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ERISA & DISABILITY BENEFITS NEWSLETTER

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ABOUT OUR FIRM

Eric Buchanan & Associates, PLLC is a full-service disability benefits, employee benefits, and insurance law firm. The attorneys at our firm have helped thousands of disabled people who have been denied social security disability benefits, ERISA LTD benefits, health insurance, life insurance and other ERISA employee benefits, as well as private disability and health insurance benefits.

For more Information about Eric Buchanan & Associates, PLLC, visit our website at www.buchanandisability.com.



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ERISA DISCOVERY BY: JEREMY L. BORDELON

One of the main differences between ERISA benefits litigation and analogous litigation over, for example, other contracts or other insurance claims is in the area of discovery. Although the standards differ somewhat from federal circuit to federal circuit, and even from district court to district court in some places, each and every court in the land imposes drastic limits on the discovery permitted in ERISA cases. Understanding what discovery is likely to be allowed in court helps one to understand the type of pre-litigation development necessary to make a good case.

The reasoning courts often offer in support of limited discovery in ERISA cases is twofold: First, citing to legislative history, courts are fond of saying that "A primary goal of ERISA was to provide a method for workers and beneficiaries to resolve disputes over benefits inexpensively and expeditiously." *See Perry v. Simplicity Eng'g*, 900 F.2d 963, 967 (6th Cir. 1990) (citing 1974 U.S.C.C.A.N. 5000). The courts have come up with all manner of limitations to litigation under the auspices of promoting that "primary goal," not least of which is curtailing discovery. The second reason courts often offer for limiting ERISA discovery, and the one that actually makes some sense, is based on relevancy.

Generally, regardless of what standard of review the court uses to review the decision, the court will only consider facts known to the decision-maker at the time the decision was made. *See, e.g., Wilkins v. Baptist Healthcare Sys., Inc.,* 150 F.3d 609, 618 (6th Cir. 1998). Most of the medical facts known to the decision-maker eventually make their way into the "claim file," which is usually filed with the court as the "ERISA record" or the "administrative record." Since the court will only consider the facts known to the decision-maker, and those facts have been filed with the court already, there is no allowance for further discover as to the Plaintiff's medical problems, testimony from his doctors, or the like. If it wasn't in the decision-maker's claim file at the time the decision was made, the court simply won't consider it to be relevant. And as we all know, if something is not relevant, the court is not likely to find it to be discoverable, either. *See* Fed. R. Civ. P. 26(b)(1) ("Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense.")

Discovery into the merits of a Plaintiff's claims (i.e., the medical facts surrounding a disability claim, healthcare benefits claim, or accidental death claim) is commonly referred to as "merits discovery," in the ERISA context. Absent unusual circumstances, it is usually not permitted by the courts, for the reasons stated above. There is, however, another area of inquiry into which the courts are frequently allowing discovery, especially in the wake of the United States Supreme Court decision in *Metropolitan Life*

Insurance Company v. Glenn, 554 U.S. 105 (2008). These days, it is commonly referred to as "conflict discovery."

Going back a bit, the Sixth Circuit Court of Appeals in *Wilkins* wrote that discovery would generally not be available in ERISA cases because of the limited scope of the court's review. However, the Sixth Circuit left a small exception to that general rule, allowing that a court would be permitted to consider evidence outside the administrative record "when consideration of that evidence is necessary to resolve an ERISA claimant's procedural challenge to the administrator's decision, such as an alleged lack of due process afforded by the administrator or alleged bias on its part." *Wilkins*, 150 F.3d at 618. For a time, this judicial tidbit essentially lay dormant. Then, in one of the first district court opinions to recognize what this language really said, the Eastern District of Tennessee allowed Eric Buchanan & Associates to take discovery into alleged bias and due process violations by UnumProvident, but held that we were only allowed to do so because we had come forward with an "initial threshold showing" of bias. *Bennett v. Unum Life Insurance Company of America*, 321 F.Supp.2d 925 (E.D. Tenn. 2004).

For a long time, *Bennett* stood as the paradigm for obtaining discovery into alleged biases and due process violations, and it was difficult to get any discovery without a pre-existing library of "dirt" on the defendant in question. The problem, of course, was that insurers do not typically place evidence of bad faith or bias into the claim file, so it was very difficult to make the "threshold showing" required by *Bennett* for any Defendant which had not been the subject of extensive public investigation. Eventually, after several years of trying to explain these difficulties to the courts, the same Eastern District of Tennessee Magistrate Judge who wrote *Bennett* (Magistrate Judge William B. Mitchell Carter), responded to our arguments and partially reversed himself, holding that in the years since he wrote *Bennett*, it had become increasingly apparent that the "threshold showing" requirement was not allowing plaintiffs the discovery to which they should be entitled, and that it should be done away with. *Myers v. The Prudential Insurance Co. of America*, 581 F. Supp. 2d 904 (E.D. Tenn. 2008).

As these developments were taking place in Tennessee, and throughout the Sixth Circuit, other federal circuits were developing their own peculiar forms of ERISA discovery. Many courts would not allow for any discovery at all, no matter what the plaintiff could show up front. Other courts allowed for wide-open discovery, even into the merits of a claim, if a due process violation could be shown in the "first round" of discovery, or if the *de novo* standard of review was found to apply. Often, these rules were developed at the district court level, with the Courts of Appeals only rarely weighing in, and the Supreme Court remaining notably silent.

Finally, the Supreme Court offered the lower courts a bit of thinly-veiled guidance in 2008, with the *Glenn* decision. Admittedly, *Glenn* was not a case in which discovery was at issue, and it did not explicitly change the rules of ERISA discovery. What the Supreme Court found in *Glenn* was that a conflict of interest exists where an entity "both determines whether an employee is eligible for benefits and pays benefits out of its own pocket," which is the case with most insured employee benefits. *Glenn*, 554 U.S. at 108. Therefore, the Court held, "a reviewing court should consider that conflict as a factor in determining whether the plan administrator has abused its discretion in denying benefits," and that "the significance of the factor will depend upon the circumstances of the particular case." *Id.* Offering examples of when the conflict might be more or less important, the Court wrote:

> The conflict of interest at issue here, for example, should prove more important (perhaps of great importance) where circumstances suggest a higher likelihood that it affected the benefits decision, including, but not limited to, cases where an insurance company administrator has a history of biased claims administration. It should prove less important (perhaps to the vanishing point) where the administrator has taken active steps to reduce potential bias and to promote accuracy, for example, by walling off claims administrators from those interested in firm finances, or by imposing management checks that penalize inaccurate decision making irrespective of whom the inaccuracy benefits.

Id. at 117 (internal citations omitted). If the original rationale for denying discovery was that anything discovered would not be relevant to the issues the court would ultimately consider, *Glenn* definitely made that rationale obsolete as to certain areas of inquiry. Now, with *Glenn*, we have the Supreme Court stating that the decision-maker's conflict of interest is relevant to the court's inquiries, and must be considered. Furthermore, in order to determine how much weight the conflict should have as a "factor," district courts must allow discovery into the "circumstances" surrounding the claims decision. We now often refer to this as "conflict discovery."

Most courts faced with the question have admitted that *Glenn* marks a shift in ERISA discovery. Now, courts are often awarding discovery on issues such as bonuses paid to claims personnel, whether the decision-maker has a history of biased claims denials, how often particular "independent" doctors are hired to review claims, and how

much those doctors are paid. *See, e.g., Raney v. Life Ins. Co. of N. Am.*, 2009 WL 1044891 (E.D. Ky. 2009); *Myers v. Prudential Ins. Co. of America*, 581 F.Supp.2d 904, 914 (E.D. Tenn. 2008); *Pemberton v. Reliance Standard Life Ins. Co.*, 2009 WL 89696, *3-4 (E.D. Ky. 2009); *McQueen v. Life Ins. Co. of N. Am.*, 595 F.Supp.2d 752, 755 - 756 (E.D. Ky. 2009); *Kinsler v. Lincoln Nat'l Life Ins. Co.*, 660 F.Supp.2d 830 (M.D. Tenn. 2009).

Of course, these new developments in the area of "conflict discovery" have not changed the situation with respect to "merits discovery," and it is still critical that attorneys make sure they properly develop the medical facts of a claim during the appeals process, prior to litigation. But these new avenues of discovery can certainly be worthwhile in demonstrating to the court that conflicted decision-makers may not have given your client's claim the "full and fair review" to which it is entitled, and can serve as a sort of "tie-breaker" in close cases. Needless to say, the mere specter of what this type of discovery may reveal can often serve to enhance the settlement value of cases, as well.

ERIC BUCHANAN & ASSOCIATES, PLLC UPCOMING CLE SPEAKING ENGAGEMENTS

Eric Buchanan will be speaking at the NOSSCR Social Security Disability Spring Conference on ERISA Long Term Disability claims to be held in Baltimore, MD May 11-14, 2011.

NEED A SPEAKER?

The attorneys at Eric Buchanan & Associates are available to speak to your organization regarding Social Security Disability, ERISA Long-term Disability, Group Long-term Disability, Private Disability Insurance, ERISA Benefits, Denied Health Insurance Claims and Life Insurance Claims. Contact Molina Haynes, Office Manager at (423) 634-2506 or via email at mhaynes@buchanandisability.com