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ERISA Fiduciaries and the Attorney-Client Privilege

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In these uncertain economic times, people are looking closely at all aspects of their finances, including the management of their retirement plans. Not only are plan participants concerned with their account balances, they and plaintiffs' counsel are examining the underlying management and administrative practices of the plans themselves. Occasionally, this examination leads to litigation and the accompanying discovery process, as participants seek to obtain recovery for perceived wrongs. It is here that the so-called "fiduciary exception" to the attorney-client privilege may come into play.

Background

Communications between clients and attorneys are generally confidential, and cannot be divulged to outside parties without the client's consent. Thanks to this protection, clients are encouraged to speak freely with their attorneys, knowing that the discussion is protected from discovery by one of the strongest privileges allowed under United States law. Attorney-client privilege is not without exception, however, and there are times when the client may have unknowingly waived privilege, or when the privilege simply does not apply. In the benefit plan world, an understanding of how the fiduciary exception to the attorney-client privilege works is essential. ERISA plan fiduciaries and their counsel need to know what types of communications qualify for the privilege and which ones they can expect to be shared with plan participants and beneficiaries. Accordingly, this article examines who is an ERISA fiduciary, what the fiduciary exception is, and when the exception may apply.

Who Is A Fiduciary?

The fiduciary exception to the attorney-client privilege affects those who act in a fiduciary capacity. A fiduciary under ERISA is a person who 1) exercises discretionary authority or discretionary control over an employee benefit plan or over the management and disposition of a plan's assets, 2) provides investment advice for a fee or other compensation, or has the authority or responsibility to do so, or 3) has discretionary administrative authority or responsibility over the plan. A fiduciary's primary responsibility is to act in the best interests of the plan and the plan's beneficiaries. The fiduciary is not to make decisions that are based on what would be best for the business, or for the fiduciary personally, while acting in a fiduciary capacity. This requirement to act for the plan and the plan's beneficiaries provides the underpinning for the fiduciary exception.

The Fiduciary Exception Defined

The fiduciary exception prevents communications between a plan fiduciary and counsel "in the execution of fiduciary duties" from being privileged against plan participants and beneficiaries. *Wachtel v. Health Net*, 482 F.3d 225, 226 (2d Cir. 2007) (contains a good brief history of the development of the fiduciary exception). The theory for the exception is that counsel is, in fact, representing plan participants when advising a fiduciary in the exercise of its duties.

The sticking point is determining who the attorney is representing at the time the conversation occurred, and it is helpful to consider the role of the employer vis-à-vis the plan. An employer may act as a fiduciary in matters of plan administration and management, but the employer does not act as a fiduciary when engaged in plan design activities. *Becher v. LILC*, 129 F.3d 268, 268 (2d Cir. 1997). Accordingly, if a fiduciary consults counsel on a matter of plan administration, the fiduciary may not claim privilege against participants. The participants are the rightful clients of the attorney for purposes of that conversation. If, however, the fiduciary consults with the attorney on a matter of plan design, termination, or other business matters, the fiduciary exception would not apply. The plan and its participants are no longer the clients at that point, because the matter under discussion involves business decisions and is not related to plan management or administration. In such a case, the business entity is the client and retains the privilege.

There is no bright-line rule for when the fiduciary exception may be applied. That said, it is fair to say that when counsel is being properly paid from the plan—as opposed to the plan sponsor—the fiduciary exception will most likely apply. It is otherwise a case-by-case examination, based on the content, timing, and the impetus for each communication. "It is not the terms of an engagement letter, but rather the nature of the particular attorney-client communication that is dispositive." *United States v. Mett*, 178 F.3d 1058, 1064 (9th Cir. 1999). A key distinction should be noted: a person's fiduciary status is not constant and unchanging. An employer may meet with counsel for the purposes of discussing the investment performance of the funds in the plan, but change the topic to the possibility of plan termination. At which point does the employer change from discussing a fiduciary matter to discussing a settlor (business) matter? Evaluating plan investment performance is a fiduciary function. Thus, in the first half of the conversation described above, the employer seeks advice on behalf of the plan, but for the benefit of the plan beneficiaries. Therefore, counsel's true clients are the plan's participants and beneficiaries. The communication would likely fall under the fiduciary exception and would not be privileged against the participants. In contrast, the second half of the conversation involves matters of plan design. The employer was acting on behalf of the business and likely may claim attorney-client privilege against plan participants for that portion of the conversation.

The Fiduciary Exception in Practice

As discussed above, the fiduciary exception is applicable when the true client is not the fiduciary, but the plan participants and beneficiaries. It does not apply when the advice given falls within the settlor functions of a plan sponsor. Further, the exception may not apply when a fiduciary is seeking advice for his or her own protection in anticipation of litigation.

A good example of how the fiduciary exception to attorney-client privilege can work to compel document production through discovery is found in *Fischel v. Equitable Life Assurance*, 191 F.R.D. 606 (N.D. Ca. 2000). The plaintiffs, former employees of the defendant, sought to compel the defendant employer to disclose various documents from meetings with the company's inside and outside counsel by invoking the fiduciary exception. The court used a test that examined not only the advice given, but the intended recipient of the advice, as well as the underlying reasons for seeking it. *Id.* at 609. As a result, the court allowed production of memoranda examining documents that were intended to educate plan beneficiaries about changes in their plan benefits. The court found that the documents were primarily focused on communicating information about plan changes that had already been made, as opposed to advising whether the changes were desirable. As such, the intended beneficiaries of the advice were the plan participants, not the employer. With the participants thus established as the actual clients, the work fell within the fiduciary exception to the attorney-client privilege and was discoverable. *Id.* at 610.

The fiduciary exception does not apply when the fiduciary is engaged in settlor functions. In *Tatum v. R.J. Reynolds Tobacco Company*, 247 F.R.D. 488 (M.D.N.C. 2008), the defendant employer eliminated two stocks from the company's 401(k) plan investment lineup as part of an overall plan restructuring. A beneficiary filed suit, claiming that the elimination of the stock constituted a breach of fiduciary duties. In the course of discovery, the plaintiff sought to compel production—among other documents—of certain memoranda and notes that he claimed fell within the fiduciary exception.

The court began its analysis by reviewing the premise that attorney-client privilege may be asserted "when the communications [between the administrator and counsel] relate to plan sponsor or 'settlor' functions of adopting, amending, or terminating a plan." *Id.* at 493. The court reviewed the documents in question to determine which were fiduciary in nature, and which were related to plan settlor functions, based on the "context and content" of each communication in question. *Id.* at 495 (quoting *United States v. Mett,* 178 F.3d 1048, 1064 (9th Cir. 1999). The court determined that the documents reflecting legal advice as to the adoption of plan amendments and legal services related to the amendments constituted settlor functions, and were therefore subject to attorney-client privilege. In contrast, a certain redaction in a draft communication to participants was determined to be advice on how plan changes should be communicated to the participants. Communicating plan changes to participants is a fiduciary function, not a settlor function, and therefore is subject to the fiduciary exception. *Tatum*, 247 F.R.D. at 496.

In *United States v. Mett*, the Ninth Circuit found that a plan fiduciary can properly assert attorney-client privilege when seeking advice in anticipation of litigation. 178 F.3d 1058. In *Mett*, business owners—who were also the company pension plan administrators—withdrew a significant amount of money from the plan to cover general operating expenses. The defendants solicited advice from their counsel about potential criminal and civil sanctions that could result from their actions, and received two memoranda detailing the various penalties to which they could be subjected. The plaintiffs successfully obtained those memoranda through the pre-trial discovery process, citing the fiduciary exception as their basis. The Ninth Circuit held that the fiduciary exception to attorney-client privilege did not apply based on the actual content of the memoranda. "[The memoranda are] devoted entirely to advising [defendants] regarding their own personal civil and criminal exposure. . . ." *Id.* at 1064. Therefore, the defendants were acting in their own interests, not those of the plan participants, and the fiduciary exception did not apply.

The Ninth Circuit rejected the government's argument that the scope of the fiduciary exception should be extended to include matters broadly related to the administration of the plan. The court stated that broadening the scope of the fiduciary exception ran the risk of effectively eliminating attorney-client privilege for all ERISA trustees and administrators; almost any conversation an administrator may have with counsel could relate to the plan's administration in however tangential a manner. The court also recognized that giving legal advice to an ERISA trustee about his or her own liability is not advice being sought for the benefit of the plan or its beneficiaries. By definition, that advice could not fall under the fiduciary exception, as the individual is not acting in a fiduciary capacity at that time. *Id.* at 1065.

The court provided an additional practical basis against broadening the scope of the fiduciary exception. Trustees and administrators who need to seek legal advice for non-fiduciary matters may not do so if they fear that their conversations with counsel may no longer be privileged. They may choose not to serve on a plan administrative or investment committee, or, if so, may only consult their attorneys when things begin to fall apart, as opposed to being proactive. *Id.* The court went on to say that when there is a difficult question of privilege, the dispute should be resolved in favor of nondisclosure. In a precedential legal system, it is often better to preserve the privilege's integrity rather than establish a dangerous precedent that could be used to defeat the original intent of the privilege. *Id.*

Conclusion

Whether a particular conversation or communication fits the fiduciary exception to the attorney-client privilege can be a complicated determination. If the communication relates to a fiduciary function such as evaluating plan investment performance, then it fits within the fiduciary exception and is not privileged against the plan participants or beneficiaries. If the communication relates to a settlor function such as plan or design, then it is not fiduciary in nature, the exception does not apply and the attorney-client privilege may be invoked. If the communication is for the fiduciary's own benefit in anticipation of potential litigation against him or her, then the fiduciary is the true client for that communication and attorney-client privilege may be asserted. As a practical matter, in order to preserve the privilege, it is best for counsel to view his or her role as one involving service to the fiduciary or business entity in a manner related to their liability risk. It should be noted that the application of the fiduciary exception may vary from jurisdiction to jurisdiction, and counsel is always wise to check the law of the relevant jurisdiction before acting.

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