

Court Sheds Light on ERISA's Fiduciary Exception to Attorney-Client Privilege

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A federal district court in Ohio recently attempted to shed some light on when internal communications between an ERISA plan administrator and its in-house counsel are discoverable and when they are protected by the attorney-client privilege.

In *Duncan v. Minnesota Life Insurance Co.*, an ERISA plan beneficiary sought the production of certain communications between Minnesota Life (the plan administrator) and its in-house counsel relating to Minnesota Life's denial of the beneficiary's claim for accidental death benefits. Minnesota Life had previously withheld the documents arguing that such communications between it and its in-house counsel were protected by the attorney-client privilege. The beneficiary, however, argued that Minnesota Life was required to produce such documents based on ERISA's fiduciary exception. Under the fiduciary exception, a plan fiduciary generally must make available to the beneficiary, upon request, any communications with an attorney that are intended to assist in the administration of the plan. This is because when an attorney advises a plan administrator or other fiduciary concerning plan administration, the attorney's clients are the plan beneficiaries for whom the fiduciary acts, not the plan administrator. Minnesota Life countered that none of the communications with its in-house counsel related to administration of the plan, such as deciding whether to grant or deny the beneficiary's claim, but rather were made in preparation for anticipated litigation.

The court explained that when the interests of the ERISA plan fiduciary and the plan beneficiaries have diverged sufficiently such that the fiduciary seeking legal advice is no longer acting directly in the interests of the beneficiaries, but in its own interests to defend against plan beneficiaries, then the attorney-client privilege remains intact. The court noted, however, that the mere prospect of potential litigation over a claim decision is insufficient to defeat the fiduciary exception because denying benefits to a beneficiary — and any related pre-decisional legal advice — is as much a part of the administration of a plan as conferring benefits to a beneficiary.

Following an in camera review of the subject communications, the court compelled the production of certain communications between Minnesota Life and in-house counsel occurring before and after the claim denial because the parties' relationship had not become adversarial yet and simply involved ordinary matters of ERISA claim administration. The court, however, noted that "[t]hings changed somewhat dramatically" when the beneficiary's counsel notified Minnesota Life that they were appealing the initial denial of benefits. The court held that "[o]nce Minnesota Life received counsel's strongly worded, evidence-based letter along with [a doctor's] opinion letter, Minnesota Life faced more than a mere possibility of future litigation if it continued to deny benefits." The court noted that, at this point, the relationship was clearly adversarial and litigation was almost a certainty. Accordingly, the court determined that the fiduciary exception did not apply to communications after this point as such communications were protected by the attorney-client privilege.

Authored By



Todd M. Fuller

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