IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

DEBRA L. WARNER	)	
	)	
Plaintiff	)	**No. 12-cv-02782**
	)	
vs.	)	**Judge John J. Tharp Jr.**
	)	
UNUM LIFE INSURANCE COMPANY Of AMERICA	)	**Magistrate Judge Jeffrey T. Gilbert**
	)	
Defendant	)	

UNUM LIFE INSURANCE COMPANY OF AMERICA'S
RESPONSE TO PLAINTIFF'S MOTION TO COMPEL DISCOVERY

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Additional Authority

INTRODUCTION

Debra Warner initiated this action to recover long-term disability benefits under an employee welfare benefit plan ("Plan") sponsored by her employer, Tyson Foods. Unum Life Insurance Company of America ("Unum") is the Plan's insurer and claims administrator. Because Unum has discretionary authority, the court reviews Unum's benefit decision through the lens of the arbitrary and capricious standard. Under the arbitrary and capricious standard, the court looks "only to ensure that the decision has rational support in the record." *Becker v. Chrysler LLC Health Care Benefits Plan*, 691 F.3d 879, 885 (7th Cir. 2012) (quoting *Davis v. Unum Life Ins. Co. of Am .*, 444 F.3d 569, 576 (7th Cir. 2006)).

Warner, a nurse manager at Tyson Foods, claimed to be disabled since January 19, 2011 due to Lupus, Lyme disease, fatigue, sleeping difficulty, back pain, arthralgia (generalized joint pain), fevers, dizziness, and concentration and memory difficulties. But the medical evidence establishes that Warner does not have Lupus or Lyme disease, her sleep studies were completely normal, and she does not have any documented cognitive deficit. Based on the objective tests and clinical findings of her treating specialists in rheumatology and infectious disease, Warner does not have any disabling functional impairment. Unum consulted James Folkening, MD, Susan Council, MD, and Laina Rodela, MD, who evaluated the medical evidence and concluded that Warner does not have documented functional restrictions or limitations that would prevent her from working as a nurse manager.

Warner issued interrogatories and document requests to Unum, purporting to explore Unum's structural conflict as insurer and claims administrator. But Warner's primary targets are the physicians consulted by Unum, and not Unum's structural conflict. She seeks the compensation paid to Drs. Folkening, Council, and Rodela, and their "performance evaluations,"

from 2007 to 2011. She seeks "statistics" about their medical opinions in all disability claims reviewed from 2007 to 2011. Quiescently acknowledging the burdensomeness of her statistics request, alternatively she wants to inspect a "sampling" of Dr. Folkening's, Dr. Council's, and Dr. Rodela's assessment of the medical conditions of other insureds. The Seventh Circuit has criticized this type of "batting average" approach, in which medical opinions in other disability claims would be paraded as evidence of bias in Warner's disability claim.

Unum agreed to produce the medical qualifications and employment history of Dr. Folkening, Dr. Council, and Dr. Rodela. Unum agreed to produce Dr. Rodela's IRS 1099 forms for the years 2011 and 2012 showing her compensation from Unum. Unum agreed to produce its compensation, bonus, and incentive programs applicable to the benefits personnel and medical consultants employed by Unum, including Drs. Folkening and Council. Specifically, Unum agreed to produce its (i) Management Incentive Compensation Plan, (ii) Stock Incentive Plan, (iii) Compensation Programs Summary, and (iv) the Benefits Center Recognition Programs Brochure. (Pl. Mot. Ex. F, Answer Interrog. No. 8).[1] And Unum agreed to produce its Benefits Center Claims Manual.

Warner simply proclaims that Unum has a structural conflict of interest—a given in every ERISA benefits dispute—and declares that she is entitled to any discovery she desires to probe around for conflicts. But she fails to correlate her request for batting average statistics, personal employment evaluations, and salary information, to any perceived procedural irregularity in the administration of her disability claim. The Supreme Court's decision in *Metropolitan Life Ins. Co. v.*

[1] Unum agreed to produce the Compensation Programs Summary, Benefits Center Recognition Programs Brochure, and Dr. Rodela's 1099 forms under a mutually agreeable protective order that satisfies Form LR 26.2.

Glenn, 554 U.S. 105 (2008) did not license Warner and her counsel to conduct an inquisition into the medical verities of consulting physicians' opinions in all disability claims. Unum agreed to produce substantial information to Warner about physician credentials, claims practices, financial incentive programs, and bonus structures. Warner is not entitled to statistics, samplings, and employment files under *Glenn*, and she fails to satisfy the standards for conflict discovery under *Semien v. Life Ins. Co. of N. Am.*, 436 F.3d 805 (7th Cir.), *cert. denied*, 127 S.Ct. 53 (2006).

STATEMENT OF FACTS

Warner claimed to be disabled from working as a nurse manager since January 19, 2011, after missing work due to a bout with the flu. Her family physician, Dr. Kevin Jeffries, submitted an Attending Physician Statement ("APS") to Unum listing Warner's primary diagnosis as Lupus, her symptoms as fatigue, night sweats, foggy memory, inability to concentrate, dizziness, vision problems, difficulty sleeping, and arthralgia. According to Dr. Jeffries, Warner was essentially bedridden. Dr. Jeffries opined in check-a-box fashion that Warner could sit, stand, or walk for "0" hours, and could "Never" perform fine finger movements, hand/eye coordinated movements, or pushing/pulling movements ("0%"). Dr. Jefferies checked "Never" for lifting 0-10 lbs, but inconsistently checked "Continuously" for lifting 51-100 lbs. In the section of the APS for specific restrictions and limitations, Dr. Jeffries simply wrote "No Work." (Ex. A, APS).

Unum consulted Dr. James Folkening, a physician Board certified in Internal Medicine, who called Dr. Jeffries' office numerous times to discuss Warner's condition. But Dr. Jeffries never returned the call. Unum requested that Dr. Jeffries provide specific information about Warner's condition and complete a Functional Abilities form. The Functional Abilities form, however, was completed by Dr. Omprakash Sureka, who has never treated Warner. Dr. Sureka noted that

Warner could occasionally (up to 33% of the work day) lift and carry 1-10 lbs, occasionally bend, kneel, crawl, climb stairs, and reach above shoulders, and occasionally push/pull 10 lbs. Dr. Sureka noted that Warner's restrictions and limitations were associated with low back pain and joint pain, and that Warner could return to full time work in "about 6 months." Dr. Folkening called Dr. Sureka, who explained that Warner was experiencing pain primarily from osteoarthritis, and reiterated that Warner could return to work within 6 months. Dr. Sureka did not attribute any functional impairment to a diagnosis of chronic fatigue syndrome, fibromyalgia, Lupus, or any infectious disease. (Ex. B, Dr. Folkening's telephone notes; Ex. C, Dr. Sureka Functional Abilities form).

On December 9, 2011, nearly one year after Warner's alleged date of disability, Dr. Sureka performed a second evaluation at the request of Dr. Jeffries. Dr. Sureka concluded that Warner cannot work due to pain in her lumbar spine. But Dr. Sureka incorrectly assumed that Warner had Lupus and Lyme disease, despite objective tests refuting both diagnoses and contrary to his July 8, 2011 Functional Abilities form. (Ex. D, Dr. Sureka's Dec. 9, 2011 report).

Warner's rheumatologist, Dr. Joseph Couri, and infectious disease specialists, Dr. Wahab Brobbey and Dr. Mirza Baig, refuted Dr. Jeffries' and Dr. Sureka's opinions. Dr. Couri examined Warner on January 27, 2011 and obtained comprehensive lab tests, all of which were normal. During a follow-up examination on April 28, 2011, Dr. Couri noted, "I told her that I had been following her for over 10 years and she has never had anything to suggest lupus. (Had same discussion with her 10 years ago)." Dr. Couri opined that Warner's "main diagnosis" was fibromyalgia, which experienced a temporary flare-up following her bout with the flu. (Ex. E, Dr. Couri Jan. 27, 2011 & Apr. 28, 2011 exams).

Dr. Brobbey examined Warner on February 23, 2011 and opined that she has "no tenderness," "normal strength and tone," and "normal range of motion without pain" in her upper and lower extremities, and "normal movements without pain" and "normal strength and tone" in her head and neck. Dr. Brobbey opined that Warner has no joint swelling, no joint stiffness, no muscle weakness, and no joint instability. Laboratory tests confirmed that Warner did not have Lupus or Lyme disease. (Ex. F, Dr. Brobbey Feb. 23, 2011 exam). Dr. Baig examined Warner on March 31, 2011, April 19, 2011, and June 13, 2011, with normal findings. (Ex. F, Dr. Baig Mar. 31, Apr. 19 & June 13, 2011 exams).

The objective tests and clinical findings of Drs. Couri, Brobbey, and Baig established that Warner did not have Lupus, Lyme disease, or any other infectious disease. Warner had no joint swelling, no joint stiffness, no muscle weakness, and no joint instability. Dr. Brobbey's detailed clinical examination—performed approximately 5 weeks after the alleged date of disability—established that Warner had normal strength, normal muscle tone, and normal movement of her head, neck, arms, and legs *without pain*.

Unum consulted Dr. Folkening, Dr. Council, and Dr. Rodela, who concurred that the medical evidence failed to support Dr. Jeffries' and Dr. Sureka's opinion of Warner's restrictions and limitations. The consulting physician reports of Drs. Folkening, Council, and Rodela are attached as Exhibits G, H, and I, respectively.

On December 1, 2011, Dr. Jeffries referred Warner to a physical therapist, Dan Ryan, for a Functional Capacity Evaluation. Mr. Ryan incorrectly noted Lupus as Warner's primary diagnosis, and incorrectly concluded that her functional capacities were "consistent with" Lupus.

Mr. Ryan noted that Warner reported pain on movement of her spine and lower extremities.[2] Mr. Ryan's FCE is contradicted by the clinical examination findings of Dr. Brobbey, who opined that Warner has full strength and movement without pain in her upper and lower upper extremities and cervical spine. Unum reasonably determined that the functional assessment of infectious disease specialist Dr. Brobbey was more reliable that Mr. Ryan's inaccurate Functional Capacity Evaluation.

Unum reasonably determined that Warner failed to satisfy the Plan's definition of Disability throughout the 90-day elimination period based on (i) objective tests and the opinions of Dr. Couri and Dr. Brobbey establishing that Warner did not have Lupus or Lyme disease, (ii) Dr. Brobbey's functional examination establishing that Warner has full strength, motion, and no pain upon movement of her neck, head, and upper and lower extremities, (iii) the unreliable extreme restrictions and limitations in Dr. Jeffries' APS, which were refuted by Dr. Brobbey's clinical findings, and (iv) the medical opinions of Dr. Folkening, Dr. Council, and Dr. Rodela, who evaluated all the medical evidence and concluded that Warner's medical condition did not prevent her from working in her regular occupation.

ARGUMENT

I. The Seventh Circuit Restricts Conflict Discovery To "Exceptional Cases" Where A *Prima Facie* Showing Of Misconduct Has Been Made

In ERISA cases governed by the arbitrary and capricious standard, discovery generally has not been permitted. See *Gutta v. Standard Select Trust Ins. Plans*, 530 F.3d 614, 619 (7th Cir. 2008); *Perlman v. Swiss Bank Corp. Comp. Disability Prot. Plan*, 195 F.3d 975, 981-982 (7th Cir. 1999). The

[2] Mr. Ryan noted that Warner could not sit in a "hard" armless chair for more than 30 minutes without adjusting her position, and that she required a padded chair with arms.

Seventh Circuit in *Krolnik v. Prudential Ins. Co. of Am.*, 570 F.3d 841 (7th Cir. 2009) reemphasized that judicial review under the arbitrary and capricious standard is confined to the administrative record. "When review is deferential—when the plan's decision must be sustained unless arbitrary and capricious—then review is limited to the administrative record." *Id.* at 843.

In "exceptional cases," however, limited discovery may be permitted when "a *prima facie* showing of impropriety has been made...." *Semien*, 436 F.3d at 814. In *Semien*, the Seventh Circuit articulated clear rules for district courts to apply in determining whether conflict of interest discovery is appropriate. First, the plaintiff "must identify a specific conflict of interest or instance of misconduct." *Id.* at 815. Second, the plaintiff "must make a *prima facie* showing that there is good cause to believe limited discovery will reveal a procedural defect in the Plan administrator's determination." *Id.* The Seventh Circuit's limitation on discovery to "exceptional cases" furthers the congressional goal that ERISA plan administration should be "inexpensive[] and expeditious[]," lest employers decide to stop offering these voluntary benefit programs. *Id.*

Warner (and the entire plaintiffs' bar) approaches *Glenn* as if conflicts of interest are a new Supreme Court revelation. She infers from *Glenn* that because an administrator's structural conflict as insurer and claims administrator is potentially relevant, discovery is necessary in every ERISA case in order to rummage for evidence of financial bias. According to Warner, *Glenn* inferentially abrogates *Semien's* standards for determining the propriety of conflict discovery.

But *Glenn* is not a case about discovery; it is a case about the standard of judicial review. *Glenn* holds that an administrator's structural conflict of interest as insurer and claims administrator does not change the standard of judicial review from arbitrary and capricious to *de novo*. Rather, a conflict of interest is one of many factors courts may consider in evaluating the reasonableness of

the administrator's decision, precisely as the Supreme Court held two decades earlier in *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 115 (1989). *Glenn*, 554 U.S. at 117.

Conflicts of interest are not a new arrival on the ERISA scene. *Firestone* established long ago that an administrator's conflict of interest may be relevant and should be considered as a "factor" in evaluating the reasonableness of the administrator's decision. *Id.* at 115. But courts have not inferred from *Firestone* that discovery must be permitted because conflicts of interest are relevant, or that *Semien's* discovery standards are incompatible with *Firestone*.

Warner string cites district court decisions primarily clustered in the Southern District of Indiana and a few from this district, holding that *Glenn* inferentially abrogates *Semien*. This Court should not join that sojourn into judicial activism. "Judicial activism" is "the born enemy of stare decisis." *Harper v. Virginia Dept. of Taxation*, 509 U.S. 86, 105 (1993).

In deciding *Semien*, the Seventh Circuit expressly considered *Firestone's* pronouncement that conflicts may be a factor for consideration. *Glenn's* affirmation of *Firestone* does not provide a legal basis to infer that *Semien* is no longer good law. To the contrary, the Seventh Circuit has emphasized that *Glenn* is "best read" simply as an extension of *Firestone*. See *Leger v. Tribune Co. Long Term Disability Benefit Plan*, 557 F.3d 823, 831 (7th Cir. 2009) ("Our study of *Glenn* convinces us, first, that the decision is best read as an extension of the Court's previous decision in *Firestone* and, second, that it is not applicable to the present case."); *Love v. Nat'l City Corp.*, 574 F.3d 392, 396 n.1 (7th Cir. 2009) ("We reject Love's suggestion that the Supreme Court's decision in [*Glenn*] 'fundamentally altered the paradigm for adjudicating ERISA claims' by requiring us to conduct a more searching review.").

That *Glenn* acknowledged an administrator's dual role as a structural conflict—which is entirely consistent with *Firestone*—does not provide a legal basis for tossing *Semien's* framework

into the garbage heap. The Seventh Circuit continues to apply *Semien* when evaluating conflicts post-*Glenn*, and never suggested that *Semien* has been abrogated. See, e.g., *Raybourne v. Cigna Life Ins. Co. of N.Y.*, 576 F.3d 444 (7th Cir. 2009). The majority of the courts in the Northern District of Illinois have refused to infer from *Glenn* that *Semien* is no longer good law. District courts should not deem to overturn Seventh Circuit authority that specifically addresses conflict discovery based on an inferential interpretation of *Glenn*, a case that does not mention discovery and reaffirms *Firestone*. As explained in *Allen v. HSBC-N. Am. (U.S.) Ret. Income Plan*, No. 09 CV 5713, 2010 WL 3404966, at *4 (N.D. Ill. Aug. 24, 2010):

> This Court finds that *Semien* continues to be the law. *Glenn* only considered examination of a conflict of interest—the procedure for doing so was established within this Circuit in *Semien*. The Seventh Circuit already contemplated consideration of conflicts of interest when it imposed limitations on discovery in *Semien*.

See also *Ball v. Standard Ins. Co.*, No. 09 C 3668, 2010 WL 2024082, at *7 (N.D. Ill. May 17, 2010) ("[T]he Court finds no basis by which to conclude that the factors outlined in *Semien* are no longer good law following the Supreme Court's ruling in *Glenn*."); *Central States, S.E. & S.W. Areas Pension Fund v. Waste Management of Michigan*, Inc., 268 F.R.D. 312, 318 (N.D. Ill. 2010) (holding that a "slightly relaxed *Semien* analysis applies" post-*Glenn*); *Garvey v. Piper Rudnick LLP Long Term Disability Ins. Plan*, No. 08 C 1093, 2009 WL 3260010, at *6 (N.D. Ill. Oct. 9, 2009) ("[E]very Illinois court considering the issue to date has concluded that *Semien* remains controlling law in this circuit."), vacated in part on other grounds, 2009 WL 4730963 (N.D. Ill. Dec. 8, 2009) (denying plaintiff's request for discovery under *Semien*); *Anderson v. Hartford Life and Acc. Ins. Co.*, 2:08-cv-471, 2009 U.S. Dist. LEXIS 48853, at *7 (S.D. Ind. June 10, 2009) (holding that district courts "should continue to apply *Semien's* standard in this Circuit—since that case has yet to be reversed."). Accord *Munson v. C.H. Robinson Co.*, No. 09 C 495, 2009 WL 1586325, at *2

(N.D. Ill. June 8, 2009); *Nash v. Life Ins. Co. of N. Am.*, No. 09 C 1357, 2009 WL 1181605, at *2 (N.D. Ill. Apr. 29, 2009); *Huss v. IBM Medical and Dental Plan*, No. 07 C 7028, 2009 WL 780048 (N.D. Ill. Mar. 20, 2009); *Kaplan v. Susquehanna Int'l Group, LLP Long Term Disability Plan*, No. 08 C 752, slip. op. (N.D. Ill. Dec. 18, 2008); *Marszalek v. Marszalek & Marszalek Plan*, No. 06 C 3558, 2008 WL 4006765, at *2 (N.D. Ill. Aug. 26, 2008) (holding that *Semien* remains good law and has not been overturned). [3]

In fashioning standards for district courts to apply in deciding requests for conflict discovery, the Seventh Circuit in *Semien* specifically considered Congress's crucial goal of encouraging employers to offer ERISA plans by reducing administrative costs and litigation complexities. *Semien*, 436 F.3d at 815. The Supreme Court further emphasized these congressional goals in *Conkright v. Frommert*, 130 S.Ct. 1640 (2010), in directing courts to comply with principles of deferential judicial review in ERISA cases. "Congress sought 'to create a system that is [not] so complex that administrative costs, or litigation expenses, unduly discourage employers from offering [ERISA] plans in the first place.'" *Id.* at 1649 (quoting *Varity Corp. v. Howe*, 516 U.S. 489, 497 (1996)).

Only 30% of private employers choose to provide long-term disability coverage to their employees, and unfortunately that number may erode. In the current economic climate, employers may not need to provide disability protection in order to attract and retain good

[3] Warner suggests that *Parrilli v. Hartford Life & Accident Ins. Co.*, No. 09 C 0769, 2009 WL 7447751 (N.D. Ill. Sept. 29, 2009) held that *Glenn* abrogates *Semien*. *Parrilli* reflects the application of *Semien's* two-part test, and not the rejection of it. The court specifically identified evidence "to suggest that Hartford's determination may have been improper," reflecting that the court found *prima facie* evidence of a procedural defect as required by *Semien*.

workers.[4] District courts should not usurp the Seventh Circuit's balancing of congressional incentives by deeming to overturn *Semien* based on an inferential interpretation of *Glenn*.

II. Warner Fails to Establish That This Is An Extraordinary Case Meriting Her Expansive "Conflict" Discovery

Balancing Congress's desire to encourage voluntary plan formation and reduce litigation costs, *Semien* establishes reasonable standards for determining the propriety of conflict discovery. To obtain conflict discovery, Warner must do more than proclaim that Unum has a structural conflict of interest, which is the norm in virtually every ERISA plan. Warner must establish that this is an "exceptional case" in which "it appears likely" that the plan administrator committed misconduct. *Semien*, 436 F.3d at 815-816.

Essentially all employee welfare plans operate under a structural conflict, because the vast majority of these plans necessarily are insurer-funded and administered or employer-funded and administered. To say that a structural conflict entitles a plaintiff to conflict discovery means that discovery would occur in every ERISA case, which would undermine congressional goals articulated in *Semien* and *Conkright*.

Warner seeks extensive financial and statistical documentation from Unum. She notes Unum's structural conflict of interest, a given in virtually every ERISA benefits dispute. But she fails to establish that this is an exceptional case warranting discovery under *Semien*, and she fails to correlate her expansive discovery to any perceived procedural irregularity or misconduct in the administration of her disability claim. See *Corbisiero v. Bank of Am. Corp.*, No. 09 C 1587, 2010

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[4] Based on data reported by the Bureau of Labor Statistics. See Dept. of Labor ERISA Advisory Counsel, "Managing Disability Risks in an Environment of Individual Responsibility," Statement for the Record of Warren von Schleicher, Aug. 28, 2012 at http://www.dol.gov/ebsa/pdf/AC-VonSchleicher.pdf, pg. 3 (viewed Feb. 10, 2013).

WL 996441, at *5 (N.D. Ill. Mar. 16, 2010) ("[Plaintiff] has not pointed to evidence indicating any actual conflict of interest impacted the Arbitrator's decision or the Committee's decision in this case.").

Warner seeks to compel "statistics" of every claim reviewed by Drs. Folkening, Council, and Rodela from 2007 to 2011, including whether they opined that the claimed restrictions and limitations were supported or unsupported for every disability claim over that five year period. Disability claims are not simplistic black and white determinations, requiring only a thumbs-up or thumbs-down for restrictions and limitations. Many disability claimants, guided by their attorneys, assert a litany of functional impairments. In a particular disability claim, some conditions may be limiting, others may not. Warner's request for a compilation of statistics would require individual examination of every disability claim reviewed by Unum's medical consultants from 2007 to 2011. Warner's counsel, shedding crocodile tears over the burdensomeness of her statistics request, alternatively suggests production of a "sampling" of five "file reviews" from Drs. Folkening, Council, and Rodela for counsel's inspection and scrutiny. (Pl. Motion pg. 12).

Warner's physician statistics and sampling discovery is not discovery aimed at Unum's inherent structural conflict as insurer and claims administrator. Rather, Warner seeks to conduct an inquisition into Dr. Folkening's, Dr. Council's, and Dr. Rodela's professional medical opinions about other disability claimants. That is not structural conflict discovery at all. It is an attempt to place the medical judgment of Drs. Folkening, Council, and Rodela on trial based on sweeping generalizations about their assessment of insureds' unique medical conditions in other cases.

An administrator's consultation with physicians who review the medical file is not evidence of a structural conflict. The Seventh Circuit repeatedly has endorsed the practice in ERISA cases of consulting with physicians who evaluate the clinical and objective medical findings. See *Marantz v. Permanente Medical Group, Inc. Long Term Disability Plan*, 687 F.3d 320, 335 (7th Cir. 2012) ("[Dr.] Manolakas did not examine [plaintiff], but did review her medical file, a procedure accepted by this court.") (citing *Davis*, 444 F.3d at 577); *Williams v. Aetna Life Ins. Co.*, 509 F.3d 317, 325 (7th Cir. 2007) (rejecting the plaintiff's argument that consulting physicians who review the medical file are "inherently biased.").

Not only is Warner's proposed statistical discovery unrelated to an administrator's structural conflict, but it sheds no light on the reliability of the physician's medical judgment *in this case*. So what if a consulting physician finds restrictions and limitations unsupported in 20%, 50%, or 80% of the claims reviewed. The propriety of a physician's medical conclusions is not determined according to the law of averages, but by the specific medical facts and circumstances of each disability claim. An administrator would be faced with the impossibly burdensome task of rebutting statistics by delving into the medical merits of each claim reviewed by consulting physicians from 2007 to 2011, in violation of the claimants' rights to medical privacy.

Warner's alternative "sampling" proposal is equally inappropriate and unfeasible. Warner seeks, as an alternative to statistics, production of five medical consulting reports prepared by Drs. Folkening, Council, and Rodela involving other disability claimants. A consulting physician's opinions in other claims are not evidence of a conflict of interest in Warner's case. The Seventh Circuit has warned, "*Glenn* does not invite a 'batting average' approach, assessing conflict by comparing the number of benefits decisions affirmed and reversed in federal court. (The sampling problems with that approach would be daunting)." *Holmstrom v. Metropolitan Life*

Ins. Co., 615 F.3d 758, 767-768 (7th Cir. 2010). The court in *Garvey v. Piper Rudnick LLP Long Term Disability Ins. Plan*, No. 08 C 1093, 2012 WL 1079966 (N.D. Ill. Mar. 30, 2012) refused to use a similar batting average approach in assessing structural conflicts. "The Seventh Circuit has warned that sampling problems render useless this type of 'batting average approach,' in which prior adverse court decisions are used to infer bias on the part of a plan administrator." *Id.* at *9 (quoting *Holmstrom*, 615 F.3d at 767-768). Cf. *Hoffman v. Sara Lee Corp.*, No. 11 C 3899, 2012 WL 404496, at *5 (N.D. Ill. Feb. 8, 2012) (denying plaintiff's request for discovery into the disability claims of other insureds).

Warner asserts that the batting average approach condemned in *Holmstrom* and *Garvey* is problematic only when sampling consulting physician opinions *by lawsuit* and not when sampling consulting physician opinions *by claim*. Whether the sampling pool includes claims in litigation or all claims is irrelevant. The flaws of the batting average approach are the same. Warner cannot infer bias from a sampling of claims, because medical opinions are a fact intensive and claim specific inquiry. *Garvey* held that the batting average approach repudiated by the Seventh Circuit applies to consulting physician opinions. "The batting average approach is no more useful for establishing the bias of consulting physicians, for it is possible that [the consulting physician] has consulted in hundreds of cases where her opinions were not and could not fairly have been challenged." *Garvey*, 2012 WL 1079966, at *9.

Warner disregards serious privacy concerns in her McCarthyesque inquest for structural conflicts. Individuals have a right to privacy over their personal medical records. Their private medical problems should not be culled, inspected, exhibited, and debated by Warner and her counsel to try to win benefits and fees in this case. Warner's counsel suggested blacking out individual names, but that approach provides little solace to individuals who do not want (and

would never imagine) their personal medical conditions to be debated by strangers in adversarial litigation. As articulated by the Seventh Circuit in *Northwestern Mem. Hosp. v. Ashcroft*, 362 F.3d 923, 929 (7th Cir. 2004): "Even if there were no possibility that a patient's identity might be learned from a redacted medical record, there would be an invasion of privacy. Imagine if nude pictures of a woman, uploaded to the Internet without her consent though without identifying her by name, were downloaded in a foreign country by people who will never meet her. She would still feel that her privacy had been invaded."

Warner seeks to compel production of the compensation paid to Drs. Folkening and Dr. Council. Discovery into a structural conflict should not require disclosure of private individual employee payroll records. The Supreme Court has acknowledged that protecting privacy rights is an important consideration in determining the scope of discovery, because discovery "may seriously implicate privacy interests of litigants and their parties*[.]*" *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 35 n. 21 (1984). Unum produced the compensation, bonus, and incentive programs applicable to the benefits personnel and medical consultants employed by Unum, including Drs. Folkening and Council. Unum produced its (i) Management Incentive Compensation Plan, (ii) Stock Incentive Plan, (iii) Compensation Programs Summary, and (iv) the Benefits Center Recognition Programs Brochure. (Pl. Mot. Ex. F, Answer Interrog. No. 8).[5] These programs establish that Unum does not encourage or reward benefits personnel or medical consultants to deny valid claims. The actual compensation paid to employees such as Drs. Folkening and Council is irrelevant. The fact that Unum's written compensation programs wall-off

[5] Unum agreed to produce the Compensation Programs Summary and Benefits Center Recognition Programs Brochure under a mutually agreeable protective order that satisfies the requirements of Form LR 26.2.

compensation from disability claim approvals or denials sufficiently establishes that employees are not given financial incentives to deny meritorious disability claims.

Unum also agreed to produce the IRS 1099 forms for 2011 and 2012 for Dr. Rodela, who maintains an independent practice and is not an employee of Unum. Warner wants more 1099 forms for Dr. Rodela dating back to 2007. Warner's disability claim was submitted, evaluated, and decided in 2011 and early 2012. Dr. Rodela evaluated Warner's medical records in 2012. Unum therefore produced Dr. Rodela's IRS 1099 form for 2011 to 2012, the years applicable to Warner's disability claim. Warner's quest for more Dr. Rodela 1099 forms for several years predating the physician's involvement with Warner's disability claim does not pass Rule 26 scrutiny and is inconsistent with *Semien*.

Warner desires to inspect "performance evaluations" of Drs. Folkening, Council, and Rodela, in her crusade for evidence of Unum's structural conflict. They are licensed and Board certified physicians. As the court in *Garvey* commented, "state licensing bodies are in a far better position than this court to police the competency of physicians." *Garvey*, 2012 WL 1079966, at *9.

Moreover, Warner fails to establish any correlation between the performance evaluations and a procedural irregularity in the medical opinions of Drs. Folkening, Council, and Rodela.[6] Warner argues that Unum "disregarded" the medical opinions of family practitioners Dr. Jeffries and Dr. Sureka. (Pl. Motion pg. 14). But Unum did not disregard the opinions of Warner's physicians. On July 22, 2011, Dr. Folkening called and spoke with Dr. Sureka about his assessment of Warner's functional capacities. Dr. Folkening attempted to contact Dr. Jeffries by phone and letter on July 27, 2011, but Dr. Jeffries "disregarded" Dr. Folkening and refused to

[6] As an independent contractor, Dr. Rodela would not receive annual employee performance evaluations.

respond. The physician-consultant reports of Drs. Folkening, Council, and Rodela discuss the clinical and objective evidence in detail, including the opinions of Drs. Jeffries and Sureka, as well as the opinions of Drs. Brobbey, Couri, and Baig whose findings did not support Warner's disability claim. Unum's consultation with three Board certified physicians who reviewed all the medical evidence demonstrates unbiased decision-making, and not a conflict of interest. See *Bzdyk v. Sheet Metal Workers Local 265 Welfare Fund*, No. 10-CV-4352, 2011 WL 3704718, at *8 (N.D. Ill. Aug. 22, 2011) (holding that the administrator's consultation with two physicians who reviewed the medical records "cuts against the possibility of a conflict of interest.") (citing *Black v. Long Term Disability Ins.*, 582 F.3d 738, 748 (7th Cir. 2009)).

Warner cites John Langbein's law review article "Trust Law as Regulatory Law" and a so called "white paper" titled "Fibromyalgia Position Statements and Guidelines," as her *prima facie* showing under *Semien* of a procedural irregularity in Unum's administration of her disability claim. John Langbein's article (referenced in *Glenn*) criticized Unum's practices in the decade preceding 2003. The fibromyalgia "white paper" was authored in 2002 and was never implemented by Unum, never distributed to Unum's benefits personnel, and never used by Unum to decide fibromyalgia claims. (Ex. J, Affidavit of Robert N. Anfield, M.D., J.D., ¶¶ 4-7).[7] Warner's disability claim was administered by Unum in 2011 and 2012, ten years after the fibromyalgia white paper was authored and ten years after the purported practices criticized by Langbein's article.

[7] Dr. Anfield's Affidavit was filed by Unum in 2005 in *Wyatt v. UnumProvident Corp.*, No. 3:04-CV-1781-M in the Northern District of Texas.

The Supreme Court's reference to Langbein's article in *Glenn* (even though Unum was not a party to *Glenn*) has unfairly disparaged Unum. The court in *Hagopian v. Johnson Fin. Group, Inc. Long-Term Disability Plan*, No. 09-C-926, 2010 WL 3808666 (E.D. Wis. Sept. 23, 2010) rejected the plaintiff's argument that Langbein's article evidences a conflict of interest. The court stated that *Glenn's* reference to Langbein's article "has had the perhaps unintended effect of placing a target on Unum, as numerous plaintiffs (including Hagopian) cite to *Glenn* and the Langbein article as presumptive evidence that Unum's structural conflict should be given added weight in cases against Unum." *Id.* at *7. The court held that Langbein's article about Unum's purported pre-2003 practices (and *Glenn's* reference to the article) does not provide evidence of a structural conflict in claims administered by Unum after 2003:

> [T]he Court finds that Unum's conflict of interest should not be given heightened importance in this case merely because of Unum's past practices that were documented in the Langbein article. The Langbein article criticized Unum's questionable practices in the decade leading up to 2003, but Hagopian's claim wasn't filed until 2005.

Id. at *9.

John Langbein's outdated law review article about pre-2003 *unproven* practices should not be portrayed as contemporary evidence of a structural conflict. In November 2004, Unum and its subsidiaries entered a Regulatory Settlement Agreement ("RSA") with the Secretary of Labor and insurance commissioners of 47 states. In the RSA, Unum agreed to implement wide-ranging practices in its corporate structure and claims administration, under the oversight of state and federal regulators including insurance regulators from Maine and New York (the "Lead Regulators"). In April 2008, Maine's insurance commissioner called Unum "a model for other insurers." The commissioner stated, "The strong new processes and the resulting change in corporate culture—measured by the very low rate and in some cases a 0% error in claim

determinations is remarkable[.]" (Ex. K, Maine Bureau of Ins. Press Release). In May 2008, New York's insurance commissioner reported, "Unum is to be commended for its cooperation and its prompt implementation of the required reforms." New York's commissioner publicized that the Lead Regulator's independent report "found Unum complied with the changes in corporate governance and claim administration procedures and actions required by the settlement agreement. The company's error rate was now substantially better than the standards required by the [RSA]." (Ex. L, NY Ins. Dept. News Release).

Finally, in her document requests, Warner seeks production of Unum's "complete underwriting file" and all "financial records" pertaining to the Group Policy, including "premiums received" and "benefit payments" since 2008. (Pl. Motion Ex. C, Doc. Req. No. 6). In her Motion, Warner asserts that she is entitled to documents reflecting "the financial performance of the Policy" and the "profitability of the Policy." (Pl. Motion pgs. 4, 10). But she fails to anchor her broad request to any potential irregularity in the administration of her disability claim. She fails to present any argument to support her broad request for "financial performance," "profitability," or underwriting documents for a Group Policy issued to Tyson Foods more than a decade ago, in 2002. See *Milligan v. Bd. of Trs. of S. Ill. Univ.*, 686 F.3d 378, 386 (7th Cir. 2012); *Alioto v. Town of Lisbon*, 651 F.3d 715, 721 (7th Cir. 2011); *Judge v. Quinn,* 612 F.3d 537, 557 (7th Cir. 2010) ("perfunctory and undeveloped arguments, and arguments that are unsupported by pertinent authority, are waived") (internal quotation marks omitted).

Warner's proposed profitability discovery only invites argument by innuendo, with every innuendo being negative. If ERISA policies are profitable—and obviously they are or insurers would be out of business—then Warner would argue that the profits reflect stingy claims practices. If ERISA policies are not profitable, then Warner would argue that the insurer has an

incentive to deny claims, in order to avoid further losses. No standard exists by which profitability would be declared "just right." The profitability discovery Warner desires is designed for demagoguery and should be denied.

III. Warner Is Not Entitled To Unum's Privileged Attorney Communications

Warner challenges Unum's assertion of privilege over three communications between Unum's benefit analyst and Unum's legal department on September 20, 26, and 28, 2011. (Pl. Motion pgs. 14-15). She contends that Unum, as an ERISA fiduciary, acts as a representative on her behalf, so any privilege asserted by Unum belongs to her, based on the fiduciary exception to privilege. According to Warner, Unum's legal communications occurred before her appeal was decided and before litigation occurred. Warner neglects to mention that on September 19, 2011, her attorney Mark DeBofsky submitted a letter to Unum advising that he has been retained, that future correspondence must be directed to him, and providing "notification" that all electronically stored information must be "preserved in the event litigation might ultimately result from this claim." (Ex. M, Mr. DeBofsky's Sept. 19, 2011 letter). Mr. DeBofsky's letter notified Unum that a litigation hold must be placed on evidence. Mr. DeBofsky cannot insist on a litigation hold, instigate Unum to consult its legal department, and then turn around and claim that Unum's legal consultation constitutes a privilege that belongs to him and his client.

CONCLUSION

Warner fails to identify any procedural defect in Unum's determination, or assert that discovery is likely to reveal a procedural defect. She does not contend "it appears likely that the plan administrator committed misconduct or acted with bias." *Semien*, 436 F.3d at 815-816. Accordingly, Warner's Motion to Compel Discovery should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 19, 2013, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the attorney of record listed below:

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