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LITIGATION REVIEW

Liberalizing Discovery in ERISA Disability Insurance Cases

BY KEVIN SCHLOSSER

Long-term disability insurance provided by employers and governed by the Employee Retirement Income Security Act of 1974, 29 U.S.C. §1001 et seq., has been fertile ground for litigation. Insofar as ERISA preempts any and all state laws "as they may now or hereafter relate to" an employer-sponsored disability insurance plan, a separate body of federal law exclusively governs all issues concerning such disability insurance claims. See 29 U.S.C. §§1144(a) & 1144(c)(1).

Among the heavily litigated issues is what standard of review the courts must undertake in determining whether the disability insurance plan administrator has properly denied benefits: de novo review or the more limited "abuse of discretion" standard. See Firestone Tire & Rubber Company v. Bruch, 489 U.S. 101, 115 (1989) (a de novo review is undertaken "unless the benefit plan gives the administrator . . . discretionary authority to determine eligibility for benefits").

In determining whether the plan in question contains the required language, the U.S. Court of Appeals for the Second Circuit has held there are no "magic words" that confer discretionary authority on the plan administrator as a matter of law, leaving the courts to address this issue on a case-by-case basis. See Kinstler v. First Reliance Standard Life Insurance Co., 181 F.3d 243, 251 (1999).

Another significant issue is whether the court may admit evidence beyond the materials or information considered by the plan administrator in reviewing the disability insurance claim (referred to as the "administrative record"). In the Second Circuit, district courts have discretion to admit evidence outside the administrative record upon a finding of "good cause." DeFelice v. American Intern. Life Assur. Co. of New York, 112 F.3d 61, 66 (1997).

A related issue, albeit entirely separate, is the extent to which the disability insurance claimant-plaintiff is entitled to discovery and, specifically, information and materials beyond the administrative record in prosecuting an action challenging the denial of benefits. Recent case law has liberalized the discovery available to such a plaintiff.

The U.S. Supreme Court's decision in Metropolitan Life Insurance Co. v. Glenn, 128 S.Ct. 2343 (2008), is likely to have significant impact on numerous issues litigated under ERISA, including the scope of discovery in such cases.

In Glenn, the claimant-plaintiff appealed both the administrative denial of her claim and the District Court's refusal to overturn that denial. The Sixth Circuit reversed and set aside the denial of the benefits, even though the "deferential standard" of review applied since the plan afforded the insurance company "discretionary authority to determine benefits."

On appeal to the Supreme Court, the two principal issues were (i) whether the insurance company was operating under a conflict of interest because it both provided the benefits and determined whether to pay the claims and (ii) how such a conflict should be taken into account when a court reviews the administrator's denial of benefits under the deferential standard.

Analyzing the issues under traditional common law principles of trust law, the Court ruled that where the plan administrator "both evaluates claims for benefits and pays benefits," a conflict of interest does indeed exist. The Court declined, however, to set any preconceived standards in addressing that conflict, ruling that the courts must consider this conflict of interest as a factor, among others, in determining whether the administrator abused its discretionary authority and thereby wrongfully denied the claim.

Significantly, in upholding reversal of the claim denial in Glenn, the Court approved of the Sixth Circuit's consideration of several factors: (1) an insurance company administrator's history of biased claims administration; (2) whether an administrator has taken active steps to reduce potential bias and promote accuracy, such as "by walling off claims administrators from those interested in firm finances, or by imposing management checks that penalize inaccurate decisionmaking irrespective of whom the inaccuracy benefits"; (3) whether the administrator

Kevin Schlosser *is a partner and chair of the Litigation Department at Meyer, Suozzi, English & Klein, P.C., Counselors at Law, Garden City, New York (516) 741-6565 • kschlosser@msek.com*

has encouraged the claimant to obtain Social Security benefits only to reject the grant of such benefits in determining whether to pay the insurance benefits; and (4) whether the insurance company has emphasized edical reports and evidence that favor a denial while de-emphasizing contrary evidence.

Given the Court's approval of the Sixth Circuit's consideration of these factors, it follows logically that claimant-plaintiffs should be entitled to discovery beyond the administrative record to delve into these issues to determine whether the plan administrator abused its discretionary authority to determine benefits.

Southern District Case

A recent well-reasoned decision in the Southern District of New York determined that the Supreme Court's decision in Glenn had removed any doubt as to whether discovery should be allowed in ERISA cases seeking to challenge the denial of disability insurance benefits.

In Hogan-Cross v. Metropolitan Life Insurance Company, 2008 WL 2938056, the defendant insurance company sought to resist any "material disclosure, contending that review of its termination of benefits is measured by the arbitrary and capricious standard and . . . that such review is confined to the administrative file."

The court categorically rejected this position, approving of broad, yet relevant, discovery well beyond the administrative record. Relying on Glenn's admonition that no "special procedural or evidentiary rules" should be applied in ERISA cases of this nature, the court found that the discovery issues should be analyzed the same as they are in any other case - "whether the discovery sought is relevant in itself or 'appears reasonably calculated to lead to the discovery of admissible evidence.'"

Thus, the court allowed plaintiff discovery "concerning approval and termination rates for [the employer's] long term disability claims and statistics regarding long term disability claims administered by [the defendant] in litigation." The court also approved of discovery seeking "information regarding the compensation of 'persons involved in evaluating, advising upon, or determining plaintiff's eligibility for continued benefits.'"

In approving the broad discovery requested, the court observed: "The categorical or nearly categorical view of [certain prior cases] that discovery is seldom if ever permissible in these [ERISA disability insurance] cases, at least if the existence of the conflict inherent in the plan administrator both determining claims and paying benefits is apparent on the record - thus is blind to potentially important information that, at least in some cases, may be critical to the fair and informed review of benefit claims."

The court thereby interpreted Glenn as "abrogate[ing] the limitations on discovery unique to ERISA cases that were imposed or applied by [cases rendered before Glenn]."

Eastern District Case

Another recent decision in the U.S. District Court for the Eastern District of New York also approved of discovery beyond the administrative record, albeit in more limited terms, and without reference to Glenn.

In Garg v. Winterthur Life, 2008 WL 4004960, the defendant insurance company moved for the court to determine the applicable standard of review and to limit discovery to the administrative record.

First, the court determined that defendant had not sustained its burden of proving that a deferential standard of review applied because it failed to lay an appropriate evidentiary foundation for the document it claimed contained the allegedly discretionary language giving rise to the deferential standard of review.

The court then turned to what it referred to as the question of whether evidence outside of the administrative record could be considered under the "good cause" standard announced by the Second Circuit in DeFelice.

While the issue as to whether to admit additional evidence is different than whether plaintiff is entitled to discovery beyond the administrative record, the court appears to have focused at that stage of the litigation on whether plaintiff would be entitled to discovery in an effort to satisfy the "good cause" requirement.

Without citing the U.S. Supreme Court's decision in Glenn (the motion was briefed before Glenn was decided), the court found "that discovery in this action may proceed outside of the administrative record, in order to allow the court to determine the appropriate standard of review."

Thus, the court in Garg limited discovery to whether the defendant "had a conflict of interest when it denied [plaintiff's] request for disability benefits, and whether that conflict influenced its decision."

While the court did not elaborate on what type of discovery would be allowed under these issues, it would appear that the same issues approved of in Glenn and elaborated upon in Hogan-Cross would be fair game.

Conclusion

As courts continue to review these highly litigated issues in ERISA cases, the U.S. Supreme Court's decision in Glenn should have a significant impact. Certainly, with respect to the scope and extent of discovery, Glenn should remove any doubt that the full, unfettered type of discovery provided by the Federal Rules of Civil Procedure should apply, regardless of whether the case is governed by ERISA.

Indeed, as Hogan-Cross noted, courts still have at their disposal all of the normal remedies to limit "needlessly expensive discovery" in ERISA cases. However, as the court so aptly observed: "Blunderbuss attempts to cut off discovery on the ground that it never or rarely should be permitted in [ERISA] cases, whatever their merits before Glenn, no longer have merit."