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Employee Benefits Exceptions to Attorney-Client Confidentiality (and the Exceptions to the Exceptions)

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The attorney-client privilege and the attorney work-product doctrine have been described, respectively, as the "most sacred" of privileges and as "essential" to the proper preparation of a client's case. In the employee benefits context, however, the conflicting demands of full disclosure to and prudent protection of plan participants and beneficiaries, on the one hand, and on the other hand, respect for the principle of attorney-client confidentiality, have resulted in an intricate balancing act full of rules, exceptions, and exceptions to the exceptions. Attorneys, employers, fiduciaries, and plaintiffs alike need to understand the complex and sometimes unpredictable ways in which courts have balanced these competing interests.

"[T]he attorney-client privilege is, perhaps, the most sacred of all legally recognized privileges, and its preservation is essential to the just and orderly operation of our legal system."[1]

In addition to honoring this "most sacred" privilege, courts also recognize the attorney work-product doctrine because:

> [I]t is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel. Proper preparation of a client's case demands that

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> he assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference.[2]

With statements like these adorning numerous federal cases, it is no wonder that benefits attorneys and their clients are often surprised by how limited the scope of the attorney-client privilege and the work-product rule can be when an employee benefit plan is involved.

ATTORNEY-CLIENT PRIVILEGE

The purpose of the attorney-client privilege is to promote "full and frank communication between attorneys and their clients."[3] Accordingly, before the privilege can exist, the parties must create an attorney-client relationship. Furthermore, the mere fact that an attorney has sent a communication to a client, or vice versa, is not enough to entitle that communication to the shield of the privilege. For example, a company could not privilege its sales figures simply by sending the reports to its law firm. In order for the privilege to attach, the communication must be a *confidential* communication that was *intended to obtain legal advice,* not a communication conveying merely factual information.[4] If all of these requirements are met, the communication will be privileged unless an exception applies. In the context of employee benefit plans, however, the exceptions sometimes appear to swallow the rule.

Eligibility for Privilege Protection

Before worrying about the exceptions to and limitations on the attorney-client privilege, a litigant seeking to protect communications must first determine whether the three-factor test has been satisfied.

Attorney-Client Relationship

Even without the involvement of a benefit plan, numerous lawsuits demonstrate that it sometimes can be hard to be sure whether an attorney-client relationship exists between an attorney and a person with whom the attorney interacts with respect to a legal matter.[5] When a benefit plan is added to the mix, the question becomes even more complicated. Does the attorney represent the employer, the individuals, third-party entities serving as fiduciaries, or the plan itself (and thus, by extension, the interests of its participants and beneficiaries), or some combination of these entities?

It is extremely common for an attorney to represent the employer in its capacity as the settlor and sponsor of a plan and in that capacity to provide advice both with respect to plan design and in regards to the fiduciary obligations of the employer's employees who serve in a fiduciary capacity. A lawyer filling this role may also take on responsibilities that reasonably could be considered to involve direct representation

of the plan. It is certainly permissible for a lawyer to act in this manner, absent circumstances that generate a prohibited conflict of interest among one or more of the clients.[6] This multiplicity of roles is not necessarily fatal to a claim of privilege,[7] but it can complicate the analysis.

Since the first hurdle to establishing a claim of privilege is to prove that the lawyer's communication was made to or received from a client, identifying which of the multiple potential clients was, in fact, the client is an essential step. Of course, the answer may be that more than one entity was the attorney's client. In that case, information may not be privileged with respect to any of the clients, as among themselves. Comment 30 to Rule 1.7 of the ABA's Model Rules of Professional Conduct notes that "the prevailing rule is that, as between commonly represented clients, the privilege does not attach." However, Comment 31 concedes that it may be possible for the joint clients to agree, "after being properly informed, that the lawyer will keep certain information confidential."

Obviously, untangling overlapping relationships can be complicated when a benefit plan is involved. A carefully drafted engagement letter, detailing which entities the lawyer represents and what services the lawyer will provide to whom can prevent confusion from arising in the first place. However, as with all attorney-client relationships, a good engagement letter only sets the stage. Careful, consistent, and well-documented communication with the client regarding the scope of the lawyer's engagement is invaluable in setting and protecting a client's expectations of privilege. Conversely, allowing the lines of representation to blur may prove fatal to a subsequent effort to shield communications.[8] Ultimately, an attorney must know which entities are his or her clients, and must make sure all potential clients know who is, and who is not, a client and what implications joint client status may have on the applicability of attorney-client privilege.

Intended to Obtain Legal Advice

While anyone who has ever tried to read a legal memo could be forgiven for assuming that no one would communicate with a lawyer unless in desperate need of legal advice, this is not in fact the case. Lawyers, especially in-house lawyers, often receive routine information about the business and/or personal lives of their clients and their clients' employees. In addition, lawyers often obtain factual information in the course of preparing and providing legal advice. For example, a lawyer reviewing a denied claim for disability benefits would receive a file full of factual information about the claimant's medical condition. Facts cannot be shielded from third-party view simply because they have been shared with a lawyer. Likewise, business advice and other non-legal communications cannot be privileged simply because the communications are prepared by or for a lawyer.

Accordingly, lawyers (especially in-house lawyers) and clients need to take care to identify communications intended to give or obtain legal advice. Even more important, lawyers and clients need to understand that communications that fall outside of this category are not entitled to the protection of the attorney-client privilege. However, courts have recognized that the giving and receiving of legal advice may in limited circumstances involve third parties. If information is provided by a third party for the use of counsel in the preparation of legal advice, the privilege can attach to that information despite the fact that it was obtained from someone other than the client.[9] Likewise, communications from a lawyer to a third-party assisting the lawyer in this fashion may be eligible for the privilege.

In the benefit plan world, with so much essential information in the hands of institutional recordkeepers, claims administrators, actuaries, consultants, and other third-party service providers, this aspect of attorney-client privilege doctrine is essential for the privilege to function meaningfully. Nonetheless, attorneys and clients need to handle third-party information with extreme caution, and take care to document the justification for the privileged status of sensitive information. Courts historically have taken a narrow approach to applying the privilege to third-party information.

For example, in *Byrnes v. Empire Blue Cross Blue Shield*,[10] the employer successfully asserted a claim of privilege with respect to certain documents prepared by its plan actuary. The employer had been sued in connection with its denial of retiree life insurance benefits, and the actuary "was involved as a consultant on the very project for which the attorney was also rendering assistance to [the employer]."[11] The court distinguished the case of *U.S. v. Ackert,*[12] in which the attorney in question had consulted an accountant, "but there was no indication that the accounting firm had been retained in whole or in part by the attorney or the client to assist in the project for which the legal services were being provided."[13] The *Byrnes* court emphasized, however, that privilege attached only if the actuary's communications were intended to assist the attorney in rendering legal advice, rather than to aid in the business decisions of the employer's officers, and rejected claims of privilege for various documents because they did not meet this standard.

Confidential Communications

In order to be privileged, a communication must have been intended to be confidential. In other words, the communication must be shared only with those who *need to know*. In the benefit plan context, the attorney and employer should consider particularly carefully before adding individuals to the "need to know" list. Obviously, the first step is to determine whether there is a legitimate purpose for sharing the

information. However, the attorney and employer should also bear in mind whether the individual has a potential conflict of interest. For example, in *Lewis v. UNUM Corp. Severance Plan*,[14] the court held that the employer's claim of privilege had been waived when information was shared with an individual serving as a plan fiduciary, even though that individual was also an employee of the plan sponsor.

Fiduciary Exception

Assuming that the conditions for application of the attorney-client privilege are met, the next potential hurdle is the rule known as the "fiduciary exception" to the attorney-client privilege. The "fiduciary exception" states that communications between an attorney and a client with respect to fiduciary activities (such as plan administration or investments) generally are not protected against disclosure to participants (or the government acting on behalf of the participants). Courts have identified two different rationales for this exception to "the most sacred of all legally recognized privileges." Some cases assert that because the lawyer represents the plan, the participants in the plan are also the lawyer's clients, while other cases rest the exception on the basis of the fiduciary's duty to disclose information to plan participants.[15]

The landmark case regarding the fiduciary exception in the employee benefit plan context is *Washington-Baltimore Newspaper Guild, Local 35 v. The Washington Star Company*.[16] Holding that, "Under ERISA, the trustees of an employee benefit plan are fiduciaries who owe an undivided duty of loyalty to the participants in the benefit plan," the court rejected a requirement that the plaintiffs satisfy a "good cause" requirement in order to be entitled to use the affidavit of a former plan attorney with respect to the approval process for a disputed plan amendment. "In a trustee relationship," the court noted, "there exists no legitimate need for a trustee to shield his actions from those he is obligated to serve."[17]

In short, "An ERISA fiduciary has an obligation to provide full and accurate information to the plan beneficiaries regarding the administration of the plan. As part of this obligation, the ERISA fiduciary must make available to the beneficiary, upon request, any communications with an attorney that are intended to assist in the administration of the plan. An ERISA fiduciary cannot use the attorney-client privilege to narrow the fiduciary obligation of disclosure owed to the plan beneficiaries."[18] However, while it is important for attorneys advising employers, fiduciaries, and plans to understand the limits on attorney-client privilege in light of the fiduciary exception, the application of this exception in any given case may not be a foregone conclusion. The exception itself is subject to some significant limitations on its scope.

Settlor vs. Fiduciary Functions

In the first instance, a litigant seeking disclosure of attorney-client communications must demonstrate that the subject of the communications falls within the scope of the fiduciary exception. Not surprisingly, courts have held that the fiduciary exception only extends to communications connected to fiduciary functions.

For example, in *In re Long Island Lighting Co.*,[19] the court held that advice regarding issues of plan design had been offered to the employer in its role as plan sponsor, the settlor of the plan trust, rather than in connection with the fiduciary function of plan administration.[20] Since the employer did not act in a fiduciary capacity when acting in its role as plan sponsor, the communications were not subject to the fiduciary exception—even though the same lawyer had also provided advice about fiduciary matters. The court noted that utilization of separate attorneys was an appropriate response to a conflict of interest, but did not govern the applicability of privilege.

As with most issues in the benefit plan context, identifying whether a communication relates to a "settlor" (plan sponsor) function rather than a "fiduciary" function can be complicated. For example, as recognized by the *Long Island Lighting Co.* case, an employer's decision to make an optional amendment to a plan's benefits generally falls into the "settlor" category. Accordingly, attorney-client communications about the amendment should not be covered by the fiduciary exception.

Even these situations, however, are not always cut and dried. As noted above, the *Washington Star* case authorized disclosure of an attorney affidavit regarding the approval process for a plan amendment. In addition, in Field Advisory Bulletin 2002-2, the Department of Labor recognized that a plan amendment to a multiemployer plan might involve fiduciary action, even though amendments constitute "settlor" functions in the case of single-employer plans. Even in the single-employer plan context, the cost of certain legally required amendments may be payable in whole or in part from plan assets, implicating fiduciary obligations regarding prudent expenditure of plan assets.[21]

Other situations are even less clear. For example, communicating with plan participants about plan features generally is considered a fiduciary function, even if the communication is about a plan amendment adopted by the employer in its role as plan sponsor. However, *Hudson v. General Dynamics*[22] ruled that advice with respect to participant communications involving a plan amendment was also shielded as relating to the "settlor function" of plan amendment rather than the fiduciary function of communication to participants. The *Hudson* court asserted that:

> If such legal advice to an ERISA trustee were deemed to relate, even indirectly, to plan administration, such trustees would have no attorney-client privilege in effect; (2) such a result would undermine a core purpose of the attorney-client privilege to encourage clients [e.g., employers considering the logistics and substance of plan amendments] to make full disclosure to their attorneys; and (3) if ERISA trustees without assurance of confidentiality are disinclined to seek legal counsel, they may act or fail to act in ways that harm the interests of beneficiaries.[23]

Despite this broad statement, plan fiduciaries should not be unduly optimistic regarding the confidentiality of advice involving participant communications about plan amendments. In reaching its result, the *Hudson* court emphasized that the fiduciaries were seeking legal advice about their responsibilities and potential liability arising from misinformation about future plan amendments. As discussed below, the seeking of advice about potential fiduciary liability serves as another limitation on the fiduciary exception, and this rule appears to have served as the real basis for the *Hudson* court's decision, despite the court's discussion of the settlor-fiduciary distinction.[24] Furthermore, other courts have allowed disclosure of attorney advice relating to plan communications. For example, *Tatum v. R.J. Reynolds Tobacco Co.*[25] held that advice relating to communications was subject to the fiduciary exception.

Unfortunately, there is no way to obtain advance certainty as to whether a "grey area" attorney-client communication should be classified as "settlor" or "fiduciary." Although careful documentation of the intended classification and purpose of a communication can help, an employer or fiduciary cannot assure classification of attorney-client communications as "settlor" or "fiduciary" merely by labeling them as such, or even by designating separate counsel as "plan counsel" and "fiduciary counsel." Just as the functional test utilized to determine whether a person is a fiduciary under ERISA assures that a person's actual conduct and not the person's title governs the person's fiduciary status or lack thereof, the actual contents of a communication govern its classification as "settlor" or "fiduciary."

For example, in *Martin v. Valley National Bank*,[26] Valley National Bank was the trustee of an ESOP. It retained separate counsel to represent its interests and advise it with respect to its fiduciary duties. The ESOP had a separate law firm acting as its counsel, and the employer had separate counsel as well. However, in practice, both the law firm retained by Valley National Bank and the law firm retained by the ESOP advised the ESOP's fiduciaries regarding plan administration. The court ruled that the Department of Labor was entitled to disclosure of communications relating to plan administration, regardless of whether counsel had been retained by the trustee or the ESOP.[27]

Therefore, just as failure to maintain separate counsel for settlor and fiduciary functions does not doom settlor communications to lose the protection of the attorney-client privilege, retention of an attorney designated as an adviser to a plan's fiduciary does not prevent disclosure of communications to or from that attorney when the contents of the communications implicate the fiduciary exception.

Although retaining separate counsel and maintaining careful restrictions on that counsel's responsibilities to prevent entanglement in plan administration may assist an employer or fiduciary in establishing that communications were obtained for a purpose exempt from the fiduciary exception, such rigid separation is often impractical. *Valley National Bank* demonstrates vividly that the "separate counsel" method is not foolproof. In the end, labeled records or separate counsel may facilitate a client's response to discovery and creation of a privilege log, but the contents of each communication will control whether that communication is privileged.

Fiduciary Liability Exclusion

If communications do relate to fiduciary rather than settlor functions, a fiduciary seeking to protect communications should consider whether the advice was offered with respect to his or her personal liability, rather than in his or her capacity as a fiduciary (and representative) of the plan and its participants.

Scope of the Exclusion

As *U.S. v. Mett* noted:

> [T]he case authorities mark out two ends of a spectrum. On the one hand, where an ERISA trustee seeks an attorney's advice on a matter of plan administration and where the advice clearly does not implicate the trustee in any personal capacity, the trustee cannot invoke the attorney-client privilege against the plan beneficiaries. On the other hand, where a plan fiduciary retains counsel in order to defend herself against the plan beneficiaries (or the government acting in their stead), the attorney-client privilege remains intact.[28]

In between these two extremes, the determination is more complicated.

U.S. v. Mett is the seminal case with respect to the exclusion of advice relating to fiduciary liability from the scope of the fiduciary exception. In that case, the trustees of an employee benefit plan had used plan assets for their own benefit, and eventually found themselves facing criminal prosecution. The court held that attorney communications "aimed at advising the trustees how far

they were in peril" were not covered by the fiduciary exception, and thus were entitled to the protection of the attorney-client privilege.

Significantly, the *Mett* court also held that it was not necessary for the trustees to be embroiled in active litigation in order for the advice regarding their potential liability to be excluded from the fiduciary exception. The court observed that,

> Although no legal action was then pending against the defendants in connection with the pension plans, CAG employees had begun asking difficult questions regarding the financial condition of the plans. Trouble was in the air. The defendants thus had good reason to seek advice from [the attorney] regarding their personal exposure to additional civil and criminal liabilities arising from the pension plan withdrawals.[29]

The *Mett* court concluded that the divergence of interests between the plan's participants and the plan's fiduciaries in a situation that created the potential for fiduciary liability destroyed the basis for the fiduciary exception. The court further observed that,

> [F]rom a policy perspective, an uncertain attorney-client privilege will likely result in ERISA trustees shying away from legal advice regarding the performance of their duties. This outcome obviously hurts beneficiaries—all else being equal, beneficiaries should prefer well-counseled trustees who clearly understand their duties. In addition, a trustee's fear that her lawyer will be used against her may well translate into either an unwillingness to serve at all, or an insistence on contractual protections aimed at diluting the trustee's accountability. Neither option serves the interest of beneficiaries.[30]

Accordingly, the court asserted, hard cases should be resolved in favor of the privilege.[31]

Tatum v. R.J. Reynolds Tobacco Co.[32] offers more information about the extent of the exclusion for advice relating to fiduciary liability. Like the *Mett* court, the *Tatum* court noted that the seeking of such advice indicated a divergence of interest between plan and fiduciaries, destroying the justification for the fiduciary exception.[33] The *Tatum* court, however, noted that "The key issue remains whether the communication related to plan administration or generalized concern for liability, as opposed to concern for the fiduciaries' liability as a result of a specific threat of litigation."[34] Following this approach, a court should examine the contents and circumstances of attorney advice in order to determine whether the advice relates to routine plan administration or was offered in anticipation of litigation or otherwise with respect to a specific concern about liability.

The Claims Process

The impact of the fiduciary liability exclusion on attorney-client communications associated with a benefit plan's claims process remains a contentious area of litigation. Fiduciaries and their attorneys need to understand that even though the claims process may present concerns regarding fiduciary liability, the exclusion for fiduciary liability advice may not be available for some or all communications about a claim.

After all, post-decisional litigation against a plan by a disappointed claimant is always a possibility when a plan denies a claim. Thus, allowing the possibility for such litigation to invoke the fiduciary liability exclusion would bar disclosure of any advice obtained during the claims process, in contradiction of the fiduciaries' obligation to administer the plan, and thus the claims process, in the participants' best interest.[35] In other words, "[b]ecause denying benefits to a beneficiary is as much a part of the administration of a plan as conferring benefits to a beneficiary, the prospect of post-decisional litigation against the plan is an insufficient basis for gainsaying the fiduciary exception to the attorney-client privilege."[36] Barring disclosure of legal communications also may run afoul of the Department of Labor claims regulations at 29 C.F.R. Section 2560.503-1, which entitle claimants to materials generated during the claims process.

However, courts considering requests for disclosure of attorney-client communications generated during the claims process must attempt to balance the fiduciary obligations associated with the claims process against the need for fiduciaries to have access to confidential legal advice in the performance of their duties. Some courts have sought to formulate a bright-line test, ruling that communications generated during the claims process are subject to disclosure, as the results of the fiduciary function of plan administration, but that communications after the final claims decision has been made are exempt from the fiduciary exception. Other courts have rejected use of a strict pre-decision/post-decision dividing point, instead looking at the specific context in which a particular attorney-client communication was generated.

Geissal v. Moore Medical Corp.[37] has been cited as a leading exponent of the "pre-decision/post-decision" bright-line test.[38] In that case, the court required disclosure of documents assessing a claimant's entitlement to COBRA coverage. The court asserted that since the lawyer's advice had been procured for the purpose of determining whether there was an appropriate legal basis for denying coverage, all the plan's participants had an interest in the lawyer's analysis.

However, although the *Geissal* decision divided its disclosure ruling between pre- and post-decision advice, not all courts agree that such a division is automatically appropriate, or even that the *Geissal* opinion established this divide as a bright-line rule. For example,

the *Tatum* court rejected both this reading of *Geissal* and the pre-decision/post-decision division, establishing an alternative, more flexible standard. *Tatum* holds that,

> The mere prospect of post-decisional litigation against the plan by a disappointed beneficiary can exist whenever the plan denies a claim, and is not sufficient to render all pre-decisional legal advice privileged as against the beneficiary. Rather, only once there is a divergence of interests and a threat of litigation is it warranted for the fiduciary to obtain confidential legal advice and assert attorney-client privilege on the matter against the beneficiary.[39]

In the *Tatum* case itself, the court ruled against disclosure of various communications generated during the administrative claims process. The court noted that the plaintiff had retained counsel and was threatening litigation against the fiduciaries in connection with investment losses. Given these circumstances, the court held that the fiduciaries were responding to a specific threat rather than to a generalized prospect of litigation, and were entitled to confidential legal advice.

In this regard, it is noteworthy that the claim at issue in *Tatum* was a claim directly against the fiduciaries. Specifically, the plaintiff asserted that the plan fiduciaries had breached their fiduciary duties when they divested the plan's holdings in the former plan sponsor's stock at a time when that stock's price was at a low point from which it subsequently rebounded. If a specific threat of litigation involves a claim for benefits payable by the plan, rather than personal liability for fiduciaries, the outcome may differ.

For example, the court in *Coffman v. Metropolitan Life Ins. Co.*[40] indicated that the target of a claim may influence the outcome of the privilege analysis. In that case, the court required disclosure of pre-decision communications on the grounds that the attorney had been consulted in connection with the claims process, not for the purpose of defending the employer against a claim.

Likewise, although Boeing Company recently was successful in defending against disclosure of pre-decisional documents generated in connection with a claim for benefits,[41] the court in that case emphasized that litigation which included a claim asserting fiduciary liability along with claims for benefits was already pending when the plaintiffs filed their administrative claim. Indeed, the employer had already hired litigation counsel to assist it at the time the claim was filed. Characterizing these circumstances as unique, the court held that the parties' interests had diverged and the fiduciary exception did not apply, even to advice relating to the "fiduciary" function of plan interpretation.

Finally, the role that the communications play in the claims process and the fiduciaries' litigation strategy may affect the extent to

which they are subject to disclosure. In *Estate of Cornwell v. AFL-CIO*,[42] the court held that the fiduciaries who had received a presentation by counsel in the course of making their decision could not call upon the court to give deference to their decision unless they provided the court with sufficient access to the evidence presented to them to allow the court to assess the reasonableness of their decision in light of the information available to them. In other words, the court ruled that the fiduciaries had placed the contents of the presentation in controversy, and thus had to disclose that information.

Importantly, the fiduciaries in *Cornwell* had based their claim that their decision was reasonable on the evidence presented by counsel, and had not asserted that their reliance on counsel was itself proof of reasonableness. Accordingly, the court did not require disclosure of legal advice relating to the merits of the claim. Thus, only the evidence was subject to disclosure, and factual information, as the *Cornwell* court observed, generally is not entitled to privilege protection in any event.

However, fiduciaries should be sensitive to this potential wrinkle when conducting a claims review and drafting a claim denial letter, as well as when formulating arguments in support of their decision during litigation. Of course, even if proper care is taken in this regard, legal advice running directly to the conduct of the claims process and the plan's obligations is likely to be subject to disclosure under the standards established by cases such as *Geissal* and *Tatum*. It is advice relating to potential fiduciary liability associated with a claim that may be able to escape disclosure so long as defendants avoid placing such advice in issue.

WORK-PRODUCT DOCTRINE

The work-product doctrine is in some respects broader and in other respects narrower than the attorney-client privilege. Under Federal Rule of Civil Procedure 26(b)(3), the doctrine protects communications by attorneys or their clients (or their representatives) that are "prepared in anticipation of litigation."

The materials with respect to which protection is sought must be documents or tangible things prepared in anticipation of litigation or for trial, and prepared by or for a party or a representative of that party. Work product can relate to facts, legal conclusions, or both. Under Rule 26(b)(3)(A), if work product relates to factual information, it can be disclosed on a showing of the opposing party's "substantial need." Rule 26(b)(3)(B) provides that work product relating to legal conclusions ("the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation") is always protected from disclosure, with no exception for "substantial need."

"In Anticipation of Litigation"

The question of when materials have been prepared "in anticipation of litigation" remains a contentious one. As the Second Circuit observed in *U.S. v. Adlman*, "The formulation applied by some courts in determining whether documents are protected by work-product privilege is whether they are prepared 'primarily or exclusively to assist in litigation.' . . . Others ask whether the documents were prepared 'because of' existing or expected litigation."[43] The standard that applies to a given case can make a significant difference.

For example, in *U.S. v. Adlman,* the documents at issue had been prepared to assist the client in deciding whether to proceed with a proposed business reorganization. The documents assessed the likely risks from a tax litigation perspective. The court held that under the "because of" standard, the documents could be entitled to the work-product doctrine even though they also served a business purpose,[44] although the court disallowed the doctrine's protection for business documents which would have been prepared in the same fashion regardless of concerns about litigation.[45] In contrast, under the "primary purpose" standard, the court in *In re July 5, 1999, Explosion at Kaiser Aluminum & Chem. Co.*[46] rejected a claim of work-product protection for a company's safety analysis. The court emphasized that the "primary purpose" of the analysis was safety, not preparation for litigation, even though the court conceded that the review involved an assessment of regulatory and legal implications and was undertaken at least in part with a view towards the company's position under general principles of tort law.

Courts also vary in terms of the extent to which they require litigation to be imminent in order for work-product protection to attach. Concededly, there is a general consensus that the doctrine can apply to materials prepared prior to commencement of litigation. Applying the "because of" standard, the Second Circuit confirmed that even if the events expected to give rise to litigation have not yet occurred, work-product protection can still attach.[47] Even courts using the "primary motivating force" standard have agreed that litigation need not be imminent so long as it is, in fact, the primary motivating force.[48] However, a general prospect of litigation is not enough to trigger work-product protection.[49] Once again, the involvement of a benefit plan adds to the complexity of this determination.

In the benefit plan context, *Geissal v. Moore Medical Corp.*[50] rejected work-product protection for pre-decisional advice given during the claims process. The court asserted that, "While litigation can result from any fiduciary act, the administrator's acts of securing legal advice for the plan, and the advice rendered, prior to the plan's decision regarding benefits cannot be said to be in anticipation of litigation. Such acts occurred before the later-objected to decision was final and

the divergence of interests occurred."[51] Effectively, the court's decision aligned the work-product standard with the standard the court had adopted for determining whether the fiduciary liability exclusion from the fiduciary exception applies.

Lewis v. Unum Corporation Severance Plan agreed with this approach, rejecting work-product protection even though "The advice provided and the notes taken by counsel with respect to [plaintiff] occurred under circumstances where it was evident that litigation was going to occur in the event of a denial to plaintiff. Specifically, counsel for plaintiff had been in the picture for a considerable period of time, had threatened litigation, and had already filed litigation on behalf of another former UNUM employee."[52]

Accordingly, fiduciaries should conduct the claims process with the understanding that advice received and information provided to counsel may be subject to disclosure. However, efforts to seek work-product protection may be successful in some cases. In *Tatum v. R.J. Reynolds Tobacco Co.*, the court allowed work-product protection to attach with respect to pre-decisional materials. Of course, in contrast to the *Geissal* and *Lewis* cases, the *Tatum* case involved an assertion of breach of fiduciary duty, and thus a risk of personal liability for the fiduciaries. It was not a routine claim for benefits, to be handled in accordance with the plan's routine procedures. The obvious antagonism of interests between the *Tatum* claimant and plan fiduciaries and the genuine risk posed to the fiduciaries in the event of litigation may have influenced the court's decision that work-product protection was appropriate.

Fiduciary Exception

Courts generally have not applied the fiduciary exception to the work-product doctrine.[53] Since work-product protection is intended at least as much for the attorney as for the client, to allow the attorney to work privately, courts generally have not considered it reasonable to perceive a mutuality of interests between the preparer of the work-product materials and the plan participants.

However, in some circumstances, the tangled relationship among lawyers, fiduciaries, plan sponsors, and the plan may nonetheless require disclosure of materials prepared in anticipation of litigation. In *Everett v. USAir Group, Inc.*, the court held that:

> Lawyers who act for fiduciaries of an employee benefit plan may assert the work product privilege since the privilege belongs, at least in part, to the attorney. But generally they may not invoke it to shield their attorney work product from their own ultimate clients, the plan beneficiaries. Accordingly, defendants may assert the work product privilege with respect to [disclosure requests] to

> the extent that they call for information and documents that were prepared expressly in anticipation of litigation except insofar as they were prepared in anticipation of litigation on behalf of the plan beneficiaries.[54]

Likewise, in *Martin v. Valley National Bank,* the court held that the attorneys could not shield work product when their client (the plan) directed that it be released.[55] Thus, as was the case for the attorney-client privilege analysis, the identity of the attorney's client may be a pivotal fact.

THE IMPLICATIONS OF LIMITED CONFIDENTIALITY

Courts' interpretations of the privilege and work-product protection available to attorney-client communications in the benefit plan context vary. As a general rule, fiduciaries are likely to have the most protection in situations posing a threat of personal liability, and the least in situations involving routine plan claims and issues of day-to-day plan administration. In all situations, fiduciaries and their attorneys should be sensitive to the risks associated with generating materials that they would not want to see disclosed in the event of a lawsuit or government audit.

However, seeking and receiving appropriate legal advice is an essential ingredient in employers' and fiduciaries' efforts to avoid situations that result in litigation or a finding of liability on audit. In fact, fiduciaries have a legal obligation under ERISA Section 404 to seek advice from experts when a prudent person would do so. In addition, fiduciaries have an obligation to administer their plans fairly and consistently, to pay benefits properly due, to act in the best interests of participants and beneficiaries, and to maintain appropriate plan records.

Accordingly, fiduciaries and employers should not avoid seeking appropriate advice or fail to maintain proper records of advice given and actions taken in response to that advice. Instead, employers, fiduciaries, and their lawyers should be sure they understand the potential limits on the protection of the attorney-client privilege and work-product doctrines, exercise appropriate caution, and take the impact of potential disclosure obligations into account when making strategic decisions.

NOTES

1. U.S. v. Bauer, 132 F.3d 504, 510 (9th Cir. 1997).

2. Hickman v. Taylor, 329 U.S. 495, 510–511 (1947).

3. Upjohn Co. v. U.S., 449 U.S. 383, 389 (1981).

4. *See id.*

5. *See, e.g.,* Thomas P. Sukowicz, "The Unintended Client and Non-Engagement Letters." <*http://www.lacba.org/showpage.cfm?pageid=3537*> (last visited Apr. 3, 2010).

6. *See In re Long Island Lighting Co.*, 129 F.3d 268, 272 (2d Cir. 1997).

7. *See id.* (rejecting contrary dicta in Washington-Baltimore Newspaper Guild, Local 35 v. The Washington Star Company, 543 F. Supp. 906, 910 (D. D.C. 1982)); U.S. v. Mett, 178 F.3d 1058 (9th Cir. 1999) (citing *Long Island Lighting Co.*). The reverse is also true: utilization of separate counsel for the plan and for a fiduciary does not assure confidentiality of communications. *See In re Long Island Lighting Co.* (in dicta); Martin v. Valley National Bank, 140 F.R.D. 291, 324–326 (S.D.N.Y. 1991).

8. In this regard, it is worth noting that payment of attorney fees by the plan will hinder, but is not necessarily fatal to, an effort to assert that the employer or fiduciary, rather than the plan, is the client with respect to the plan-paid services. *See Martin*, *supra* n.7, 140 F.R.D. at 326.

9. *See* United States v. Kovel, 296 F.2d 918 (2d Cir. 1961); Byrnes v. Empire Blue Cross Blue Shield, 1999 U.S. Dist. LEXIS 17281 (S.D.N.Y. Nov. 4, 1999).

10. *Byrnes*, *supra* n.9.

11. *Byrnes*, *supra* n.9 at *6.

12. 169 F.3d 136 (2d Cir. 1999).

13. *Byrnes*, *supra* n.9 at *6.

14. 203 F.R.D. 615 (D. Kan. 2001).

15. *See, e.g.,* Tatum v. R.J. Reynolds Tobacco Co., 247 F.R.D. 488 (M.D.N.C. 2008); U.S. v. Mett, *supra* n.7.

16. *Supra* n.7, 543 F. Supp. at 909.

17. *But c.f. Tatum*, *supra* n.15 (rather than rejecting a "good cause" requirement entirely, court should review the full "context and content" of communications to determine whether the privilege should be respected or whether the fiduciary exception should be applied; the question turns on why the communications were prepared and what issues they address).

18. *In re Long Island Lighting Co., supra* n.6, 129 F.3d at 271–272 (2d Cir. 1997).

19. *In re Long Island Lighting Co., supra* n.6.

20. *See also Tatum*, *supra* n.15, and Wachtel v. Health Net, Inc., 482 F.3d 225, 233 (3d Cir. 2007). *But see* Fischel v. The Equitable Life Assurance, 191 F.R.D. 606 (N.D. Cal. 2000) (rejecting the "settlor" versus "fiduciary" distinction in favor of inquiring only whether the advice was eligible for the exclusion from the fiduciary exception applicable to advice obtained by fiduciaries with respect to their own liability).

21. *See* Department of Labor Advisory Opinion 2001-01A (Jan. 18, 2001).

22. 73 F. Supp. 2d 201 (D. Conn. 1999).

23. *Id.*, 73 F. Supp. at 203 (internal citations omitted). As this quotation indicates, the *Hudson* court blurred the lines between the "settlor versus fiduciary" exclusion from the fiduciary privilege, and the exclusion for advice obtained by fiduciaries for their own protection.

24. *C.f. Fischel*, *supra* n.20 (rejecting claims of privilege for advice regarding participant communications as relating to plan administration rather than the potential liability of the fiduciary because attorney review seemed focused on wordsmithing

rather than substantive advice and public policy strongly favors full disclosure to beneficiaries; upholding privilege with respect to other communications reflecting a substantive review with a focus on potential fiduciary liability).

25. *Tatum, supra* n.15, 247 F.R.D. at 497.

26. *Martin*, *supra* at n.7.

27. Correspondence related to advising the trustee regarding responses to the Department's audit was protected under the exclusion for fiduciary liability advice discussed in the next section.

28. U.S. v. Mett, *supra* n.7, 178 F.3d at 1064.

29. *Id*. 178 F.3d at 1064.

30. *Id*. 178 F.3d at 1065.

31. *Id*.

32. *Tatum*, *supra* n.15.

33. *Tatum*, *supra* n.15, 247 F.R.D. at 497.

34. *Id*. at 498.

35. *See* Geissal v. Moore Medical Corp., 192 F.R.D. 620 (E.D. Mo. 2000).

36. Lewis v. UNUM Corp. Severance Plan, *supra* n.14, 203 F.R.D. at 620.

37. *Geissal*, *supra* n.35.

38. *See* Neathery v. Chevron Texaco Corp. Group Accident Policy No. OK 826458, 2006 U.S. Dist. LEXIS 96586 (S.D. Cal. July 7, 2006).

39. *Tatum*, *supra* n.15, 247 F.R.D. at 497–498 (internal quotations and citations omitted).

40. 204 F.R.D. 296 (S.D. W. Va. 2001).

41. Soc'y of Prof'l Eng'g Emples. in Aero., IFPTE Local 2001 v. Boeing Co., 2009 U.S. Dist. LEXIS 102345 (D. Kan. Nov. 3, 2009).

42. 197 F.R.D. 3 (D. D.C. 2000).

43. U.S. v. Adlman, 134 F.3d 1194, 1198 (2d Cir. 1998).

44. *Id*. at 1198–1199.

45. *Id*. at 1202.

46. 1999 U.S. Dist. LEXIS 14107 (E.D. La. Sept. 10, 1999), *aff'd* DeNova v. United States DOL (*In re Kaiser Aluminum & Chem. Co.)*, 214 F.3d 586 (5th Cir. 2000), *cert. denied* 532 U.S. 919 (2001).

47. *See* U.S. v. Adlman, *supra* n.43, 134 F.3d at 1200 (citing U.S. v. Adlman, 68 F.3d 1495, 1501 (2d Cir. 1995)). *See also* Byrnes v. Empire Blue Cross Blue Shield, *supra* n.9 (interpreting *Adlman* to hold that the anticipated litigation can be a "distant future prospect.")

48. *See, e.g*., U.S. v. El Paso Co., 682 F.2d 530, 542–543 (5th Cir. 1982), *cert. denied* 466 U.S. 944 (1984).

49. *See* Nat'l Union Fire Ins. Co. v. Murray Sheet Metal Co., 967 F.2d 980, 984 (4th Cir. 1992).

50. *Supra* n.35.

51. *Geissal*, *supra* n.35, 192 F.R.D. at 625.

52. *Lewis*, *supra* n.14, 203 F.R.D. at 622.

53. *See, e.g.*, Donovan v. Fitzsimmons, 90 F.R.D. 583, 587–588 (N.D. Ill. 1981); *Tatum*, *supra* n.15, 247 F.R.D. at 501.

54. 165 F.R.D. 1, 5–6 (D. D.C. 1995) (internal citations omitted).

55. *Martin*, *supra* n.7, 140 F.R.D. at 320. Notably, the *Martin* court noted that the parties disputed the application of the fiduciary exception, but found it unnecessary to resolve the issue (140 F.R.D. at 327).

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