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ERISA & DISABILITY BENEFITS NEWSLETTER

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VOLUME 13, ISSUE 3, AUGUST 2021

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MAY THE TRUE CLIENT WIN: THE FIDUCIARY EXCEPTION TO CLIENT-ATTORNEY PRIVILEGE
BY: KACI GARRABRANT

I. Introduction

After fighting hard to get discovery in ERISA cases, insurance companies often object that certain materials are subject to the attorney-client privilege and try to hide them. This is frustrating for Plaintiffs who have already done the hard work to be allowed to dig into the insurance company's claims handling practices. The good news is that the fiduciary exception to attorney-client privilege often applies in the ERISA context and neutralizes this objection.

II. The Fiduciary Exception: Growth From Trusts to Employee Benefits

The fiduciary exception to the attorney-client privilege comes from the common law of trusts. Under this exception, a trustee who obtains legal advice related to the execution of fiduciary obligations cannot assert the attorney-client privilege against beneficiaries of the trust. *U.S. v. Jicarilla Apache Nation*, 564 U.S. 162 (2011). In other words, the trustee is not entitled to prevent a beneficiary from discovering the contents of communications with attorneys when those communications were to obtain advice about performing duties for the same beneficiaries' benefit.

A classic example in trust law is *Riggs Nat. Bank of Washington v. Zimmer*, where the trust's beneficiaries sought to inspect a memo prepared by the bank's attorney for the trustee. 355 A.2d 709 (Chancery Ct. Del. 1976). Critically, this document was prepared before the institution of the beneficiaries' claim for a surcharge. The court held that the memorandum was discoverable because the trustee had sought legal advice to administer the trust- rather than the purpose of defending against the claim. Because the trustee was acting on behalf of the beneficiaries, the "true client" was the beneficiar-

ies, not the trustee, and therefore there was no valid claim of privilege.

III. Beware of Circuit Splits: The Scope of the Fiduciary Exception in ERISA Cases

Under ERISA, administrators have fiduciary duties to the beneficiaries, just as trustees do under the common law of trusts. Throughout the history of ERISA litigation, plaintiffs have argued for the fiduciary exception's application in their cases. In many cases, the court has applied the fiduciary exception, but the scope of the exception – in terms of which communications and from which fiduciaries- may be limited depending on the court.

There are two main rationales for the fiduciary exception in the ERISA arena. Some courts hold that it comes from the ERISA trustee's duty to disclose all information about plan administration to beneficiaries. *Becher v. Long Island Lighting Co.*, 129 F.3d 268 (2d Cir. 1997). Other courts hold that because the trustee is a representative of the beneficiary, then at least as far as advice regarding plan administration, the actual client is the beneficiary, and the trustee never enjoyed the privilege. *Washington-Baltimore Newspaper Guild, Local 35 v. Washington Star Co.*, 543 F. Supp. 906 (D.D.C. 1982).

A significant limitation is that attorney-client privilege remains intact to the extent that any communication was for the trustee obtaining legal advice to defend himself against an action by the beneficiaries. *U.S. v. Mett*, 178 F.3d 1058 (9th Cir. 1999). The key is to look at the context and content of communications: the timing, purpose, and intent behind receiving the advice or communication. Memos or other legal advice provided in anticipation of litigation against the beneficiary are still subject to attorney-client privilege, while memoranda prepared in the administrative period that offer advice related to administering the ERISA plan are not. For example, in *Stroot v. Hartford Life and Accident Ins. Co.*, the court applied the fiduciary exception to memos written by Hartford's in house counsel advising the claims handler about the Plaintiff's claim before the Plaintiff had filed suit, finding that they were not subject to the attorney-client privilege because they were advice for the benefit of administering the Plaintiff's claim, rather than advice regarding upcoming litigation. Simply put, if the content, timing, and intent of the communication show that the communication was intended to help the fiduciary perform its claims handling function, then it is unlikely to be protected by the attorney-client privilege.

Another issue regarding the scope of the exception is what kind of fiduciaries it applies to. Employers who act in a fiduciary capacity as the plan administrator are subject to the exception when they seek advice about plan administration. *A.F. v. Providence Health Plan*, 173 F. Supp. 3d 1061 (D. Or. March 24, 2016). It is also generally accepted that the fiduciary exception applies to ERISA administrators who act as trustees, such as in pension benefits cases. This makes sense, given that trustees are the closest fiduciaries to the trustees who are a part of traditional trust law. Some courts differentiate between trustees and employers who act as fiduciaries on the one hand and insurers who act as fiduciaries.

For example, in *Wachtel v. HealthNet,* the Third Circuit declined to extend the fiduciary exception to insurers designated as fiduciaries under ERISA for two reasons. 482 F.3d 225 (3rd Cir. 2007). First, the court held that the need for the attorney-client privilege is at its highest when the law the client is seeking to comply with is complex, and the penalty is for non-compliance is great. *Id.* Also, creating uncertainty in the attorney-client relationship for insurers might cause them to rethink serving as ERISA fiduciaries because they may choose to stop providing insurance for benefit plans, raise their costs, or decline to fully inform their attorneys about situations to avoid or make up for the likelihood that their communications would be revealed. *Id.* "An entity's ability to secure confidential legal advice should not be at its lowest when complex legal obligations are at its highest." *Id.* Critically, the court cited the fact that the insurer and the beneficiary have divergent and conflicting interests because they have different financial incentives; the "true client" could not be the beneficiary because their interests did not align with the insurer's. *Id.*

That said, the prevailing view is that insurers who are ERISA fiduciaries are also subject to the fiduciary exception. In *Christoff v. Unum Life*, the court explained that in the years since *Wachtel*, the

Third Circuit's reasoning had been persuasively rejected by nearly every court that took up the question. 2018 WL 1327112 (D. Minn. Mar. 15, 2018). It highlighted the fact that other courts have not adopted the reasoning that the true client was not the insurance beneficiary. *Id.* As explained by the *Christoff* court, there is no meaningful distinction between the insurance situation where insurers juggle multiple claimants and other fiduciary situations. Courts also generally reject the idea that insurers will avoid providing coverage under ERISA plans just because they might have to disclose how they reached benefits decisions. *Id.* *Christoff* explains that this exception is generally accepted in terms of fiduciaries who are insurers and employers, just the same. *Id.* Nonetheless, this does not mean that every court agrees with the *Christoff* court in every situation.

IV. Conclusion

Simply put, although courts disagree as to the justification for the fiduciary exception, and some courts disagree as to which fiduciaries it applies to, when attorneys advise a fiduciary about the administrative claims handling process, that communication is usually not privileged. Ultimately, because every Circuit has not applied the fiduciary exception to the same scope of fiduciaries or the same scope of communications, the best practice is to check the recent case law in your Circuit. The fiduciary exception is a tool to avoid improper claims of privilege, but it may not apply in every situation. It is always best to check the relevant case law or contact an ERISA attorney for help.

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