

Glenn: Emerging Issues

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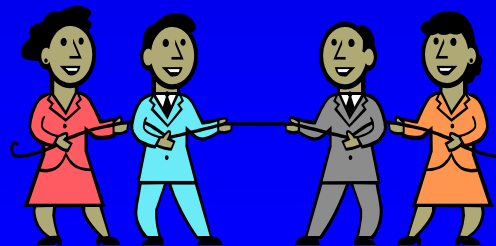
Overview – Significance of *Glenn*

Metropolitan Life Ins. Co. v. Glenn, 128 S. Ct. 2343, 2348 (2008)

- An ERISA plan sponsor or insurer operates under a conflict of interest where it serves a “dual role” – making eligibility determinations and paying benefits
- Although dual status may create a conflict of interest, discretionary standard of review applies to benefit determinations and the effect of the conflict must be assessed using a “totality-of-the-circumstances” test, otherwise described as a “combination-of-factors method of review”
- The significance of the conflict will depend on the circumstances of the particular case

Overview – Before *Glenn*

- Prior to the Supreme Court's decision in *Glenn*, the lower courts produced conflicting results on conflicted-administrator claims. Some eliminated the discretionary standard of review entirely for dual-role administrators; others concluded that the conflict was irrelevant or too speculative. In *Glenn*, the Supreme Court sought to resolve these conflicts by articulating a standard for reviewing adverse benefit determinations made by a conflicted administrator.



***Glenn* – The Question Presented**

“If an administrator that both determines and pays claims under an ERISA plan is deemed to be operating under a conflict of interest, how should that conflict be taken into account on judicial review of a discretionary benefit determination?”



The *Glenn* Facts

- MetLife was both plan administrator and the insurer of Sears, Roebuck & Company's LTD plan, an ERISA-governed employee benefit plan
- MetLife determined that Wanda Glenn was entitled to receive 24 months of benefits because she was unable to perform the material duties of her own occupation due to a heart condition
- MetLife directed Glenn to apply for Social Security benefits
- MetLife subsequently terminated benefits due to a change in the plan's test for disability – Glenn was not unable to perform sedentary work at any "other" occupation for which she qualified

Glenn – Framing the Issues



- #1** Does a conflict of interest exist when the claims administrator serves the dual role of both determining eligibility and paying claims?
- #2** If so, does the presence of a conflict justify eliminating the more favorable discretionary standard of review?

The *Glenn* Holdings

- In analyzing these issues, the Court applied principles of review enunciated in *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989):
 - Standard of review derived from tenets of trust law; benefit determination is a fiduciary act
 - Review is de novo unless plan specifies otherwise
 - If plan grants discretion to administrator to determine eligibility for benefits, deferential standard of review is appropriate
 - If plan grants discretionary authority to administrator or fiduciary operating under conflict of interest, the conflict must be weighed as a “factor” in determining whether there was an abuse of discretion

The *Glenn* Holdings (cont.)

- **HELD**
- An ERISA plan sponsor or insurer operates under a conflict of interest where it serves in a “dual role” – both making eligibility determinations and paying benefits
- Rather than eliminating the more favorable abuse of discretion standard of review in conflicted-administrator cases, the Supreme Court determined that the potential conflict was **one “factor”** to be considered in applying the discretionary standard
- Under this standard, the effect of the conflict must be assessed using a “totality-of-the-circumstances” test; the significance of the conflict factor will depend upon the circumstances of the case

The *Glenn* Holdings (cont.)

- **Weighing the factors where a conflict is present—**
 - Any one factor will act as a tiebreaker when other factors are closely balanced
 - the degree of closeness depends on tiebreaking factor's inherent or case-specific importance
 - Conflict more important if circumstances suggest higher likelihood that it affected the benefits decision – *e.g.*, history of biased claims administration
 - Conflict less important (“perhaps to the vanishing point) where administrator has taken active steps to reduce potential bias and promote accuracy – *e.g.*, walling off claims administrators from those interested in firm finances or imposing management checks that penalize inaccurate decision-making

Analyzing the *Glenn* Facts

- In *Glenn*, the conflict was weighed along with several factors identified by the Court:
 - MetLife encouraged Glenn to argue to the Social Security Administration that she could not work. When Glenn persuaded the SSA, MetLife received most of the benefit of her success, then ignored the agency's finding – instead concluding that Glenn could in fact do sedentary work
 - MetLife emphasized a certain medical report that favored denial, while deemphasizing other reports suggesting a contrary conclusion
 - MetLife failed to provide its independent vocational and medical experts with complete information

Analyzing the *Glenn* Facts (cont.)

- Seemingly conflicting positions with respect to SSA; both financially advantageous → more weight given to the conflict
- Deemphasizing unfavorable reports, while emphasizing a report that favored denial → “serious concern”, appearance of bias
- Failing to provide experts with all relevant evidence → “serious concern”, appearance of bias

The Bottom Line

- Conflict of interest is presumed for dual-role administrators who have discretion to make eligibility determinations
- The standard of review is abuse of discretion
- The conflict of interest is one factor to be considered in a totality-of-the-circumstances analysis
- The weight given to the conflict will be **highly fact-sensitive** and **case-specific**

Emerging Issues in a Post-Glenn World

Although the seemingly uniform test articulated by the *Glenn* Court appears clear enough, its application to real facts and the issues that are likely to ensue may raise more **questions** than answers.

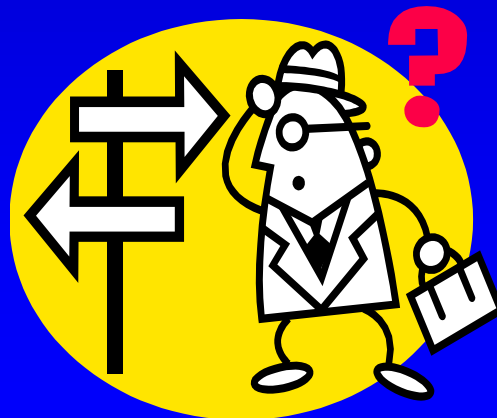


Emerging Issues in a Post-*Glenn* World

- What facts must a plaintiff establish to show the conflict and initiate the totality-of-the-circumstances analysis?
- What options does a conflicted, dual-role administrator have to reduce the effect of (*i.e.*, the weight given) the conflict factor under the *Glenn* analysis?
- What impact does *Glenn* have on discovery limitations?
- Will *Glenn* influence judicial analysis of burdens of proof and contract construction?

Emerging Issues Threshold Facts

What threshold facts must a plaintiff establish in order to prompt application of the “totality-of-the-circumstances” analysis?



Emerging Issues Threshold Facts (cont.)

In a published decision issued in December 2008, the Second Circuit applied the *Glenn* framework to an adverse benefits determination, finding that the conflicted administrator abused its discretion.

McCauley v. First Unum Life Ins. Co., 551 F.3d 126 (3rd Cir. 2008)

Emerging Issues Threshold Facts (cont.)

McCauley – standard of review:

- Under the deferential standard, a court may not overturn the administrator’s denial of benefits unless its actions are found to be arbitrary and capricious, meaning “without reason, unsupported by substantial evidence or erroneous as a matter of law.”
- “Where both the plan administrator and a spurned claimant offer rational, though conflicting, interpretations of plan provisions, **the administrator’s interpretation must be allowed to control.**”
- “[W]here the administrator imposes a standard not required by the plan’s provisions, or interprets the plan in a manner inconsistent with its plain words, its actions may well be found to be arbitrary and capricious.”

Emerging Issues Threshold Facts (cont.)

McCauley factors indicative of abuse of discretion:

- “Wholesale embrace” of one medical report supporting a claim denial to the detriment of a contrary report that favors granting benefits
- Representing to McCauley that the records submitted in support of his claim were reviewed by a physician, who concluded that the restrictions and limitations would not preclude McCauley from performing his occupation, when no records were reviewed by a physician at First Unum
- “[W]here an insurance company administrator has a history of biased claims administration.”

Emerging Issues Threshold Facts (cont.)

- Evidence of “history of biased claims administration”:
 - Other cases in which First Unum’s denials of benefits were determined to be unlawful, “reveal[ing] a disturbing pattern of erroneous and arbitrary benefits denials, bad faith contract misinterpretations, and other unscrupulous tactics.”
 - News reports on “60 Minutes” and “Dateline” regarding First Unum’s practices
 - Criticism in legal academia

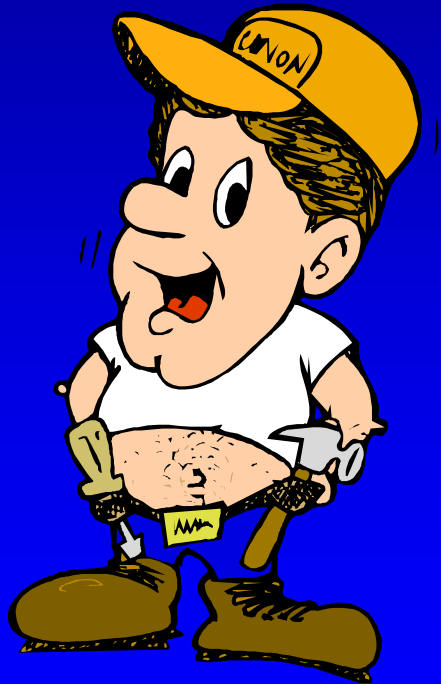
Emerging Issues Threshold Facts (cont.)

“In light of First Unum’s **well-documented history of abusive tactics**, and in the **absence of any argument by First Unum showing that it has changed its internal procedures in response**, we follow the Supreme Court’s instruction and emphasize [the conflict] factor here. Accordingly, we find First Unum’s history of deception and abusive tactics to be additional evidence that it was influenced by its conflict of interest as both plan administrator and payor in denying McCauley’s claim for benefits.”

Emerging Issues Threshold Facts (cont.)

- In *Young v. Wal-Mart Stores*, 293 Fed. Appx. 356 (5th Cir. Sept. 22, 2008), the Fifth Circuit gave virtually no weight to the conflict of interest factor under *Glenn*:
 - The conflict “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.”
 - Based on “substantial evidence” in the administrative record that supported AI Life’s determination, the court affirmed the benefits determination.

Emerging Issues Constructive Guidance



What tools does Glenn provide
for the **proactive** “conflicted”
administrator?

Emerging Issues Prophylactic Procedures

In *Glenn*, the Supreme Court arguably presented “conflicted” dual-role claims administrators with an opportunity to mitigate the effect of the conflict of interest, if not ameliorate it altogether.



Emerging Issues Prophylactic Procedures

- Negate history of biased claims administration
- Take active steps to reduce potential bias and promote accuracy –
 - Wall off claims administrators from those interested in company finances
 - Impose management checks that penalize inaccurate decision-making irrespective of whom the inaccuracy benefits
 - Incentives to award claims processors for accuracy



Emerging Issues Scope of Discovery

- In the post-*Glenn* world, will courts now allow limited discovery in benefits cases?
 - Some circuits already allow discovery
 - Court has discretion
 - Some discovery likely necessary, both for claimants to articulate the conflicts and for administrators and fiduciaries to reduce the impact in the totality-of-the-circumstances analysis

Emerging Issues Scope of Discovery

- *Wakkinen v. UNUM Life Ins. Co.*, 531 F.3d 575 (8th Cir. 2008) – recognizing that a history of biased claims administration, *i.e.*, the frequency with which an administrator denies claims and the bases for those denials, may warrant giving greater weight to the conflict of interest
- *McCauley v. First Unum Life Ins. Co.*, 551 F.3d 126 (3rd Cir. 2008) – considering news reports, other cases and legal academia in evaluating an administrator's alleged history of unscrupulous claims administration

Emerging Issues Contract Construction

In a published opinion issued March 11, 2009, the Fourth Circuit determined that, under *Glenn*, the long-standing doctrine of *contra proferentem* (an ambiguous contract is construed against its drafter) no longer applies in ERISA cases.

Carden v. Aetna Life Ins., No. 07-2165, __ F.3d __ (4th Cir. March 11, 2009)

Emerging Issues Contract Construction

The Carden facts:

- Plan provided LTD benefits to employees of Duke Energy
- Larry Carden, a power plant operator for Duke Energy, was diagnosed with episodic vertigo (causing imbalance and dizziness) and had been receiving benefits since 1997
- Carden also filed a workers' compensation claim in 1997, alleging that he suffered from asbestosis
- Duke Energy settled Carden for a lump sum payment
- Aetna later learned about the workers' comp settlement; advised Carden that the award was "other income" to be offset against his LTD benefits

Emerging Issues Contract Construction (cont.)

The issue in *Carden*:

- Case turned on interpretation of plan language, specifically “whether [Aetna], under the specific language of the plan documents ... is entitled to offset workers’ compensation benefits recovered by [Carden] against the monthly disability benefits being paid by [Aetna] to [Carden] when the physical basis for the disability benefits ... [*i.e.*, vertigo] is different than the physical basis which gave rise to the worker’s compensation award [*i.e.*, asbestosis]
- Issue is whether Aetna, functioning under a conflict of interest, acted reasonably in construing the plan language to provide for an offset against plan benefits in the amount of the workers’ comp award

Emerging Issues Contract Construction (cont.)

Analysis:

- Carden argued:
 - offset permitted only if the other income was for the same disability for which the LTD benefits are being paid
 - plan provisions were unambiguous, but if ambiguous, must be construed against Aetna because of Aetna’s conflict of interest under doctrine of *contra proferentem*
- Aetna argued:
 - Plan provided for offset
 - Plan vested Aetna with discretion to interpret plan – “Aetna shall have discretionary authority to ... construe any disputed or doubtful terms of this policy”

Emerging Issues Contract Construction (cont.)

- *Carden* Court determined:
 - *Glenn* altered several aspects of judicial review of ERISA plan determinations
 - Administrator’s conflict does not change discretionary standard of review
 - Supreme Court stated “broadly” **that conflict of interest should not lead to “special burden-of-proof rules, or other special procedural or evidentiary rules**, focused narrowly on the evaluator/payor conflict”

Emerging Issues Contract Construction (cont.)

- *Carden* Court determined (cont.):
 - ***Glenn* now forecloses our application of [the *contra proferentem* rule] to curb the discretion given to an administrator by a plan**
 - Supreme Court rejected the very idea of applying hard and fast rules for the review of ERISA determinations, calling them “formulas that will falsif[y] the actual process of judging” and “instrument[s] of futile casuistry”
 - Court must consider the conflict as one factor among many in determining reasonableness
 - Aetna’s interpretation of the plan was reasonable, “if not the best one,” and was consistent with the purposes stated in the plan
 - Aetna did not abuse its discretion