

No. 07-1121

**In The
Supreme Court of the United States**

LYNN JEWELL,

Petitioner

v.

LIFE INSURANCE COMPANY OF
NORTH AMERICA,

Respondent

**ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT**

REPLY TO BRIEF IN OPPOSITION

Mark D. DeBofsky
Counsel of Record
Daley, DeBofsky & Bryant
Suite 2440
55 W. Monroe Street
Chicago, Illinois 60603
(312) 372-5200
Attorneys for Petitioner

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

ARGUMENT 1

I. The Issue Raised By Petitioner’s Certiorari
Question Was Central to the Proceedings Below 1

II. The Direct Circuit Conflict Between *Jewell*
and the Seventh Circuit’s *Diaz* Ruling Establishes
the Impropriety of Treating ERISA Cases as Review
Proceedings..... 2

III. The Tenth Circuit’s View of ERISA Civil
Procedure Denies ERISA Claimants Adequate
Evidentiary Opportunities..... 6

CONCLUSION 8

TABLE OF AUTHORITIES

Cases

<i>Abram v. Cargill, Inc.</i> , 395 F.3d 882 (8 th Cir. 2005) .	8
<i>Alex R. v. Forrestville Valley Cmty. Unit Sch. Dist. # 221</i> , 375 F.3d 603, 611-612 (7 th Cir. 2004)	6
<i>Celotex Corp. v. Catrett</i> , 477 U.S. 317 (1986).....	4
<i>Chandler v. Roudebush</i> , 425 U.S. 840 (1976)	5
<i>Diaz v. Prudential Ins. Co.</i> , 499 F.3d 640 (7 th Cir. 2007)	2, 3
<i>Firestone Tire & Rubber Co. v. Bruch</i> , 489 U.S. 101 (1989)	3
<i>Gibson v. Berryhill</i> , 411 U.S. 564 (1973).....	8
<i>Glazer v. Reliance Standard Life Ins. Co.</i> , No. 06-15855, 2008 U.S.App.LEXIS 8583 (11 th Cir. April 21, 2008)	7
<i>Metzger v. Unum Life Ins. Co. of America</i> , 476 F.3d 1161 (10 th Cir. 2007)	7
<i>Orndorf v. Paul Revere Life Ins. Co.</i> , 404 F.3d 510 (1 st Cir. 2005).....	4
<i>Patton v. MFS/Sun Life Financial Distributors, Inc.</i> , 480 F.3d 478 (7 th Cir. 2007)	2

United States v. First City National Bank, 386 U.S. 361 (1967) 4

United States v. Raddatz, 447 U.S. 667 (1980) 5

Withrow v. Larkin, 421 U.S. 35, (1975) 8

Statutes

28 U.S.C. § 636(b)(1) 5

29 U.S.C. §1132(a)..... 3

29 U.S.C. § 1133..... 7

42 U.S.C. § 405(b)..... 2

42 U.S.C. § 405(g)..... 2

Other Authorities

2 Steven A. Childress and Martha S. Davis, *Federal Standards of Review* §15:02 (3d ed. 1999) 4

Friendly, “Some Kind of Hearing,” 123 U.Pa.L.Rev. 1267 (1975) 7

H.R.Conf.Rep. 93-1280, 93rd Cong., 2d Sess. 327 (1974) 6

MetLife (Metropolitan Life Ins. Co.) v. Glenn, 06-923, Brief for United States As Amicus Curiae Supporting Respondent 7

Rules

Fed.R.Civ.P. 56..... 4

REPLY TO BRIEF IN OPPOSITION**ARGUMENT****I. The Issue Raised By Petitioner's Certiorari Question Was Central to the Proceedings Below**

Respondent, Life Insurance Company of North America ("LINA"), begins its opposition to the Petition for a Writ of Certiorari by asserting that the issue raised by Petitioner was not passed on below. Brief in Opp. at 8-10. That contention is easily dismissed. Jewell won in the district court after the court gave plenary consideration to the evidence he presented. In the Tenth Circuit, Jewell, as Appellee, defended the district court's admission of evidence that was not previously a part of the so-called "administrative" record. Rejecting Jewell's position, however, the Tenth Circuit characterized ERISA cases as quasi-administrative proceedings and placed them outside of the Federal Rules of Civil Procedure into an extra-statutory classification. Just as the Petition asks whether ERISA cases adjudicated under the *de novo* standard are record review proceedings or plenary in nature, the Tenth Circuit opinion framed the same question and passed on it by treating ERISA cases as "administrative" review proceedings with allowance of additional evidence only in exceptional circumstances.

II. The Direct Circuit Conflict Between *Jewell* and the Seventh Circuit's *Diaz* Ruling Establishes the Impropriety of Treating ERISA Cases as Review Proceedings

Contrary to Respondent's assertion (Brief in Opp. at 11), the Seventh Circuit's decision in *Diaz v. Prudential Ins. Co.*, 499 F.3d 640 (7th Cir. 2007) directly conflicts with the Tenth Circuit's opinion. The Tenth Circuit ruled it was obligated to "restrict de novo review to the administrative record compiled during the claim administration process, instead of taking new evidence, hearing witnesses, and the like." Pet. App. 6a-7a. That conclusion presumed without any support that the record had been compiled in much the same way as a Social Security disability claim record which reaches the court for judicial review after an evidentiary hearing before an administrative law judge. 42 U.S.C. §§ 405(b); 42 U.S.C. § 405(g).

Recognizing that ERISA cases are utterly lacking in such procedural safeguards, *Diaz* rejected that approach and ordered a trial, holding, "district courts are not reviewing anything [in resolving benefit disputes]. They are making an independent decision about the employee's entitlement to benefits." 499 F.3d at 643.* Thus, contrary to

* Nor is *Patton v. MFS/Sun Life Financial Distributors, Inc.*, 480 F.3d 478 (7th Cir. 2007) consistent with *Jewell* as Respondent claims. Brief in Opp. at 11-12. *Patton* determined that evidence beyond the claim record was necessary for adequate consideration of a claim for disability benefits

Respondent's claim that application of an administrative law paradigm "is a sensible implementation of ERISA, which makes plan administrators the primary arbiters of employee benefit claims, and then provides an avenue by which employees may obtain judicial review of benefits determinations" (Brief in Opp. at 15), neither the text of ERISA nor its legislative history suggests such a model. Pet.Cert. at 16. Indeed, Congress gave primary jurisdiction over employee benefit claims to the courts, not to the Department of Labor, and certainly not to the very people administering benefit plans who, like Respondent, labor under a structural conflict inherent in the dual role of plan administrator and the source of benefit funding. *See, MetLife v. Glenn*, No. 06-923, *cert. pending*.

Nor does the ruling in *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989) furnish a basis for imposing administrative law principles upon ERISA litigation claims as Respondent maintains. Brief in Opp. at 15. *Firestone* says nothing about the scope of the evidence and procedures available in ERISA litigation, contrary to Respondent's misleading assertion that *Firestone* mandates a review, rather than a plenary proceeding. Nor has any Supreme Court ERISA case

brought under ERISA. 480 F.3d at 484-85. *Patton* also preceded *Diaz*, and was authored by an entirely different panel that failed to address the issue of review proceeding versus plenary proceeding in the same manner as *Diaz*.

since *Firestone* limited the evidence and procedures applicable to ERISA cases.

Admittedly, the appellate rulings cited by Respondent, such as *Orndorf v. Paul Revere Life Ins. Co.*, 404 F.3d 510 (1st Cir. 2005), are consistent with the Tenth Circuit ruling. However, what has been overlooked in the course of ERISA litigation since *Firestone* is that courts do not initiate proceedings; they decide disputes the parties place before them. Every time a court acts it is “reviewing” something. Thus, as the Seventh Circuit properly pointed out in *Diaz*, the term “*de novo* review” has created significant confusion. 499 F.3d at 643. That conclusion is echoed by a scholarly treatise which explains the entire concept of review in place of a *de novo* proceeding is “probably a misnomer where fact-finding issues are concerned.” 2 Steven A. Childress and Martha S. Davis, *Federal Standards of Review* §15:02 at 15-3 (3d ed. 1999)(citing *United States v. First City National Bank*, 386 U.S. 361 (1967)). And, as Petitioner has already pointed out, *First City* explicitly rejected the utilization of a “review” proceeding in place of a trial *de novo*. Petition at 12-13. Hence, just as this Court recognized in *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986) that the majority of circuits had been wrong in their analysis of the standards for entry of summary judgment in accordance with Fed.R.Civ.P. 56, the time has come for this Court to similarly rectify the lower courts’ mistaken approach to ERISA cases.

Nor do any of the other cases cited by Respondent undermine the Petitioner’s argument. For example, Respondent’s citation of *United States*

v. Raddatz, 447 U.S. 667 (1980) (Brief in Opp. at 17), is wholly inapposite. *Raddatz* construed a particular statute authorizing federal magistrates to conduct hearings on motions to suppress evidence in a criminal case. 28 U.S.C. § 636(b)(1). District judges then review the magistrates' findings and make *de novo* determinations. The key distinctions between such proceedings and ERISA cases are evident. First, 28 U.S.C. § 636(b)(1) is explicit with respect to the district court's function. Of even greater importance, though, is that unlike ERISA cases, the motion to suppress is first conducted as a testimonial proceeding before a neutral judicial officer, the United States Magistrate Judge.

In contrast, when ERISA was enacted, Congress removed from a draft of the legislation provisions providing for a pre-suit administrative hearing, leaving only the "civil action" in Section 502. *See*, Petition at 16. *Raddatz* is also a criminal case and offers no insight at all into the meaning of the "civil action" authorized by 29 U.S.C. § 1132(a), unlike *Chandler v. Roudebush*, 425 U.S. 840 (1976), which instructs that a review proceeding would be an exception to the normal civil action and is to be invoked only where the governing statute clearly signals that administrative principles apply.

Respondent's citations of cases arising under the Individuals with Disabilities Education Act, 20 U.S.C. § 1400 *et seq.* are equally misplaced. Brief in Opp. at 18-19. Conveniently ignored is that, just as in *Raddatz*, there is a preliminary evidentiary proceeding presided over by a neutral judicial officer. Moreover, district courts are empowered to consider

extrinsic evidence. *See, e.g., Alex R. v. Forrestville Valley Cmty. Unit Sch. Dist. # 221*, 375 F.3d 603, 611-612 (7th Cir. 2004). But the most important distinction is that the governing statute establishes an administrative proceeding with subsequent judicial review, unlike ERISA, which merely authorizes a civil action.

Respondent has also mischaracterized *Firestone's* treatment of Section 301 of the Labor-Management Relations Act of 1947 as guiding ERISA. Brief in Opp. at 20. *Firestone's* point was limited to a conclusion that the LMRA's arbitrary and capricious standard should not be adopted wholesale into the common law of ERISA. 489 U.S. at 109. However, the Conference Report issued in conjunction with ERISA's passage made it clear that the ERISA civil action is "to be regarded as arising under the laws of the United States in similar fashion to those brought under section 301 of the Labor-Management Relations Act of 1947." H.R.Conf.Rep. 93-1280, 93rd Cong., 2d Sess. 327 (1974). As Petitioner has already explained, actions under Section 301 of the LMRA have historically been treated as plenary proceedings. Petition at 13.

III. The Tenth Circuit's View of ERISA Civil Procedure Denies ERISA Claimants Adequate Evidentiary Opportunities

Finally, the greatest flaw in Respondent's Brief in Opposition is in its claim that "the current [ERISA] framework affords claimants fully adequate evidentiary opportunities." Brief in Opp. at 21-22 n.6. LINA tries to equate the pre-suit appeal

contemplated by 29 U.S.C. § 1133 to an administrative hearing, but the flaws in Respondent's argument are immediately apparent. As pointed out above, the principal difference between the pre-suit internal appeal and an administrative hearing is that the critical features of administrative due process are absent from the ERISA pre-suit appeal. In complete agreement, the Solicitor General recently informed the Court that Respondent's argument is simply wrong based on "key differences between ERISA and the administrative law context." *MetLife (Metropolitan Life Ins. Co.) v. Glenn*, 06-923, Brief for United States As Amicus Curiae Supporting Respondent at 30 n.3.

Specifically, ERISA pre-suit internal reviews lack the key components of a fair administrative proceeding identified by Judge Henry Friendly in his seminal law review article, "Some Kind of Hearing," 123 U.Pa.L.Rev. 1267, 1279-1295 (1975), which include an unbiased tribunal, the right to call witnesses, including the right to cross-examine adverse witnesses, and the right to know the evidence at issue. Those elements are notably missing from the internal review in ERISA claims; and with respect to the right to know all the evidence at issue, at least two Circuits have now ruled that the insurer gets the last word in the so-called "administrative" review, leaving the claimant without any meaningful opportunity to rebut unfavorable evidence. *Metzger v. Unum Life Ins. Co. of America*, 476 F.3d 1161 (10th Cir. 2007); *Glazer v. Reliance Standard Life Ins. Co.*, No. 06-15855, 2008 U.S.App.LEXIS 8583 (11th Cir. April 21, 2008).

Contra., Abram v. Cargill, Inc., 395 F.3d 882 (8th Cir. 2005).

Thus, the pre-suit internal review under ERISA more closely resembles the Board of Optometry hearing conducted by adversaries of the applicants which was successfully challenged on due process grounds in *Gibson v. Berryhill*, 411 U.S. 564 (1973). Indeed, the Court has recognized that serious due process deficiencies can taint a proceeding much like the pre-suit internal review that preceded the litigation in this case. For example, *Withrow v. Larkin*, 421 U.S. 35, 58 (1975) pointed out, "Clearly, if the initial view of the facts based on the evidence derived from nonadversarial processes as a practical or legal matter foreclosed fair and effective consideration at a subsequent adversary hearing leading to ultimate decision, a substantial due process question would be raised." Consequently, given the deficiencies and distinct differences between the ERISA pre-suit internal review and an administrative hearing, due process is hardly served by *Jewell's* version of "administrative review."

CONCLUSION

Accordingly, for the reasons set forth in the Petition and above, the Petition for Certiorari should be granted.

Respectfully submitted,

Mark D. DeBofsky
Counsel of Record
Daley, DeBofsky & Bryant
Suite 2440
55 W. Monroe Street
Chicago, Illinois 60603
(312) 372-5200

Counsel for Petitioner