# The Scope of Discovery in ERISA Wrongful Denial of Benefit Cases

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Wrongful denial of long-term disability benefits claims involving employer-sponsored insurance plans are different from other insurance disputes in many ways. One of the primary differences is that generally there is no discovery. Instead, the parties are left to argue their case solely based on the administrative record, which was developed during the internal appeals process.[1]

As one might imagine, this default "no discovery" rule can severely disadvantage plaintiffs for a number of reasons. For instance, plaintiffs and their doctors never have the opportunity to testify as to plaintiffs' disabling conditions. Rather, based on the evidence in the record, the plaintiff must prove the plan administrator acted completely unreasonably[2] when it credited the opinions of its "independent" doctors over those of the plaintiff and her treating physicians.[3] Showing that said reviews were unreasonable is especially difficult without the ability to cross-examine the insurance company's doctors.

Given the insurance companies' inherent conflict of interest (due to their dual role as both the reviewer of individual's eligibility for benefits and the payer of claims), plaintiffs continue to challenge the status quo. After all, insurers are not going to volunteer evidence of bias or misconduct. In order for a court to examine whether the conflict affected the plan administrator's decision, plaintiffs must be able to conduct discovery and present evidence regarding the conflict. As a result, district courts around the country have allowed limited discovery concerning topics such as the claims reviewers' and third party doctors' compensation and bonus structure, claims handling policies and procedures, and the training of the insurer's employees.[4]

This article summarizes the legal standard with regard to ERISA conflict of interest discovery as it has developed in the Seventh Circuit in the context of arbitrary and capricious/abuse of discretion standard of review. Since the law in this area is far from settled, this article may serve as a useful starting point for plaintiffs' attorneys seeking to advance arguments in support of conflict of interest discovery.

## I. The Supreme Court's Decision in *MetLife v. Glenn* Opened the Door to Limited Discovery

The basis for discovery in ERISA wrongful denial of benefits claims reviewed under the abuse of discretion standard comes in the wake of the 2008 U.S. Supreme Court's decision, *Metropolitan Life Insurance Co. v. Glenn*.[5] In *Glenn,* the Supreme Court recognized an insurer's clear conflict of interest when it both evaluates claims and pays them out.[6] The Court held that despite a court's deferential review, the conflict must be weighed as a factor in determining whether the insurer abused its discretion. Further, in a close case, the conflict could be used as a tiebreaker.[7] As a result of this holding, some courts have allowed plaintiffs to take discovery in order to examine the extent to which the conflict of interest played a role in the plan administrator's decision-making.[8] The question left for attorneys representing disabled individuals is – how exactly do you develop this evidence without formal discovery?

## II. The Seventh Circuit Court of Appeal's Guidance (Or Lack Thereof)

Since *Glenn*, the Seventh Circuit Court of Appeals has provided very little guidance in terms of the amount of discovery, if any, permitted to explore an insurance company's conflict of interest. Most recently, in *Dennison v. MONY Life Retirement Income Security Plan for Employees*, the Court of Appeals reiterated that trial courts retain "broad discretion" to permit or deny discovery.[9] It pointed to the Seventh Circuit's standard in a pre-*Glenn* decision, *Semien v. Life Insurance Co. of North America,*[10] stating that although subsequent cases suggested a "softening" of the *Semien* standard, the case has not been rejected altogether.[11] *Semien* required a plaintiff to demonstrate two factors **before** allowing discovery: (1) identify a specific conflict of interest or instance of misconduct and (2) make a prima facie showing that there is good cause to believe limited discovery will reveal a procedural defect in the plan administrator's determination.[12]

The Seventh Circuit Court of Appeals seems to have backed away from rigidly requiring a plaintiff to meet the *Semien* test as a prerequisite to discovery.[13] This holding makes sense since insurers are not inclined to volunteer information revealing wrongdoing. Only **after** discovery may a plaintiff be able to "identify a specific conflict of interest or instance of misconduct." Nonetheless, district courts continue to apply *Semien* with fervor.[14] This creates a problem for plaintiffs' attorneys – namely, how do you meet these threshold requirements without conducting discovery first?

## III. District Court Decisions in the Seventh Circuit Remain in Flux

District courts interpret *Dennison* as precluding discovery in "run-of the mill" cases. They say the two part *Semien* test "remains instructive;" however, the plaintiff's burden in making an initial showing is "not onerous."[15] How is that for clarity?

Given the lack of clear direction from the Court of Appeals, it is no surprise the district court decisions run the gamut, from allowing depositions of key decision-makers[16] to denying conflict of interest discovery altogether.[17] A survey of the recent district court decisions on discovery in the wrongful denial of benefits context follows.

### a. Pre-*Dennison* Decisions Permitting Conflict of Interest Discovery

Most of the cases involving conflict

of interest discovery were decided prior to the 2013 decision in *Dennison*. Still, they provide some guidance as to the evidence plaintiffs can present to convince a court to allow plaintiffs to take discovery. These cases also provide insight into the permissible scope. It is important to note, however, that prior to *Dennison*, many of the district courts viewed the U.S. Supreme Court's decision in *Glenn* as abrogating the Seventh Circuit Court of Appeal's *Semien* standard altogether,[18] a position which the Court of Appeals since has rejected.[19]

Plaintiffs have the burden of making an initial showing of a conflict of interest in the plan administration. Aside from the insurer's obvious conflict due to its dual role, plaintiff may meet its burden by highlighting other problems with claim administration. For instance, it may be sufficient evidence for a plaintiff to show the insurer insisted that claimant apply for Social Security Disability Insurance (SSDI) benefits, but when SSDI benefits were approved, the insurer refused to reconsider its denial of disability benefits.[20] Additionally, plaintiff's evidence that an insurer granted disability benefits until its own funds were at risk, despite no change in the plan definition of disability, may constitute good cause for discovery.[21] In a case involving severance benefits, there was evidence of biased plan administration where a similarly situated employee received the benefits under the same plan under which plaintiff was denied. Plaintiff also made a showing of procedural unfairness where the same individual was both the initial adjudicator of benefits and the chief fact-finder at the appeals stage.[22] Finally, a plaintiff made a showing of misconduct where the plan refused to produce earlier versions of its plan documents but failed to cite the versions it was relying on in its denial letters.[23]

Regarding the scope of discovery, courts have granted written discovery requests seeking the following information:

- The identities and compensation of the insurer's employees and other third-parties responsible for reviewing and denying plaintiff's claim,[24]
- The plan administrator's policies and procedures,[25]
- Statistics as to the approval and denial rates under the plan,[26] and
- Correspondence with medical examiners and their employees about claimant's claim.[27]

Courts generally refuse to allow plaintiffs' written requests for employee personnel files,[28] the insurer's financial information,[29] and information about other policyholders' claims that have been denied.[30]

In limited instances in the Seventh Circuit, courts will allow for depositions of key actors in the claim review process. In *Hoffman v. Sara Lee Corp.*,[31] the Northern District of Illinois permitted plaintiff to depose a member of the committee who reviewed plaintiff's claim as well as a similarly situated employee who was granted severance pay.[32] Similarly, in *Baxter v. Sun Life Assurance Co.*, the court allowed plaintiff to depose a claims consultant to understand his application of the policy's application of a plan provision.[33]

### b. Post-*Dennison* Decisions Permitting Conflict of Interest Discovery

Since the *Dennison* decision, only one district court, the Northern District of Illinois, has permitted discovery as to an insurer's conflict of interest.[34] In both cases before that court, plaintiffs were able to point to specific conflicts or instances of misconduct,[35] suggesting *Semien*'s influence remains alive and strong. Plaintiffs directed the court's attention to the plan administrator's complete disregard of plaintiff's evidence,[36] its neglect of the explicit plan language[37] and its history of biased claims administration[38] as bases for limited discovery.

Even when discovery has been permitted, requests still are limited to information relevant to a potential conflict or procedural defect. In *Warner v. Unum Life Insurance Co. of America*, the court allowed discovery of compensation and bonus structure of the doctors who reviewed the claim and performance evaluations of those doctors.[39] However, it refused to allow plaintiff to get statistics on the doctors' "batting average," *i.e.*, statistics on the reviewing physicians' up and down record, and would not allow discovery related to the profitability of the policy.[40] In *Nemitz v. Metropolitan Life Insurance Co.*, the court stated that most of plaintiff's requests were directed towards the merits of the decision, and the only category of permissible discovery was whether the insurer's conflict of interest impacted its decision.[41] The court then ordered the parties to meet and confer regarding the discovery required on this topic.[42]

### c. Post-*Dennison* Decisions Denying Conflict of Interest Discovery

Courts also have broad discretion to deny plaintiffs' requests for discovery altogether. After *Dennison*, the Eastern District of Wisconsin denied a plaintiff's request for conflict of interest discovery, finding that this was a "run-of-the-mill" ERISA case and that plaintiff had failed to point to anything in the record that "raised suspicions."[43] Judge Griesbach stated, "In light of *Dennison*, the onus of making such a showing is perhaps lessened, but there must still be something that serves as a key to open the door to the additional discovery that is not permitted in the typical case."[44]

The Northern District of Indiana likewise denied plaintiff's motion to conduct discovery because she failed to identify "a specific conflict or instance of misconduct or [make] a *prima facie* showing that there is good cause to believe that limited discovery will reveal a procedural defect."[45] Plaintiff further attempted to show there were documents missing from the administrative record, but the court maintained her "suspicions [fell] short" of showing relevant material actually was missing.[46] The holdings in these cases suggest that contrary to the implicit proposition in *Glenn*, an insurer – plan administrator's inherent conflict of interest alone is not enough to warrant discovery and the *Semien* standard maintains strong influence in the Seventh Circuit.

## IV. Conclusion

Plaintiffs' attorneys should not assume their ERISA wrongful denial of benefits claims must be limited to the administrative record alone. If you smell a rat, follow it. Upon careful review of the documents in the record and consideration of what is missing, you may be able to identify evidence that the plan administrator's conflict of interest influenced its decision to deny benefits to your client. With that in hand, you will be able to serve written discovery requests or depose company representatives. Ultimately, you are in a much stronger position to resolve the case.

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*Endnotes)*

[1] *Krolnik v. Prudential Ins. Co. of Am.*, 570 F.3d 841, 843 (7th Cir. 2009)(citing *Perlman v. Swiss Bank Corp.*, 195 F.3d 975 (7th Cir. 1999)).

[2] *Davis v. Unum Life Ins. Co. of Am.*, 444 F.3d 569, 576 (7th Cir. 2006).

[3] *See, e.g., Key v. UNUM Life Insurance Company of America,* 2008 U.S. Dist. LEXIS 64254 *20-22 (W.D. Wis. 2008).

[4] *See, e.g., Cipriani v. Liberty Life Assur. Co.*, 2014 U.S. Dist. LEXIS 69613 (M.D. Pa. May 21, 2014); *Hoffman v. Sara Lee Corp.*, 2012 U.S. Dist. LEXIS 15277 (N.D. Ill. Feb. 8, 2012); *Estrella v. Hartford Life & Accident Ins. Co.*, 271 F.R.D. 8 (D. Mass. Nov. 23, 2010); *Bird v. GTX, Inc.,* 2009 U.S. Dist. LEXIS 106301 (W.D. Tenn. Nov. 13, 2009); *Garvey v. Piper Rudnick LLP Long Term Disability Insurance Plan*, 2009 U.S. Dist. LEXIS 94694 (N.D. Ill. Oct. 9, 2009); *Fischer v. Life Ins. Co. of N. Am.*, 2009 U.S. Dist. LEXIS 22487 (S.D. Ind. Mar. 19, 2009).

[5] 554 U.S. 105 (2008).

[6] *Id.* at 112.

[7] *Id.* at 116-17.

[8] *See, e.g., Warner v. Unum Life Ins. Co. of Am.*, 2013 U.S. Dist. LEXIS 105067 (N.D. Ill. July 26, 2013) *and Baxter v. Sun Life Assur. Co.*, 713 F. Supp. 2d 766 (N.D. Ill. 2010).

[9] *Dennison v. MONY Life Ret. Income Sec. Plan for Emple.*, 710 F.3d 741, 747 (7th Cir. 2013).

[10] 436 F.3d 805 (7th Cir. 2006).

[11] *Dennison*, 710 F.3d at 747

[12] *Semien,* 436 F.3d 805 at 815.

[13] *Dennison*, 710 F.3d at 747.

[14] *See Gebert v. Thrivent Fin. For Lutherans Group Disability Income Ins. Plan,* 2013 U.S. Dist. LEXIS 181658 (E.D. Wis. Dec. 27, 2013) *and Boxell v. Plan for Group Ins. Of Verizon Communs.*, 2013 U.S. Dist. LEXIS 131621 (N.D. Ind. Sept. 16, 2013).

[15] *Gebert,* 2013 U.S. Dist. LEXIS 181658 at *5-6; *Boxell*, 2013 U.S. Dist. LEXIS 131621 at *15-16.

[16] *Hoffman,* 2012 U.S. Dist. LEXIS 15277 at *13.

[17] *See Gebert,* 2013 U.S. Dist. LEXIS 181658 at *23 *and Boxell*, 2013 U.S. Dist. LEXIS 131621 at *21.

[18] *See Baxter*, 713 F. Supp. 2d at 773; *Hughes v. CUNA Mut. Group*, 257 F.R.D. 176, 179 (S.D. Ind. 2009); *Fischer*, 2009 U.S. Dist. LEXIS 22487; *Gessling v. Group Long Term Disability Plan for Employees of Sprint/United Management Co.*, 2008 U.S. Dist. LEXIS 96623 (S.D. Ind. November 26, 2008).

[19] *Dennison*, 710 F.3d at 747.

[20] *Parrilli v. Hartford Life & Accident Ins. Co.*, 2009 U.S. Dist. LEXIS 100276 (N.D. Ill. Sept. 29, 2009).

[21] *Garvey v. Piper Rudnick LLP Long Term Disability Insurance Plan*, 264 F.R.D. 394, 399 (N.D. Ill. 2009).

[22] *Hoffman v. Sara Lee Corp.*, 2012 U.S. Dist. LEXIS 15277 (N.D. Ill. Feb. 8, 2012).

[23] *Huss v. IBM Med. & Dental Plan*, 2009 U.S. Dist. LEXIS 22588 (N.D. Ill. Mar. 20, 2009).

[24] *Hall v. Life Ins. Co. of N. Am.*, 265 F.R.D. 356 (N.D. Ind. 2010); *Garvey*, 264 F.R.D. 394; *Hughes*, 257 F.R.D. 176; *Fischer*, 2009 U.S. Dist. LEXIS 22487.

[25] *Garvey*, 264 F.R.D. 394; *Hughes*, 257 F.R.D. 176; *Fischer*, 2009 U.S. Dist. LEXIS 22487; *Huss*, 2009 U.S. Dist. LEXIS 22588.

[26] *Garvey*, 264 F.R.D. 394; *Fischer*, 2009 U.S. Dist. LEXIS 22487.

[27] *Hall*, 265 F.R.D. 356; *Hughes*, 257 F.R.D. 176.

[28] *Garvey*, 264 F.R.D. 394; *Hughes*, 257 F.R.D. 176; *Fischer*, 2009 U.S. Dist. LEXIS 22487.

[29] *Garvey*, 264 F.R.D. 394; *Fischer*, 2009 U.S. Dist. LEXIS 22487.

[30] *See Hughes*, 257 F.R.D. at 180.

[31] 2012 U.S. Dist. LEXIS 15277 (N.D. Ill. Feb. 8, 2012).

[32] *Id.* at *12.

[33] *Baxter*, 713 F. Supp. 2d 766.

[34] *See Nemitz v. Metro. Life Ins. Co.*, 2013 U.S. Dist. LEXIS 106850 (N.D. Ill. July 31, 2013) *and Warner v. Unum Life Ins. Co. of Am.*, 2013 U.S. Dist. LEXIS 105067 (N.D. Ill. July 26, 2013).

[35] *Id.*

[36] *Warner*, 2013 U.S. Dist. LEXIS 105067 at *10.

[37] *Nemitz*, 2013 U.S. Dist. LEXIS 106850 at *33-34.

[38] *Warner*, 2013 U.S. Dist. LEXIS 105067 at *10.

[39] *Id.* at *17.

[40] *Id.* at *18.

[41] *Nemitz*, 2013 U.S. Dist. LEXIS 106850 at *35.

[42] *Id.*

[43] *Gebert,* 2013 U.S. Dist. LEXIS 181658 at *6, 12.

[44] *Id.* at *6.

[45] *Boxell*, 2013 U.S. Dist. LEXIS 131621 at * 16.

[46] *Id.* at *20.