BE CAREFUL: NOT EVERYTHING YOU TELL YOUR ERISA LAWYER IS A SECRET

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Not everything you tell your ERISA lawyer—and not everything your ERISA lawyer tells you--is a secret. This is especially true in the world of ERISA and employee benefit plans and fiduciaries and plan administrators.

An important corollary, however, is that nothing you tell your employee benefits advisor who is not a lawyer engaged in the practice of law is a secret.

This note is about the attorney-client privilege and how it applies in ERISA cases. The law here is discussed in an ongoing case called Advanced Physicians, S.C. vs. Connecticut General Life Insurance Company. You can find the opinion at this link:
https://benefitslink.com/src/ctop/AdvancedPhysicians_NDTex_01032020.pdf

The court's opinion is an excellent resource for attorneys who are looking for the most up to date discussion of the attorney-client privilege in ERISA cases.

More importantly, the opinion is a good reminder to employers and their counsel, including especially in-house counsel, that the attorney-client privilege is a narrow exception to broad disclosure requirements in civil litigation. One rule of thumb is that communications between an ERISA plan administrator and a lawyer about plan administration are not covered by the attorney-client privilege and may be discoverable by a plan beneficiary, an assignee of a plan beneficiary or even the IRS or DOL.

Knowledge of the ERISA limitations of the attorney-client privilege may suggest the need to engage independent legal counsel for an employee benefit plan in appropriate cases. In addition, lawyers and clients should pay careful attention to their time-keeping and billing practices, especially where the attorney represents both the employer and the plan. Lawyers should alert clients in appropriate cases where the lawyer may believe that the privilege will not apply. And, lawyers and clients always should be careful to avoid sloppy and informal communications, especially in emails and text messages.

With those warnings out of the way, let's get into the details of the court's opinion written by Judge Fish in the United States District Court for the Northern District of Texas in Dallas. Judge Fish considered whether communications between an attorney and a plan administrator client must be turned over to a physician group that is suing the plan administrator. The immediate reaction may be that those communications are secret and protected from disclosure. After all, the United States Supreme Court has ruled that the attorney-client privilege promotes the observance of law and administration of justice by encouraging full and frank communications between attorneys and their clients. The attorney-client privilege is routinely upheld by the courts, but in the ERISA context, the words of ESPN GameDay commentator Lee Corso come to mind: "Not so fast my friend!"

On to the case.

Advanced Physicians (AP) as an assignee brought suit to recover amounts due to participants under the NFL Player Insurance Plan. AP initially filed a motion in October 2017 that sought to compel disclosure of communications between Connecticut General Life Insurance Company (Cigna) and its attorneys. Cigna, as the claims administrator, denied AP any access to its communications with its attorneys concerning the Plan based on the attorney-client privilege. AP argued that it could access communications between the two relying on the fiduciary exception to the attorney-client privilege.

The fiduciary exception states that a fiduciary, such as a trustee, cannot withhold attorney-client communications from the beneficiary of the trust. This exception has been widely adopted in the ERISA context to support claims by plan beneficiaries to receive communications between a plan administrator and counsel.

The sole issue considered by Judge Fish was whether or not AP, as an assignee of a beneficiary's claim, could trump the attorney-client privilege by asserting the fiduciary exception. A few circuit courts have addressed the attorney-client privilege in the ERISA context. However, no other court has decided a case on whether an assignee of the right to receive payments under an ERISA plan may assert the fiduciary exception to the attorney-client privilege.

The two primary rationales in previous cases to support the fiduciary exception to the attorney-client privilege are the "Duty Rationale" and the "Client Rationale."

The "duty rationale" comes from a trustee's duty to disclose information about plan administration to all plan beneficiaries.

The "client rationale" supports the notion that the trustee is not the real client, and therefore the fiduciary exception is not really an exception to the attorney-client privilege at all. The client rationale focuses on the idea that the plan administrator should not be able to use the attorney-client privilege. The thought is that a plan administrator is not even 'the real client,' so such a privilege would not be afforded to it at all.

Some courts have found that the Federal government (namely the IRS and DOL) may be allowed to use the fiduciary exception in the ERISA context as long as by doing so, the government

would be serving the interests of the plan beneficiaries. Although a different situation, the court in this case found that AP's use of the fiduciary exception was similar to the cases where the government was asserting the exception. Because the right to receive payments was assigned under the Plan to AP, the court found that the beneficiaries and AP have similar interests, therefore allowing AP to assert the fiduciary exception.

The court ultimately concluded that not only that AP was allowed to assert the fiduciary exception against Cigna's attorney-client defense, but also that Cigna could not assert the privilege in the first place against AP as long as AP was asking about communications regarding plan administration, because it was technically not the client in this situation.

There are two important limitations on the fiduciary exception to the attorney-client privilege. The first is that the attorney-client privilege remains in effect to protect communications between an attorney and her ERISA plan client that are made in connection with defending an existing lawsuit. The second limitation is that the attorney-client privilege protects communications between an attorney and her ERISA plan client that do not relate to plan administration.

In summary, lawyers and their ERISA plan clients need to be very careful to understand the scope and limitations of the attorney-client privilege. In litigation, disclosure is broadly promoted and exceptions are narrowly applied. Plan administrators and their attorneys must be aware of their roles and the rules that apply to their communications and advice.

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