Circuits at Odds

A Year after *Glenn*—No Clear Path

By Ronald Alberts, Jennifer Ghozland and Michelle Steinhardt

Unique interpretations have been provided as to how a conflict of interest will affect evaluation of ERISA disability benefit decisions.

More than a year after the decision in *Metropolitan Life Insurance Company v. Glenn*, 128 S. Ct. 2343 (2008), the circuit courts remain at odds in their attempts to make sense of the vague direction set by the Supreme Court.

In upholding the Sixth Circuit's decision in *Glenn*, the Court reviewed the administrative record under a deferential standard and treated as a "relevant factor" MetLife's conflict of interest arising out of its dual role in both determining "whether an employee is eligible for benefits and pay[ing] benefits out of its own pocket."

This article examines the application of *Glenn* on a nationwide basis, in which the circuits have grappled with the impact of *Glenn* on discovery and its effect on the ultimate adjudication of ERISA lawsuits at trial.

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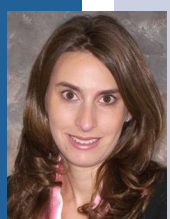

Impact on Discovery

Although *Glenn* does not purport to provide any direction regarding the scope of discovery, in light of its holding regarding the admissibility of conflict of interest evidence, many courts have used *Glenn* as a tool to determine the breadth of permissible discovery.

Before *Glenn*, the First Circuit required "at least some very good reason… to overcome the strong presumption that the record on review is limited to the record before the administrator." *Liston v. Unum Corp. Officer Severance Plan*, 330 F.3d 19 (1st Cir. 2003). In the wake of *Glenn*, a plaintiff must still present "case specific circumstances demonstrating a possibility of bias in the denial of… [the] claim" in support of a discovery request. "Discovery [continues to be] the exception, rather than the rule, in an appeal of a plan administrator's denial of ERISA benefits." *Dubois v. Unum Life Ins. Co. of Am.*, 2008 WL 2783283, *2 (D. Me. 2008).

However, discovery has been allowed on issues of bias concerning the use of third-party firms to assist in evaluating claims, but not into the claims reviewers' internal policies and procedures. *Achorn v. The Prudential Ins. Co. of Am.*, 2008 WL 4427159, **5–7 (D. Me. 2008) Without a good expla-

nation of why discovery would "tend to materially modify the way in which the reviewing court reviews the reasonableness of the insurer's underlying determination," discovery will likely be denied. *Christie v. MBNA Group Long Term Disability Plan*, 2008 WL 4427192, * 3 (D. Me. 2008).

The Second Circuit is much more inclined to permit discovery. Plaintiff "need not make a full good cause showing, but must show a reasonable chance that the requested discovery will satisfy the good cause requirement." *Burgio v. Prudential Life Ins. Co. of Am.*, 253 F.R.D. 219, 230 (E.D.N.Y. 2008). District courts within the Second Circuit have allowed discovery concerning 1) the relationship between the claims reviewer and the consultants who reviewed long term benefit claims; 2) information regarding financial incentives, bonuses, or other compensation that the decision maker had paid to individuals involved in determining the claim for benefits; 3) depositions regarding identities of individuals who were involved in the decision to deny long term disability benefits; and 4) policies or guidance materials with respect to the plan at issue.

Many courts have used *Glenn* as a tool to determine the breadth of permissible discovery.

Courts within the Second Circuit have differing opinions as to whether medical or health care professionals can be deposed and the scope of such a deposition. Although the standards in the Second Circuit appear to be a bit more relaxed when compared to other circuits in allowing discovery, the courts within the Second Circuit in general still believe that extensive discovery "would entirely frustrate ERISA's efforts to avoid complex review proceedings." *Strope v. Unum Corp.*, 2009 WL 656300, *2 (W.D.N.Y. 2009), citing *Florczyk v. Metropolitan Life Ins. Co.*, 2008 WL 39876096, *3 (N.D. N.Y. 2008).

Prior to *Glenn*, the Sixth Circuit required plaintiffs to "show more than a mere allegation of bias" before the court would allow discovery. *O'Bryan v. Consol Energy, Inc.*, 2009 WL 383401, **1–2 (E.D. Ky. 2009) After *Glenn*, courts in the Sixth Circuit have found as a matter of law that an inherent conflict of interest exists when a company determines eligibility for benefits and makes the benefit payments out of its own funds. Although the Sixth Circuit has not expressly ruled whether discovery should be allowed in all cases in which a dual role exists, the lower courts have consistently held that under such circumstances limited discovery is allowed.

Where a dual role does not exist, the court still requires some demonstration of alleged bias before permitting limited conflict of interest discovery. *See id.* Although the lower courts have become lenient with permitted discovery, "a mere allegation of bias is insufficient to throw open the doors of discovery." *McQueen v. Life Ins. Co. of N. Am.*, 595 F. Supp. 2d 752, 754 (E.D. Ky. 2009), citing *Likas v. Life Ins. Co. of N. Am.*, 222 Fed. Appx. 481, 486 (6th Cir. 2007). Each case must be examined on an individual basis to "fashion an appropriate discovery plan" that must be "strictly and carefully circumscribed to the needs of the particular case." *Myers v. The Prudential Ins. Co. of Am.*, 581 F. Supp. 2d 904, 912 (E.D. Tenn. 2008).

Following *Glenn*, district courts within the Sixth Circuit have allowed discovery concerning "statistical information about the outcomes of the claims submitted to reviewers and any 'active steps' taken by [a claims reviewer] to 'reduce any potential bias and promote accuracy,' such as 'walling off claim administrators from those interested in firm finances.'" *Glenn*, 128 S. Ct. at 2351 (2008); *McQueen*, 595 F. Supp. 2d at 755. Discovery also has been permitted concerning a claims administrator's internal policies that encourage claim denials.

However, courts have specifically denied requests for performance reviews, personnel files, and information concerning disciplinary actions; prior lawsuits or criminal charges for both employees and third parties; requests concerning whether a reviewer failed to become board certified; and the *curriculum vitae* or resume of each reviewer, finding these requests unduly burdensome or lacking a bearing on the alleged conflict of interest. *McQueen*, 595 F. Supp. 2d at 756; *Pemberton v. Reliance Standard Life Ins. Co.*, 2009 WL 89696, *3 (E.D. Ky. 2009).

Prior to *Glenn*, discovery in the Seventh Circuit was permitted only in exceptional circumstances when the plaintiff met the two-prong test espoused in *Semien v. Life Ins. Co. of N. Am.*, 436 F.3d 805 (7th Cir. 2006), which required "identify[ing] a specific conflict of interest or instance of misconduct and mak[ing] a prima facie showing that there is good cause to believe limited discovery will reveal a procedural defect." Subsequent to *Glenn*, the Seventh Circuit has had conflicting opinions as to whether the two-prong test in *Semien* is viable.

Several courts believe that *Semien* has been superseded by *Glenn* and limited discovery is now allowed. However, in those cases, discovery remains limited in order to prevent considerable delay in the adjudication of the merits of ERISA cases. Other courts do not permit conflict of interest discovery in every case and still require a showing of bias or that the case is a "close one for which conflict-of-interest factor could be dispositive." *Hughes v. CUNA Mutual Group*, 257 F.R.D. 176, 179 (S.D. Ind. 2009). In these cases, once the showing has been sufficiently made, limited discovery would be permissible.

In the Eighth Circuit, "a conflict of interest does not change the standard of review, but rather a conflict should be weighed as a factor in determining whether there is an abuse of discretion." *Samuel v. Citibank, N.A., Long Term Disability Plan, a/k/a Citigroup Long Term Disability Plan*, 2009 WL 1097484, *1 (D. S.D. 2009) The Eighth Circuit's analysis was not changed by the decision in *Glenn*. However, courts within the Eighth Circuit have utilized several factors highlighted by *Glenn* in determining the scope of discovery.

These factors include 1) "whether the administrator had a history of biased claim administration"; 2) "whether the administrator had taken active steps to reduce the potential bias and promote accuracy in its benefits decisions—either by walling off claims administration from the finance section of the firm, or by imposing management checks designed to penalize inaccurate decision-making"; 3) "the

interplay between the administrator's decision and any related disability decisions by the Social Security Administration"; and 4) "the administrator's use of the medical evidence, and focused on whether certain medical reports were downplayed, and whether the medical experts were provided with all relevant evidence." Based upon these factors, limited discovery has been permitted to support a plaintiff's claim of conflict of interest. *Winterbauer v. Life Ins. Co. of N. Am.*, 2008 WL 4643942, *5 (E.D. Mo. 2008).

However, these factors have not been universally adopted by the lower courts in determining when limited discovery is appropriate. Other Eighth Circuit district courts have denied plaintiffs' requests for discovery where a procedural irregularity could not be established, as well as when the *Glenn* factors, including conflict of interest, were not closely balanced.

Ninth Circuit pre-*Glenn* precedent provided a much more detailed roadmap than *Glenn* in *Abatie v. Alta Health & Life Ins. Co.*, 458 F.3d 955 (9th Cir. 2006), where the court held that "[t]he district court may, in its discretion, consider evidence outside the administrative record to decide the nature, extent, and effect on the decision-making process of any conflict of interest," as well as where procedural irregularities prevented a full and fair review. Like *Glenn*, *Abatie* held that a conflict of interest must be weighed as a factor in an abuse of discretion review. The Ninth Circuit liberally permits discovery concerning inquiries "designed to obtain 'evidence of malice, of self-dealing, or of a parsimonious claims-granting history.'" *Santos v. Quebecor World Long Term Disability Plan*, 254 F.R.D. 643, 648 (E.D. Cal. 2009), quoting *Abatie*, 458 F.3d at 968.

Similar to the Eighth Circuit, district courts within the Ninth Circuit have also looked to *Glenn* for guidance on the scope of discovery in ERISA matters. Discovery may be permitted based upon the *Glenn* factors discussed above. To that end, courts have permitted depositions of claims administrators into areas concerning policy amendments; document production concerning statistics of long term disability claims; and steps taken by the claims administrator to reduce bias, promote accuracy, wall off claims administrators from those interested in firm finances, and implement management checks that penalize inaccurate decisions.

When evaluating a conflict of interest, the Tenth Circuit undertakes a "'sliding scale' analysis, according deference in inverse proportion to the degree of seriousness of the conflict." *Paul v. Hartford Life and Accident Ins. Co.*, 2008 WL 2945607 (D. Colo. 2008). While never squarely addressing whether discovery is permitted to determine the scope of the conflict of interest in an ERISA case, the Tenth Circuit has suggested that discovery may be appropriate. Tenth Circuit district courts have determined that the "burden [in establishing a conflict of interest] placed on the plaintiff by the Tenth Circuit itself justifies limited discovery." *Paul*, 2008 WL 2945607, *1; *Dubrovin v. Ball Corp. Consolidated Welfare Benefit Plan for Employees*, 2008 WL 5427986, **4–5 (D. Colo. 2008). Previously, discovery into a potential conflict of interest was not always permitted in the Tenth Circuit and had been extremely difficult to obtain. Currently, the lower courts in the Tenth Circuit are trending towards allowing discovery "into the seriousness of a potential conflict of interest." *Kought v. Hartford Life and Accident Ins. Co.*, 2008 WL 52646163, *12 (D. Colo. 2008), citing 2008 WL 2945607, *2. Discovery regarding the factual merits of a claim is generally not permitted at all.

Following *Glenn*, the clear trend around the circuits is to open the door wider to discovery where there is a conflict of interest, to permit discovery of possible admissible evidence supporting a reduction of the deference granted to the claims administrator. Nonetheless, practically all courts voice reluctance to permit full blown discovery, and practically none permit discovery regarding the merits of the underlying claim decision.

Impact on Adjudication on the Merits

Glenn makes clear that the heightened skepticism that will accompany a claim where an abuse of discretion standard applies boils down to a case-by-case analysis. There is scant case law that illustrates just how conflicts of interest will be adjudicated post-*Glenn*. However, in practically every case in which there is a grant of discretion to a conflicted or self-interested claims reviewer, some weighing of evidence supporting a conflict will impact the degree of deference afforded by the courts. As discussed below, a few courts have suggested that a mini-court trial on the issue of conflict is permissible in advance of the trial on the merits.

Prior to *Glenn*, the Second Circuit allowed a court to review de novo the administrator's decision when it was shown that a conflict of interest actually influenced that decision. However, this standard was abandoned as inconsistent with the instructions in *Glenn*. The Second Circuit now recognizes that a conflict of interest is to be weighed as a factor in determining whether there was an abuse of discretion. In *McCauley v. First Unum Life Ins. Co.*, 551 F.3d 126 (2d Cir. 2008), the Second Circuit found that the defendant abused its discretion when scrutinized under a heightened standard based on the fact that First Unum was both the claims administrator and payor of benefits, unreasonably relied on one medical report in support of its denial to the detriment of a more detailed contrary report without further investigation, deceptively indicated to McCauley that the medical professional assigned to review his records was a medical doctor when the individual was in fact a nurse, failed to obtain a physician's recommendation, mischaracterized its rationale for continuing to deny benefits, and based on consideration of what the court described as a history of abusive claims processing.

The principles announced in *Glenn* altered the Fourth Circuit's earlier approaches to reviewing discretionary determinations made by ERISA administrators allegedly operating under a conflict of interest. Before *Glenn*, where a conflict of interest existed, the Fourth Circuit applied a "modified" abuse-of-discretion standard that reduced deference to the administrator to the degree necessary to neutralize any untoward influence resulting from the conflict of interest. *Stanford v. Cont'l Cas. Co.*, 514 F.3d 354, 357 (4th Cir. 2008). The Fourth Circuit now recognizes that a conflict of interest is readily determinable by the dual role of an administrator or other fiduciary, and courts are to simply apply the abuse-of-discretion standard for reviewing discretionary determinations by that administrator, even if the administrator operated under a conflict of interest.

Pre-*Glenn*, the Fourth Circuit in *Booth v. Wal-Mart Stores, Inc. Assocs. Health & Welfare Plan*, 201 F.3d 335 (4th Cir. 2000), identified eight nonexclusive factors that a court may consider, including a conflict of interest, as (1) the language of the plan; (2) the purposes and goals of the plan; (3) the adequacy of the materials considered to make the decision and the degree to which they support it; (4) whether the fiduciary's interpretation was consistent with other provisions in the plan and with earlier interpretations of the plan; (5) whether the decision making process was reasoned and principled; (6) whether the decision was consistent with the procedural and substantive requirements of ERISA; (7) any external standard relevant to the exercise of discretion; and (8) the fiduciary's motives and any conflict of interest it may have. Incorporating *Glenn* with these eight factors, the Fourth Circuit has reviewed the plan's determination for abuse of discretion, taking into account any conflict of interest as one of the factors considered in determining reasonableness.

Factors have not been universally adopted by the lower courts in determining when limited discovery is appropriate.

In *Champion v. Black & Decker (U.S.) Inc.*, 550 F.3d 353 (4th Cir. 2008), the Fourth Circuit evaluated the eighth and final *Booth* factor—whether the plan's determination is rendered unreasonable by the effects of its conflict of interest—and found that the plan did not act in a biased manner. The court found it significant that plaintiff's initial claim was denied by a third-party administrator that lacked a direct financial interest in the matter, that the initial denial was reversed by the plan based on only minimal submissions by plaintiff, that the plan allowed plaintiff an additional untimely appeal, and that during the final appeal, the plan presented the issue to two independent experts whose advice the plan followed in its ultimate denial decision. The Fourth Circuit concluded that while there may have been errors in the process and in plan interpretation, there was no evidence of bad faith that could increase the weight of the inherent structural conflict.

The Fifth Circuit found *Glenn* to be harmonious with its prior conflict of interest analysis under *Vega v. National Life Ins. Servs.*, 188 F.3d 287 (5th Cir. 1999). In *Vega*, the Fifth Circuit, sitting en banc, wrestled with the question of how a claim-denying administrator's conflict of interest should be considered in a reviewing court's analysis of such a denial and concluded that a conflict "is a factor to be considered in determining whether the administrator abused its discretion in denying a claim." The Fifth Circuit went on to say that the impact of the conflict of interest on the court's deference under the abuse of discretion standard would fluctuate depending on the nature of the evidence surrounding the conflict. Finally, the Fifth Circuit stated that a conflicted administrator's denial must "fall somewhere on a continuum of reasonableness—even if on the low end."

In *Corry v. Liberty Life Assurance Co.*, 499 F.3d 389 (5th Cir. 2007), the Fifth Circuit reaffirmed these principles. The Fifth Circuit found that the administrator did not abuse its discretion when it interpreted the plan, whether the decision was legally correct or not. The court found that the claimant did not demonstrate that the administrator's decision was tainted by a substantial conflict of interest based on its dual role as administrator and insurer. Thus, the Fifth Circuit concluded that the district court should have applied only a "modicum less deference" than would otherwise be afforded under the abuse of discretion standard. The court found that the administrator's calculation of benefits fell within the continuum of reasonableness.

Illustrating the application of the circuit court's direction, in *Sweeney v. Aetna U.S. Healthcare*, 2008 U.S. Dist. LEXIS 100106 (E.D. Tex. 2008), the district court found defendant's conflict of interest an insufficient basis on which to conclude that defendant abused its discretion in denying plaintiff's claim where on remand defendant submitted the claim file to a new doctor and removed the reports of the first doctor, who had concluded that plaintiff was not unable to work. The court concluded that defendant had taken steps "to reduce potential bias and to promote accuracy." The court noted that plaintiff failed to highlight circumstances that would permit the court to assign sufficient weight to the conflict of interest to make it outcome determinative such as, for example, that defendant took inconsistent positions during the course of its handling of plaintiff's claim or failed to provide the reviewing experts with all of the relevant material.

The Seventh Circuit refused to remand a case to the district court for review under *Glenn* where the administrator's dual role created a conflict of interest, but where there were no other factors to be closely balanced. In *Gutta v. Standard Select Trust Ins. Plans*, 285 Fed. Appx. 302 (7th Cir. 2008), the court found no abuse of discretion where the administrator took into account the views of 12 doctors; a number of experts believed that even with his vision problems and his arthritis, the employee was capable of performing sedentary to light-level work, in particular administrative work; the record showed that the employee had over 10 years' experience in administrative positions; he had owned and operated a medical practice for over 20 years; and he had some administrative experience in hospitals.

The Eighth Circuit has issued two reported opinions discussing the impact of the *Glenn* decision. *See Jones v. Mountaire Corp. Long Term Disability Plan*, 542 F.3d 234 (8th Cir. 2008), and *Wakkinen v. UNUM Life Ins. Co. of Am.*, 531 F.3d 575 (8th Cir. 2008). In *Jones*, the court suggested that the combination-of-factors approach announced by the Supreme Court is a new method for addressing the standard of review. In *Wakkinen*, the court held that although Unum was acting under a conflict of interest, based on what the court called a history of biased claims administration, there was not a sufficiently close balance for the conflict of interest to act as a tiebreaker in favor of finding that defendant abused its discretion. In reaching this conclusion, the court found that Wakkinen's argument that procedural irregularities existed where Unum failed to inquire into his fibromyalgia and chronic fatigue syndromes, failed to conduct an independent review by a phy-

sician with appropriate expertise and failed to conduct an independent review on each appeal, was insufficient to warrant heightened scrutiny where Unum was consistent in its position for denying the claim and Wakkinen had not demonstrated through his own treatment records that depression, fibromyalgia or chronic fatigue syndrome, or any combination of those conditions, precluded him from performing the material and substantial duties of his position through the elimination period.

The Ninth Circuit has found that the *Glenn* decision is largely consistent with preexisting, controlling Ninth Circuit authority. *Burke v. Pitney Bowes Inc. Long-Term Disability Plan*, 544 F.3d 1016, 1029 (9th Cir. 2008) (instructing the district court to apply the "*Metlife/Abatie* standard" on remand). In a very detailed analysis of the handling of conflicts of interest prior to *Glenn*, the Ninth Circuit in *Abatie v. Alta Health & Life Ins. Co.*, 458 F.3d 955 (9th Cir. 2006), emphasized that a plan administrator's decision is always reviewed for an abuse of discretion when it has been conferred discretionary authority to make benefit determinations by plan terms. However, the Ninth Circuit in *Abatie* cautioned that when applying the abuse of discretion standard, the trial court's review should be "informed by the nature, extent, and effect on the decision-making process of any conflict of interest that may appear in the record." More specifically, the trial court must "decide in each case how much or how little to credit the plan administrator's reason for denying insurance coverage."

Under *Abatie*, the Ninth Circuit instructs that both "possible" and "actual" conflicts of interest, or evidence thereof, will be considered by the trial court. The Ninth Circuit further suggests that evidence rising to an actual conflict of interest would include malice, self-dealing, parsimonious claims-granting history, and a situation where the plan administrator offers inconsistent reasons for denial, fails to adequately investigate a claim or request information from the plaintiff, fails to give proper credit to a plaintiff's reliable evidence, or repeatedly denies benefits by misinterpreting the plan's language or incorrectly making decisions contrary to the weight of the record.

The Ninth Circuit has found that when a claim administrator raised a new reason for denying benefits in the final appeal, namely that the claimant failed to present objective evidence in support of her claim, this conduct bears on whether the claim administrator's denial is the result of an impartial evaluation or colored by a conflict of interest. Additionally, the court found that disabling pain cannot always be measured objectively and that the denial of disability benefits based on the lack of evidence of subjective individual pain reactions may bear on the degree of deference the court accords a plan administrator's decision. *Saffon v. Wells Fargo & Co. Long Term Disability Plan*, 522 F.3d 863, 871–72 (9th Cir. 2008).

The Ninth Circuit has further elucidated that where evidence of bias is material, a limited bench trial may be appropriate to definitely determine the existence of bias. *Nolan v. Heald College*, 551 F.3d 1148, 1156 (9th Cir. 2009). The Northern District of California, in following suit, found that a bench trial limited to the issues of conflict of interest and bias is appropriate where, in addition to a structural conflict of interest, plaintiff presented evidence that a physician who performed a document review of plaintiff's records on behalf of the administrator may have been a "bought and paid for" reviewer. *Fowler v. Aetna Life Ins. Co.*, 615 F. Supp. 2d. 1130 (N.D. Cal. 2009).

In *Santos v. Quebecor World Long Term Disability Plan*, 2009 U.S. Dist. LEXIS 42978 (E.D. Cal. 2009), the court went through an item by item analysis regarding what was in the mind of the claims administrator and how that would affect the conflict of interest analysis. The court found that the failure to order an independent medical examination or a functional capacity evaluation was not per se indicative of the extent or effect of a structural conflict of interest. The court went on to say that if the administrator was aware that a particular reviewing physician regularly issued opinions of "no disability" (or the like), then that would cause the court to weigh the structural conflict more heavily.

With regard to reserves, the court reasoned that where the decision maker was unaware of the reserve amount, then the reserve amount would have played no role in the decision and would not help to explain the extent or effect of the structural conflict of interest on the claim. With regard to contracts with outside vendors, the court found that agreements that deal with claims review criteria, financial incentives based on denials of claims, and instructions to disregard certain types of evidence or symptoms, were the types of agreements that are relevant toward evaluating a conflict of interest.

The Tenth Circuit utilizes a "'sliding scale approach' where the reviewing court will always apply an arbitrary and capricious standard, but [will] decrease the level of deference given… in proportion to the seriousness of the conflict. This approach mirrors the *Glenn* Court's method of accounting for the conflict-of-interest factor." In *Weber v. GE Group Life Assur. Co.*, 541 F.3d 1002, 1010–11 (10th Cir. 2008), the Tenth Circuit stated that the arbitrary and capricious standard remains the standard of review, but a reviewing court must weigh the "conflict of interest as a factor in determining the lawfulness of the benefits denial." Previously, the Tenth Circuit held that when there is an inherent conflict of interest, a sliding scale of deference should be applied with the claims administrator bearing "the burden of proving the reasonableness of its decision pursuant to this court's traditional arbitrary and capricious standard." Although the *Weber* court did not specifically address the *Glenn* court's statement regarding special burden-of-proof rules, the Tenth Circuit stated that a reviewing court must weigh the conflict of interest as a factor.

A few courts have suggested that a mini-court trial on the issue of conflict is permissible in advance of the trial on the merits.

By way of example, in the unpublished case of *Dove v. Prudential Ins. Co. of Am.*, 2009 U.S. Dist. LEXIS 41896 (D. Kan. 2009), the court found an inherent conflict of interest where Prudential was both the insurer and administrator of the plan. The court accordingly employed the arbitrary and capricious standard and weighed

Prudential's conflict of interest as a factor in determining the lawfulness of its benefits denial. The court concluded that the conflict of interest was a factor that would be less important in determining whether Prudential's determination was arbitrary and capricious where Prudential had taken active steps to reduce potential bias in that it had three different physicians review the claims file at each stage of the proceeding, each physician was given all of the medical records and the additional documentation on review and accordingly, each physician was given all of the pertinent information to make an informed evaluation about the claim. The court held that the evidence in front of the court was insufficient to conclude that the inherent conflict of interest tainted Prudential's decision.

Prior to *Glenn*, the Eleventh Circuit used a three-step framework to determine whether a conflicted insurer's termination of ERISA benefits should be upheld. Pursuant to this framework, a reviewing court first had to decide if the claims administrator's decision was wrong; if so, the court then determined whether the decision was nonetheless reasonable, *i.e.*, not arbitrary and capricious; and if so, the burden was shifted to the claims administrator to show the decision was not tainted by self-interest. Based on this framework, the burden was on the self-interested claims administrator to produce evidence that its conflicted status did not influence its decision to terminate an employee's benefits. *Brown v. Blue Cross & Blue Shield of Ala.*, 898 F.2d 1556, 1566–67 (11th Cir. 1990). The Northern District of Florida, in applying Eleventh Circuit precedent, has acknowledged that "using a conflict of interest as a *factor* is incompatible with the prior precedent requiring a burden shift to the administrator after a conflict." *Scippio v. Fla. Combined Life Ins. Co.*, 585 F. Supp. 2d 1317, 1328–29 (N.D. Fla. 2008). Accordingly, the court should determine whether the administrator operated under a conflict of interest prior to looking at whether the administrator's decision was arbitrary and capricious.

Conclusion

In the aftermath of *Glenn*, the circuits have begun to provide unique interpretations as to how a conflict of interest, both inherent and as evidenced by discovery, will affect evaluation of ERISA disability benefit decisions. Although *Glenn* invites a case-by-case analysis regarding whether heightened scrutiny will apply to a benefits review where the administrator is granted discretion, one trend is clear—where there is a grant of discretion, plaintiffs will pursue discovery and attempt to argue that any irregularity in the claims process or bit of evidence suggesting disability, is also evidence of bias that should be weighed by the court and reduce the amount of deference.

In response, a proactive approach may be in order to combat the suggestion of bias and explain the efforts made to ensure a full, fair and unbiased review was pursued. The degree of the impact of bias on the self-interested or conflicted claims reviewer will depend on the factual circumstances and the approach by the individual jurist. Clearly, where there is a grant of discretion, ERISA cases have become more complicated and expensive to litigate due to the expansion of the scope of discoverable and admissible relevant evidence, as a factor in determining the amount of deference a court will apply. FD