Proskauer

The ERISA Litigation Newsletter

February 2013

Editor's Overview

We are excited to announce the upcoming launch of Proskauer's ERISA Litigation Blog. Through our blog, we hope to be able to provide more immediate coverage of court rulings and regulatory guidance, as well as provide an alternative medium for our readers to review articles and case notes published in the ERISA Litigation Newsletter. Watch for the launch in March 2013!

While you may know that the attorney-client privilege is one of the most sacrosanct privileges to ever exist, you may not know that your conversations about plan administration issues with plan counsel — whether they relate to benefit claims, investment issues or others — may very well be required to be disclosed to your adversary in litigation. Stacey Cerrone provides background on the fiduciary exception to the attorney-client privilege and practice points to minimize its impact in litigation.

As always, be sure to review the section on Rulings, Filings, and Settlements of Interest.

View from Proskauer: Are Your Conversations Privileged under ERISA?[1]

Contributed by Stacey C.S. Cerrone

Under ERISA, plan participants and beneficiaries have the right to obtain information pertaining to their benefit entitlements and the operation of the plans in which they participate. Sometimes these rights compromise the protections of the attorney-client privilege. Under the fiduciary exception, "an employer acting in the capacity of ERISA fiduciary is disabled from asserting the attorney-client privilege against plan beneficiaries on matters of plan administration." *U.S. v. Mett*, 178 F.3d 1058, 1063 (9th Cir. 1999). Although courts have recognized that there are circumstances where the fiduciary exception is inapplicable, it is often difficult to predict in advance whether and when attorneys can provide advice that will be immune from disclosure, and there is an ever-present risk that advice to fiduciaries regarding plan administration will be subject to the fiduciary exception. For example, in *Stephan v. Unum Life Insurance Company of America,* 697 F.3d 917 (9th Cir. 2012), the Ninth Circuit recently analyzed the fiduciary exception and held that attorney-created memoranda were subject to the fiduciary exception because they were created upon request of the benefits claim decision maker before the final benefit appeal, and dealt with matters of plan interpretation.

Attorney-Client Privilege and the Fiduciary Exception

The purpose of the attorney-client privilege has always been to "encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice." *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). As applied in ERISA litigation, the fiduciary exception to the attorney-client privilege is rooted in two different rationales. The first is the "Duty to Disclose," where the exception derives from an ERISA fiduciary's duty to disclose to plan beneficiaries all information regarding plan administration, and the attorney-client privilege gives way to a competing legal principle. The second is the "Real Client" rationale, which is not an "exception" to the attorney-client privilege but rather reflects the fact that, at least as to advice regarding plan administration, the participants and beneficiaries are the "real client," rather than the fiduciary.

Courts routinely apply the fiduciary exception to matters that they have concluded fall within the ambit of "plan administration." However, there are circumstances where the fiduciary exception is inapplicable, including situations where: the advice relates to a settlor function; the goal of the advice is to advise the fiduciary of his or her potential personal liability; the advice pertains to matters involving a participant who is adverse to the plan; and the fiduciary's interests and the participant's interests have diverged.

Generally, the fiduciary exception can be invoked only by participants and/or beneficiaries; however, some courts have held that governmental agencies may invoke the exception.

Stephan v. Unum Life Insurance Company of America

A very recent example where a Circuit Court analyzed the fiduciary exception is in the Stephan case. In Stephan, the participant of a wholly-insured ERISA plan sued Unum, the plan administrator, for denial of a benefit claim. The district court granted summary judgment in favor of the plan administrator. On appeal, one of the issues that the Ninth Circuit addressed was whether Unum operated under a conflict of interest when making the benefit determination. In an effort to demonstrate a conflict of interest, plaintiff sought to discover internal memos created during the claims review process by Unum's in-house counsel at the request of the Unum claims analyst deciding the benefit claim. The district court held that the fiduciary exception did not apply to the memos because the interests of the participant and the fiduciary had sufficiently diverged at the time the disputed memos had been created. The Ninth Circuit disagreed. It first held that the fiduciary exception applies to insurance companies, in direct conflict with a 2007 Third Circuit decision, *Wachtel v. Health Net, Inc.*, 482 F.3d 225 (3d Cir. 2007). In so holding, the court found there was no basis to distinguish an insurance company fiduciary from any other ERISA fiduciary.

The Ninth Circuit next held that the fiduciary exception applied to the memos at issue because they dealt with plan administration and were created upon request of the analyst who was making the benefits claim decision. In analyzing the memoranda, the court found that the Unum memos clearly rendered advice on plan administration and the benefit claim. In so ruling, the court distinguished its previous decision in the Mett case where it held that the fiduciary exception did not apply to certain attorney-created memoranda that advised the trustees of their personal liability. The court then reviewed the circumstances under which the Unum memos were created. The court stated that while there was no binding precedent in the Ninth Circuit delineating when the interests of the participant and plan fiduciary diverged, most courts have held that the interests do not diverge until after the final administrative appeal. The Ninth Circuit then applied this standard and held that the Unum memos were generated in advance of Unum's decision of the participant's appeal, the memos' goal was to assist in the determination of the claim, and the memoranda were not prepared for litigation. Thus, the memoranda were subject to the fiduciary exception.

Practice Points

Although there is no fool proof method for protecting the confidentiality of fiduciary advice, plan fiduciaries and their counsel should consider in advance the nature of the legal advice being solicited or rendered, and whether such advice can be timed and structured in a way that will minimize the risk of disclosure. In reviewing whether the fiduciary exception applies to an otherwise privileged communication, it is important to keep the following practice points in mind.

Identify the client and the nature of the communication

- In determining whether the fiduciary exception will apply or whether communications will be kept privileged, counsel must identify who the client is and the nature of the communication.

- When determining whether the client is the ERISA fiduciary or some other entity, it is important to remember that the fiduciary exception only applies to communications with the plan fiduciaries.

- If the communication or advice is to the ERISA fiduciary regarding the administration of the plan, including discussions regarding claims for benefits, in

most cases those communications and advice are subject to the fiduciary exception.

- The fiduciary exception, however, generally does not apply where the advice involves settlor conduct, such as the adoption, modification or termination of an employee benefit plan. In such cases, courts have routinely declined to order the disclosure of the communications in question, even where the recipient of the advice also functions as a fiduciary.

- Thus, for example, communications with the ERISA plan sponsor regarding plan sponsor activities, such as amending an ERISA plan, are generally not subject to the fiduciary exception.

Identify the timing of the communication

- As stated above, the fiduciary exception generally applies to communication between counsel and plan fiduciaries concerning claims for plan benefits. Therefore, it is important for counsel to be aware that its communications with a plan fiduciary will likely not be privileged when advising the fiduciary during the claims review procedure.

- However, in most cases, any communications or advice that occurs after the final benefit decision has been made will be privileged. Arguably, these communications are no longer relevant to the fiduciary decision-making process and occur at a time when the interests of the beneficiary and plan fiduciary have diverged.

- In most cases, if counsel is giving legal advice to the fiduciary for the fiduciary's personal defense from civil or criminal liability, the fiduciary exception will not apply, regardless of the timing of the communication, and that advice will be privileged.

Identify whether a third party was present when the advice was given

- Finally, separate and apart from the fiduciary exception, the attorney-client privilege can be waived if the communication occurs in the presence of a third party. In the ERISA plan context, service providers, such as investment consultants, actuaries and accountants, are frequently present at plan meetings, and their presence can give rise to issues of waiver.

- There is an exception to waiver, however, that is particularly relevant in the employee benefits context: The protection of the privilege remains intact where the third party is present during attorney-client communications as either the party's or the attorney's agent to facilitate the effective rendition of legal services.

- In order to avail itself of the "agency" exception and avoid the consequences of a waiver, generally the party seeking to invoke privilege must establish that the third party was necessary for the client to obtain informed legal advice.

Rulings, Filings, and Settlements of Interest

Contributed by Anthony S. Cacace, Brian S. Neulander, Kara L. Lincoln, Page W. Griffin, and Jacklina A. Len

Benefit Claims

- In *Govrik v. Unum Life Ins. Co. of Am.*, 702 F.3d 1103 (8th Cir. 2013), the Eighth Circuit held that Unum operated under a structural conflict of interest (as it was both the decision-maker of the claim and the payer of benefits), but it did not abuse its discretion in terminating the insured's LTD benefits after it discovered that certain profits should not have been included in the calculation of the insured's pre-disability earnings. In addition, the Court remanded the case to the district court for consideration of Unum's counterclaim for overpayment of LTD benefits based on a clerical error.

- In *Lifecare Management Services LLC v. Insurance Management Administrators Inc.* ,2013 U.S. App. LEXIS 239 (5th Cir. Jan. 4, 2013), the Fifth Circuit affirmed the district court's ruling that a third party administrator of an ERISA welfare plan was a proper defendant in a claim for benefits under ERISA § 502(a)(1)(B) if the TPA "exercise[d] 'actual control' over the benefits claim process." Here, the TPA had been delegated the power to deny benefit claims filed by participants of the plan and the Court determined it abused its discretion by incorrectly interpreting plan language.

- In *Rossi v. Precision Drilling Oilfield Services Corp. Employee Benefit Plan*, 2013 WL 85910 (5th Cir. Jan. 8, 2013), the Fifth Circuit held that defendant violated ERISA § 503 by changing its basis for denying plaintiff medical coverage, because doing so prevented plaintiff from having a meaningful review of the denial of benefits. The court thus reversed the district court's grant of summary judgment and remanded the case to the plan administrator to determine whether the care

plaintiff sought was covered under the plan.

- In *Coleman v. Supervalu Inc. Short Term Disability Program*, 2013 WL 365263 (N.D. Ill. Jan. 31, 2013), the court denied an ERISA plan's motion to dismiss for improper venue, holding that the venue selection clause was unenforceable. In so ruling, the court concluded that such clauses are contrary to public policy and inconsistent with congressional intent to provide ready access to the federal courts under ERISA § 502(e)(2).

Overpayment of Benefits

- In *Wooden v. Alcoa*, 2013 WL 141777 (6th Cir. Jan. 11, 2013), the Sixth Circuit ruled that defendant's claim for reimbursement of benefits overpayments was appropriate equitable relief because defendant's claim was properly limited to a specified fund within plaintiff's general assets — the proportion of income that would have been reduced if she had received her retroactive Social Security benefits earlier.

Statute of Limitations & Standing

- In *David v. Alphin*, 2013 WL 142072 (4th Cir. 2013), plaintiffs alleged that defendants engaged in prohibited transactions and breached their fiduciary duties by selecting and maintaining Bank-affiliated mutual funds in the investment menu for the Bank's 401(k) Plan and the Bank's separate defined benefit pension plan. The Fourth Circuit affirmed dismissal of plaintiffs' claims. With respect to the defined benefit pension plan claims, the court ruled, among other things, that plaintiffs did not have constitutional standing to assert their claims because the alleged risk of the plan becoming underfunded was insufficiently "concrete and particularized" to constitute an injury-in-fact. With respect to the 401(k) plan, the Court held that since the claims arose in 1999 and the suit was filed well after ERISA's six-year statute of limitations expired, the claims were barred by the statute of limitations.

- In *Raymond v. Callebaut*, 2013 WL 150232 (3d Cir. Jan. 15, 2013) (summary order), the Third Circuit affirmed the district court's ruling that dismissed plaintiff's claim seeking benefits due under the terms of a 401(k) plan because plaintiff's claim was filed more than fourteen years after it had accrued. Plaintiff's claim was based on an allegedly improper liquidation of her account in 1997 yet she did not file her claim to recover benefits under the 401(k) plan until 2011. The court held plaintiff's claim accrued in 1997 when the IRS had sent her a notice of a distribution of her plan benefits and a notice of taxes due from the Internal Revenue Service.

COBRA

- In *In re Interstate Bakeries Corp.*,2013 U.S. App. LEXIS 1663 (8th Cir. Jan. 25, 2013), the Eighth Circuit affirmed the district court's ruling that Hostess' failure to provide a COBRA notice to a terminated employee did not cause the employee to suffer a sufficient degree of prejudice to be entitled to recovery of statutory penalties. The employee was terminated in 2006 during Hostess' bankruptcy. The company failed to provide COBRA notice and continued the employee's coverage under the company's health plan for two years before discontinuing it. The employee filed an administrative claim in the Hostess bankruptcy proceeding, claiming, among other things, that he was entitled to statutory penalties for Hostess' failure to provide him with a COBRA notice. The bankruptcy court granted Hostess' motion for summary judgment, finding that the two years of free medical coverage minimized the prejudice experienced by the employee and that there was no enforcement purpose to a statutory award because Hostess acted in good faith. The district court affirmed the ruling. The Eighth Circuit affirmed the district court's ruling, reasoning that COBRA does not mandate penalties be issued in every case where gaps in coverage occur and in this case it was appropriate to rely on the bankruptcy court's discretion in deciding whether to award statutory penalties

[1] Originally published by Bloomberg Finance L.P. Reprinted with permission.

Related Professionals

- **Russell L. Hirschhorn**
  Partner
- **Myron D. Rumeld**
  Partner