ERIC BUCHANAN AND ASSOCIATES

Eric Buchanan & Associates, PLLC
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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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UPDATE: OBTAINING DISCOVERY IN ERISA CASES UNDER THE 6TH CIRCUIT JURISDICTION - BY: D. SETH HOLLIDAY

The standard for allowing discovery in ERISA cases under the 6th Circuit's jurisdiction continues to evolve. In general terms, discovery inquires outside the ERISA Record are permitted with respect to conflict of interest issues. *See*, *e.g.*, *Metropolitan Life Ins. Co. v. Glenn*, 128 S. Ct. 2343, 2346 (June 19, 2008) (citing *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 115 (1989)); *Wilkins v. Baptist Healthcare Systems, Inc.*, 150 F.3d 609, 618 (6th Cir. 1998); *Cerrito v. Liberty Life Assurance Company of Boston*, 209 F.R.D. 663, 2002 WL 31060483 (M.D. Fla. 2002); *Stumpf, et al. v. Medical Benefits Administrators, et al.*, 179 F. Supp. 2d 1100 (D. Neb. 2001); *Dorsey v. Provident Life and Accident Ins. Co.*, 167 F. Supp. 2d. 846, 853-4 (E.D. Pa. 2001); *Gooden v. Provident Life & Acc. Ins. Co.*, 250 F.3d 329, 333 (5th Cir. 2001); *Buchanan v. Reliance Standard Life Ins. Co.*, 5 F. Supp. 2d 1172, 1181 (D. Kan. 1998). However, the discovery must be limited such that it is "reasonably calculated to lead to the discovery of admissible evidence" under Rule 26(b) of the Federal Rules of Civil Procedure, and "facilitate[s] the prompt and inexpensive resolution of disputes" under ERISA. *Mulligan*, 271 F.R.D. 584, 588 (E.D. Tenn. 2011).

Magistrate Lee's September 21, 2011, Order in *Freshour v. Sun Life Assurance Company of Canada*, Docket No. 2:10-cv-153 (E.D. Tenn. Sept. 21, 2011), Court Document #49 (hereinafter "*Freshour*" or "*Freshour* Order"), affirmed in large part by Judge Collier in his February 29, 2012, Order in that same matter, Court Document #65, tracks the current law:

> "When a claimant makes a procedural challenge to the administrator's decision [in an ERISA case], such as a claim of bias or other conflict of interest, limited discovery is permitted. . ." [Doc. 49, p.2, citing *Johnson v. Conn. Gen. Life Ins. Co.*, 324 F. App'x 459, 466 (6th Cir. 209)].
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> ". . .a plaintiff need not make a preliminary evidentiary showing or satisfy some heightened pleading standard in order to open limited discovery into a payor/administrator's alleged bias." [Doc. 49, p.4, citing *Mulligan v. Provident Life and Acc. Ins. Co.*, 271 F.R.D. 584, 588 (E.D. Tenn. 2011)].
>
> ". . .any discovery must be tailored to facilitate the prompt and inexpensive resolution of disputes." [Doc. 49, p.3, referencing *Price v. Hartford Life & Accident Ins. Co.*, 746 F. Supp. 2d 860, 865-66 (E.D. Mich. 2010)].

Magistrate Lee's *Freshour* Order contained the same sound analysis as her decision in *Mulligan v. Provident Life & Acc. Ins. Co.*, 271 F.R.D. 584, 588 (E.D. Tenn. 2011). In *Mulligan*, Magistrate Lee recognized that:

> When a claimant makes a "procedural challenge" to the administrator's decision, however, "such as an alleged lack of due process. . .or alleged bias," limited discovery is permitted in spite of the general prohibition. *Johnson v. Conn. Gen. Life Ins. Co.*, 324 F. App''x 459, 466 (6th Cir. 2009) (quoting Judge Gilman's concur-

> rence in *Wilkins*, 150 F.3d at 619). In such a case. . .the court is not prohibited from looking outside the administrative record and must instead consider circumstances affecting the administrator's conflict of interest. *Glenn*, 544 U.S. at 117.

Mulligan, 271 F.R.D. 584, 588 (E.D. Tenn. 2011). Indeed, Magistrate Lee took pains in footnote 3 to the above-quoted language to emphasize the allowance of discovery under *Metropolitan Life Ins. Co. v. Glenn*, 554 U.S. 105 (2008):

> As *Glenn* makes clear, the importance of an administrator's conflict of interest will vary with the circumstances of each case. A conflict will be a weightier factor where, for example, the insurer has a history of biased claims administration. *Id.*, at 117. A plaintiff bears the burden to provide evidence of a conflict of interest, see *Curry v. Eaton Corp*., 2010 WL 3736277, at *7 (6th Cir. 2010) (unpublished), and without some discovery, a plaintiff ordinarily cannot make that showing. Thus, a court cannot fairly fault the plaintiff for failing to show the contours of an administrator's conflict without first allowing some discovery. *See Calvert v. Firstar Fin., Inc.,* 409 F.3d 286, 293 n.2 (6th Cir. 2005) ("The Court would have a better feel for the weight to accord this conflict if Calvert had explored the issue through discovery.").

Mulligan, 271 F.R.D. 584, 588 FN3 (E.D. Tenn. 2011).

The language used by Magistrate Lee is important: "Without some discovery, a plaintiff ordinarily cannot make [a] showing [of evidence of a conflict of interest]. . .Thus, a court cannot fairly fault the plaintiff for failing to show the contours of an administrator's conflict without first allowing some discovery." *Id.* This language closely tracks Judge Trauger's language in *Kinsler v. Lincoln Nat'l Life Ins. Co.,* F. Supp.2d , 2009 WL 2996723 (M.D. Tenn. Sept. 21, 2009): "To deny a plaintiff the opportunity to conduct limited discovery on the bias issue until she has made an initial threshold showing essentially handcuffs the plaintiff, who, as the *Pratt* court noted, will rarely have access to any evidence beyond a bare allegation of bias, in the absence of discovery." Magistrate Griffin's subsequent opinion, *Phillips v. Guardian Life Insurance Company of America*, Slip op. *1-3, Docket No. 3:08-660 (M.D. Tenn. Nov. 23, 2009), followed Judge Trauger. Both *Kinsler* and *Phillips* followed Magistrate Carter's opinion, *Myers v. Prudential*, 581 F. Supp. 2d 911 (E.D. Tenn. Sept. 22, 2008), which indicated in relevant part:

> The issue presented by the Defendant's motion and pending before the undersigned is whether, in an ERISA action for judicial review of a denial of benefits, a plaintiff must make an initial or threshold evidentiary showing of a procedural defect before the Court will allow discovery into the alleged procedural defect. For the reasons stated herein, I conclude the plaintiff does not and discovery into an alleged procedural defect without a "threshold showing" is appropriate within the parameters of Fed. R. Civ. P. 26. Accordingly, the defendant's Motion for a Protective Order on the grounds sought is DENIED.

Judge Trauger, Magistrate Griffin and Magistrate Carter all followed Judge Echols opinion in *Platt v. Walgreen Income Protection Plan for Store Managers*, Slip op. *3-4, Docket No. 3:05-162 (M.D. Tenn. Dec. 6, 2005), which indicated that a plaintiff will rarely have access to any evidence beyond a bare allegation of bias, in the absence of discovery.

Magistrate Lee's decision in *Mulligan* followed *Glenn* and the *Platt-Myers-Kinsler-Phillips* line of cases and further indicated that although a plaintiff is entitled to conflict of interest discovery in ERISA cases, the discovery must be limited such that it is "reasonably calculated to lead to the discovery of admissible evidence" under Rule 26(b) of the Federal Rules of Civil Procedure, and "facilitate[s] the prompt and inexpensive resolution of disputes" under ERISA. *Mulligan*, 271 F.R.D. 584, 588 (E.D. Tenn. 2011). *Freshour* simply reiterated the law of this line of cases. In other words, the *Platt-Myers-Kinsler-Phillips-Mulligan-Freshour* line of cases, consistent with *Glenn*, stand for the following proposition: in an ERISA matter, if a plaintiff alleges that a defendant had an inherent conflict of interest that impacted the benefit decision, then that plaintiff is entitled to some discovery regarding an administrator's conflict of interest as long as the plaintiff's discovery requests are reasonably calculated to lead to the discovery of admissible evidence under Rule 26(b) of the Federal Rules of Civil Procedure and facilitate the prompt and inexpensive resolution of disputes under ERISA. However, it should be noted that Judge Collier, in his affirmation of Magistrate Lee's order in *Freshour*, stated the following:

> Although permitting discovery into conflict of interest in an ERISA case based only on mere allegations would indeed be inappropriate. . .Plaintiff comes forward with more than allegations. This showing by Plaintiff satisfies the limited requirement under Glenn to justify further, albeit also limited, discovery on the issue of conflict of Interest.

Freshour v. Sun Life Assurance Company of Canada, Slip op. *10-11, Docket No. 2:10-cv-153 (E.D. Tenn. Feb. 29, 2012). This statement modifies the *Platt-Myers-Kinsler-Phillips-Mulligan-Freshour* line of cases to some degree in the Eastern District of Tennessee. Judge Collier's Order alters the proposition of that line of cases in the following manner: in an ERISA matter, if a plaintiff alleges that a defen-

dant had an inherent conflict of interest that impacted the benefit decision, *and provides a limited showing of that defendant's history of biased claims administration*, then that plaintiff is entitled to some discovery regarding an administrator's conflict of interest as long as the plaintiff's discovery requests are reasonably calculated to lead to the discovery of admissible evidence under Rule 26(b) of the Federal Rules of Civil Procedure and facilitate the prompt and inexpensive resolution of disputes under ERISA. In other words, Judge Collier re-introduces, to some degree, the requirement of an initial threshold showing that the Eastern District moved away from in *Myers v. Prudential*, 581 F. Supp. 2d 911 (E.D. Tenn. Sept. 22, 2008) (Mag. Carter).

Fortunately, aside from Judge Collier's Order, the bulk of jurisprudence indicates that discovery into conflict of interest issues are permitted without the Plaintiff having to provide an initial, specific showing of bias or some procedural irregularity on the part of the decision-maker. *See, e.g. Calvert v. Firstar Finance, Inc.*, 409 F.3d 286 (6th Cir. 2005); *Kalish v. Liberty Mutual*, 419 F.3d 501 (6th Cir. 2005); *Mulligan v. Provident Life & Acc. Ins. Co.*, 271 F.R.D. 584, 588 (E.D. Tenn. 2011) (Mag. Lee), *Phillips v. Guardian Life Insurance Company of America*, Slip op. *1-3, Docket No. 3:08-660 (M.D. Tenn. Nov. 23, 2009) (Mag. Griffin); *Kinsler v. Lincoln Nat'l Life Ins. Co.,* F. Supp. 2d, 2009 WL 2996723 (M.D. Tenn. Sept. 21, 2009) (Judge Trauger); *Myers v. Prudential*, 581 F. Supp. 2d 911 (E.D. Tenn. Sept. 22, 2008) (Mag. Carter); *Platt v. Walgreen*, Slip op. *3-4, Docket No. 3:05-162 (M.D. Tenn. Dec. 6, 2005) (Judge Echols).

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UPCOMING SPEAKING ENGAGEMENTS

Jeremy Bordelon will be speaking at the Amputee Support Group at Fort Sanders Regional Center, 5th Floor in Knoxville, Tennessee on Thursday, April 26, 2012 at 6:00 pm regarding filing a claim for social Security and/or long term disability benefits.

Eric Buchanan will be speaking at the American Association for Justice Annual Convention scheduled for July 28 - August 1, 2012 in Chicago. He will be speaking on social security disability offsets in ERISA disability cases.

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.

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