UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

DEBORAH DUBOIS,	)	
	)	
Plaintiff	)	
	)	
v.	)	**Civil No. 08-163-P-S**
	)	
UNUM LIFE INSURANCE COMPANY OF AMERICA,	)	
	)	
Defendant	)	

MEMORANDUM DECISION AND ORDER
ON PLAINTIFF'S OBJECTION TO SCHEDULING ORDER

In this action brought pursuant to the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001, *et seq*., to recover benefits allegedly wrongfully denied, the plaintiff objects to the court's Scheduling Order, *see* Docket No. 5, invoking the recently-decided *Metropolitan Life Ins. Co. v. Glenn*, 128 S. Ct. 2343 (2008), in aid of her request to undertake discovery to determine the extent to which the defendant's role as both administrator and funder of claims may have led to an improper denial of her claim. *See generally* Plaintiff's Objection to Scheduling Order ("Objection") (Docket No. 8). The plaintiff asserts that *Glenn* altered the legal landscape, mandating allowance of the discovery she requests. *See id*. at 2. The defendant protests that the plaintiff reads far more into *Glenn* than is there, and that under still-controlling standards set forth in *Liston v. Unum Corp. Officer Severance Plan*, 330 F.3d 19 (1st Cir. 2003), the plaintiff fails to make an adequate showing to justify discovery. *See* Defendant's Response to Plaintiff's Objection to the Scheduling Order and Proposed Alternative Discovery Plan ("Response") (Docket No. 10) at 7-15. I agree with the defendant and, accordingly, overrule the

plaintiff's objection. The defendant counter-proposes a scheduling order predicated on Local Rule 9.4 of the United States District Court for the District of New Hampshire. *See id*. at 5-6, 12-13. However, for reasons discussed below, I decline to adopt that proposal. Instead, I direct the Clerk's Office to set up a conference with counsel to discuss scheduling, including briefing deadlines, in this administrative appeal.[1]

I. *Glenn*

In *Glenn*, the United States Supreme Court held that a dual role in which an employer or insurer "both determines whether an employee is eligible for benefits and pays benefits out of its own pocket . . . creates a conflict of interest; that a reviewing court should consider that conflict as a factor in determining whether the plan administrator has abused its discretion in denying benefits; and that the significance of the factor will depend upon the circumstances of the particular case." *Glenn*, 128 S. Ct. at 2346.[2]

The plaintiff contends that, under *Glenn*, "evidence of biased and otherwise unfair claims administration by Unum Provident will be relevant to the court's case-specific determination of the weight to give to the admitted conflict" in this case. Objection at 3. Yet, as the defendant points out, *see* Response at 8-9, *Glenn* was not a case about discovery and does not suggest that discovery automatically should be permitted if such a conflict exists. To the contrary, *Glenn* states that the existence of such a conflict may or may not be significant, and

[1] Technically, the Scheduling Order issued by the court permits the precise discovery the plaintiff seeks: 30 interrogatories, two sets of requests for production, and 30 requests for admission. *See* Scheduling Order at 1; Objection at 3. However, as the plaintiff implicitly recognizes in filing the instant objection, discovery is the exception, rather than the rule, in an appeal of a plan administrator's denial of ERISA benefits. *See, e.g., Liston*, 330 F.3d at 23 ("The ordinary rule is that review for arbitrariness is on the record made before the entity being reviewed.").

[2] The standard of review in this case, as in *Glenn*, is for abuse of discretion. In cases in which, as here, a plan administrator has discretion to determine eligibility for, and entitlement to, benefits, *see* Objection at 2; Response at 4 & n.1, "the district court must uphold the administrator's decision unless it is arbitrary, capricious, or an abuse of discretion[,]" *Glista v. Unum Life Ins. Co. of Am.*, 378 F.3d 113, 125 (1st Cir. 2004) (citation and internal quotation marks omitted).

may or may not function as a "tiebreaker" in close cases, depending on the totality of circumstances. *See Glenn*, 128 S. Ct. at 2351 ("[A]ny one factor will act as a tiebreaker when the other factors are closely balanced, the degree of closeness necessary depending upon the tiebreaking factor's inherent or case-specific importance. The conflict of interest issue here, for example, should prove more important (perhaps of great importance) where circumstances suggest a higher likelihood that it affected the benefits decision, including, but not limited to, cases where an insurance company administrator has a history of biased claims administration. It should prove less important (perhaps to the vanishing point) where the administrator has taken active steps to reduce potential bias and to promote accuracy, for example, by walling off claims administrators from those interested in firm finances, or by imposing management checks that penalize inaccurate decisionmaking irrespective of whom the inaccuracy benefits.").

Glenn fairly can be read to imply that the necessity for discovery depends on the circumstances of each case in which such a conflict exists. The *Glenn* court seemingly so recognized in stating:

> Neither do we believe it necessary or desirable for courts to create special burden-of-proof rules, or other special procedural or evidentiary rules, focused narrowly upon the evaluator/payor conflict. In principle, as we have said, conflicts are but one factor among many that a reviewing judge must take into account. Benefits decisions arise in too many contexts, concern too many circumstances, and can relate in too many different ways to conflicts – which themselves vary in kind and in degree of seriousness – for us to come up with a one-size-fits-all procedural system that is likely to promote fair and accurate review. Indeed, special procedural rules would create further complexity, adding time and expense to a process that may already be too costly for many of those who seek redress.

Id.

II. *Liston*

The First Circuit's views in *Liston* are entirely consistent with those expressed in *Glenn*. The First Circuit "declined in cases like this one to adopt an ironclad rule against new evidence." *Liston*, 330 F.3d at 23. However, it observed:

> Still, at least some very good reason is needed to overcome the strong presumption that the record on review is limited to the record before the administrator. This is the view of virtually all of the circuits with the possible exception of the Fifth Circuit. It is almost inherent in the idea of reviewing agency or other administrative action for reasonableness; how could an administrator act unreasonably by ignoring information never presented to it?

Id. (footnote omitted). The First Circuit recognized that, in some cases, a claim of bias or corruption might justify extra-record discovery. *See id*. However, applying *Liston*, it has rebuffed a plaintiff's bid for discovery in circumstances in which "[t]here was no serious claim of bias or procedural misconduct" toward the plaintiff. *Orndorf v. Paul Revere Life Ins. Co*., 404 F.3d 510, 520 (1st Cir. 2005).

III. The Instant Action

In this case, the plaintiff presents no case-specific circumstances demonstrating a possibility of bias in the denial of her claim. *See generally* Objection. Beyond this, the defendant asserts that there is reason to believe that determination of this particular claim was untainted by bias despite the defendant's dual-role conflict of interest. *See* Response at 2-4, 13-15. The defendant represents that the claim at issue was decided pursuant to claims-handling procedures put in place as a result of a Regulatory Settlement Agreement ("RSA") that it entered into in November 2004 with the Department of Labor and the insurance regulators of 49 states. *See id*. at 2. Pursuant to the RSA, the defendant agreed to address "regulatory and statutory concerns" by making changes to corporate governance and claims review procedures for new claims and offering a Claim Reassessment Process to an identified class of claimants. *See* RSA,

Exh. A to Response, at A.4-A.5, B.2.b, B.3.b-g. The Claim Reassessment Process was "developed in consultation with and approved by the Lead Regulators and the [Department of Labor]" and provided a review of the earlier claim decision by "an experienced claim unit" to "perform (i) a de novo review of the claims . . ., and (ii) apply the improved claim handling procedures . . . to remedy deficiencies that may have affected the earlier claim decisions[,]" *id*. at A.5.a, B.2.a.

In short, because (i) *Glenn* does not alter the legal landscape sufficiently to overrule the *Liston* standards of ERISA discovery, and (ii) the plaintiff does not meet the *Liston* standards on the showing made, her objection to the Scheduling Order is overruled.

That said, I decline to embrace the defendant's proposed Scheduling Order predicated on Local Rule 9.4 of the United States District Court for the District of New Hampshire. *See* Response at 5-6 & Exh. B thereto. Pursuant to that rule, discovery is permitted, if at all, only after the court's ruling on the parties' motions for judgment on the administrative record. *See id*. Whatever the merits of such a procedure, it has not been this court's practice to handle ERISA cases in that manner. Instead, I direct the Clerk's Office to arrange a conference with counsel to discuss whether the plaintiff wishes to continue to press any request for extra-record discovery and to set a briefing schedule in this matter.

SO ORDERED.

Dated this 14th day of July, 2008.

/s/ John H. Rich III
John H. Rich III
United States Magistrate Judge

Plaintiff

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V.

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