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EXPOSING THE TRUCH AS A WAY TO MAKE ERISA CASES LESS UNFAIR: WHEN DO COURTS IN THE SIXTH CIRCUIT ALLOW DISCOVERY IN ERISA CASES, AND WHAT DISCOVERY IS ALLOWED?

BY: R. CHANDLER WILSON

ERISA provides a big advantage for insurance companies, but sometimes exposing the truth through discovery can level the playing field.

Most Americans are covered for their health insurance through work. Many working Americans are also covered for life insurance, long term disability (LTD) insurance, and other common benefits through work. Unfortunately for most Americans with these types of insurance benefits, if the insurance company refuses to pay the medical bills, life insurance, or disability benefits because the insurance is offered through work, the legal fight over those benefits falls under the federal Employee Retirement Income Security Act of 1974 (ERISA).

Unfortunately, for most employees, ERISA rules provide many advantages for the insurance company. One big advantage for the insurance company is that courts decide most ERISA cases under an "arbitrary and capricious" standard of review. Because the insurance company deciding the claim (and potentially paying with its own money) is a fiduciary under ERISA, the Supreme Court allows the insurance company to be granted discretion. Courts then give deference to the decision to deny benefits by an insurance company with discretion. *Firestone Tire & Rubber Co. v Bruch,* 489 U.S. 101 (1989). In plain English, courts have said this means the insurance company wins and can deny benefits, even if the decision to deny is wrong, so long as the insurance company was "reasonable."

Fortunately, the same Supreme Court case, and others discussed in this article, explain that courts

should not give as much deference to the insurance company's decision when the insurance company has a conflict of interest. There should be less deference given when an insurance company is paying with its own funds, generally. Further, courts should look into the facts of each case to determine just how an insurance company's decision has been affected by its conflict of interest. See, e.g., *Metro. Life Ins. Co. v. Glenn,* 554 U.S. 105 (2008), discussed more, *infra.*

Unfortunately, another rule in favor of insurance companies in ERISA cases is that the court's review is generally limited to the ERISA record (also referred to as an ERISA administrative record), which means that the court only looks at the information that was available to or considered by the insurance company. Once a case gets to court, the employee who has been denied benefits cannot submit any more evidence to show why he or she was entitled to benefits because the "record" is closed.

One big exception to the "closed record" rule is the subject of this paper. When do courts allow new information in? When do courts allow a plaintiff to use the rules of "discovery" to learn how an insurance company may have been unfair?

If, for example, an insurance company has a target for the number of claims that should be denied each month for its claims handlers, should a court allow discovery to find out if that is true or not? If the insurance company relies on the opinions of doctors to decide if someone is disabled or not, the court should know if those doctors are employees of the insurance company and if the doctors are paid more in bonuses or retirement pay if the company makes more money. What if an insurance company doctors who are not its employees, but uses them over and over, so a large part of the doctors' income comes from the insurance company; wouldn't that mean the doctors might shade their opinions in favor of the insurance company to keep getting paid for their opinions?

The answer is that the court should know these facts to properly apply the rules under ERISA. Some courts allow "discovery" into these facts almost automatically where there is a conflict of interest, while others don't allow discovery unless a plaintiff seeking this discovery crosses certain hurdles.

The rules for allowing discovery into the conflict of interest, or "conflict discovery" in ERISA cases varies from circuit to circuit, and within most circuits. The Court of Appeals for the Sixth Circuit has addressed this issue frequently, which is the subject of this paper; we will explore other circuits' law in future papers.

Nothing in ERISA, ERISA regulations, Federal Rules of Civil Procedure, or Supreme Court holdings limits discovery in ERISA cases.

As discussed above, one of the advantages to insurance companies in ERISA cases is that courts usually don't allow discovery of the facts related to the merits of a case once the case is in court. Unfortunately, sometimes this general rule of "no discovery" is misunderstood as precluding all discovery, even conflict discovery. On the contrary, while discovery into the merits of an insurance company's decision is often limited, the rules generally do allow discovery into the conflict of interest. Nothing in the ERISA statute, regulations, Supreme Court decisions, or Federal Rules of Civil Procedure limits ERISA conflict discovery. The Supreme Court has never limited discovery; in fact, the conflict of interest is a factor that must be considered. *Firestone Tire & Rubber Co., supra*, 489 U.S. at 115.

Many cases in the Sixth Circuit allow ERISA conflict discovery based on an allegation of a conflict.

Wilkins v. Baptist Healthcare Systems, Inc., 150 F.3d 609 (6th Cir. 1998) holds that discovery is available into bias and conflict but does not set out a threshold to obtain the conflict discovery[1]. In subsequent cases, many decisions explain that the facts elated to the conflict are so important to the court's review, that courts expect plaintiffs to seek discovery. One big split in the case law is whether courts allow discovery based on only an allegation of a conflict of interest or if a plaintiff needs to show more to get discovery.

Courts that require more than a mere allegation of bias require some type of "initial showing" to get discovery. In the Sixth Circuit, the "initial showing" requirement can be traced to *Bennett v. Unum Life Ins. Co. of Am.*, 321 F. Supp. 2d 925, 931 (E.D. Tenn. 2004). (If a Plaintiff makes an initial showing that there is a reasonable basis for the discovery, the discovery is allowed.) However, shortly after *Bennett* the Court of Appeals for the Sixth Circuit explained that obtaining evidence of the conflict was so important to the court's ability to apply the standard of review where there is an allegation of bias, that discovery into the bias should be sought and presented to the court to aid in its consideration. In *Calvert v. Firstar Fin., Inc.*, 409 F.3d 286, 293, n. 2 (6th Cir. 2005), the Court of Appeals explained, it "would have a better feel for the weight to accord this conflict of interest if Calvert had explored the issue through discovery." Further, "While Calvert's counsel asserted that it was his understanding that discovery is never permissible in an ERISA action premised on a review of the administrative record, an exception to that rule exists where a plaintiff seeks to pursue a decision-maker's bias." *Id.*

Shortly after that, the Supreme Court decided *Metro. Life Ins. Co. v. Glenn, supra,* confirming that courts need to consider the facts related to bias to apply the standard of review properly. The *Glenn* Court held that a conflict did not change the standard of review if plan documents grant discretion. *Id*.at 115. (If the plan grants discretion, a court reviews a biased fiduciary's decision under the arbitrary and capricious standard of review). However, applicable law requires "the reviewing judge to take account of the conflict when determining whether the trustee, substantively or procedurally, has abused his discretion." *Id.* Any conflict of interest would be a "factor" to be taken into account in determining how the court applies that standard of review. *Id*. at 117.

The Court explained that courts take into account the "case-specific" factors and weigh them together. *Id.* For example, "[t]he conflict of interest . . . 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 administrator has a history of biased claims administration." *Id*.

Following *Metro. Life Ins. Co. v. Glenn,* courts acknowledged discovery was crucial to allow courts to explore the extent of the conflict of interest and to understand how a conflict might affect a decision. Because the information is so crucial, plaintiffs do not need to make an initial showing to get discovery, but rather only need to allege a conflict to get discovery into the issue. *See, e.g., Myers v. Prudential*, 581 F. Supp. 2d 911 (E.D. Tenn. 2008). ("[A]bsent 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.") [2]

What followed was a split within the Sixth Circuit, in which some courts allowed discovery only upon an initial showing, while other courts allowed discovery based on just an allegation. One of the most thorough cases to discuss this split is *Kinsler v. Lincoln Nat. Life Ins. Co.*, 660 F. Supp. 2d 830, 836 (M.D. Tenn. 2009).

In *Kinsler*, the Court explained that the line of cases that required an initial showing relied on a series of unpublished cases that were not binding authority. *Kinsler*, 660 F. Supp. 2d at 832. The *Kinsler* court found, instead, that the controlling line of cases allowed for discovery even based on an allegation of conflict without an initial showing. *Id.* The court discussed that in *Calvert* and *Kalish, supra,* the plaintiff was criticized for not seeking discovery into the conflict of interest. *Id*. at 832-3. (Also noting that nothing in those cases set a threshold requirement for discovery and that *Calvert* and *Kalish* are published cases).

The *Kinsler* court then recognized that "district courts have, perhaps unsurprisingly, come to divergent conclusions as to whether to follow the *Putney–Likas–Huffaker* line of cases or to take a lead from the *Calvert –Kalish–Moore* approach." *Id*. at 834. The court concluded, "*Wilkins, Moore*, and *Glenn compel the result that discovery into this alleged conflict of interest is proper, even if the plaintiff has not made an initial threshold showing of bias* beyond alleging the existence of this type of conflict of interest." *Id*. at 836 (emphasis added).

Where an initial showing is required, a Plaintiff need only show a "reasonable basis" to obtain conflict discovery.

Even if an initial showing is required, plaintiffs need only show a "reasonable basis" to get discovery into bias.

In the *Bennett* case, *supra*, requiring an "initial showing" before conflict discovery would be allowed, the court set out the test: a plaintiff should first identify a specific procedural challenge and then "makes an initial showing . . . that he has *a reasonable basis to make such procedural challenges,* then good cause exists to permit the plaintiff to conduct appropriate discovery." *Bennett*, 321 F. Supp. 2d at 933 (emphasis added). The *Bennett* court also explained:

> Where, … an ERISA plaintiff comes forward with a reasonable basis to believe that this conflict of interest has solidified into conscious, concrete policies, procedures, and practices to promote the company's financial welfare at the expense of a full and fair evaluation of the plaintiff's claim for benefits, then the plaintiff should be allowed to conduct limited discovery to determine whether such policies, procedures, and practices do actually exist and, if so, to what extent they interfered with the fair review of the plaintiff's claim for benefits.

Id. at 932–33. This language offers some helpful guidance; if a plaintiff provides "a reasonable basis to believe that a conflict … has solidified into policies, procedures, and practices to promote the company's financial welfare," rather than a proper full and fair evaluation as required by ERISA, the plaintiff should be allowed discovery to determine if they "do actually exist." *Id.*

This rule, that if an initial showing is required, a plaintiff must present "a reasonable basis to make such procedural challenges," has been followed in multiple cases. *See, e.g. Bradford v. Metro. Life Ins. Co.*, No. 3:05-CV-240, 2006 WL 1006578, at *4 (E.D. Tenn. Apr. 14, 2006); *Williamson v. UnumProvident Corp.*, *supra*. Other courts use very similar language. *See, e.g. Geer v. Hartford Life & Acc. Ins. Co.*, No. CIV.A. 08-12837, 2009 WL 1620402, at *5 (E.D. Mich. June 9, 2009) "discovery should be allowed where a plaintiff has provided sufficient initial facts suggesting a likelihood that probative evidence of bias or procedural deprivation would be developed."

While it is arguable that an "initial showing" may no longer be required, to the extent it is, courts should only require plaintiffs to present a "reasonable basis" to obtain discovery.

Are depositions allowed?

When courts permit discovery in an ERISA case, there is no special rule limiting discovery to written discovery or limiting depositions. Many courts both inside and outside of the Sixth Circuit have permitted such depositions when they are specifically limited to the issues of conflict of interest, bias, or due process violation. *See, Gluc v. Prudential Life Ins. Co. of Am.*, 309 F.R.D. 406, 418 (W.D. Ky. 2015)("[I]t appears to the Court that the majority of courts to address this issue have denied the efforts of defendant insurers to prohibit depositions in ERISA actions involving plaintiffs who allege that they were wrongfully denied disability benefits due to an inherent conflict of interest arising from the dual status of the defendant as both administrator and payor of disability claims"); *See also, Santos v. Quebecor World Long Term Disability Plan*, 254 F.R.D. 643, 648–49 (E.D.Cal.2009)(permitting a Rule 30(b)(6) deposition in an ERISA case for payment of long term disability benefits of the disability plan administrator, Hartford Life Group Insurance Company); *Puri v. Hartford Life & Acc. Ins. Co.*, 784 F.Supp.2d 103, 106 (D.Conn.2011) (granting the plaintiff's motion to compel the deposition of a rehabilitation clinical case manager of the defendant insurance company whom the plaintiff alleged was biased in her review due to her failure to properly assess the plaintiff's specific job duties or consider her cognitive deficits); *Crume v. MetLife Ins. Co.*, 388 F.Supp.2d 1342, 1345 (M.D.Fla. Aug. 10, 2005), affirmed, *Crume v. MetLife Ins. Co.*, 387 F.Supp.2d 1212 (M.D.Fla.2005) (denying a motion for a protective order brought by the defendant insurer to prevent the deposition of the insurer employee who made the final decision that denied the plaintiff's claim for long term disability benefits on administrative appeal where the deposition was limited to (1) the exact nature of information considered by the fiduciary; (2) whether the fiduciary was competent to evaluate the information in the administrative record; (3) how the fiduciary reached its decision; (4) whether given the nature of the information of record it was incumbent on the fiduciary to seek outside technical assistance to make a "full and fair review" of the claim; and (5) whether a conflict of interest existed."); *Toven v. MetLife Ins. Co.*, 517 F.Supp.2d 1171, 1173 (C.D.Cal.2007) (denying the defendant insurer's motion for a protective order to prohibit the deposition of the administrator's claims representative given the inherent conflict of interest alleged by the plaintiff); *Fish v. Unum Life Ins. Co. of Amer.*, 229 F.R.D. 699, 701–02 (M.D.Fla.2005) (denying a motion for protective order filed by defendant insurer to prevent the deposition of its employees involved in the administrative denial of plaintiff's claim for LTD benefits).

Conclusion

While there is still some debate as to whether an "initial showing" is required, courts in the Sixth Circuit allow discovery in ERISA cases as to the issues of conflict of interest, bias, and due process violations. Further, courts in the Sixth Circuit may allow the taking of depositions so long as they are limited in scope to those specific areas.

End Notes:

[1]The *Myers* decision specifically rejected the prior rationale from *Bennett, supra*, which required a plaintiff "to come forward with evidence to establish 'a reasonable basis' to believe that such a procedural defect exists before discovery will be allowed into the defect." *Id*. (citing *Bennett*, 321 F.Supp. 2d 932-33). The Court considered the *Kalish* and *Calvert* cases discussed above, as well as *Smith v. Continental Casualty Co.,* 450 F.3d 253 (6th Cir. 2006) in which "the district court had allowed fairly extensive discovery, including depositions, concerning the manner in which the insurance company evaluated disability claims." *Myers*, 581 F. Supp. 2d at 909. The court also considered *Moore v. Lafayette Life Ins. Co.,* 458 F.3d 416 (6th Cir. 2006), which did limit discovery, but because the plaintiff in that case failed to even "raise a colorable claim of a due process violation." *Myers*, 581 F. Supp. 2d at 909. Then, with the additional consideration of *Metro. Life Ins. Co. v. Glenn,* the court concluded "with confidence that the 'threshold' requirement has had its day." *Myers*, 581 F. Supp. 2d at 911.

[2]While discovery is generally unavailable into the merits of a claim, a "district court may consider evidence outside of the administrative record only if that evidence is offered in support of a 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." *Id*.at 618. "This also means that any prehearing discovery at the district court level should be limited to such procedural challenges." *Id.*

[3]The *Kinsler* court explained that the line of cases began with the Sixth Circuit's unpublished decision in *Putney v. Medical Mutual of Ohio,* 111 Fed.Appx. 803 (6th Cir. 2004), which was followed by the unpublished case of *Likas v. Life Insurance Co. of North America,* 222 Fed.Appx. 481, 486 (6th Cir. 2007), which in turn was following the unpublished case of *Huffaker v. Metropolitan Life Insurance Co.,* 271 Fed.Appx. 493, 504 (6th Cir. 2008)). The court explained, "[n]otably, … none of these three cases is published, and, thus, none provide binding precedent. *E.g., Gray v. Moore,* 520 F.3d 616, 620 n. 1 (6th Cir.2008) (citing 6th Cir. R. 206(c))." *Kinsler*, 660 F. Supp. 2d at 832.

[4]The *Kinsler* court also explained that *Moore, supra,* was another important case not requiring a showing, as was *Smith v. Cont. Cas. Co.,* 450 F.3d 253, 260 (6th Cir.2006) "(finding that district court correctly declined to consider alleged conflict of interest where plaintiff 'did not develop the record' regarding her allegation of a conflict of interest, without suggesting that any initial threshold showing was required for plaintiff to develop the record on that issue)." *Kinsler*, 458 F.3d at 833-4.

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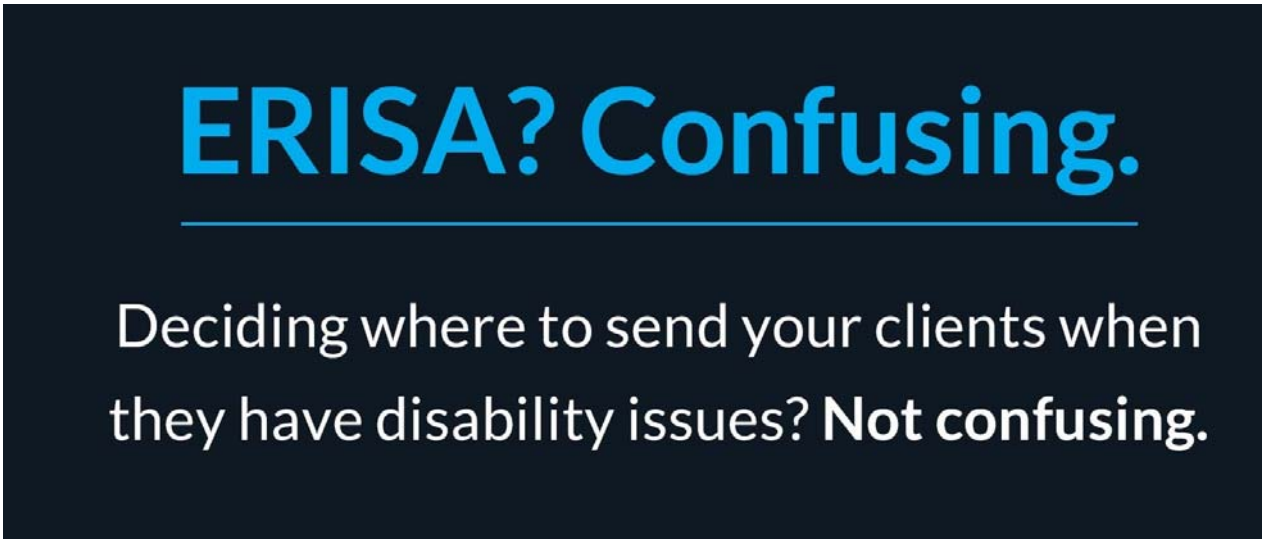

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