The Influence of *Metropolitan Life Insurance Company v. Glenn* on the Availability of Discovery in ERISA Welfare Benefits Cases

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Ask any defense attorney two years ago about the scope of discovery in ERISA welfare benefits litigation, and he would undoubtedly tell you "ERISA doesn't allow discovery." Although this was a gross oversimplification of a fairly nuanced area of law, many courts might have agreed. Nevertheless, that was not the law then, and certainly is not the law today.

Courts were wrong to preclude even minimal discovery and they would be even more wrong to take that approach today following the Supreme Court decision last term of *Metropolitan Life Insurance Co. v. Glenn.*[1] In *Glenn*, the Court held that "a plan administrator [that] both evaluates claims for benefits and pays benefits" has a conflict of interest for ERISA purposes.[2] The Court focused on an issue that was dealt with only in dictum in *Firestone Tire and Rubber Co. v. Bruch*—whether a plan administrator that both administers claims and pays benefits out of its own treasury is acting under a conflict of interest; and if so, how is that conflict to be factored into the court's evaluation of the benefit determination.[3]

The old defense argument went along the lines that if ERISA litigation became expensive, that would cause employers to drop employee benefits. There was no empirical basis for this belief, and, after *Glenn*, it should be a dead issue. In no uncertain terms, the Supreme Court stated ERISA was not enacted to foster the development of employee benefits at the expense of denying employees with meritorious claims the right to enforce their claims to the promised benefits.

> [W]e cannot find in these considerations any significant inconsistency. As to the first, we note that trust law functions well with a similar standard. As to the second, we have no reason, empirical or otherwise, to believe that our decision will seriously discourage the creation of benefit plans. As to the third, we have just explained why approval of a conflicted trustee differs from review of that trustee's conflicted decision making. As to all three taken together, *we believe them outweighed by "Congress' desire to offer employees enhanced protection for their benefits."*[4]

Therefore, all Courts must follow ERISA's main edict of protecting employee benefits from abuses. In so doing, the Supreme Court has directed the lower courts to focus on trust law. "In determining the appropriate standard of review for actions under § 1132(a)(1)(B) [ERISA § 502(a)(1)(B)], we are guided by principles of trust law."[5] Trust law does not preclude normal discovery.

Moreover, discovery in ERISA cases is not without precedent, but has never been easy to obtain. For example, in *Liston v. Unum Corporation Officer Severance Plan*, the First Circuit held

> Whether discovery was warranted depends in part on if and in what respect *it matters* whether others were better treated than Liston, and this is not a question that has a neat mechanical answer. Liston's suit is for benefits that Liston says were promised to her by the plan, not a discrimination case, so the central issue must always be what the plan promised to Liston and whether the plan delivered. Nevertheless, how others were treated could—in some cases—be substantively relevant to the question whether the administrator's construction and application of the plan to Liston was reasonable.[6]

Glenn removed any doubt that insurers are structurally conflicted and that the lower courts must weigh that conflict even in the absence of direct evidence that the conflict influenced the decision. The Supreme Court commanded that the lower courts always consider the conflict when reviewing the denial of benefits, the significance of which will vary depending upon other circumstances.

The Supreme Court pronounced

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without equivocation that it is neither "necessary [n]or desirable for courts to create special burden-of-proof rules, or other special procedural or evidentiary rules, focused narrowly upon the evaluator/payer conflict."[7] This language undermines the defense world's contention that discovery is not permitted in similar ERISA cases.

In fact, there is nothing in either the ERISA statute or regulations that limits, much less prohibits, discovery. Rather, limitations on discovery are a function of the scope of the evidentiary record reviewed by the court, and the standard of review by which that evidence is judged.

Perhaps a recent opinion in the Southern District of New York summed up why discovery in ERISA litigation is appropriate and necessary.

> The categorical…view…upon which it relied—that discovery is seldom if ever permissible in these cases, at least if the existence of the conflict inherent in the plan administrator both determining claims and paying benefits is apparent on the record—thus is blind to potentially important information that, at least in some cases, may be critical to the fair and informed review of benefit claims.
>
> Were there any doubt about this, *Glenn* removed it…
>
> …
>
> No one denies that speedy, simple, and inexpensive determination of actions seeking review of benefit determinations is desirable. Eliminating or sharply limiting discovery would serve that goal. But that is not the only goal. Congress enacted ERISA to provide unsuccessful claimants with a federal forum for the fair determination of their claims. Pretrial discovery is a part of the process for which Congress opted.[8]

There is no doubt that ERISA's purpose is not to make it easy for insurance companies to deny benefits in close cases but

> to protect...the interests of participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts.[9]

With this background in mind, it is important to understand how courts approached ERISA discovery in the past. Twenty years of bad law cannot be undone overnight. Knowing the prior history of discovery in ERISA litigation will allow you to help your clients and educate Courts as to the correct standard of the law today.

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History of ERISA Discovery

The Sixth Circuit's formulation regarding discovery was fairly typical: Often, but not always, the court is restrained to considering only that evidence that was before the plan administrator when it made its final decision.

> The only exception to the above principle of not receiving new evidence at the district court level arises when consideration of that evidence is necessary to resolve an ERISA claimant's procedural challenge to the administrator's decision, such as an alleged lack of due process afforded by the administrator or alleged bias on its part.[10]

In the most extreme outlier, the Seventh Circuit made discovery almost impossible to obtain.[11] Most of the other Circuits permitted some discovery, particularly focusing on conflict.

ERISA litigation was compared to administrative proceedings. If a court determined that the deferential standard of review applied, it could only base its decision on the record, which was before the claims administrator at the time of the decision.[12]

Under pre-*Glenn* law, additional evidence about the merits of the claim was often considered relevant or admissible because the court was not evaluating in the first instance whether a plaintiff was entitled to benefits, but was instead judging the reasonableness of an insurer's decision on a closed record. As such, discovery bearing on the severity of a long term disability claimant's medical condition was precluded.

However, details of the insurer's decision making process, which are relevant to due process/procedural defect, or the existence (or extent) of a conflict of interest, which is relevant to the standard of review, are relevant. Therefore, discovery into these matters should be allowed.[13] As more picturesquely stated by a Kansas court:

> [I]f a decision-maker testified in a deposition that he or she had flipped a coin to decide the claim, the court believes that it should be permitted to consider such evidence in determining whether the defendant's action was arbitrary and capricious.[14]

In the most general sense, courts across

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the nation agreed with this formulation. In practice, however, there had been variation. At the same time, the Sixth Circuit said that discovery was allowed as to questions of due process or conflict of interest, and chastised plaintiff attorneys for not obtaining such discovery.[15] Some courts regarded conflict of interest as a binary, yes or no question, and refused to allow discovery on conflict of interest if a defendant admitted to one.[16] Others refused to give any weight to the conflict of interest without evidence, gleaned through discovery, demonstrating the extent and impact of the conflict.[17]

A common Solomonic compromise was to allow discovery, but only after a threshold showing of bias, conflict of interest, or procedural defect.[18] The problem with such a compromise is that, absent some discovery, it would be difficult for most plaintiffs to do anything more than allege bias since the information concerning the potential bias is in the hands of the employer and/or the plan administrator.[19]

The *Glenn* Court observed, for example, that

> when judges review the lawfulness of benefit denials, they will often take account of several different considerations of which a conflict of interest is one. This kind of review is no stranger to the system. Not only trust law, but administrative law, can ask judges to determine lawfulness by taking account of several different, often case specific, factors, reaching a result by weighing all together.[20]

And, the Court went on to discuss just a few examples of the type of evidence that may bear on the question:

> In such instances, any one factor will act as a tiebreaker when the other factors are closely balanced, the closeness necessary depending on the tiebreaking factor's inherent or case-specific importance. The conflict of interest here, for example, should prove more important (perhaps of great importance) where circumstances suggest a higher likelihood that it affected the benefits decision, including, but not limited to, cases where an insurance company has a history of biased claims administration. It should prove less important (perhaps to the vanishing point) where the administrator has taken active steps to reduce potential bias and to promote accuracy, for example, by walling off

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> claims administrators from those interested in firm finances, or by imposing management checks that penalize inaccurate decision making irrespective of whom the inaccuracy benefits.[21]

Glenn was not strictly speaking a discovery case, but rather addresses how, if at all, a court should take conflict of interest into account. The *Glenn* Court reached the unsurprising conclusion that where an insurance company assumes the dual role of administrator of a disability plan and payer of funds under the plan, then a conflict of interest exists.

While agreeing that this conflict constituted a factor the court must take into account in reviewing an insurer's denial of benefits, the *Glenn* court resisted any bright line tests or procedures for weighing the conflict. Rather, the conflict must be evaluated on a case-by-case basis, taking into account the individual facts present in a given situation.

While doing little or nothing to clarify standard of review, *Glenn* does provide, from a plaintiff's perspective, an opening for greater availability of discovery: How can courts fulfill their mandate to weigh conflict of interest on an individualized, case-by-case basis, unless plaintiffs are allowed to obtain the evidence necessary for such an analysis? The easy answer, of course, is they cannot. Therefore, discovery must be allowed.

Early returns are good. In *Hogan-Cross v. Metropolitan Life Insurance Co.*, the plaintiff sought statistical information concerning approval and termination rates on long-term disability claims, as well as compensation rates for and frequency of use of certain outside medical consultants by the insurer.[22] Relying on *Glenn*'s charge that "not all conflicts are created equal," and that the court must therefore evaluate the extent and impact of a conflict of interest on a case-by-case basis, the *Hogan-Cross* court found that such evidence would be relevant, and therefore allowed discovery.

Other courts have followed *Hogan-Cross*'s lead.[23] The *Winterbauer* case has a good collection of post-*Glenn* discovery decisions. Beware, however, that the court did not accurately recite all these cases.

A number of cases illustrate the significant of *Glenn* in the ongoing debate about the availability of discovery in ERISA cases. The Eastern District of Tennessee had long required an "initial threshold showing" before discovery would be allowed.[24] But after *Glenn*, and in part relying on *Glenn*'s command that the impact of conflict of interest must be considered on a case-by-case basis, the Magistrate who wrote the Bennett order changed course, and allowed limited discovery without the initial threshold showing.[25]

In the Northern District of Georgia, the court followed the lead of Judge Kaplan from the Southern District of New York and entering an order the court "conclude[ing] that the plaintiff is entitled to pursue any discovery that 'is relevant in itself or [that] appears reasonably calculated to lead to the discovery of admissible evidence.'"[26] Judge Kaplan in the Southern District of New York called an insurer's refusal to produce documents and answer interrogatories in an ERISA long term disability case "a paradigm of discovery abuse."[27]

Even the Seventh Circuit is coming around. In *Gessling v. Group Long Term Disability Plan for Employees of Sprint/United Management Co.*, the court allowed discovery, asserting in part that in light of *Glenn*, *Semien* "appear[s] to be superceded."[28]

But it is not one-way traffic; a number of courts have continued to disallow discovery, finding *Glenn* makes no change at all.[29]

There have been unusual or unexpected results as well. In *Reimann v. Anthem Insurance Companies, Inc.*, the court used *Glenn* to allow the defendant to supplement the record in court to include the qualifications of its medical consultants.[30] But in *Creasy v. CIGNA Life Insurance Co. of New York*, the same court deferred discovery until after briefing on the merits, stating that discovery would be allowed only if the case was such a close call that evidence of conflict of interest might serve as a tie-breaker.[31] And there remains maddening inconsistency. On the very same day, the District of Maine issued two orders, one allowing discovery, the other denying it.[32]

What might be found through discovery? The answer—glaring evidence of bias. When permitted, the fruits of discovery have been significant and meaningful.[33] This type of information will get the judiciary in tune with the financial conflict that is unfairly causing meritorious claims to be denied.

The tide is a changing. By educating courts about the significance of *Glenn* discovery should become the standard nationwide. Discovery is necessary to unmask the often biased opinions of so-called independent health professionals and vocational experts retained by insurers to support claim terminations or out right denials of benefits in worthy cases.

It is clear that *Glenn* is no panacea. It does, however, provide some added justification for expanding discovery in ERISA cases, sufficient that at least some courts are revering their prior stances. ■

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Notes

1. ___ U.S. ___, 128 S.Ct. 2343, 2348-50 (2008).
2. *Id.* at 2348.
3. 489 U.S. 101, 115 (1989).
4. *Glenn*, 128 S. Ct. at 2349 (internal citations omitted, emphasis added).
5. *Firestone* 489 U.S. at 111.
6. *Liston v. Unum Corp. Officer Severance Plan*, 330 F.3d 19, 25 (1st Cir. 2003).
7. *Glenn*, 128 S. Ct. at 2351.
8. *Hogan-Cross v. Metropolitan Life Ins. Co.*, 568 F. Supp. 2d 410, 415-16 (S.D.N.Y. 2008).
9. 29 U.S.C. § 1001(b).
10. *Wilkins v. Baptist Healthcare Systems, Inc.*, 150 F.3d 609, 618 (6th Cir. 1998).
11. *See Semien v. Life Ins. Co. of N. Am.*, 436 F.3d 805, 815 (7th Cir. 2006).
12. *Kiley v. Travelers Indem. Co. of R.I.*, 853 F. Supp. 6, 14 (D. Mass. 1994); *see also, Miller v. United Welfare Fund*, 72 F. 3d 1066, 1071 (2nd Cir. 1995) (collecting cases from the third, sixth, eighth,

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ninth, and tenth circuits.).
13. *See* Fed. R. Civ. P. 26(b)(1) (generally, parties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party).
14. *Buchanan v. Reliance Standard Life Ins. Co.*, 5 F. Supp. 2d 1172, 1181 n.5 (D. Kan. 1998).
15. *See Kalish v. Liberty Mutual*, 419 F.3d 501, 508 (6th Cir. 2005).
16. *See, e.g., Fought v. Unum Life Ins. Co. of Am.*, 379 F.3d 997, 1004 (10th Cir. 2004).
17. *See Calvert v. Firstar Finance, Inc.*, 409 F.3d 286 (6th Cir. 2005).
18. *Bennett v. Unum Life Ins. Co. of Am.*, 321 F. Supp. 2d 925 (E.D. Tenn. 2004).
19. E.g., *Myers v. Prudential Ins. Co. of Am.*, 581 F. Supp. 2d 904 (E.D. Tenn. 2008).
20. *Glenn*, 128 S. Ct. at 2351.
21. *Id.* (internal citations omitted).
22. 568 F. Supp. 2d 410, 413-14 (S.D. N.Y. 2008)
23. *See Gessling v. Group Long Term Disability Plan for Employees of Sprint/United Management Co.*, 2008 WL 5070434 (S.D. Ind. Nov. 26, 2008); *Winterbauer v. Life Ins. Co. of North America*, 2008 WL 4643942 (E.D.Mo. 2008); *Garg v. Winterthur Life*, 573 F. Supp. 2d 763, 771 (E.D. N.Y. 2008).
24. *Bennett v. Unum Life Insurance Company of America*, 321 F.Supp.2d 925 (E.D. Tenn. 2004).
25. *Myers v. Prudential Ins. Co. of Amer.*, 573 F. Supp. 2d 763.
26. *Adams v. Hartford Life & Acc. Ins. Co.*, 589 F. Supp. 2d 1366, 168 (N.D. Ga. 2008), quoting *Hogan-Cross v. Metropolitan Life Ins. Co.*, 568 F. Supp. 2d 410, 414 (S.D. N.Y. 2008) ("The question for ERISA cases, as in all cases, is whether the discovery sought is relevant in itself or appears reasonably calculated to lead to the discovery of admissible evidence.").
27. *Jacoby v. v. Hartford Life & Acc. Ins. Co.*, 254 F.R.D. 477 (S.D. N.Y. 2009).
28. *Id.*; 2008 WL 5070434, at *1-2.
29. *See Marszalek v. Marszalek & Marszalek Plan*, 2008 WL 4006765 (N.D. Ill. Aug. 26, 2008) (adhering to Semien and denying request for discovery on structural conflict); *Christie v. MBNA Group Long Term Disability Plan*, 2008 WL 4427192, at * 1 (D. Me. Sept. 25, 2008) (denying plaintiff's motion for discovery of the administrator's internal policies and procedures, incentive programs, and structures for "walling off" claims handlers); *Singleton v. Hartford Life & Accident Ins. Co.*, 2008 WL 3978680 (E.D. Ark. July 29, 2008) (denying plaintiff's motion for production of documents that described performance awards, incentives, and bonuses for employees involved in plaintiff's claim).
30. 2008 WL 4810543, at *22-23 (S.D. Ind. Oct. 31, 2008)
31. 2008 WL 4810539, at *2 (S.D. Ind. Oct. 31, 2008).
32. *Compare Achorn v. Prudential Ins. Co. of Am.*, 2008 WL 4427159, at *4-6 (D. Me. Sept. 25, 2008) (permitting discovery of, among other things, the amount and rate of compensation paid to third-party firms that reviewed plaintiff's claim for benefits) *with Christie v. MBNA Group Long Term Disability Plan*, 2008 WL 4427192, at *1 (D. Me. Sept. 25, 2008) (denying plaintiff's motion for discovery of the administrator's internal policies and procedures, incentive programs, and structures for "walling off" claims handlers).
33. *Denmark v. Liberty Life Assur. Co. of Boston*, 2005 WL 3008684, at *10-11 (D. Mass. Nov. 10, 2005) (where it was unveiled that insurer hired, Network Medical Review to review 1,204 claim files and had been paid $2,046,000.00 in a three year period for this service.); *see also, Caplan v. CNA Fin. Corp.*, 544 F. Supp. 2d 984, 991-92 (N.D. Cal. 2008) ("Hartford's structural conflict of interest is accompanied by its reliance on UDC, a company which Hartford knows benefits financially from doing repeat business with it, collecting more than thirteen million dollars from Hartford since 2002. It follows that Hartford knows that UDC has an incentive to provide it with reports that will increase the chances that Hartford will return to UDC in the future-in other words, reports upon which Hartford may rely in justifying its decision to deny benefits to a Plan participant."); *Walker v. Metropolitan Life Ins. Co.*, 585 F. Supp. 2d 1167, 1174-76 (N.D. Cal. 2008) (NMR received more than $11 million from MetLife between 2002 and 2007).