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LEGAL ALERT

September 13, 2012

Ninth Circuit Applies ERISA Fiduciary Privilege Exception to Insurer

On September 12, 2012, the Ninth Circuit became the first circuit court to consider the Third Circuit's holding in *Wachtel v. Health Net, Inc.*, 482 F.3d 225 (3d Cir. 2007), that the ERISA "fiduciary exception" to the attorney-client privilege did not apply to an insurer making claims decisions in a fiduciary capacity. In a brief discussion within an opinion addressing a number of other issues as well, the Ninth Circuit declined to follow *Wachtel*. *Stephan v. Unum Life Insurance Co. of America*, No. 10-16840, 3:08-cv-01935-MHP (9th Cir. Sept. 12, 2012). Click here for the opinion.

Since the 1980s, a number of courts, including the Ninth Circuit, have recognized a "fiduciary exception" to the attorney-client privilege in the context of ERISA. In litigation initiated by plan beneficiaries (or sometimes by the government), courts have required production of legal advice given to plan fiduciaries in the context of plan administration, on the theories that the fiduciaries are acting for the benefit of the beneficiaries and/or that disclosure obligations of ERISA fiduciaries extend to legal advice they have received. This "fiduciary exception" has been subject to a number of limitations and exceptions.

One such limitation was found by the Third Circuit in *Wachtel v. Health Net, Inc.* which rejected the application of the fiduciary exception to an insurer making claims decisions in a fiduciary capacity. The Third Circuit based its conclusion that the plan participants were not the true beneficiaries of the legal advice in question on four factors. First, unlike the traditional situation in which the fiduciary exception had been applied where the fiduciary was managing assets over which it lacked ownership rights, the insurer was making decisions with respect to claims paid from its own assets. Second, the court reasoned that there was a structural conflict of interest when an insurer was making eligibility decisions regarding benefits paid from its own funds and that this structural conflict undermined the argument that the insurer's counsel was providing advice for the benefit of the plan beneficiaries. Third, the court reasoned that there was an additional structural conflict where an insurer was responsible for making decisions for multiple benefit plans at once. Fourth, the court also noted that the insurer paid for the legal advice with its own assets, not the assets of the plan or its beneficiaries. Under these facts, the court concluded that the insurer was the real client of counsel and that the fiduciary exception therefore should not apply.

In *Stephan*, the Ninth Circuit became the first circuit court to consider the Third Circuit's holding in *Wachtel*. In the course of reviewing a grant of summary judgment for the insurer on a challenge to the insurer's disability benefits decision, the Ninth Circuit also considered the district court's denial of plaintiff's request for certain legal memoranda prepared by in-house counsel at the request of a claims analyst. Plaintiff had sought these memoranda to support an argument that the insurer had a conflict of interest. The district court assumed (without deciding) that the fiduciary exception could apply in the context of a wholly insured plan, but held that it would not apply to the particular communications at issue because the interests of the plaintiff and the insurer had sufficiently diverged by that point that the legal advice could not be viewed as having been provided for plaintiff's benefit.

The Ninth Circuit had previously recognized the fiduciary exception, but it noted that whether the fiduciary exception applies to insurance companies in the ERISA context was a matter of first impression in that court and that the Third Circuit was the only other Court of Appeals to decide the issue. In a relatively brief discussion, the Ninth Circuit rejected the conclusion of *Wachtel*, expressing its view that the justifications for the fiduciary exception did not support excluding insurers from the fiduciary exception:

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> ERISA has broad disclosure requirements: It requires that "every employee benefit plan . . . afford a reasonable opportunity to any participant whose claim for benefits has been denied for a full and fair review by the appropriate named fiduciary of the decision denying the claim." 29 U.S.C. § 1133. Because "[t]he opportunity to review . . . pertinent documents is critical to a full and fair review," *Ellis v. Metropolitan Life Insurance Co.*, 126 F.3d 228, 237 (4th Cir. 1997), the regulations implementing this provision require that upon request, a claimant be provided all "information relevant to the claimant's claim for benefits," 29 C.F.R. § 2560.503-1(h)(2)(ii). Neither the statute nor the regulations provide any reason why the disclosure of information is any less important where an insurer, rather than a trustee or other ERISA fiduciary, is the decisionmaker.
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> Similarly, the obligation that an ERISA fiduciary act in the interest of the plan beneficiary does not differ depending on whether that fiduciary is a trustee or an insurer. There is therefore no principled basis for excluding insurers from the fiduciary exception.

The Ninth Circuit did not specifically address the four factors that underlay the Third Circuit's contrary conclusion in *Wachtel*. After concluding that the fiduciary exception could apply to an insurer, the Ninth Circuit then held that it did apply to the particular communications in question. Rejecting the district court's contrary conclusion, the Ninth Circuit held that the advice was given prior to the insurer's final decision on the claim for benefits and before the interests of the plaintiff and insurer had become sufficiently adverse to fall outside the scope of the fiduciary exception.

In other parts of its decision, the Ninth Circuit held that the discretionary clause in the insurance policy did not violate either California law or the insurer's settlement agreement with the California Department of Insurance and remanded the case for further consideration of the insurer's alleged conflict of interest.

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