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PA JUSTICE NEWS

PENNSYLVANIA ASSOCIATION FOR JUSTICE

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The Voice for Those Who Can't Speak

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During the Fall Legislative Session, PAJ supported Legislation that would have given plaintiffs' counsel, at their option, the right to potentially argue for specific money damages for non-economic losses. There was a hearing before the Senate Banking and Insurance Committee at which time Senator Donald White, a Republican from Indiana County, remarked, "How come I never hear any complaints from my constituents that this is a problem that needs to be addressed?"

The truth of the matter is when we advocate for protecting or expanding our clients' rights, we are really advocating for those individuals who have not yet been killed, injured or disabled by the negligence of others. Virtually any type of change in the law would only apply to our future clients who have not yet walked through our office doors. But how can future clients lobby their state legislators for a change in the law to expand their rights as an injured victim, when they have no way of knowing that they will be a victim of negligence or medical malpractice? Obviously they can't and that is why we must be their voice.

You had to attend the hearing on House Bill 2246 to fully appreciate the resolve of our opponents who want to strip our clients of the protections they currently possess under the law in Pennsylvania.

To counteract these efforts, we as an organization need to change the conversation.

PAJ, through Craig Giangiulio [craig@pajustice.org], our Executive Director and Robert Bershad [robert@pajustice.org], our Communications Manager, is prepared to assist our members in changing the story.

For example, if you have a case that demonstrates the importance of the concept of joint and several liability which allowed your client to obtain a recovery, ask your client if they will allow their story to be told. Once you have obtained your client's permission to publicize their case story, our Communications Department can use the various resources of our website, press releases and newsletters, including letters to legislators, to give real life examples of why joint and several liability is an important protection that should not be abrogated or reduced. Our search for these stories is not limited to issues solely regarding joint and several liability. Cases that show why a cap on damages, particularly in medical malpractice cases, would be unfair to a victim of medical negligence are also needed.

We need to tell the stories of our existing clients to protect the rights of our future clients so they can enjoy the same full protection of the Constitution and Laws of Pennsylvania that our current clients possess. ■

Tim Conboy serves as President of the Pennsylvania Association for Justice and is a Champion of Justice Member. He is happy to receive your comments, criticisms or thoughts by email, tconboy@pajustice.org, or by phone, 800.222.8816.

IN THIS ISSUE

PAJ Responding to Midterm Election Balance Shift

Mark Phenicie, Esquire

Election Day 2010 across the nation showcased enormous Republican victories from top to bottom in almost every state except California and New York. Voters, frustrated by high unemployment and deficits, solidly rejected President Obama and the Democratic Party. Pennsylvania was no exception.

In Pennsylvania, Governor-elect Tom Corbett won a decisive victory over Dan Onorato, while Senator-elect Toomey won narrowly over Congressman Sestak for U.S. Senate.

The state House of Representatives will now be controlled by a Republican majority after a net gain of 12 seats, leaving the House at 112-92, the largest Republican margin since 1954. Unfortunately, nearly all of these new Republicans do not have a pro civil justice view of the rights of our clients.

Responding to the change in the balance of power, your PAJ leadership is moving forward in a pro-active way:

- We'll continue to assess the threat to our clients' rights, and we'll be meeting with the new legislators from both parties, and with those lawmakers who ascend to new leadership positions.
- Our efforts will focus on both parties and both houses of the state legislature.
- As trial lawyers, we will play to our strength: Working within the rule of law and the legislative procedure to resist or limit the impact of proposed legislation on our clients' rights.

We have been successful before and we are committed to using all the advocacy skills of the organization to protect our clients' rights. ■

Mark Phenicie is PAJ's Legislative Counsel.

ERISA CONFLICT OF INTEREST DISCOVERY AFTER *METROPOLITAN LIFE v. GLENN*

Alan H. Casper[1]

Over two years ago, the U.S. Supreme Court in *Metropolitan Life Ins. Co. v. Glenn*, 554 U.S. 105, 128 S. Ct. 2343, 171 L. Ed. 2d 299 (2008) dramatically changed the standard of review in ERISA benefits cases, requiring a more probing review based on the higher standard of conduct imposed upon insurers. Following *Glenn*, courts must engage in a combination-of-factors method of review. Adverse benefit decisions may only be upheld if the rationale and facts supporting the decision, after carefully weighing the evidence and considering any conflict of interest, are justifiably sound. No longer may courts simply affirm a fiduciary's decision merely because it was reasonable or plausible based on the record before it.

The U.S. Supreme Court made clear in *Glenn* that:

> ERISA imposes higher-than-marketplace quality standards on insurers. It sets forth a special standard of care upon a plan administrator, namely, that the administrator "discharge [its] duties" in respect to discretionary claims processing "solely in the interests of the participants and beneficiaries" of the plan…it simultaneously underscores the particular importance of accurate claims processing by insisting that administrators "provide a 'full and fair review' of claim denials,"…and it supplements marketplace and regulatory controls with judicial review of individual claim denials….[2]

A structural conflict of interest exists potentially whenever the ERISA plan fiduciary making the benefits claim decision — usually an insurer — is also the party paying the resulting benefits. With regard to a court's review of an insurer's conflict of interest, the U.S. Supreme Court stated:

> Neither do we believe it necessary or desirable for courts to create special burden-of-proof rules, or other special procedural or evidentiary rules, focused narrowly upon the evaluator/payor conflict. In principle, as we have said, conflicts are but one factor among many that a reviewing judge must take into account. Benefits decisions arise in too many contexts, concern too many circumstances, and can relate in too many different ways to conflicts — which themselves vary in kind and in degree of seriousness — for us to come up with a one-size-fits-all procedural system that is likely to promote fair and accurate review. Indeed, special procedural rules would create further complexity, adding time and expense to a process that may already be too costly for many of those who seek redress.[3]

Although the Supreme Court did not address explicitly the issue of conflict of interest discovery in *Glenn*, its directives have spurred many federal courts across the country to re-examine what discovery is appropriate in ERISA benefits cases. This article reviews some of the many decisions that have issued in the intervening time period.

In the first major post-*Glenn* ERISA discovery ruling, the district court in *Hogan-Cross v. Metropolitan Life Ins. Co.*,[4] addressed how *Glenn* justifies discovery into the compensation of consultants used by ERISA plan fiduciaries to make claims decisions:

> A consultant may be compensated in a manner and/or to an extent that creates a motive to recommend against the payment of benefits because such recommendations are believed to serve the interests of the plan administrator. If a decision maker knowingly were to rely on advice from such a consultant, it would be only common sense to say that the decision would command less deference than one made on the basis of unbiased advice or in ignorance of the bias.
>
> [T]he Court [in *Glenn*] made clear that not all conflicts are created equal. Their significance in any given case depends upon all of the circumstances, including those suggesting a higher or lower likelihood that the conflict affected the decision. Information bearing on the manner in which a conflicted plan administrator compensates outside consultants could be highly pertinent. Maintenance of compensation arrangements that create economic incentives for consultants to recommend denial or termination of benefits would have a material bearing on the likelihood that the administrator's conflict affects its benefit determinations.[5]

A few months later in *Burgio v. Prudential Life Ins. Co.*,[6] the court ordered Prudential to produce documents and answer interrogatories regarding financial incentives, bonuses, or other monetary awards received by any of the individuals involved in determining the disability claim for LTD and the basis upon which such financial incentives, bonuses, or other monetary awards were earned. Third party vendor contracts — including vendors responsible for IMEs and medical records reviews — were also ordered for *in camera* inspection. Statistical information was ordered regarding: (a) the number of times individuals were engaged or retained (directly or through a third party vendor) to perform reviews and IMEs and (b) the compensation provided to each individual. Finally, the court also ordered Prudential to present for deposition "at least one of the people on the Committee responsible for the final claim decision upholding the termination of Plaintiff's claim" for disability benefits, as well as produce for deposition a Rule 30(b)(6) witness.

In *Myers v. Prudential Ins. Co.*,[8] the court addressed how *Glenn* had changed the court's view on the preliminary showing required to justify discovery in an ERISA benefits case. No longer did plaintiff have the burden of production: "to come forward with a small amount of evidence sufficient to establish a reasonable basis to believe that discovery would reveal other conflict of interest evidence beyond the administrator/payor role held by the defendant."[9] The district court proceeded to permit discovery regarding: "any type of incentive, bonus, or reward program or system, formal or informal, for any employee(s) involved in any meaningful way in reviewing disability claims." Although the court stated it was "disinclined to allow discovery of pay records and personnel files of the individual physician who reviewed plaintiff's claim," the court approved of discovery regarding "the identity of the physician's employer (assuming it to be other than the defendant) and information regarding the temporal and financial depth of the employer's relationship to the defendant."[10]

The district court in *Pemberton v. Reliance Standard Life Ins. Co.*,[11] reached a similar conclusion:

> While the defendant correctly states that *Glenn* does not mention discovery, it incorrectly contends that *Glenn* does not have an impact on the rules of discovery in ERISA matters. Even though the Supreme Court did not expressly alter the rules for discovery in an ERISA conflict-of-interest case, they effectively did so by recognizing the inherent conflict and requiring courts to consider it as a factor when deciding whether the plan administrator abused its discretion. Without discovery, plaintiffs would be severely hindered in their ability to obtain evidence to show the significance of the conflict of interest. Therefore, it is logical to assume that the Supreme Court meant for lower courts to allow some discovery beyond the administrative record when a conflict of interest is present.[12]

The district court then set the parameters for discovery of the relationship between Reliance Standard and its third-party reviewers.[13]

The district court in *Fischer v. Life Ins. Co. of North America*,[14] the court, after reviewing the split in discovery decisions after *Glenn*, also reached a similar conclusion:

> While there may be merit in permitting discovery only once a case has been deemed sufficiently close on the merits, *Glenn* states that "the degree of closeness necessary depend[s] upon the tiebreaking factor's inherent or case-specific importance." *Glenn*, 128 S. Ct. at 2351. Furthermore, the merits of ERISA cases are usually considered under cross motions for summary judgment, and the administrative record has historically provided little information into the case-specific importance of the structural conflict. Requiring a plaintiff to survive such a motion before permitting discovery puts the cart before horse, and runs counter to Fed. R. Civ. P. 56(f)(2), which permits discovery into facts essential to the motion.[15]

The district court then proceeded to order the insurer to provide discovery responses regarding its records reviewers responsible for reviewing and denying plaintiff's claim, including statistical information regarding approvals, denials and terminations, as well as "steps LINA has taken to ensure the accuracy of its benefits decisions."[16]

Within the Third Circuit, the district court in *Kalp v. Life Ins. Co. of North America*,[17] ordered the insurer to produce discovery regarding: its "written procedures followed by its employees and by its medical reviewers in determining claims;" LINA's agreements with MES Solutions and the physicians "who were involved in the review of the Plaintiff's claim;" and, the identity of "all persons who participated in providing answers to the foregoing Interrogatories, including counsel."[18]

The potential evidentiary significance of such discovery is well demonstrated by *Wright v. Raytheon Co. STD Plan*,[19] where the district court found that the financial relationship between MetLife and the medical reviewing company was material evidence of conflict of interest:

> In addition, MetLife's denial of Plaintiff's appeal relied on the opinion of Dr. Rosenberg. MetLife increased its payments to NMR, a company that markets its services to insurance companies and employs Dr. Rosenberg, from $79,410 in 2001 to $2,063,890 in 2005. This marked increase in annual revenue supports the conclusion that MetLife had a close relationship with NMR in which both entities stood to benefit from the denial of claims. Such a relationship is considered evidence of bias. See *Caplan v. CNA Financial 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.")[20]

There remain a minority of courts, however, that maintain the *Glenn* decision has not changed the rules on ERISA conflict of interest discovery. *Christie v. MBNA Group LTD Plan*, provides a typical example: "*Glenn* was not a case about discovery and the Supreme Court did not state to what extent reviewing courts should or should not permit discovery to explore the particular dimensions of an administrator's conflict."[21] Holding that none of the "focused" discovery regarding "the contours of the structural conflict of interest that exists for Prudential" would affect the weight the court would give the conflict issue when reviewing the benefits claim decision, the magistrate judge concludes:

> For example, if discovery revealed that claims handlers received incentives for "closing claims files," would that mean that Christie would be entitled to benefits under the plan no matter what the record demonstrated on the merits. I presume not. And as to any specific item of evidence in the record, would the existence of such an incentive have any tendency to make that evidence immaterial or less weighty? If so, Christie has failed to articulate how and why and it is for that reason that I now deny her request for leave to serve the proposed discovery requests.[22]

The decision in *Christie* to require a more substantial preliminary evidentiary showing by plaintiff before granting ERISA conflict of interest discovery appears to conflict directly with the Supreme Court's admonition in *Glenn* that courts should avoid creating "special burden-of-proof rules, or other special procedural or evidentiary rules."[23] But even the *Christie* magistrate judge, apparently, is prepared to order conflict of interest discovery in ERISA cases where she believes it merited.[24]

The U.S. Court of Appeals for the Third Circuit has not yet ruled directly on the scope of post-*Glenn* ERISA discovery. In its recent ERISA severance benefit decision *Howley v. Mellon Financial Corp.*,[25] however, the Third Circuit adopted an approach in ERISA cases that compels district courts to countenance discovery and the submission of evidence from outside the administrative record.

The ERISA displacement benefits plan in *Howley* provided that employees would not be entitled to severance benefits if their subsidiary is sold "to a company that provides comparable employment."[26] The day after the sale of the subsidiary, when Howley and ninety-nine co-employees showed up for work, they were informed that they were being terminated. Howley's subsequent administrative appeal was denied when the Program Administrator, using a "snap shot" approach, focused only on the promise of employment contained in the contract of sale and not what happened on the day immediately following the sale.[27]

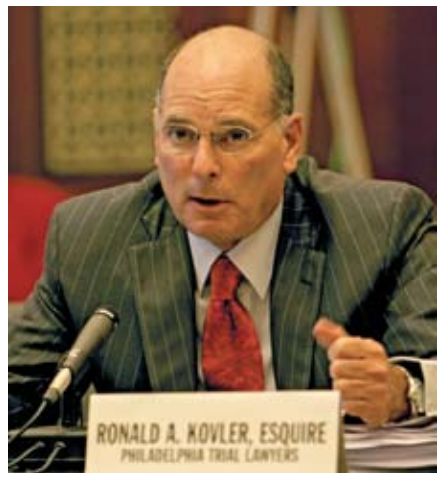
Critical to both the district court's and the Third Circuit's decisions to reverse the denial and award severance benefits was the following compelling evidence obtained through discovery:

See **"ERISA"** *on Page 6*

Testifying for Auto Insurance Minimums Increase

On September 23 in Philadelphia City Hall, Pennsylvania Association for Justice Vice President Scott Cooper presented testimony in favor of Pennsylvania Senate Bill 1460, which would have raised minimum bodily injury liability coverage, at a Senate Democratic Policy Committee hearing. The bill, which would increase limits from $15,000 to $30,000 for one person and from $30,000 to $60,000 for two or more, would have been Pennsylvania's first raise in mandatory coverage since 1974.

Philadelphia Trial Lawyers Association President Ronald Kovler and Patricia Boyle, a client of Kovler's, also gave testimony supporting the bill. Boyle was hit by a van driver carrying minimum coverage, and her bills for treatment and care far exceeded $15,000. In other testimony, PTLA board member Ronald Rosen and Allan Schwartz, an insurance actuary, presented testimony that Pennsylvania's minimum limit does not account for inflation and is lower than that in a vast majority of other states. Insurance Federation president Sam Marshall spoke against the bill. ■



Near right: PAJ Vice President Scott Cooper
Far right: PATLA President Ron Kovler

PUBLIC AFFAIRS SECTION – MESSAGE FROM THE CHAIR

The Misery of Bad Ideas

David I. Fallk, Esquire
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Victor Hugo once said that nothing is more powerful than an idea whose time has come. Unfortunately, there is nothing that guarantees that any idea whose time has come will be a good idea, and today our country is beset by bad ideas. Even more worrisome is that the promotion of these bad ideas is being orchestrated for purposes that bode ill for both the justice system and the common good.

We know what these ideas are because of their ubiquity in most political and social discussions. Prime among them are "tort reform" and "corporate Constitutional rights;" in tandem they make up a dangerous combination which undermines the ideas of both public safety and personal accountability.

Tort reform is nothing new as a mantra of the business community. For decades, the tobacco, insurance, manufacturing and other industries promoted tort reform through deft manipulation of facts and emotions and by focusing public attention away from their nefarious conduct. Touted as a way to improve society, tort reform really sought to improve the bottom line of businesses by allowing short cuts that produced harm to go unpunished. By preventing accountability, bad habits and conduct created a large class of injured people, whose traumas and even deaths shifted costs to society in general.

The promotion of tort reform has waxed and waned over the years, but has never abated. The investment of the business community in tort reform has been extensive and has taken several forms, which in combination has created a vast network and infrastructure. The establishment of numerous think tanks has provided a constant supply of idea incubators, and the public relations savvy of corporate America has deftly used its promotional power to publicize and spread these ideas. By infusing alleged expertise into the psyche of opinion makers as well as the body politic, a self-reinforcing aura of acceptability gradually took hold.

Now, a new and potentially more devastating factor has been added to the mix. The Supreme Court's decision in the *Citizens Untied* case has opened the path for unlimited financial backing of not only the manufacturing of ideas but the promotion of political candidates who pledge to enact laws in concert and advancement of those ideas. Moreover, the financiers of these candidates and ideas have now been cloaked in anonymity. Our airwaves have been saturated with commercials paid for by groups or committees whose names belie their origins so that the true nature of their agenda is masked.

Gradually, and with great difficulty, we have learned that significant funds have been provided by a few families of billionaire businessmen, with little regard for true justice, who have created or supported front organizations. The United States Chamber of Commerce has been at the forefront of the tort reform movement since its inception. It now stands accused of raking in large donations from foreign corporations and then using the fungible funds to boost its campaign spending into the tens of millions of dollars.

Given the predicted outcome of the tort reform push, it is more than likely that trial lawyers and consumer advocates will become greater targets of the moneyed coalition. Of course, safety, transparency, and accountability as accessed through the courts in front of citizen jurors will be the true victims.

Ironically, the Chamber of Commerce has also promised to turn the courts into one of its tools. "Litigation is one of our most powerful tools for making sure that federal agencies follow the law and are held accountable," said its leader, Tom Donohue recently. Perhaps instead of Victor Hugo we should be channeling George Orwell. ■

President's Club Member David I. Fallk is a Scranton trial attorney and president of The Committee for Justice for All, Kingston.

ERISA

coninued from page 4

During discovery, it came to light that certain Buck managers had helped plan his eventual termination by ACS prior to the sale. These managers provided ACS with the names of 100 employees, including Howley, whom they believed could be terminated immediately after the closing without causing harm to the business. Thus, these managers knew, prior to the sale's closing, that Howley would never be a bona fide employee of ACS.[28]

Defendants' argument that the district court improperly considered this evidence because it was outside of the administrative record was soundly rejected by the Third Circuit:

A court may certainly "consider evidence of potential biases and conflicts of interest that is not found in the administrator's record."…The necessity for this exception is obvious. A plan participant may be unaware of information relating to an administrator's conflict until well after the administrative process has ended, and a conflicted administrator, especially one whose decision-making has been affected by that conflict, is not at all likely to volunteer that information. To allow an administrator the benefit of a conflict merely because it managed to successfully keep that conflict hidden during the administrative process would be absurd.

Although we adopted this exception prior to the Supreme Court's decision in *Glenn*, it remains equally appropriate after *Glenn*…For this legal standard to be meaningful, courts plainly must be willing to consider evidence relating to "the nature, extent, and effect on the decision-making process of any conflict of interest" revealed during the litigation process.[29]

The Third Circuit held that the extra-record evidence was not only "relevant to assessing the extent of MFC's conflict of interest,"[30] but that it also proved that the administrator's interpretation of the Plan was unreasonable under the Third Circuit's *Moench v. Robertson* test for determining reasonableness:

(1) whether the interpretation is consistent with the goals of the Plan; (2) whether it renders any language in the Plan meaningless or internally inconsistent; (3) whether it conflicts with the substantive or procedural requirements of the ERISA statute; (4) whether the [relevant entities have] interpreted the provision at issue consistently; and (5) whether the interpretation is contrary to the clear language of the Plan.[31]

The Third Circuit found it patently unreasonable for Mellon to offer a Displacement Program where a buyer would be free to terminate an employee "one week, one day, or one

See **"ERISA"** *on Page 10*

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ERISA

coninued from page 6

hour (or even one minute) after completion of the sale."[32]

The lessons from *Howley* for both future Third Circuit panels and district courts in the Third Circuit ruling on ERISA discovery issues after *Glenn* are significant:

• Critical evidence of an administrator's conflict of interest often can only be found through the discovery process;

• Evidence from outside the administrative record is necessary to prove both conflict of interest and the unreasonableness of a plan's interpretation; and,

• A full and fair opportunity to discover such evidence using the discovery procedures of the Federal Rules needs to be provided so that the evidence can be considered at the adjudicative stage.

Pursuing ERISA benefits claims is a difficult enterprise, fraught with obstacles of both statutory and case law origin. It took the U.S. Supreme Court almost thirty years from its first passing observation about fiduciary conflict of interest in *Firestone & Rubber Co. v. Bruch*,[33] to its pronouncements in *Glenn* regarding the effect of conflicts upon the judicial review of adverse claims decisions. *Glenn's* effect in re-energizing courts to review and reform their practices with respect to ERISA conflict of interest discovery should be seen as a small beneficial step in improving the chances of claimants with meritorious cases in obtaining judicial redress.

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[1] Mr. Casper is an insurance, bad faith and ERISA attorney in Philadelphia. He was also one of plaintiffs' counsel in the *Moench v. Robertson* case cited in the article.

[2] *Glenn*, 128 S. Ct. at 2350 (citations omitted).

[3] *Glenn*, 128 S. Ct. at 2351.

[4] 568 F. Supp.2d 410 (S.D.N.Y. 2008).

[5] *Hogan-Cross*, 2568 F. Supp.2d at 415 (emphasis added); see also *Adams v. Hartford Life and Accident Ins. Co.*, 589 F. Supp. 2d 1366, 1367-68 (N.D. Ga. 2008) (conflict of interest discovery permitted pursuant to *Glenn* and *Hogan-Cross*).

[6] 253 F.R.D. 219 (S.D.N.Y. 2008).

[7] *Id.* at 236-37; see also *Self v. Prudential Ins. Co. of America*, 2010 U.S. Dist. LEXIS 32213 at *9 (N.D. Fla. March 16, 2010) (ordering depositions "for the purpose of exposing the extent of any conflict of interest, establishing whether any unwritten procedures or facts were considered, determining whether a reasonable investigation was performed, and establishing whether the methodology used to review the claim was compatible with the duties of care, skill, prudence and diligence owed in interpreting the plan.").

[8] 581 F. Supp. 2d 904 (E.D. Tenn. 2008).

[9] *Myers*, 581 F. Supp. at 912-13.

[10] *Id.* at 915; see also *Hays v. Provident Life and Accident Ins. Co.*, 2008 U.S. Dist. LEXIS 100579 (S.D. Ky. Dec. 12, 2008) (approving of Myers court's interpretation of *Glenn* and the type of discovery permitted).

[11] 2009 U.S. Dist. LEXIS 2070 (E.D. Ky. Jan. 13, 2009).

[12] *Pemberton*, 2009 U.S. Dist. LEXIS 2070 at *5-6 (emphasis added).

[13] *Pemberton*, 2009 U.S. Dist. LEXIS 2070 at *8-9; see also *Achorn v. Prudential Ins. Co.*, 2008 U.S. Dist. LEXIS 73832 at *8, 15-17 (D. Me. Sept. 25, 2008) (even though court does not believe *Glenn* changed ERISA discovery, permits discovery of compensation to consultants involved in plaintiff's claim and statistical data about the number of claims sent to the reviewers and the number of denials which result); *Wilcox v. Metropolitan Life Ins. Co.*, 2009 U.S. Dist. LEXIS 2977 (D. Ariz. Jan. 8, 2009) (permitting discovery regarding the financial incentives of consultants involved in plaintiff's claim and defendant's "general approval and termination rates for long-term disability claims, and, separately, for long-term disability claims involving fibromyalgia"); *Santos v. Quebecor World LTD Plan*, 254 F.R.D. 643, 649-50 (E.D. Cal. 2009) (permitting discovery of, *inter alia*, agreements with and compensation to consultants involved in plaintiff's claim and statistical data about the number of claims sent to the reviewers and the number of denials which result); *Sansby v. Prudential Ins. Co.*, 2009 U.S. Dist. LEXIS 26046 at *6 (D. Mass. Mar. 25, 2009) ("Sansby is entitled to the production of documents shedding light on Prudential's relationship with MLS and Dr. Foye during the four-year period during which Sansby's claim was being processed, including…the total amount of compensation paid to MLS and Dr. Foye during the four-year period; the number of claims referred by Prudential to MLS and to Dr. Foye; and reliable statistics showing the number of claims that MLS and Dr. Foye recommended be denied, as opposed to the number of claims that MLS and Dr. Foye recommended be allowed.").

[14] 2009 U.S. Dist. LEXIS 22487 (S.D. Ind. March 29, 2009).

[15] *Fischer*, 2009 U.S. Dist. LEXIS 22487 at *6-7; see also *Barker v. Life Ins. Co. of North America*, 2009 U.S. Dist. LEXIS 123490 (S.D. Ind. December 28, 2009) ("court finds that the Supreme Court's holding in *Glenn* does contemplate the production of evidence relevant to LINA's alleged conflicts in making disability determinations," orders substantial discovery regarding LINA's relationship with its subsidiary Intracorp responsible for obtaining medical reviewers); *McQueen v. Life Ins. Co. of North America*, 595 F. Supp.2d 752 (E.D. Ky. 2009) (noting *Glenn* "effectively" alters the rules of discovery in ERISA conflict-of-interest cases, permits discovery of statistical information about reviewer claims outcomes and regarding rewards or incentives to employees who deny claims).

[16] *Fischer*, 2009 U.S. Dist. LEXIS 22487 at *11-12.

[17] 2009 U.S. Dist. LEXIS 7957 (W.D. Pa. February 4, 2009).

[18] *Id.* at *20-26; see also *Winterbauer v. Life Ins. Co. of North America*, 2008 U.S. Dist. LEXIS 83712 (E.D. Mo. Oct. 20, 2008) (ordering discovery on insurer's "internal guidelines and policies," identify all information provided to its IME physician, and produce discovery regarding the compensation paid to its consulting medical evaluators); *Raney v. Life Ins. Co. of North America*, 2009 U.S. Dist. LEXIS 34098 (E.D. Ky. April 20, 2009) (allowing discovery of formal or informal policies encouraging or rewarding denials through compensation, promotion, or otherwise); accord *Dandridge v. Raytheon Co.*, 2010 U.S. Dist. LEXIS 5854 (D.N.J. Jan. 26, 2010) ("While *Glenn* was not a case about discovery, the opinion does contain certain language that could arguably be interpreted to reject special evidentiary rules when balancing conflicts of interest," some procedural conflict of interest discovery permitted in ERISA pension case); Bair v. Life Ins. Co. of North America, 2009 U.S. Dist. LEXIS 109001 (E.D. Pa. Nov. 20, 2009) (ordering deposition of LINA's appeal claim manager on procedural conflict issues in de novo review case).

[19] 2008 U.S. Dist. LEXIS 81951 (D. Ariz. Sept. 17, 2008).

[20] *Wright*, 2008 U.S. Dist. LEXIS 81951 at *33-34 (footnote omitted); see also *Nolan v. Heald College*, 551 F.3d 1148 (9th Cir. 2008) (finding 25.62% of NMR's gross income in 2005 was attributable to payments from MetLife and its medical reviewers both performed a substantial percentage of their work for and derived a substantial income from MetLife); *Achorn, v. Prudential Ins. Co.*, 2008 U.S. Dist. LEXIS 73832 at *16 ("If Prudential is utilizing third-party service providers whose services routinely result in claim denials, that is something that is likely to be understood by Prudential and would be highly suggestive that the referral process is itself biased").

[21] 2008 U.S. Dist. LEXIS 73835 at *5 (D. Me. Sept. 25, 2008).

[22] *Id.* at **7-9; see also *Dubois v. Unum Life Ins. Co.*, 2008 U.S. Dist. LEXIS 53970 at *5, 7 (D. Utah Sept. 15, 2008) ("*Glenn* fairly can be read to imply that the necessity for discovery depends on the circumstances of each case in which such a conflict exists…In this case, the plaintiff presents no case-specific circumstances demonstrating a possibility of bias in the denial of her claim."); *Weeks v. Unum Group*, 2008 U.S. Dist. LEXIS 69902 at *1 n.1 (D. Utah Sept. 15, 2008) ("because First Unum's dual role does not alter the court's standard of review [under *Glenn*], and therefore prevents the court from considering materials outside the administrative record, the court denies Weeks's Motion for Additional Discovery."); *Marszalek v. Marszalek & Marszalek Plan*, 2008 U.S. Dist. LEXIS 75319 at *6-7 (N.D. Ill. Aug. 26, 2008) (discovery beyond the administrative record is guided by *Semien v. Life. Ins. Co. of North America*, 436 F.3d 805 (7th Cir. 2006), *cert. denied*, 549 U.S. 942 (2006) not *Glenn* and is appropriate only in 'exceptional' circumstances where claimant can identify a specific conflict of interest or instance of misconduct and make a prima facie showing of good cause to believe limited discovery will reveal a procedural defect); *Singleton v. Hartford Life & Accident Ins. Co.*, 2008 U.S. Dist. LEXIS 66928 at *6-7 (E.D. Ark. July 29, 2008) (denying discovery because "*Glenn* did not create new evidentiary rules in connection with the conflict of interest."); *Florczyk v. Metropolitan Life Ins. Co.*, 2008 U.S. Dist. LEXIS 54651 at *9 (N.D.N.Y. July 11, 2008) (requested discovery of administrator's claims handling procedures, internal training and evaluation materials, memoranda to claim adjusters, bonus or incentive plans, and internal structure and organization would be a 'fishing expedition' because earlier permitted discovery uncovered nothing probative).

[23] *Glenn*, 128 S. Ct. at 2351.

[24] *Compare* The magistrate's denial of discovery in *Christie* with her grant of substantial discovery in *Achorn*, *supra* n. 13.

[25] 2010 U.S. App. LEXIS 18147 (3d Cir. Aug. 31, 2010).

[26] *Id.* at *2.

[27] *Id.* at **3-5.

[28] *Id.* at **6-7.

[29] *Id.* at **13-15 (citations omitted).

[30] *Id.* at *15.

[31] *Id.* at *17, quoting, *Moench*, 62 F.3d 553, 566 (3d Cir. 1995).

[32] *Id.* at **22-23.

[33] 489 U.S. 101, 115 (1989) ("Of course, if a benefit plan gives discretion to an administrator or fiduciary who is operating under a conflict of interest, that conflict must be weighed as a 'facto[r] in determining whether there is an abuse of discretion.' Restatement (Second) of Trusts §187, Comment d"). ■