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Report of the Subcommittee on Ethics

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A district court granted defendant health plan claim provider’s motion to disqualify plaintiffs’ counsel based on that law firm’s previous representation of defendant in ERISA actions.1 The court found that the law firm “represented [defendant plan sponsor] in at least six ERISA healthcare claim cases and provided advice on issues relating to the denial of ERISA-benefits claims, claims processing, evaluations, appeals, the availability and exhaustion of administrative remedies, and the enforcement of anti-assignment clauses, including the same anti-assignment clause at issue in the instant litigation.”2 The court then held that the law firm

2 Id., at *3.
improperly represented plaintiffs – pharmaceutical companies and assignees of beneficiaries whose claims were previously denied by defendant plan sponsor – while concurrently representing the defendant. ³ Without disclosing its representation of plaintiffs to defendant, the law firm contacted defendant in an effort to resolve plaintiffs’ claims; that conduct, the court found, undermined the loyalty that the law firm owed to defendant given its previous representation.⁴ While this case does not deal with the multiple representation of clients in a single matter, it does deal with the ethical concerns created by representing multiple clients in the rendering of services in connection with the administration of employee benefit plans.

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A. Attorney-Client Privilege
   1. The Attorney-Client Privilege in the Employee Benefits Setting

   Communications by pension plan trustees to obtain advice as to whether the trustees violated federal law and regulations governing the voluntary compliance program in paying early retirement benefits to plaintiffs, the substance of which had been communicated to plaintiffs, are not privileged. Agendas and minutes of meetings where these matters were discussed with counsel present also were not privileged.⁵

   2. The Attorney-Client Privilege in Entity Representation

   When the entity is a government agency, different considerations may come into play. These considerations are discussed by the District of Columbia in Jordan v. U.S. Dept. of Labor,⁶ in which an individual sought documents from the Department of Labor under the Freedom of Information Act. In particular, FOIA Exemption 4 exempts “trade secrets and commercial or financial information obtained from a person and privileged or confidential” matters from disclosure.⁷ However, communications between an employee of a government contractor and the

³ Id., at *7-8.
⁴ Id., at *8.
⁵ Metzgar v. U.A. Plumbers & Steamfitters Local No. 22 Pension Fund, 2018 WL 2744904, at *4 (W.D.N.Y. June 6, 2018)
⁷ Id. at 42 (quoting 5 U.S.C. §552(b)(4).
contractor’s in-house attorney were not privileged and were not protected from disclosure under Exemption 4.⁸

3. *The Attorney-Client Privilege in Multiple Representation*

4. *Attorney-Client Privilege in Fiduciary Representation*
   a. *The Fiduciary Exception to the Privilege in the ERISA Context*
      i. *Early Cases Requiring Good Cause*
      ii. *Later Rationales for Not Requiring Good Cause*

   In order for the fiduciary exception to apply, one of the parties to the communication must be a fiduciary. In a district court in the Fourth Circuit, plaintiffs sought attorney-client communication of an entity that contracts with the insurer/claims administrator of a health plan to provide a mechanical process for the submission of claims under the insurer/claims administrator’s rules and clinical oversight functions relating to its network of treating providers. The court held that the entity did not have any discretion and was not a fiduciary and thus the entity’s attorney-client communications were protected and not subject to the fiduciary exception.⁹ Further, the communication must relate to fiduciary matters in order for the fiduciary exception to apply. A communication involving risks to the fiduciaries falls outside the fiduciary exception.¹⁰

   b. *Limitations on the Fiduciary Exception*
      i. *Settlor Functions*
      ii. *Personal Liability*
      iii. *Divergent Interests*

   The past year has seen some tuning of when there is a divergence of interest between the fiduciary and the beneficiary such that the fiduciary exception to the attorney-client privilege does not apply.

   A district court in Washington applied the Ninth Circuit’s opinion in *Stephan v. Unum Life Ins. Co.*,¹¹ to hold that the plan had fiduciary responsibilities toward the plan beneficiary up and until final denial of the beneficiary’s claim:

   These fiduciary responsibilities were not discharged by Plaintiff’s seeking involvement from the U.S. Department of Labor or the vague threats of future litigation; so long as Defendants were considering Plaintiff’s appeal and making a

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⁸ *Id.*
¹⁰ Baird v. BlackRock Institutional Tr. Co., N.A., 322 F. Supp. 3d 966, 974 (N.D. Cal. 2018). See also Peters, supra (a fiduciary’s contracting with a non-fiduciary to perform mechanical administrative services is not a fiduciary function).
¹¹ 697 F.3d 917 (9th Cir. 2012)
determination of coverage, they were acting in a fiduciary capacity, and the fiduciary exception would apply.\textsuperscript{12}

A district court in Ohio took a somewhat different approach. While recognizing that the parties’ interests “have sufficiently diverged such that the fiduciary exception no longer applies after the final administrative determination has been made”

“a sufficiently adversarial relationship may arise before the final decision denying benefits.” … In addition to the timing of the communications, “[o]ther factors to be considered include evidence that: 1) the threat of litigation was more than a remote possibility; 2) the interests of the beneficiary and ERISA fiduciary had diverged significantly; 3) the documents or communications were not necessary to or relied upon in the administrative claim process; and 4) the documents relate to a settlor function (i.e., amendment of the plan) and were not considered in evaluating the claim at issue.”\textsuperscript{13}

Under the unique circumstances of the case, the court determined that the timing of the communications carried less than the typical weight. Where the plan administrator told the participant \textit{before} he submitted a claim that the claim would be denied, but encouraged him to submit the claim anyway so that he could appeal as a predicate to filing legal action, it was “reasonable and prudent” for the plan administrator to anticipate litigation, even in the early stages of the dispute, involving defendants’ repeated misstatements regarding the calculation of the participant’s pension benefit. Thus, defendants were not required to produce communications that related to the plan administrator’s defense of litigation that it reasonably concluded was forthcoming.\textsuperscript{14}

In the past year, courts have opined on the question of whether the fiduciary exception applies to communications by the insurer of an ERISA plan. A district court in the Eighth Circuit noted that the decision of the Third Circuit in \textit{Wachtel v. Health Net, Inc.}\textsuperscript{15} has not been widely adopted, that its reasoning has been heavily criticized and that more recent decisions holding that the fiduciary exception does apply to insurance companies represent the better rule.\textsuperscript{16} The court found no “principled basis for applying the fiduciary exception differently in

\textsuperscript{12} D.T. by & through K.T. v. NECA/IBEW Family Med. Care Plan, 2018 WL 4353263, at *4 (W.D. Wash. Sept. 12, 2018). \textit{See also} Christoff v. Unum Life Ins. Co. of Am., 2018 WL 1327112, at * 6-9 (N.D. Minn. Mar. 15, 2018) (where all communications occurred prior to the final determination of the participant’s claim and involved claim administration, an adverse relationship not demonstrated by the fact that the participant had retained counsel during the administrative process or that there was disagreement between the participant’s attorney or the insurer’s claims analysts).


\textsuperscript{14} \textit{Id.}, at * 5-6.

\textsuperscript{15} 482 F.3d 225 (3d Cir. 2007).

\textsuperscript{16} Christoff v. Unum Life Ins. Co. of Am., 2018 WL 1327112, at *5 (D. Minn. Mar. 15, 2018) (citing Stephan v. Unum Life Ins. Co. of Am., 697 F.3d 917, 931 n.6 (9th Cir. 2012)).
the context of an insurance company than for other ERISA fiduciaries,” and predicted that the Eight Circuit would follow the *Stephan* line of cases.\(^\text{17}\)

However, not all functions of an insurer administering an ERISA plan are fiduciary functions. A district court in the Fourth Circuit considered whether a health insurer, administering a self-insured plan, was acting as a fiduciary in contracting with an entity that provided discrete claims processing and clinical oversight functions relating to its network of treating providers. The court held that while the health insurer was a fiduciary, the contracting with that entity was not a fiduciary function because the entity did not engage in any fiduciary functions, and the insurer was not required to produce attorney-client communications relating to the contract under the fiduciary exception.\(^\text{18}\)

**iv. Top Hat Plans**

5. *Waiving the Attorney-Client Privilege*

**B. Work Product Immunity**

1. *Anticipation of Litigation*

2. *Fiduciary Exception*

A district court in Ohio assumed that the fiduciary exception applied to the work-product doctrine in the Sixth Circuit on the same basis as it applied to the attorney-client privilege.\(^\text{19}\) The Northern District of Illinois held that emails between a severance plan administrator and the employer’s in-house counsel regarding the implementation of the decision to deny benefits was subject to the fiduciary exception to the work product doctrine.\(^\text{20}\)

3. *Preserving the Work Product Protection*

**VI. Choice of Law and the Unauthorized Practice of Law**

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\(^{17}\) Id., at *6.  