Synopsis: Administrators of ERISA plans frequently receive requests from participants, beneficiaries and their representatives for plan-related documents. A recent decision from the Court of Appeals for the Fifth Circuit supports providing only those documents that fall under a narrow reading of ERISA Section 104(b)(4). Over-production could serve to facilitate litigation.

Section 104(b)(4) of ERISA requires that plan administrators provide certain plan documents to a participant or beneficiary (or their authorized personal representative) upon written request, including copies of the summary plan description, plan document, annual report, trust agreement, contract and bargaining agreement, as well as documents that fall within a catch-all of “other instruments under which the plan is established or operated.” When document requests are received, it’s not at all uncommon for the request to include a long list of documents, often times repetitive, leaving the plan administrator to weed through the request and identify the documents that must be provided under ERISA.

In Theriot v. Building Trades United Pension Trust Fund, et al. (E.D. La. Nov. 4, 2019), plaintiff alleged that the defendants, a multi-employer pension fund and its trustees, failed to timely produce plan documents in violation of Section 104(b)(4), entitling the plaintiff to statutory penalties of up to $110 per day.

In 2017, the plaintiff requested “a complete copy of the plan agreement, including [her deceased mother’s] application and all other correspondence from her to the Fund.” The defendants provided a copy of the plan document, current through 2017. The plaintiff alleged that the defendants should have known that she was also requesting other plan documents, including an outdated version of the plan document and summary plan description, even though she did not specifically request them.

In 2018, the plaintiff made a second request, also including a long list of additional plan documents. The defendants provided only copies of the 2017 plan document, trust agreement and summary plan description in effect as of the dates specifically requested, as well as copies of Forms 5500 and attachments. Plaintiff, however, alleged that the defendants failed to produce any of the other documents from the 2018 request. The court determined that certain of the document requests were not sufficiently clear, some of the requested documents did not exist and some were not relevant to the plaintiff understanding her rights under the plan. The court also determined that a reasonable plan administrator would not have known that the plaintiff was requesting other documents beyond the 2017 plan document. And notably, the court agreed with the majority of other circuits that Section 104(b)(4) did not encompass the fidelity bonding policy, any errors and omissions insurance policy or any fiduciary insurance policy.

Takeaway. The Theriot case shows that narrowly construing Section 104(b)(4) can be defensible. It also can be advisable. Any lawsuit challenging fiduciary conduct must allege plausible facts to survive a motion to dismiss and enter into expensive discovery. There is no sound reason to make the plaintiff’s task in this regard easier by over-producing documents under Section 104(b)(4).