the value of a plan administrator's investigatory powers, the Fifth Circuit disregards the possibility that a biased plan administrator may abuse such powers.¹⁴⁴

Even if federal courts are better suited to take evidence than ERISA plan administrators, courts should evaluate whether the supposed benefits to claimants from improved evaluation of evidence outweigh the added burdens on federal courts.¹⁴⁵ The Fifth and Sixth Circuits contend that the burdens would be great and that courts should not do the work of

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¹⁴⁰ Pierre, 932 F.2d at 1562.
¹⁴¹ Expert testimony often produces "frustrating confusion for judges and juries and mistrust of the experts themselves. Instead of being enlightened, the decision-makers often are more baffled than they were before the experts testified." CARNegie COM'MN ON SCIENCE, TECHNOLOGY, & GOV't, THE WORK OF THE FEDERAL COURTS IN RESOLVING SCIENCE-BASED DISPUTES: SUGGESTED AGENDA FOR IMPROVEMENT 2, reprinted in I U.S. JUDICIAL CONFERENCE, FEDERAL COURTS STUDY COMMITTEE: WORKING PAPERS & SUBCOMMITTEE REPORTS app. (1990) [hereinafter FEDERAL COURTS STUDY COMMITTEE]; cf Heasley v. Beldin & Blake Corp., 2 F.3d 1249, 1262 (3d Cir. 1993) (noting that "apparently credible and informed experts" testified for both parties on whether liver transplant at issue was "experimental").
¹⁴² See, e.g., 5 U.S.C. § 556(d) (1988) (providing that "[a]ny oral or documentary evidence may be received" by government agency); see also Richardson v. Perales, 402 U.S. 389, 409-10 (1971) (holding that agency may base decision solely on hearsay evidence).
¹⁴³ See Pierre, 932 F.2d at 1562-63 (upholding plan administrator's decision to deny benefits based largely on hearsay evidence which claimant sought to exclude).
¹⁴⁴ Cf. Quesinberry v. Life Ins. Co. of North America, 987 F.2d 1017, 1026 n.7 (4th Cir. 1993) (en banc) (holding that potential bias is factor in determining whether to admit additional evidence). In Southern Farm Bureau Life Insurance Co. v. Moore, the plan administrator assembled an evidentiary record supporting denial of benefits then sued the claimant for a declaratory judgement. 993 F.2d 98, 100 (5th Cir. 1993). Although the court found that the administrator's investigation was reasonable, id. at 104, Moore suggests that an administrator's investigation could slant the record against the claimant.
¹⁴⁵ A rule excluding evidence also burdens federal courts that must determine what evidence is in the administrator's record. See, e.g., Whisman v. Robbins, 810 F. Supp. 936, 940-41 (S.D. Ohio 1992). Excluding additional evidence as required by the Sixth Circuit, the court relied on an affidavit by the pension
plan administrators.\textsuperscript{146} Although neither circuit estimated the actual workload burden that would result from admitting additional evidence in ERISA benefits litigation,\textsuperscript{147} the Fifth Circuit noted that plan administrators must make a large number of benefit determinations,\textsuperscript{148} implying that full evidentiary hearings could be unduly burdensome to the federal court system.

A thorough assessment of the circuit rules shows that all three main rules cause serious practical difficulties. Most obviously, the per se rule excluding additional evidence may exclude evidence showing that the claimant deserves benefits.\textsuperscript{149} Exclusion forces claimants to seek legal assistance\textsuperscript{150} and to present all potential evidence, including expert testimony,\textsuperscript{151} at the earliest stages in the claim review process,\textsuperscript{152} adding expense and complication to routine proceedings. A per se rule excluding evidence is also subject to abuse if a plan administrator compiles an administrative record favoring denial of benefits, then sues for declaratory judgment, thereby freezing the record for judicial review.\textsuperscript{153}

A per se rule admitting additional evidence also has several negative consequences. The rule allows a claimant to circumvent the plan's claim review procedures by failing to present evi-
dence to the plan administrator.\textsuperscript{154} The rule may also significantly delay final benefit determinations if claims languish in federal court.\textsuperscript{155} Additionally, to the extent that claimants are more successful before a federal judge than the plan administrator, the rule could deplete the plan's benefit fund due to frequent litigation and unanticipated benefits.\textsuperscript{156}

The rule allowing additional evidence will also significantly burden federal courts through more frequent\textsuperscript{157} and complex litigation.\textsuperscript{158} Complexity will increase if courts hear extensive expert testimony or if parties pursue discovery.\textsuperscript{159} A rule allowing additional evidence forces federal judges into a role similar to that of administrative law judges in the Social Security Admin-


\textsuperscript{155} \textit{See}, e.g., Masella v. Blue Cross & Blue Shield, Inc., 936 F.2d 98, 100-02 (stating that trial court made decision nearly five years after claimant filed initial claim).

\textsuperscript{156} \textit{See} Pierre v. Connecticut Gen. Life Ins. Co., 932 F.2d 1552, 1559 (5th Cir.), \textit{cert. denied}, 112 S. Ct. 453 (1991). \textit{But see} Masella, 936 F.2d at 103 (rejecting administrator's argument that "court's interpretation of the plan terms [may force plan] to pay benefits it did not intend to offer"). In \textit{Masella}, the court noted that an insurer has the "ability to protect itself by including a provision that gives it discretionary authority to interpret the terms of the plan." \textit{Id}. For example, ERISA allows a plan to reduce its coverage for acquired immune deficiency syndrome (AIDS) treatment from $1,000,000 to $5,000 ever after a participant has "submitted his first claims for reimbursement." McGann v. H & H Music Co., 946 F.2d 401, 403 (5th Cir. 1991), \textit{cert. denied}, 113 S. Ct. 482 (1992).

\textsuperscript{157} \textit{E.g.}, Crespo v. Candela Laser Corp., 780 F. Supp. 866, 867 (D. Mass. 1992) ("ERISA cases generally . . . constitute a burgeoning area of federal courts' caseload.").

\textsuperscript{158} The complexity of ERISA benefit litigation is as important a burden on federal courts, as is the sheer number of cases. I \textit{FEDERAL COURTS STUDY COMMITTEE}, supra note 141, at 33. Indeed, many ERISA cases admitting additional evidence involve multi-day trials. \textit{See}, e.g., Donatelli v. Home Ins. Co., 992 F.2d 763, 764 (8th Cir. 1993) (three-day trial); \textit{Masella}, 936 F.2d at 102 (two-day trial).

\textsuperscript{159} \textit{See}, e.g., Weber v. Saint Louis Univ., 6 F.3d 558, 559 (8th Cir. 1993) (requiring court to allow discovery and additional evidence); Apitz v. Teledyne Monarch Rubber Hourly Pension Plan, 800 F. Supp. 1526, 1534 n.2 (N.D. Ohio 1992) (rejecting "several affidavits and deposition excerpts" because not before plan administrator).
istration, a burden which is unjustified given the weak federal interests in ERISA benefit cases.

The multi-factor discretionary rules also produce undesirable practical results, suffering the disadvantages of both per se rules. The mere possibility of introducing evidence in federal court may allow claimants to bypass the claim review process. In addition, when a court decides to allow additional evidence, the full evidentiary trial may burden the court system. Simultaneously, the threat that a court will exclude evidence may encourage claimants to seek expensive legal assistance and expert testimony early in the claim process even if such measures are not necessary. Parties also face uncertainty because the admissibility of evidence depends on whether a district judge will choose to exercise her discretion or characterize the evidence in a way to justify hearing the evidence.

In sum, the practical weaknesses of the current circuit court rules regarding the proper scope of evidentiary review are seri-

160. Social Security cases are particularly "burdensome" on federal judges because they involve interpretation of complex regulations, expert medical and vocational evidence, and assessment of claimants' credibility. See FEDERAL COURTS STUDY COMMITTEE, supra note 141, at 286, 290. ERISA cases often resemble Social Security disputes; indeed, disability claimants often pursue both Social Security benefits and employee benefits. See Perry v. Simplicity Eng'g, 900 F.2d 963, 964 (6th Cir. 1990).

161. The federal interests in deciding whether a single individual claimant deserves benefits are small compared to constitutional cases which federal courts decline to hear under current habeas corpus, res judicata, and abstention doctrines. See FEDERAL COURTS STUDY COMMITTEE, supra note 141, at 112 (discussing federal interests in deciding Constitutional cases). The federal interests in ERISA welfare benefit cases are particularly weak because Congress passed ERISA primarily to regulate pension plans and many analysts think that ERISA should not apply to welfare benefits. See Langebein & Wolk, supra note 18, at 413 ("Why regulate under a common scheme such fundamentally different things as a long-duration pension plan and a short-duration welfare benefit plan?").


163. See supra note 158 and accompanying text (noting that courts often hold multi-day trials when hearing additional evidence).

164. See supra notes 150-152 and accompanying text.

165. See supra notes 76-93 and accompanying text (describing discretionary rules used by Third, Fourth, and Eighth Circuits).

166. It may be difficult to determine whether the administrator's record is sufficient or whether evidence is offered to aid plan term interpretation or to determine a claimant's condition. See Donato v. Metropolitan Life Ins. Co., 822 F. Supp. 535, 539 & n.5 (N.D. Ill. 1993) (noting potential for "hair splitting" between whether evidence relates to plan term interpretation or factual determination), aff'd 1994 U.S. App. LEXIS 5428 (7th Cir. Mar. 22, 1994).
ous. The rules excluding a claimant’s evidence undermine the claims of deserving beneficiaries and threaten to increase the expense of routine benefit claim procedures. The rules admitting additional evidence create more complicated and expensive litigation which burdens the federal courts. Without a compelling legal rationale for either rule, federal courts should seek a pragmatic rule that takes advantage of the strengths of plan administrators yet adequately protects claimants’ interests.

IV. A PROPOSAL FOR A LIBERAL REMAND POLICY

When a claimant seeks to introduce evidence that he did not present to the administrator, federal courts should remand ERISA benefit cases to plan administrators for reconsideration. Absent congressional action to reduce ERISA’s burden on federal courts, a remand policy is the best way to limit the burdens on federal courts while protecting claimants’ interests. A liberal remand policy would protect claimants by giving the plan administrator an opportunity to reverse the decision denying benefits, by providing an incentive for plan administrators to improve their claim review procedures, and by ensuring that the administrator’s record includes claimants’ evidence for a

167. See supra notes 149-152 accompanying text.
168. See supra notes 159-161 and accompanying text.
169. See supra notes 103-134 and accompanying text.
172. Cf., Makar v. Health Care Corp., 872 F.2d 80, 83 (4th Cir. 1989) (noting that under exhaustion requirement “subsequent court action may be unnecessary in many cases because the plan’s own procedures will resolve many claims”).
173. See infra note 176 and accompanying text.
court to review de novo, if necessary.\textsuperscript{174} This remand policy offers more protection for claimants than the limited remand policy federal courts followed before \textit{Bruch}; under the limited remand policy, federal courts rejected a claimant's proffered evidence whenever the administrator's record provided "substantial evidence" to support denying benefits.\textsuperscript{175}

A liberal remand policy also would reduce the burden on federal courts from ERISA benefits litigation. The policy not only would avoid full evidentiary hearings in federal court, but also would encourage administrators to provide a new procedural step\textsuperscript{176} at which parties would know they must prepare for trial. A new procedural step would ensure that parties complete the administrator's evidentiary record,\textsuperscript{177} enabling courts to judge many ERISA benefits cases on summary judgment.\textsuperscript{178}

In addition, a liberal remand policy would help plan administrators maintain control over benefit plan administration. From a fiscal perspective, plan administrators prepare evidentiary records less expensively than federal courts.\textsuperscript{179} Plan administrators also could avoid the costs of litigation by reaching settlements with claimants.\textsuperscript{180} Moreover, a liberal remand pol-

\textsuperscript{174} See \textit{infra} note 177 and accompanying text.
\textsuperscript{175} See \textit{supra} note 38 and accompanying text.
\textsuperscript{176} If plan administrators know with certainty that federal courts will remand cases when claimants seek to introduce additional evidence, they would have an incentive to provide a process for reconsideration to avoid the inconvenience and expense of a trip to federal court. Over time, such procedures would obviate the need for a special remand policy because courts would remand under the exhaustion of plan remedies requirement. See \textit{supra} note 33 and accompanying text.
\textsuperscript{178} See Goodman v. S & A Restaurant Corp., 821 F. Supp. 1139, 1146 (S.D. Miss. 1993) ("Because there is no dispute as to what evidence was considered by the plan administrator [after remand], it would serve no useful purpose to delay a decision in this case pending a trial."). \textit{But see} Hamilton v. Connecticut Gen. Life Ins. Co., 799 F. Supp. 828, 832 (S.D. Ohio 1992) (rejecting summary judgment due to "contradictory evidence" in administrator's record).
\textsuperscript{179} Cf. Amato v. Bernard, 618 F.2d 559, 567 (9th Cir. 1980) (noting that internal plan claim resolution procedures will help "minimize the costs of claims settlement for all concerned").
\textsuperscript{180} See Jader v. Principal Mut. Life Ins. Co., 723 F. Supp. 1338, 1343 (D. Minn. 1989) (approving settlement upon reconsideration when administrator paid $1,440 out of disputed $4,337). The opportunity to settle is particularly important because many ERISA benefit claims have low financial values compared to the costs of litigating and hiring expert testimony. See, e.g., Weaver v. Phoenix Home Life Mut. Ins. Co., 990 F.2d 154, 156 n.1 (4th Cir. 1993) (suit for
icy would help avoid "adversarial litigation" in favor of private dispute resolution and would signal a court's respect for the plan's administrator and other fiduciaries.

One objection to a remand policy is that such a policy may be a "useless formality" in cases in which the claimant's evidence is unlikely to change the outcome. The fear is that a remand policy will merely delay a court's timely resolution of the dispute. Making an exception for trivial or redundant evidence, however, would undermine the incentives created by a liberal remand policy. By contrast, remanding in such cases only would require plan administrators to read the evidence and

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$4,369.60); Masella v. Blue Cross & Blue Shield, Inc., 936 F.2d 98, 99 (2d Cir. 1991) (suit for $1,558.43). Plan administrators, however, may have a strong financial incentive to fight even small claims if a litigated outcome affects how the administrator must decide future claims. Cf. Wildbur v. ARCO Chem. Co., 974 F.2d 631, 638 (5th Cir. 1992) (holding that "whether the administrator has given the plan a uniform construction" is a factor in deciding if administrator abused discretion).


182. Cf. Makar v. Health Care Corp., 872 F.2d 80, 83 (4th Cir. 1989) (noting that exhausting claim review procedures allows plan administrators and fiduciaries to "correct their errors").


184. If plan administrators seek to delay the process by introducing additional evidence to the court, courts should exclude the administrator's evidence as an impermissible post hoc rationalization of a benefit denial. See Phillips v. Kennedy, 542 F.2d 52, 55 (8th Cir. 1976) (finding nothing in record to support administrator's decision and thus granting benefits); cf. Burlington Truck Lines v. United States, 371 U.S. 156, 168-69 (1962) (holding that "post hoc rationalizations" are inadequate bases for governmental agency decisions). But see Weber v. Saint Louis Univ., 6 F.3d 558, 560 (8th Cir. 1993) (requiring court to consider plan provisions that may justify benefit denial even though administrator's decision did not rely on said provisions); Farley v. Benefit Trust Life Ins. Co., 979 F.2d 653, 660 (8th Cir. 1992) (allowing court to consider other plan provisions not relied on in administrator's decision). A rule excluding additional evidence offered by the plan administrator would protect beneficiaries and give administrators an incentive to provide better explanations of their decisions.

185. If a court made a preliminary determination about the quality of a claimant's evidence, plan administrators may choose to argue against the quality of the claimant's evidence rather than including reconsideration procedures in the plan instrument. Cf. Goodman v. S & A Restaurant Corp., 821 F. Supp. 1139, 1142 (S.D. Miss. 1993) (noting that administrator objected when court remanded case). In addition, a preliminary determination would force courts to examine the very evidence that was too burdensome for courts to hear in the first instance. See supra notes 157-161 and accompanying text (describing burdens on federal courts from hearing additional evidence).
add it to the claimant’s file record. Moreover, frivolous additions to the record are unlikely to occur because claimants, like plan administrators, have no interest in suffering through inconvenient procedural steps.

A second objection is that plan administrators may not have adequate procedures for rehearing benefit decisions. One reason claimants seek to introduce additional evidence to the court is that the plan administrator did not offer adequate opportunities to submit evidence in the first place. Procedural shortcomings, however, do not necessarily mean that courts should hear evidence. Instead, courts could address procedural inadequacies directly under ERISA’s provisions requiring “full and fair” claim review procedures. In addition, Congress or federal regulators could strengthen standards for claim review procedures. Nonetheless, if courts hear evidence in cases in which the plan administrator has no procedures for reconsideration.

186. See Grossmuller v. International Union Local 813, 715 F.2d 853, 858 n.5 (3d Cir. 1983) (noting that ERISA’s procedural requirements do not require administrator to hear oral testimony).

187. Indeed, if claimants know that they cannot force a federal court to hear new evidence, they are more likely to present such evidence to the plan administrator during the plan’s claim review procedure. Cf Masella v. Blue Cross & Blue Shield, Inc., 936 F.2d 98, 105 (2d Cir. 1991) (noting potential burden on claimants that might result from presenting evidence to administrator).

188. This may be particularly true for benefit plan administrators who are not aware that ERISA regulates their plan. See Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 105 (1989) (noting that defendant did not know ERISA governed its termination pay plan and had not established any claims procedures); see also supra note 17 (noting that whether benefits constitute plan is an issue in many ERISA suits).


tion, this would strengthen the incentive for plan administrators to provide better claim review procedures. Nor would an exception to the remand policy for inadequate procedures unduly burden federal courts, which already evaluate plan procedures under ERISA.

Finally, claimants may object that plan administrators will abuse their access to a claimant's evidence by carefully rebutting the claimant's evidence in the record or that courts will be incapable of appreciating their claims without full evidentiary hearings. Neither objection should preclude a liberal remand policy because claimants will be free to add to the administrative record to raise these issues and to bring them to the court's attention. If a judge is concerned about bias, she can increase her scrutiny of a decision under the de novo standard, or when a judge feels the need to understand an issue better, she can focus her attention on that issue, thereby assuring the claimant's protection.

CONCLUSION

Following Firestone Tire & Rubber Co. v. Bruch, federal circuit courts have split over the proper evidentiary scope of de novo review in ERISA benefits litigation. The circuits disagree over whether to exclude or admit a claimant's evidence that he

192. See Quesinberry, 987 F.2d at 1027 (allowing courts to admit additional evidence where administrator provided “very limited” review procedures); Sturgill v. Lewis, 372 F.2d 400, 401 (D.C. Cir. 1966) (per curiam) (threatening to hear evidence if pension trustees fail to “conform to at least elemental requirements of fairness”).


195. See Quesinberry, 987 F.2d at 1027 (approving use of expert medical testimony to clarify complex medical issues).

196. Cf. Van Boxel v. Journal Co. Employees' Pension Trust, 836 F.2d 1048, 1052 (7th Cir. 1987) (noting that under arbitrary and capricious standard federal courts used a “sliding scale of judicial review” depending on “suspicion of partiality”).

197. Cf. Ethyl Corp. v. E.P.A., 541 F.2d 1, 69 (D.C. Cir. 1975) (Leventhal, J., concurring) (stating that judges “have had to acquire the learning pertinent to complex technical questions” to conduct review of agency decisions), cert. denied, 426 U.S. 941 (1976).

did not present to the benefit plan administrator during the plan's claim review process. The Fifth and Sixth Circuits follow per se rules excluding the claimant's evidence, while the Eleventh Circuit follows a per se rule admitting such evidence. Other circuits, such as the Fourth Circuit, follow multi-factor discretionary rules specifying instances when a district court may admit the claimant's additional evidence.

Each rule produces undesirable practical results. Excluding evidence hinders ERISA's policy of protecting potential beneficiaries and encourages claimants to employ lawyers and expert witnesses early in the claim review process, perhaps unnecessarily. Admitting additional evidence burdens federal courts through full evidentiary hearings on detailed medical and disability cases and potentially depletes the benefit fund through more costly litigation. A discretionary rule creates uncertainty about whether claimants should spend heavily in the claim review process and whether administrators should strengthen the plan's claim review procedures.

This Note proposes that courts remand cases to plan administrators for reconsideration when claimants seek to introduce additional evidence. A liberal remand policy would reduce the burdens on federal courts by eliminating full evidentiary hearings and would utilize the practical strengths of plan administrators to develop evidence. A remand policy also would essentially create a new procedural step in which parties could settle their disputes or prepare to litigate by augmenting the administrative record which, if necessary, would serve as the basis for a court's de novo review.