THE EIGHTH CIRCUIT'S EVOLVING STANDARD OF REVIEW IN ERISA CONFLICT-OF-INTEREST CASES: PAST, PRESENT, AND FUTURE

ABSTRACT

Today, the vast majority of public-sector employee benefit plans are covered by the Employee Retirement Income Security Act of 1974 (ERISA), a comprehensive statute designed to protect the participants and beneficiaries of these plans. One issue that routinely arises in ERISA-related litigation is the appropriate standard of review of a plan administrator's decision to deny benefits. This determination is particularly problematic when the plan administrator acts under a conflict of interest, that is, when the entity that funds the ERISA-governed plan also determines a claimant's eligibility for benefits. Due to the conflict, claimants seeking judicial review of a denial of their benefits routinely ask courts to give less deference than that typically applied under the arbitrary and capricious standard. The U.S. Supreme Court, in a trilogy of cases, attempted to instruct courts on what level of deference to give to the decisions of conflicted plan administrators. By analyzing the Eighth Circuit's response to each of these landmark cases, this Note charts the history of the Eighth Circuit's jurisprudence regarding the level of deference given to decisions of conflicted administrators. The Note also analyzes the Eighth Circuit's response to the Supreme Court's most recent decision on this subject, Metropolitan Life Insurance Co. v. Glenn*, which reiterated to lower courts that the deferential arbitrary and capricious standard should be applied but that the conflict should be taken into account. This Note also addresses questions that have arisen in* Glenn*'s aftermath, specifically, whether claimants should be permitted discovery relating to the plan administrator's conflict and whether* Glenn *opened a door allowing defendants to almost completely shield themselves from having a court scrutinize their conflict of interest. Because the Eighth Circuit has yet to rule on whether some form of discovery is allowed, this Note argues that the court should permit at least some form of limited discovery.*

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I. INTRODUCTION

The Employee Retirement Income Security Act of 1974 (ERISA) was enacted in response to the rapidly growing number of employee benefit plans and to protect the millions of employees covered by such plans.[1] Today, the vast majority of private-sector employee benefit plans—including health, disability, and pension plans—are covered by ERISA.[2] In order to protect the recipients and beneficiaries of employee benefit plans, ERISA laid out a broad framework that requires "the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, . . . establish[es] standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and . . . provid[es] for appropriate remedies, sanctions, and ready access to the [f]ederal courts."[3]

While ERISA opened the federal courthouse doors, its preemption provisions, combined with the courts' highly restrictive reading of the

1. Employment Retirement Income Security Act of 1974, Pub. L. No. 93-406, § 2(a), 88 Stat. 829, 832–33 (codified at 29 U.S.C. § 1001(a) (2012)) [hereinafter ERISA].

2. As of 2003, the employee benefit plans of approximately 131 million people were covered by ERISA. HINDA RIPPS CHAIKIND, CONG. RESEARCH SERV., ERISA REGULATION OF HEALTH PLANS: FACT SHEET 1 (2003), *available at* http://www.allhealth.org/briefingmaterials/erisaregulationofhealthplans-114.pdf. A 2008 report estimated that approximately 132.8 million people were covered by ERISA-governed health plans in 2006. William Pierron & Paul Fronstin, *ERISA Pre-emption: Implications for Health Reform and Coverage*, EBRI ISSUE BRIEF (Emp. Benefit Research Inst., Wash., D.C.), Feb. 2008, at 1, *available at* http://www.ebri.org/pdf/briefspdf/EBRI_IB_02a-20082.pdf.

3. 29 U.S.C. § 1001(b).

statute, have deprived plaintiff participants and beneficiaries of many of the remedies that would otherwise be available to them under state law.[4] Although ERISA was heralded by legislators as a landmark statute that would protect the rights of those covered by employer-run retirement and benefits plans, judicial interpretation of ERISA has largely resulted in a set of rules that are so defendant friendly, some commentators have wondered whether employees might be better off without ERISA.[5] The U.S. Supreme Court justifies its restrictive reading of ERISA as a way to avoid creating

4. DAVID A. PRATT & SHARON REECE, ERISA AND EMPLOYEE BENEFIT LAW: THE ESSENTIALS 7, 353 (2010). ERISA contains three preemption-related provisions: the preemption clause, the saving clause, and the deemer clause. Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 44–45 (1987).

Under the preemption clause, ERISA preempts any state law that "relate[s] to" an ERISA plan. ERISA § 514(a). The U.S. Supreme Court has held that a state law "relates to" an ERISA plan, and is thus preempted, if it references, targets, has a connection to, or directly affects an ERISA plan. Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 96–97 (1983); *see* Jillian Redding, *ERISA: Remedies, Preemption and the Need for More State Regulatory Oversight*, 18 CONN. INS. L.J. 169, 175 (2011). The savings clause, meanwhile, will save from preemption state laws that regulate insurance, banking, or securities. ERISA § 514(b)(2)(A). "An example of this is when an employer purchases insurance for group coverage of its employees under a plan, thus uses an insurer, and the plan is subject to state regulation because the employer is using direct insurance and there is an insurance contract." Redding, *supra*.

The deemer clause works in conjunction with the savings clause. *See Dedeaux*, 481 U.S. at 45. In essence, "insured" plans are covered under the saving clause and are subject to state law regulation. *Id.*; ERISA § 514(b)(2)(A). "Self-funded" plans, per the deemer clause, are not subject to state laws. *See* ERISA § 514(b)(2)(B); *Dedeaux*, 481 U.S. at 45.

> A plan is self-funded when the employer completely funds the plan, or creates a trust for the employee . . . plans and deposits money for the claims into the trust. . . . [D]ue to numerous state insurance regulation laws which are expensive to comply with, employers are more likely to avoid the costs of complying with the insurance state regulations by creating a trust.

Redding, *supra*.

The primary reason the Court has given for ERISA's expansive preemption of state laws and remedies is to encourage employers to create ERISA plans by protecting them from nearly all of the remedies provided by state law. *See Dedeaux*, 481 U.S. at 54 ("[T]he inclusion of certain remedies and the exclusion of others under the federal scheme would be completely undermined if ERISA-plan participants and beneficiaries were free to obtain remedies under state law that Congress rejected in ERISA.").

5. *See, e.g.*, Andrew Stumpff, *Darkness at Noon: Judicial Interpretation May Have Made Things Worse for Benefit Plan Participants Under ERISA Than Had the Statute Never Been Enacted*, 23 ST. THOMAS L. REV. 221, 222–24 (2011).

"a system that is so complex that administrative costs, or litigation expenses, unduly discourage employers from offering [ERISA] plans in the first place."[6] In other words, to encourage employers to create ERISA-governed benefit plans, the Court has essentially insulated employers from many of the claims of abuse that ERISA was designed to prevent and remedy.[7]

One of the greatest difficulties facing claimants who have been denied benefits is the deferential "arbitrary and capricious" standard of review courts apply to plan administrators' decisions to deny benefits.[8] This highly deferential standard applies even when the plan administrator acts with a "conflict of interest"—a conflict generally occurs when the administrator of a plan is also the plan insurer.[9] This difficulty faces the vast majority of plaintiffs seeking judicial review of a denial of their benefits because most entities that fund an ERISA-governed plan also determine a claimant's eligibility for benefits.[10] A deferential standard of review is not required by the ERISA statute.[11] Rather, it is a judicially created rule developed by the Supreme Court in 1989.[12]

Ultimately, even though ERISA guarantees plaintiffs their day in court, judicial interpretation that ERISA preempts nearly all state law claims has guaranteed defendants that the day can take place in a federal

6. Vanity Corp. v. Howe, 516 U.S. 489, 497 (1996).

7. *See* Stumpff, *supra* note 5, at 223. *See generally id.* at 228–36.

8. *See* Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 115 (1989); Stumpff, *supra* note 5, at 230.

9. McGarrah v. Hartford Life Ins. Co., 234 F.3d 1026, 1030 (8th Cir. 2000) ("[I]t is wrong to assume a financial conflict of interest from the fact that a plan administrator is also the insurer."), *abrogated by* Metro. Life Ins. Co. v. Glenn, 554 U.S. 105 (2008); Sahulka v. Lucent Techs., Inc., 206 F.3d 763, 768–69 (8th Cir. 2000) (declining to apply a less deferential standard of review because plaintiff failed to show the conflict was causally connected to the decision to deny benefits); Barnhart v. Unum Life Ins. Co. of Am., 179 F.3d 583, 587 (8th Cir. 1999) (citing Woo v. Deluxe Corp., 144 F.3d 1157, 1161 (8th Cir. 1998)) (holding that not every conflict of interest warrants a less deferential standard of review); *Woo*, 144 F.3d at 1161 (adopting a test for determining what standard of review should apply to conflict of interest cases), *abrogated by* Metro. Life Ins. Co. v. Glenn, 554 U.S. 105 (2008).

10. *See Glenn*, 554 U.S. at 108 ("Often the entity that administers the plan, such as an employer or an insurance company, both determines whether an employee is eligible for benefits and pays benefits out of its own pocket."); Marrs v. Motorola, Inc., 577 F.3d 783, 789 (7th Cir. 2009) (noting that a structural conflict of interest exists in almost every ERISA case).

11. *Firestone*, 489 U.S. at 109.

12. *See id.* at 115.

court.[13] Once there, plaintiffs face the uphill battle of proving that the denial of benefits was not only wrong but "*so* wrong as to have been 'arbitrary and capricious.'"[14] Because the deferential arbitrary and capricious standard of review is extremely difficult to overcome, plaintiffs have repeatedly argued for a less deferential standard in certain circumstances, such as when the plan administrator acted under a conflict of interest or when the denial of benefits was preceded by a significant procedural irregularity.[15] Some courts, including the Eighth Circuit, have recognized the possibility for a less deferential review in particularly egregious circumstances.[16] How courts interpret Supreme Court decisions regarding the appropriate level of review and whether they are willing to apply a less deferential standard in some cases can have a significant impact on a plaintiff's chances of winning a claim for benefits.[17]

Part II of this Note provides an overview and history of the various standards of review courts have employed when reviewing decisions made by conflicted plan administrators. It also discusses the major Supreme Court decisions in this area of law and the Eighth Circuit's reaction to each of these cases. Most importantly, Part II will discuss *Metropolitan Life Insurance Co. v. Glenn*,[18] the Court's most recent landmark decision, in detail. Part III discusses, with a focus on the Eighth Circuit, two major issues that have emerged post-*Glenn*: the appropriate scope of discovery in cases involving a conflicted administrator and the possibility that administrators may be able to rely on *Glenn* to further shield themselves from claims that a conflict led to an improper denial of benefits. Part IV describes how the Eighth Circuit has an opportunity to change course from its history of restrictive interpretation. By following the lead of some of the

13. *See* 29 U.S.C. § 1132(a)(1)(B), (e) (2012). These sections give federal courts jurisdiction to hear ERISA-related claims but also give states concurrent jurisdiction in some claims. *Id.* § 1132(e). However, if the claims are ERISA-related, the suit will always be subject to removal to federal court. Redding, *supra* note 4, at 176. And since the "conventional wisdom is that ERISA plaintiffs . . . fare better in state court," defendants will "almost always seek to remove the action to federal court" if it is originally filed in a state court. PRATT & REECE, *supra* note 4, at 370.

14. Stumpff, *supra* note 5, at 231 (quoting *Firestone*, 489 U.S. at 114–15).

15. *See, e.g.*, McGarrah v. Hartford Life Ins. Co., 234 F.3d 1026, 1030 (8th Cir. 2000) (rejecting plaintiff's argument and applying a more deferential abuse of discretion standard), *abrogated by Glenn*, 554 U.S. at 105; Woo v. Deluxe Corp., 144 F.3d 1157, 1160 (8th Cir. 1998), *abrogated by Glenn*, 554 U.S. 105.

16. *Woo*, 144 F.3d at 1161–62.

17. *See* Stumpff, *supra* note 5, at 231.

18. *Glenn*, 554 U.S. at 105.

other circuit courts of appeals and lower federal court decisions, the Eighth Circuit could open the door to more successful claims by ensuring plaintiffs have adequate access to discovery to determine how greatly the administrator was conflicted, whether the conflict played a role in the decision to deny benefits, and whether the defendant's attempts to prevent the conflict from influencing decisionmaking were successful.

II. STANDARD OF REVIEW AND CONFLICTS: THE BASICS

The standard of review in ERISA cases has been guided by two landmark Supreme Court decisions: *Firestone Tire & Rubber Co. v. Bruch* and *Glenn*.[19] Although ERISA does not demand any particular level of review,[20] the Court has held that the default standard is de novo,[21] "under which the reviewing court examines the merits afresh."[22] However, when an ERISA-governed employee benefits plan grants the administrator discretionary authority, the standard of review is for "abuse of discretion," and the administrator's decision will be upheld unless the plaintiff can show the decision was arbitrary and capricious.[23] As such, most plans will grant the administrator discretionary authority to ensure its decisions are reviewed using the highly deferential arbitrary and capricious standard.[24] Problems with this two-option framework arise when a plan administrator acts under a conflict of interest.

A. *Conflicted Plan Administrators*

ERISA specifically allows employers to choose plan administrators who operate under a conflict of interest.[25] Conflicted administrators are often those who both determine a claimant's eligibility for benefits and also

19. *Id.* at 115–16; Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 115 (1989).

20. *See Firestone*, 489 U.S. at 108–09 ("Although it is a 'comprehensive and reticulated statute,' ERISA does not set out the appropriate standard of review . . . ." (citation omitted) (quoting *Nachman Corp. v. Pension Benefit Guaranty Corp.*, 446 U.S. 359, 361 (1980))).

21. *Id.* at 115.

22. John H. Langbein, Essay, *Trust Law As Regulatory Law: The Unum/Provident Scandal and Judicial Review of Benefit Denials Under ERISA*, 101 Nw. U. L. REV. 1315, 1322 (2007).

23. *See Firestone*, 489 U.S. at 115.

24. *See* Langbein, *supra* note 22, at 1323.

25. ERISA § 408(c)(3) (permitting ERISA fiduciaries to also serve as "an officer, employee, agent, or other representative of a party in interest").

pay out the claims from their own coffers.[26] This structural conflict can arise in two ways. The first way is when the employer self-funds the plan, most commonly by establishing a trust fund, and then also determines the eligibility of those claiming rights to benefits.[27] The second type of structural conflict arises when an employer contracts with an insurance company, which then both determines eligibility and pays benefits.[28] As explained by the Third Circuit in the lead-up to *Firestone*, this conflict arises because "every dollar provided in benefits is a dollar spent by [the administrator's employer]; and every dollar saved by the administrator on behalf of his employer is a dollar in [the employer's] pocket."[29] Today, most plan administrators act under this inherent conflict of interest.[30] Both *Firestone* and *Glenn* attempted to provide guidance to federal courts on the appropriate level of deference in cases involving a conflicted administrator.[31]

B. *The* Firestone *Era*

In *Firestone*, six Firestone employees sought benefits under and information about three ERISA-governed benefit plans that were self-funded by Firestone.[32] Firestone sold five of its plants to another company, which in turn rehired most of the Firestone plant employees.[33] After the sale, the six plaintiffs sought severance benefits under Firestone's termination pay plan, which provided that participants would receive termination pay if their employment was terminated due to "a reduction in work force."[34] Several of the plaintiffs also sought information regarding their benefits, pursuant to ERISA's disclosure requirements, under all

26. Metro. Life Ins. Co. v. Glenn, 554 U.S. 105, 108 (2008).

27. *See* Langbein, *supra* note 22, at 1326 ("ERISA fiduciaries are commonly aligned with the employer . . . .").

28. *See id.*

29. Bruch v. Firestone Tire & Rubber Co., 828 F.2d 134, 144 (3d Cir. 1987), *aff'd in part, rev'd in part*, 489 U.S. 101 (1989).

30. *See Glenn*, 554 U.S. at 116 (declining to adopt a de novo standard of review for all conflicts cases because it "could bring about near universal review by judges . . . of the lion's share of ERISA plan claims denials"); *see also* Colucci v. Agfa Corp. Severance Pay Plan, 431 F.3d 170, 179 (4th Cir. 2005) (stating that the existence of dual-role administrators is "commonplace"), *abrogated by Glenn*, 554 U.S. at 105.

31. *See Glenn*, 554 U.S. at 108; *Firestone*, 489 U.S. at 105.

32. *Firestone*, 489 U.S. at 105–06.

33. *Id.* at 105.

34. *Id.* at 105–06.

three ERISA plans provided by Firestone.[35] Firestone denied all requests, claiming the plants' sale "did not constitute a 'reduction in workforce' within the meaning of the termination pay plan" and that the former employees "were not entitled to the information [about their benefits] because they were no longer 'participants' in the plans."[36]

The district court determined Firestone's denial of severance benefits was not arbitrary or capricious and granted Firestone's motion for summary judgment.[37] The Third Circuit reversed, reasoning that although federal courts usually apply the arbitrary and capricious standard when reviewing a denial of ERISA benefits, some courts apply a less deferential standard when the fiduciary acts under a conflict of interest.[38] When, as in Firestone's case, the employer is both the fiduciary and the administrator, a de novo review is appropriate "given the lack of assurance of impartiality on the part of the employer."[39] The Supreme Court granted certiorari in an attempt to resolve the circuit split regarding the appropriate standard of review.[40]

The Court's *Firestone* decision is important for three major holdings, all of which are based on principles of trust law. First, the Court held that a de novo review should be the default standard.[41] Second, if the plan grants the administrator discretionary authority to interpret the terms of a plan or to determine eligibility for benefits, then the administrator's decision should be reviewed under the arbitrary and capricious standard.[42] Third, if the plan grants the administrator discretionary authority and the administrator acts under a conflict of interest, the "conflict must be weighed as a 'facto[r] in determining whether there is an abuse of discretion.'"[43] The Firestone plan did not grant the company any discretionary authority, so the Court remanded the case with instructions to conduct a de novo review of the decision to deny benefits.[44]

35. *Id.* at 106.

36. *Id.*

37. *Id.* at 106–07 (citing Bruch v. Firestone Tire & Rubber Co., 640 F. Supp. 519, 521–26 (E.D. Pa. 1986)).

38. *Id.* at 107 (citing *Firestone*, 828 F.2d at 138–40).

39. *Id.* at 107–08 (citing *Firestone*, 828 F.2d at 137–45).

40. *Id.* at 108.

41. *Id.* at 112–13.

42. *See id.* at 114–15.

43. *Id.* at 115 (alteration in original) (quoting RESTATEMENT (SECOND) OF TRUSTS § 187 cmt. d (1959)).

44. *Id.* at 118.

Significantly, the Court stressed its preference for de novo review throughout the *Firestone* opinion.[45] Although Firestone urged the Court to set the arbitrary and capricious standard as the default standard, the Court rejected this argument, noting that "ERISA was enacted 'to promote the interests of employees and their beneficiaries in employee benefit plans,' and 'to protect contractually defined benefits.'"[46] The Court feared the arbitrary and capricious standard would reduce the rights and remedies ERISA was meant to protect.[47] The Court recognized that a de novo standard could increase ERISA-related litigation, but "the threat of increased litigation is not sufficient to outweigh the reasons for a *de novo* standard."[48]

At first glance, the *Firestone* decision appeared to be a win for ERISA plaintiffs because the Court's clear preference for de novo review seemed to ensure strong judicial oversight of plan administrators' decisions to deny benefits.[49] However, in response to the *Firestone* decision, most plan administrators amended their plans to ensure they contained explicit language granting discretionary authority, thereby guaranteeing the highly deferential arbitrary and capricious standard.[50]

1. *The Eighth Circuit's Response*

In adherence to *Firestone*, courts first look to the plan's language to determine whether it grants the plan administrator express discretion in evaluating a claimant's eligibility for benefits.[51] If the plan does not grant the administrator discretion, the court will review the decision to deny

45. *See, e.g.*, *id.* at 112 (stating that the "trust law *de novo* standard of review is consistent with the judicial interpretation of employee benefit plans prior to the enactment of ERISA"); *id*. at 113–14 ("Adopting Firestone's reading of ERISA [that arbitrary and capricious should be the default standard] would require us to impose a standard of review that would afford less protection to employees and their beneficiaries than they enjoyed before ERISA was enacted.").

46. *Id.* at 113 (citations omitted) (quoting Shaw v. Delta Airlines, Inc., 463 U.S. 85, 90 (1983); Massachusetts Mutual Life Ins. Co. v. Russell, 473 U.S. 134, 148 (1985)).

47. *See Firestone*, 489 U.S. at 113–14.

48. *Id.* at 114–15.

49. *See id.*

50. Jayne Zanglein & Matthew Lenihan, *When Is a Plan Administrator No Longer Entitled to Deference Under ERISA?*, 37 PREVIEW U.S. SUP. CT. CAS., 169, 171 (2010).

51. Brown v. Seitz Foods, Inc. Disability Benefit Plan, 140 F.3d 1198, 1200 (8th Cir. 1998).

benefits under the de novo standard.[52] However, when plans contain explicit discretion-granting authority, courts apply an abuse of discretion standard, which, in the Eighth Circuit, is identical to the arbitrary and capricious standard.[53] Since most administrators added discretion-granting language to their plans to ensure deferential review, plaintiffs argued that the decisions of conflicted administrators should be given less deference.[54] By the time the Eighth Circuit first addressed the appropriate standard of review in conflict of interest cases,[55] a new circuit split had already developed on the issue.[56] In *Firestone,* the Supreme Court instructed courts that a conflict of interest should be weighed as a factor in determining whether there was an abuse of discretion.[57] In response,

> [Some circuits] adopted a "presumptively void" test under which a decision rendered by a plan administrator with such a conflict is presumed to be an abuse of discretion unless the administrator can demonstrate that either (1) under de novo review the result was correct, or (2) the decision was not made to serve the administrator's conflicting interest. [Other circuits] use a "sliding scale" approach, under which the reviewing court always applies an abuse-of-discretion standard but decreases the amount of discretion given to the administrator's decision in proportion to the seriousness of the conflict.[58]

The Eighth Circuit first grappled with this issue in *Armstrong v. Aetna Life Insurance Co.*, in which the court declined to adopt either the "presumptively void" or "sliding scale" approach, but the court's reasoning in *Armstrong* suggested it was leaning toward a presumptively void

52. *See id.*

53. Schatz v. Mut. of Omaha Ins. Co., 220 F.3d 944, 946 n.4 (8th Cir. 2000) ("We think review for an 'abuse of discretion' or for being 'arbitrary and capricious' is a distinction without a difference, and we use the terms interchangeably here."); *see Brown*, 140 F.3d at 1200.

54. Zanglein & Lenihan, *supra* note 50; *see Schatz*, 220 F.3d at 947.

55. *See* Armstrong v. Aetna Life Ins. Co., 128 F.3d 1263, 1265 (8th Cir. 1997) ("We have not addressed the appropriate standard for review where the insurer of a health benefits plan is also the plan administrator.").

56. *See id.* (noting that the Ninth and Eleventh Circuits applied a "presumptively void" approach, while the Fourth, Fifth, Seventh, and Tenth Circuits applied a "sliding scale" standard of review). For a more in-depth discussion of the various standards of review applied by the circuits post-*Firestone*, see *infra* Part II.B.2.

57. Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 115 (1989).

58. *Armstrong*, 128 F.3d at 1265.

framework.[59]

Just a few months after the *Armstrong* decision, however, the court changed course and developed the framework that would govern ERISA conflict of interest cases in the Eighth Circuit for the next decade. In *Woo v. Deluxe Corp.*, the Eighth Circuit officially adopted the sliding scale approach[60] and developed a two-pronged test (the Woo Test) plaintiffs must meet to obtain a standard of review less deferential than abuse of discretion.[61] Under the Woo Test, the plaintiff "must present material, probative evidence demonstrating that (1) a palpable conflict of interest or serious procedural irregularity existed, which (2) caused a serious breach of the plan administrator's fiduciary duty to" the claimant.[62] If the plaintiff meets this two-part test, the court technically still uses an abuse of discretion standard.[63] However, some reviewing courts will "decrease the deference given to the administrator in proportion to the seriousness of the conflict of interest."[64] Finally, applying the sliding scale approach requires "evidence supporting the plan administrator's decision [to] increase in proportion to the seriousness of the conflict."[65]

Although the Woo Test allowed for the possibility of a less deferential standard,[66] in reality, few plaintiffs were able to meet the evidentiary burden to show that the conflict had a causal connection to the denial of benefits.[67] Indeed, the Eighth Circuit stated the second prong of

59. *Id.* (noting it was applying the reasoning of the Eleventh Circuit, which had adopted the presumptively void framework for perpetual conflicts).

60. Woo v. Deluxe Corp., 144 F.3d 1157, 1161 (8th Cir. 1998), *abrogated by* Metro. Life Ins. Co. v. Glenn, 554 U.S. 105 (2008).

61. *Id.* at 1160.

62. *Id.*

63. *See id.* at 1161.

64. *Id.*

65. *Id.* at 1162 (citing Ellis v. Metro. Life Ins. Co., 126 F.3d 228, 233 (4th Cir. 1997)).

66. *See id.* at 1160–61 (adopting a test for determining what standard of review should apply to conflict of interest cases).

67. *See, e.g.*, McGarrah v. Hartford Life Ins. Co., 234 F.3d 1026, 1030 (8th Cir. 2000) ("[I]t is wrong to assume a financial conflict of interest from the fact that a plan administrator is also the insurer."), *abrogated by* Metro. Life Ins. Co. v. Glenn, 554 U.S. 105 (2008); Sahulka v. Lucent Techs., Inc., 206 F.3d 763, 768–69 (8th Cir. 2000) (declining to apply a less deferential standard of review because the plaintiff failed to show the conflict was causally connected to the decision to deny benefits); Barnhart v. Unum Life Ins. Co. of Am., 179 F.3d 583, 587 (8th Cir. 1999) (holding that not every conflict of interest warrants a less deferential standard of review).

the Woo Test "presents a considerable hurdle for plaintiffs."[68] Seven years after *Woo*, the Eighth Circuit noted that it was "aware of only two cases that [had] satisfied" the second prong of the test.[69] Thus, although the Eighth Circuit did, in theory, allow for the possibility of a less deferential standard of review, the fact that few plaintiffs were able to meet the burden indicates the Eighth Circuit had one of the more relatively restrictive rules.[70]

2. *Standards of Review Across the Circuits*

Most circuits, including the Eighth Circuit, require the plaintiff to prove that the administrator was conflicted *and* that the conflict influenced the decision to deny benefits.[71] The First Circuit places "the burden on the claimant to show that the . . . decision was improperly motivated."[72] The Second Circuit also places the burden on the plaintiff to show both that the plan administrator acted under a conflict and that the conflict actually influenced the decision.[73] However, if the burden is met, the administrator's decision is reviewed de novo.[74] The Third, Fifth, and Tenth Circuits also use a sliding scale analysis but automatically consider the conflict as a factor.[75] The Fourth Circuit always construes the plan language against the insurer if it has a conflict of interest.[76] The Sixth[77] and Ninth[78] Circuits do not recognize the possibility for a less deferential standard of review. However, when the plan administrator acted under a conflict of interest, the conflict is always considered as a factor when determining

68. *Barnhart*, 179 F.3d at 588 n.9.

69. Torres v. Unum Life Ins. Co. of Am., 405 F.3d 670, 679 (8th Cir. 2005).

70. *See id.*

71. Langbein, *supra* note 22, at 1333–34 (quoting Schatz v. Mut. of Omaha Ins. Co., 220 F.3d 944, 948 (8th Cir. 2000)).

72. Pari-Fasano v. ITT Hartford Life & Accident Ins. Co., 230 F.3d 415, 418 (1st Cir. 2000) (internal quotation mark omitted) (quoting Doyle v. Paul Revere Life Ins. Co., 144 F.3d 181, 184 (1st Cir. 1998)).

73. Pulvers v. First Unum Life Ins. Co., 210 F.3d 89, 92 (2d Cir. 2000), *abrogated by* Metro. Life Ins. Co. v. Glenn, 554 U.S. 105 (2008).

74. *Id.*

75. *See* Estate of Schwing v. Lilly Health Plan, 562 F.3d 522, 525 (3d Cir. 2009); Weber v. GE Grp. Life Assurance Co., 541 F.3d 1002, 1010 (10th Cir. 2008); Crowell v. Shell Oil Co., 541 F.3d 295, 311 n.66 (5th Cir. 2008).

76. *See* Champion v. Black & Decker (U.S.) Inc., 550 F.3d 353, 359 (4th Cir. 2008).

77. Calvert v. Firstar Fin., Inc., 409 F.3d 286, 293 (6th Cir. 2005).

78. Abatie v. Alta Health & Life Ins. Co., 458 F.3d 955, 967–68 (9th Cir. 2006) (rejecting the sliding scale standard of review).

whether the decision was arbitrary and capricious.[79] The Seventh Circuit has held that a conflict does not necessarily arise just because the plan administrator both determines eligibility and pays the benefits.[80] Meanwhile, the Eleventh Circuit shifts the burden to the conflicted fiduciary, requiring it to show the conflict played no role in the denial of benefits.[81]

C. Glenn: *An Overview*

In response to the circuit split over the appropriate standard of review, the Supreme Court in *Glenn* was again asked to determine whether a less deferential standard of review was appropriate when reviewing a conflicted administrator's decision to deny benefits.[82] The Court declined to recognize any less deferential standard of review and held that abuse of discretion is the appropriate standard, even when a plan administrator acts with a conflict.[83]

Glenn contains two significant holdings. First, when an entity—such as an employer or insurance company—plays the dual role of both determining who is eligible for benefits and also paying the benefits, that entity operates under an inherent conflict of interest.[84] Second, the conflict should be weighed as one of several "different, often case-specific, factors" when evaluating whether there was an abuse of discretion.[85] When the factors are closely balanced, the conflict could act as a tiebreaker.[86] As the Court explained,

> The conflict . . . 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

79. *Id.* at 968–69; *Calvert*, 409 F.3d at 292.

80. *E.g.*, Cozzie v. Metro. Life Ins. Co., 140 F.3d 1104, 1108 (7th Cir. 1998). For an in-depth discussion of the Seventh Circuit's post-*Firestone* and pre-*Glenn* case law on the standard of review in conflict of interest cases, see Barbara C. Long, Note, *Conflict of Interest and the Standard of Review in ERISA Cases: The Seventh Circuit's Refusal to Acknowledge What Other Circuits Already Know*, 1 SEVENTH CIRCUIT REV. 152 (2006).

81. Doyle v. Liberty Life Assurance Co. of Bos., 511 F.3d 1336, 1340 (11th Cir.), *withdrawn and superseded*, 542 F.3d 1352 (11th Cir. 2008).

82. Metro. Life Ins. Co. v. Glenn, 554 U.S. 105, 110 (2008).

83. *Id.* at 108.

84. *Id.*

85. *Id.* at 117.

86. *Id.*

> 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 decisionmaking irrespective of whom the inaccuracy benefits.[87]

The Court ultimately affirmed the lower court's ruling in favor of Glenn, a Sears, Roebuck & Company employee who had been denied an extension of disability benefits by Metropolitan Life Insurance Company (MetLife).[88] In upholding the decision, the Court first held that MetLife acted under an inherent conflict of interest because it was both the administrator of Sears's insurance plan and the plan's insurer.[89] The Court next had to determine how much weight to give the conflict, one of several relevant factors in determining whether the administrator abused its discretion.[90] The Court noted that MetLife told Glenn to seek Social Security disability benefits, which were granted, and then determined Glenn was not disabled.[91] This process suggested procedural unreasonableness and warranted giving greater weight to MetLife's conflict of interest.[92] Additionally, while the administrator did fully investigate Glenn's claim and obtained an outside consultant to further investigate, it failed to provide the consultant with all of the evidence and downplayed evidence that weighed heavily in Glenn's favor.[93] These factors, when combined with the conflict, suggested the administrator had abused its discretion.[94]

1. Glenn*'s Impact on the Eighth Circuit*

The Eighth Circuit first confronted *Glenn* a few weeks after the Supreme Court's decision. *Wakkinen v. Unum Life Insurance Co. of*

87. *Id.* at 117 (citation omitted).
88. *Id.* at 109, 118–19.
89. *Id.* at 108, 114 (noting that the plan granted MetLife discretionary authority to determine whether an employee's claim for benefits was valid, and if so, MetLife itself would pay the claim).
90. *Id.* at 115–16.
91. *Id.* at 118 (citing Glenn v. MetLife, 461 F.3d 660, 666–69, 674 (6th Cir. 2006)).
92. *Id.*
93. *Id.* (citing *Glenn*, 461 F.3d at 669–74).
94. *See id.*

America involved a plaintiff suffering from major depression and chronic fibromyalgia pain—a chronic fatigue syndrome.[95] Unum originally granted short-term disability benefits; however, Unum later denied Wakkinen long-term disability benefits when it concluded Wakkinen had not remained continuously disabled for the required time period.[96] Recognizing *Glenn*'s instructions, the court noted that Unum was acting under an inherent conflict of interest and had a troubling history of bad faith denials and biased claims reviews.[97] As such, Unum's financial conflict was given great importance when weighing all the facts.[98] Ultimately, the court determined Unum had taken several steps to minimize the potential for its conflict of interest to influence decisions regarding eligibility for benefits.[99] The court recognized that *Glenn* had changed Eighth Circuit law but did not specify how it had changed.[100]

The Eighth Circuit's second examination of *Glenn* provided greater clarity of how the Supreme Court's decision would affect Eighth Circuit law regarding conflicts of interest. *Chronister v. Unum Life Insurance Co. of America* involved a plaintiff who began receiving long-term disability benefits after sustaining injuries in a car accident.[101] Unum approved and paid the benefits for 24 months, after which it notified Chronister that her benefits were going to be terminated.[102] In analyzing Chronister's request for a less deferential standard of review, the court recognized two significant impacts of *Glenn*.[103] First, a conflict of interest is inherent when the entity administering the plan both determines eligibility and pays the benefits.[104] Prior to *Glenn*, the Eighth Circuit had held the exact opposite.[105]

95. Wakkinen v. Unum Life Ins. Co. of Am., 531 F.3d 575, 577 (8th Cir. 2008).

96. *Id.* at 577–78.

97. *Id.* at 581–83. For an in-depth discussion of Unum's history of bad faith denials, see Langbein, *supra* note 22, at 1317–21.

98. *Wakkinen*, 531 F.3d at 582.

99. *See id.* at 582–83.

100. *See id.* at 581–82.

101. Chronister v. Unum Life Ins. Co. of Am., 563 F.3d 773, 774 (8th Cir. 2009).

102. *Id.*

103. *Id.* at 775.

104. *Id.*

105. *Id.*; McGarrah v. Hartford Life Ins. Co., 234 F.3d 1026, 1030 (8th Cir. 2000) ("[I]t is wrong to assume a financial conflict of interest from the fact that a plan administrator is also the insurer."), *abrogated by* Metro. Life Ins. Co. v. Glenn, 554 U.S. 105 (2008).

Second, *Glenn* eliminated the second prong of the Woo Test, which required the claimant to show the conflict was causally connected to the denial of benefits.[106] The court went on to weigh several factors and determined Unum did, in fact, abuse its discretion.[107] First, the court noted Unum's "disturbing" history of bad faith, arbitrary, and erroneous denials, which warranted giving greater weight to Unum's conflict of interest.[108] Unum also failed to follow its own claims-handling procedure by not giving significant weight to the fact that Chronister was awarded Social Security disability benefits and by not addressing this fact in its notice of denial, both of which were required by Unum's policy manual.[109] Considering these factors, along with Unum's conflict of interest, the court found that Unum had abused its discretion in terminating Chronister's benefits.[110]

In general, post-*Glenn* case law thus far tends to put a much greater emphasis on a conflicted administrator's attempts to reduce potential bias.[111] An example of an administrator taking steps to reduce bias is illustrated in *Wattenhofer v. Target Corp.*[112] In this case, Target was both the plan administrator and benefits insurer.[113] The company also conducted second-level appeals.[114] However, "Target hired a third party . . . to conduct initial investigations, determine eligibility, pay claims and review first-level appeals."[115] Additionally, the claims were paid from a benefit trust fund, so individual claims had little to no impact on the company's finances.[116] Finally, the Target employees who conducted second-level appeals were completely removed from other parts of the plan's administration and funding, and their compensation was not tied to how they reviewed claims.[117] As such, the court gave "minimal weight" to the conflict and

106. *Chronister*, 563 F.3d at 775 (citing *Glenn*, 554 U.S. at 117).

107. *Id.* at 776–77.

108. *Id.* at 776 (internal quotation mark omitted) (quoting *Redford Trust v. First Unum Life Ins. Co.*, 321 F. Supp. 2d 226, 247 (D. Mass. 2004)).

109. *Id.*

110. *Id.* at 776–77.

111. *See, e.g.*, *id.*; Wakkinen v. Unum Life Ins. Co. of Am., 531 F.3d 575, 582–83 (8th Cir. 2008).

112. Wattenhofer v. Target Corp., No. 07–4116(DSD/JJG), 2009 WL 3242025 (D. Minn. Oct. 2, 2009).

113. *Id.* at *1.

114. *Id.*

115. *Id.* at *3.

116. *Id.*

117. *Id.*

determined there was no abuse of discretion.[118]

These cases suggest that *Glenn* has, in practice, led to a form of burden shifting. Under *Woo*, plaintiffs were required to demonstrate both a conflict and a causal connection between the conflict and the decision to deny benefits.[119] Post-*Glenn*, a conflict is assumed, and it is up to the defendant to show it has taken steps to ensure the conflict does not affect eligibility determinations if it wants to make sure the conflict is given little weight.[120]

2. *A Survey of* Glenn*'s Impact Outside of the Eighth Circuit*

In the First Circuit's most informative case, *Denmark v. Liberty Life Assurance Company of Boston*, the court compared its previous case law to *Glenn* and determined that its previously articulated standard of review was generally consistent with *Glenn*.[121] The court noted, however, that *Glenn* required two revisions to its approach.[122] "First, the market forces rationale no longer allows a reviewing court to disregard a structural conflict without further analysis."[123] *Glenn* requires courts to consider a conflict as a factor, and to determine how much weight to accord the conflict, "courts are duty-bound to inquire into what steps a plan administrator has taken to insulate the decisionmaking process against the potentially pernicious effects of structural conflicts."[124] Second, evidence that a conflict did in fact influence the decision to deny benefits "may justify a conclusion that the denial was itself arbitrary and capricious (and, thus, an abuse of discretion)."[125] In its next major case, *Cusson v. Liberty Life Assurance Company of Boston*, the First Circuit did not give "any special weight to the conflict" because there was no evidence the conflict

118. *Id.* at *3–4.

119. Woo v. Deluxe Corp., 144 F.3d 1157, 1160–61 (8th Cir. 1998), *abrogated by* Metro. Life Ins. Co. v. Glenn, 554 U.S. 105 (2008).

120. *Wattenhofer*, 2009 WL 3242025, at *3 (noting Target had taken numerous steps to reduce potential bias); Anderson v. Nationwide Mut. Ins. Co., 592 F. Supp. 2d 1113, 1126 (S.D. Iowa 2009) (noting Nationwide provided no evidence to show it had taken steps to "wall off" the committee from those with interests in Nationwide's finances).

121. Denmark v. Liberty Life Assurance Co. of Bos., 566 F.3d 1, 9 (1st Cir. 2009).

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

influenced the decision to deny benefits.[126]

The Second Circuit acknowledged that *Glenn* invalidated its prior practice of allowing de novo review in cases in which the conflict of interest actually influenced the decision to deny benefits.[127] The court also indicated that *Glenn* requires an evaluation of evidence to determine what role, if any, the conflict played in the decision to deny benefits and subsequently, how much weight to accord the conflict.[128] When an administrator has taken active steps to wall off claims administrators from those who have an interest in the company's finances, the conflict will be given little to no weight.[129]

The Third Circuit recognized that *Glenn* invalidated its previous sliding scale standard of review.[130] Rather, as *Glenn* instructs, the conflict is one of several factors the court will consider in evaluating the reasonableness of the plan administrator's decision to deny benefits.[131] In evaluating the conflict, courts are permitted to hear evidence outside of the record if it pertains to the "nature, extent, and effect on the decision-making process of any conflict of interest."[132]

In the Fourth Circuit, the court held that *Glenn* prohibited its previous practice of automatically construing ambiguous plan language against the administrator.[133] The remaining analysis remains largely unchanged post-*Glenn*.[134] The court analyzes eight factors in determining the reasonableness of an administrator's decision, and a conflict was, and remains, one of those factors.[135]

126. Cusson v. Liberty Life Assurance Co. of Bos., 592 F.3d 215, 228 (1st Cir. 2010).

127. McCauley v. First Unum Life Ins. Co., 551 F.3d 126, 132 (2d Cir. 2008).

128. Hobson v. Metro. Life Ins. Co., 574 F.3d 75, 83 (2d Cir. 2009).

129. *See* Schnur v. CTC Commc'ns Corp. Grp. Disability Plan, 413 F. App'x 377, 380 (2d Cir. 2011); Fortune v. Grp. Long Term Disability Plan for Emps. of Keyspan Corp., 391 F. App'x 74, 79 (2d Cir. 2010).

130. Estate of Schwing v. Lilly Health Plan, 562 F.3d 522, 525 (3d Cir. 2009); *see also* Howley v. Mellon Fin. Corp., 625 F.3d 788, 793 (3d Cir. 2010).

131. Metro. Life Ins. Co. v. Glenn, 554 U.S. 105, 115 (2008); *see id.* at 117–18; *see also Howley*, 625 F.3d at 792–93.

132. *Howley*, 625 F.3d at 793–94 (quoting Burke v. Pitney Bowes Inc. Long-Term Disability Plan, 544 F.3d 1016, 1028 (9th Cir. 2008)).

133. Carden v. Aetna Life Ins. Co., 559 F.3d 256, 260–61 (4th Cir. 2009); *see also Glenn*, 554 U.S. at 115, 117–18.

134. *See Carden*, 559 F.3d at 261; *see also Glenn*, 554 U.S. at 117.

135. *Carden*, 559 F.3d at 261.

The Fifth Circuit held that much of its sliding scale case law is compatible with *Glenn* in that it treats a conflict as a factor that can alter the relative weights of other factors.[136] However, in a separate string of cases, the court has also seemed to suggest that the conflict need not be considered unless it is needed as a tiebreaker.[137]

Because *Glenn* originated in the Sixth Circuit, and the U.S. Supreme Court largely followed the appellate court's reasoning, Sixth Circuit case law is largely unaffected by *Glenn*.[138]

True to its history of charting its own course in ERISA cases, the Seventh Circuit looks upon *Glenn* with relative disdain:

> [One interpretation of *Glenn*] makes the existence of a conflict of interest one factor out of many in determining reasonableness. That sounds like a balancing test in which unweighted factors mysteriously are weighed. Such a test is not conducive to providing guidance to courts or plan administrators. "Multifactor tests with no weight assigned to any factor are bad enough from the standpoint of providing an objective basis for a judicial decision; multifactor tests when none of the factors is concrete are worse."[139]

The Seventh Circuit suggested an alternative interpretation:

> If the circumstances indicate that probably the decision denying benefits was decisively influenced by the plan administrator's conflict of interest, it must be set aside, just as a decision by a judge who should have recused himself must be set aside even if he might well have reached the same decision had there been no basis for recusal.[140]

In effect, the Seventh Circuit has followed its own alternate interpretation and generally does not consider a conflict unless it is needed as a tiebreaker.[141] But, when there is ample evidence of "procedural

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136. Holland v. Int'l Paper Co. Ret. Plan, 576 F.3d 240, 247 (5th Cir. 2009).

137. *See* Carter v. Nationwide Mut. Ins. Co., 338 F. App'x 377, 379 (5th Cir. 2009); Dutka v. AIG Life Ins. Co., 573 F.3d 210, 213 n.6 (5th Cir. 2009); Sanders v. Unum Life Ins. Co. of Am., 553 F.3d 922, 925 (5th Cir. 2008).

138. *Compare Glenn*, 554 U.S. at 105, *with* Glenn v. MetLife, 461 F.3d 660 (6th Cir. 2006).

139. Marrs v. Motorola, Inc., 577 F.3d 783, 788 (7th Cir. 2009) (quoting Menard, Inc. v. Comm'r, 560 F.3d 620, 622–23 (7th Cir. 2009)).

140. *Id.* at 789.

141. *See, e.g.*, Jenkins v. Price Waterhouse Long Term Disability Plan, 564 F.3d 856, 861–62 (7th Cir. 2009); Gutta v. Standard Select Trust Ins. Plans, 285 F.

unreasonableness" in the decisionmaking process, the plan administrator's decision will be set aside, regardless of whether the conflict was the cause.[142]

The Ninth Circuit has indicated that *Glenn* does not require it to alter its standard of review, including its determination that completely stripping an administrator of deference may be justified in extraordinary circumstances.[143] The Tenth Circuit has recognized that *Glenn* invalidated its previous burden-shifting framework that required the conflicted administrator to prove the decision was not arbitrary and capricious.[144] The Eleventh Circuit has concluded the same and also that *Glenn* overruled and conflicted with its heightened standard.[145]

III. Emerging Issues

A. *The Impenetrable Defensive Wall*

In *Glenn*'s attempt to provide clarity regarding which factors should be considered relevant, the Court also provided suggestions employers may implement to effectively shield themselves from claims alleging that a conflict of interest led to an improper denial of benefits.[146] The Court explained that the existence of a conflict would be given very little—or potentially no—weight when "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 decisionmaking irrespective of whom the inaccuracy benefits."[147] In doing so, the Court essentially laid out procedural steps plan administrators could take to make any claim of a conflict of interest essentially moot.[148] As one commentator noted, "One

App'x 302, 302 (7th Cir. 2008).

142. *See, e.g.*, Holmstrom v. Metro. Life Ins. Co., 615 F.3d 758, 777 (7th Cir. 2010); Majeski v. Metro. Life Ins. Co., 590 F.3d 478, 484 (7th Cir. 2009).

143. *See* Abatie v. Alta Health & Life Ins. Co., 458 F.3d 955, 972 (9th Cir. 2006) (explaining how conflicts should be weighed and when administrators should receive no deference); *see also* Kaiser v. Standard Ins. Co., 314 F. App'x 921, 922 (9th Cir. 2008) (holding that *Glenn* did not alter the standard of review laid out in *Abatie*).

144. Holcomb v. Unum Life Ins. Co. of Am., 578 F.3d 1187, 1192 (10th Cir. 2009).

145. Doyle v. Liberty Life Assurance Co. of Bos., 542 F.3d 1352, 1359 (11th Cir. 2008).

146. *See* Metro. Life Ins. Co. v. Glenn, 554 U.S. 105, 117 (2008).

147. *Id.*

148. Jayne Zanglein & Janet Ford, *Déjà vu All Over Again: Will the Supreme*

can imagine a series of procedural steps becoming standard practice for this purpose just as plan administrators reacted to the *Firestone* holding by including discretionary clauses as a standard practice."[149]

Evidence that adopting these safeguards is an effective way for administrators to shield their conflict from judicial scrutiny can already be seen in recent Eighth Circuit cases.[150] This approach also raises questions regarding discovery, which will be discussed in more depth in subpart III.B. Plan administrators would be well-advised to present evidence of the procedural steps they have taken to reduce potential bias.[151] At the same time, plaintiff beneficiaries may face situations in which the plan administrator presents evidence of these steps while the plaintiff is denied any opportunity for discovery to determine whether these steps have actually worked to reduce bias.[152]

B. *The Appropriate Scope of Discovery*

Glenn was somewhat successful in creating greater uniformity among the circuits regarding the appropriate standard of review in conflicts cases. However, the decision has led to a new circuit split regarding if and when discovery is permissible.[153] Although *Glenn* did not address discovery, some courts have relied on it in order to permit discovery and to allow introduction of evidence outside of the administrative record.[154] Others

Court's ERISA Decisions Prompt the Fifth Circuit To Revise Its Standards?, 41 TEX. TECH L. REV. 897, 912 (2009).

149. Roy F. Harmon III, *The Debate over Deference in the ERISA Setting—Judicial Review of Decisions by Conflicted Fiduciaries*, 54 S.D. L. REV. 1, 21 (2009).

150. *See, e.g.*, Chronister v. Unum Life Ins. Co. of Am., 563 F.3d 773, 776–77 (8th Cir. 2009); Wakkinen v. Unum Life Ins. Co. of Am., 531 F.3d 575, 582–83 (8th Cir. 2008); Wattenhofer v. Target Corp., Civil No. 07-4116(DSD/JJG), 2009 WL 3242025, at *3 (D. Minn. Oct. 2, 2009).

151. Zanglein & Ford, *supra* note 148.

152. *E.g.*, Jones v. ReliaStar Life Ins. Co., 615 F.3d 941, 945 (8th Cir. 2010) (finding plan administrator's admittance of a conflict sufficient to deny plaintiff's request for discovery).

153. Winterbauer v. Life Ins. Co. of N. Am., No. 4:07 CV 1026 DDN, 2008 WL 4643942, at *4–5 (E.D. Mo. Oct. 20, 2008) ("Given the case-specific nature of the required focus, courts considering ERISA discovery disputes in the aftermath of *Glenn* have reached very different decisions."); s*ee generally* JAYNE E. ZANGLEIN ET AL., ERISA LITIGATION 589–90, 592–95 (4th ed. 2011) (explaining the circuit split regarding extra-record discovery).

154. *See, e.g.*, Crosby v. La. Health Serv. & Indem. Co., 629 F.3d 457, 461–62 (5th Cir. 2010), *withdrawn and superseded*, 647 F.3d 258 (5th Cir. 2011); Murphy v. Deloitte & Touche Grp. Ins. Plan, 619 F.3d 1151, 1157–58 (10th Cir. 2010); Denmark v.

continue to reject the possibility of any discovery.[155] *Glenn* made clear that a structural conflict of interest must be weighed as a factor when determining whether a plan administrator abused its discretion.[156] Some plaintiffs have argued—and some courts have agreed—that this requires discovery to determine the extent of the conflict and, thus, how much weight it should be given.[157]

Because courts almost always apply an abuse of discretion standard when reviewing claims, judicial review of the denial of benefits is generally limited to the record that was before the plan administrator when it made the decision to deny benefits.[158] As such, plaintiffs are often not entitled to discovery to bolster their allegations of a conflict and its effect on the decision to deny benefits.[159]

The Eighth Circuit has long held that discovery is "ruled out" when conducting deferential review and is discouraged on de novo review.[160] Despite this seemingly straightforward rule, its application in ERISA cases was erratic even prior to *Glenn*.[161] In general, however, the Eighth Circuit permitted discovery, at least when conducting de novo review, upon a showing of good cause by the plaintiff.[162] Post-*Glenn*, the Eighth Circuit's position on discovery when applying an abuse of discretion is still unclear and often inconsistent.[163] To date, the Eighth Circuit has declined to

Liberty Life Assurance Co. of Bos., 566 F.3d 1, 10 (1st Cir. 2009).

155. *See, e.g.*, Atkins v. Prudential Ins. Co., 404 F. App'x 82, 85 (8th Cir. 2010) (holding the denial to compel discovery was not an abuse of discretion); Ford v. Motorola, Inc., 298 F. App'x 560, 561 (9th Cir. 2008) (affirming denial of discovery for purposes of revealing evidence of conflicts); *see also* Singleton v. Hartford Life & Accident Ins. Co., No. 4:08-CV-00361-WRW, 2008 WL 3978680, at *1 (E.D. Ark. July 29, 2008).

156. Metro. Life Ins. Co v. Glenn, 554 U.S. 105, 108 (2008).

157. Elizabeth J. Bondurant, *Standard of Review and Discovery After* Glenn*: The Effect of the* Glenn *Standard of Review on the Role of Discovery in Cases Involving Conflicts of Interest*, 77 DEF. COUNS. J. 120, 124–25 (2010).

158. *Id.* at 124.

159. *See id.*

160. Brown v. Seitz Foods, Inc. Disability Benefit Plan, 140 F.3d 1198, 1200 (8th Cir. 1998).

161. *See* Ferrari v. Teachers Ins. and Annuity Ass'n, 278 F.3d 801, 807 (8th Cir. 2002) (recognizing the rule that discovery is discouraged on de novo review, while also implying that extrinsic evidence may be considered upon a showing of good cause even when reviewing the case under deferential review).

162. *Brown*, 140 F.3d at 1200.

163. *Compare* Green v. Union Sec. Ins. Co., 646 F.3d 1042, 1049 (8th Cir. 2011) (noting that the district court had permitted discovery and not raising questions

definitively decide whether and how *Glenn* affects discovery.[164]

With no clear direction from above, district courts within the Eighth Circuit have arrived at drastically different interpretations of *Glenn*'s impact on discovery.[165] At a minimum, the Eighth Circuit has made it clear that discovery will not be permitted merely to explore a plan administrator's conflict of interest when the administrator has admitted the conflict.[166] In another case, the court also held that discovery would not be permitted when "the administrative record is sufficient to permit a fair evaluation of [the] decision."[167] However, these decisions have not completely shut the door to discovery.[168] In *Whipple v. Unum Group Corp.*, the court ordered the defendant, Unum, to turn over documents regarding the financial relationship between Unum and the four doctors and one nurse who reviewed Whipple's claim and whose opinions played a role in Unum's decision to deny benefits.[169] The plaintiff sought discovery to determine the number of cases the medical professionals reviewed for Unum and how much they were paid, arguing that if they reviewed many cases and received a substantial income from Unum, "they may have an

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about the appropriateness of that order), *and* Jones v. ReliaStar Life Ins. Co., 615 F.3d 941, 945 (8th Cir. 2010) (holding that the district court did not abuse its discretion by denying the plaintiff's request for discovery but not addressing whether discovery is ever permissible), *with* Siegel v. Conn. Gen. Life Ins. Co., 702 F.3d 1044, 1049 (8th Cir. 2013) ("When an administrator's decision is reviewed for abuse of discretion, the scope of review is limited to the evidence before the administrator.").

164. Atkins v. Prudential Ins. Co., 404 F. App'x 82, 85 (8th Cir. 2010) ("We have not yet decided whether *Glenn* affects discovery limitations under ERISA . . . .").

165. *See, e.g.*, Maly v. Trs. of Local 309 Wireman's Pension Trust, No. 4:11CV00675 AGF, 2011 WL 5597316, at *2 (E.D. Mo. Nov. 17, 2011) (denying discovery request because it was not designed to investigate a potential conflict of interest, and therefore, plaintiff failed to show good cause); Mohlke v. Metro. Life Ins. Co., No. 4:10CV01995 JLH, 2011 WL 3876114, at *2 (E.D. Ark. Sept. 2, 2011) (rejecting discovery request to determine whether MetLife's interpretation of the plan was inconsistent with prior interpretations but permitting discovery to determine whether MetLife complied with its internal policies and guidelines in reviewing plaintiff's claim); Howard v. Hartford Life & Accident Ins. Co., Civil No. 11-MC-14, 2011 WL 3795155, at *2 (W.D. Ark. July 5, 2011) (finding that "certain discovery is allowable").

166. *See Jones*, 615 F.3d at 945 (affirming the district court's decision to deny discovery because ReliaStar admitted it was both the plan insurer and administrator).

167. *Atkins*, 404 F. App'x at 85.

168. *See, e.g.*, Whipple v. Unum Grp. Corp., No. CIV.10-050575-JLV, 2012 WL 589565, at *4 (D.S.D. Feb. 22, 2012) (allowing discovery "to explore the nature and extent of the purported conflict.").

169. *Id.* at *1, *4.

interest in preserving their income and employment."[170]

The defendant argued that recent Eighth Circuit decisions prohibited Whipple from conducting discovery because the administrative record was complete and Unum admitted its inherent conflict as both plan administrator and funder.[171] The court rejected Unum's arguments, noting that Whipple's claim was distinguishable from the other cases because it involved heavily disputed facts, including a battle of experts, and Unum failed to acknowledge that "four of its five 'independent' medical advisors are actually employees of Unum."[172]

IV. An Opportunity to Change Course

While some courts have permitted discovery in limited cases, others seem to have already shut the door on the possibility.[173] To date, the Eighth Circuit has not created hard-and-fast rules regarding discovery in the post-*Glenn* world.[174] As such, it has a unique opportunity to fashion new rules that allow courts to effectively evaluate if and how a conflict affected a decision, while still protecting parties from a protracted and expensive discovery period.[175] At a minimum, it should permit limited discovery to allow plaintiffs to ascertain the extent of the conflict and the adequacy of any safeguards the administrator has implemented.

The Eastern District of Missouri has noted that *Glenn*'s instructions logically allow at least limited discovery.[176] For instance, in evaluating an administrator's conflict of interest (and, thus, determining how much weight to give the conflict), the Supreme Court instructed lower courts to consider whether the administrator had a history of biased decisions and whether the administrator had taken steps to wall off those reviewing claims from those with a financial interest in the outcome of a claim.[177] Common sense dictates that the information required to fully evaluate

170. *Id.* at *1 (internal quotation mark omitted).

171. *Id.* at *3.

172. *Id.*

173. *See* Winterbauer v. Life Ins. Co. of N. Am., No. 4:07 CV 1026 DDN, 2008 WL 4643942, at *4–5 (E.D. Mo. Oct. 20, 2008) (discussing the various and conflicting rulings on discovery post-*Glenn*).

174. *See* Atkins v. Prudential Ins. Co., 404 F. App'x 82, 85 (8th Cir. 2010).

175. *Winterbauer*, 2008 WL 4643942, at *4 (noting discovery questions involve the competing goals of properly evaluating a conflict and the fact that conflicted administrators are commonplace).

176. *Id.* at *6.

177. *Id.* at *5.

these two considerations will not be within any administrative record. It seems unlikely that an administrator would admit, within an administrative record, to having a history of biased claims denials. Moreover, if defendants are permitted to offer evidence of their attempts to wall off administrators, plaintiffs should be allowed to conduct at least some discovery to ensure the evidence is accurate and to determine whether the safeguards have actually been effective. Otherwise, reviewing courts would be relying on unsubstantiated assertions by defendants.

Permitting plaintiffs to conduct limited discovery relating to the existence and extent of a conflict does not require opening the floodgates of discovery.[178] The traditional rule that discovery is impermissible when the plaintiff seeks to present new evidence on the substantive merits of his or her claim could still be maintained.[179] However, contrary to the reasoning in *Jones v. ReliaStar Life Insurance Co.*, discovery should not be limited merely to establishing whether a conflict exists.[180] Such a rule would permit defendants to simply admit that there is a conflict of interest and thereby insulate themselves from any further inquiry into the conflict.[181]

One potential compromise was recently articulated by the Fourth Circuit.[182] Prior to *Helton v. AT & T Inc.*, the Fourth Circuit's case law could have been interpreted as completely barring extrinsic evidence when conducting a deferential review.[183] The court rejected this interpretation, noting that a complete bar would amount to an effective surrender of the court's "ability to review ERISA benefits determinations because plan administrators could simply omit any evidence from the administrative record that would suggest their decisions were unreasonable."[184] To avoid this result, the Fourth Circuit held that while a reviewing court is generally limited to the evidence contained within the administrative record, a court may consider extrinsic evidence if that evidence was known to the administrator at the time of the decision.[185] The court specifically identified two kinds of evidence that are often known to an administrator but not contained in a record that are thus discoverable and admissible when

178. *See id.* at *6.
179. *See id.*
180. *See* Jones v. ReliaStar Life Ins. Co., 615 F.3d 941, 945 (8th Cir. 2010).
181. *See id.*
182. Helton v. AT & T Inc., 709 F.3d 343, 354 (4th Cir. 2013).
183. *See id.* at 352; Sheppard & Enoch Pratt Hosp., Inc. v. Travelers Ins. Co., 32 F.3d 120, 125 (4th Cir. 1994).
184. *Helton*, 709 F.3d at 353.
185. *Id.* at 355.

conducting a deferential review: evidence showing how the administrator has interpreted terms of the plan in prior situations and evidence evaluating the impact of the administrator's conflict of interest.[186]

In addition, the reasoning utilized by courts, such as in *Whipple*, shows the necessity of allowing plaintiffs to fully explore the degree to which a conflict may influence eligibility decisions.[187] *Whipple* demonstrates that even if a company takes steps to reduce the influence of its financial conflict, employees and consultants may have their own biases.[188] Courts should not forget the lessons learned in the wake of the Unum/Provident scandal that came to light in 2002.[189] After a multitude of lawsuits and investigations, it was discovered that for nearly a decade, Unum made a regular practice of denying claims in bad faith, interpreting plans in bad faith, "and [engaging in] other unscrupulous tactics."[190] Courts described Unum's claims evaluation process as "def[ying] common sense" and "border[ing] on outright fraud."[191] The smoking gun against Unum came in an Unum executive's internal memorandum, which provided a stark example of how ERISA can be abused by conflicted plan administrators.[192] Yale University law professor John Langbein described the memorandum as follows:

> In the course of discovery proceedings in the lawsuits against Unum, there came to light a remarkable internal memorandum written in 1995 by a Unum executive. In it, he exults in the "enormous" advantages that ERISA, as interpreted by the courts, bestowed upon Unum in cases in which an insured sought judicial review of a benefit denial. "[S]tate law is preempted by federal law, there are no jury trials, there are no compensatory or punitive damages, relief is usually limited to the amount of benefit in question, and claims administrators may receive a deferential standard of review." The memorandum recounts that another Unum executive "identified 12 claim situations

186. *Id.* at 354.
187. Whipple v. Unum Grp. Corp., No. CIV.10-050575-JLV, 2012 WL 589565, at *4 (D.S.D. Feb. 22, 2012).
188. *See id.* at *3.
189. Langbein, *supra* note 22, at 1317–21.
190. *Id.* at 1318–20 (quoting Radford Trust v. First Unum Life Ins. Co., 321 F. Supp. 2d 226, 247 (D. Mass. 2004)).
191. *Id.* at 1320 (quoting Dandurand v. UNUM Life Ins. Co. of Am., 284 F.3d 331, 338 (1st Cir. 2002); Watson v. UnumProvident Corp., 185 F. Supp. 2d 579, 585 (D. Mass. 2004)) (internal quotation marks omitted).
192. *Id.* at 1321.

> where we settled for $7.8 million in the aggregate. If these 12 cases had been covered by ERISA, our liability would have been between zero and $0.5 million." We see in this document Unum's keen understanding of how the deferential standard of review allowed under [*Firestone*] interacts with aspects of ERISA remedy law to facilitate aggressive claim denial practices.[193]

Of course not all administrators behave irresponsibly, and Unum's conduct was so exceedingly outrageous that it was eventually caught.[194] But Unum was able to continue its misbehavior for nearly a decade, and the misconduct came to light only after numerous lawsuits and other opportunities for ample discovery.[195] This potential for abuse is inherent in ERISA, given judicial interpretations that have shielded conflicted administrators from effective judicial review and scrutiny.[196] As Langbein noted, "Cases of abusive benefit denials . . . abound. Unum turns out to have been a clumsy villain, but in the hands of subtler operators such misbehavior is much harder to detect."[197] The difficulty in detecting nonflagrant misconduct by conflicted administrators is precisely why courts should permit at least limited discovery into an administrator's conflict of interest.

V. Conclusion

Glenn may have succeeded in creating more uniformity among the circuits regarding the appropriate standard of review in cases involving a conflicted administrator. However, *Glenn* also raised new questions as to how courts should weigh the conflict of interest and whether plaintiffs should be entitled to discovery. Since the Supreme Court has not yet addressed discovery, lower courts are free—and are in the process of fashioning their own rules—to determine if and when to permit discovery. If courts continue a restrictive interpretation, discovery will be yet another obstacle for plaintiffs. If, however, courts ultimately decide on a broader view of discovery, plaintiffs may finally have a useful tool on their side.

Additionally, as courts wrestle with *Glenn*'s ambiguous instruction to weigh administrator conflict as a factor, they should seek to avoid creating additional shields for defendants and obstacles for plaintiffs. Because

193. *Id.* at 1321 (first alteration in original) (footnotes omitted).
194. *Id.*
195. *Id.* at 1320–21.
196. *See id.* at 1321.
197. *Id.*

Glenn reiterated that conflicts are to be evaluated on a case-by-case basis and declined to provide explicit guidelines for what facts should be considered and how much weight they should be given, the circuits are beginning to articulate their own divergent lists of factors and weighting systems. The Supreme Court listed only one factor—a history of biased claims administration—that would require courts to give a conflict a significant amount of weight.[198] Meanwhile, it listed several steps plan administrators could take to shield themselves from conflicts claims.[199] Potentially, this means that even an administrator with a long history of biased claims can render that fact entirely moot merely by offering evidence that it has taken corrective steps.[200] To prevent conflicted administrators from being able to completely shield conflicts from judicial review, courts must not simply accept bare assertions that procedural safeguards have eliminated the potential for bias. Permitting at least limited discovery and extrinsic evidence will encourage plan administrators to enact truly effective safeguards. The alternative will only foster the potential for misconduct.

Danya M. Hooker[*]

198. Metro. Life Ins. Co. v. Glenn, 554 U.S. 105, 117 (2008).
199. *Id.*
200. *See id.*; Wakkinen v. Unum Life Ins. Co. of Am., 531 F.3d 575, 582–83 (8th Cir. 2008); *see also* Zanglein & Ford, *supra* note 148.

* B.A., University of Wisconsin–Madison, 2005; J.D. Candidate, Drake University Law School, 2014.