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The Fiduciary Exception

by John M. Vine, Esq.[*]

SUMMARY

The attorney-client privilege should protect confidential communications between fiduciaries of ERISA-governed employee benefit plans and their lawyers to the same extent that the privilege protects confidential communications between non-fiduciaries and their lawyers.[1]

The great majority of the courts that have addressed the issue have come to a different conclusion. These courts have concluded that the fiduciary exception to the attorney-client privilege allows plan participants and the Secretary of Labor to obtain testimony or documents relating to confidential communications between plan fiduciaries and their lawyers regarding plan administration.[2]

Although the fiduciary exception was the product of the English common law of trusts of the 19th century, the fiduciary exception was not adopted by any court in the United States until 1968. The exception was first applied to ERISA fiduciaries by two district courts in the early 1980s, before virtually all of the relevant Supreme Court cases regarding attorney-client privilege and fiduciary responsibility under ERISA were decided.

The fiduciary exception has been criticized by some courts and by many academics and other commentators.[3] Many of the appellate decisions that have been characterized as recognizing the fiduciary exception actually concluded that the exception did *not* apply in the case before the court. The Supreme Court has not addressed the validity of the fiduciary exception, and there is good reason to believe that the Court will be open to arguments against applying the fiduciary exception to the fiduciaries of ERISA plans.

The special nature and purpose of employee benefit plans and the language, structure and purposes of ERISA all counsel against applying the fiduciary exception to the fiduciaries of ERISA-governed employee benefit plans. Although ERISA's fiduciary responsibility standards were derived from the common law of trusts, ERISA's fiduciary responsibility provisions should not be interpreted to incorporate common-law doctrines that are not appropriate for employee benefit plans. The conference report for ERISA voiced the expectation that ERISA's fiduciary standards would be interpreted "bearing in mind the special nature and purpose of employee benefit plans,"[4] and, after reviewing ERISA's legislative history, the Supreme Court declared that the common law of trusts often will inform, but will not always determine, the outcome of an effort to interpret ERISA's

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fiduciary standards. In some cases, the Court observed, trust law will provide only a starting point for interpreting ERISA, after which the court must consider whether the language, structure or purposes of ERISA require a departure from common-law standards.[5]

In 19th-century England, gratuitous trusts were not subject to comprehensive disclosure and fiduciary duty requirements similar to those imposed by ERISA, and in the absence of comprehensive disclosure and fiduciary responsibility requirements, it might have been appropriate for courts to adopt the fiduciary exception. Without access to relevant information, the beneficiaries of a testamentary trust might not have been able to hold the trustee to its obligations as the representative of the trust's beneficiaries.

However, the enactment of ERISA's comprehensive disclosure and fiduciary responsibility requirements sharply curtailed any need or justification for common-law rulemaking for employee benefit plans. ERISA was designed to address the particular circumstances of employee benefit plans, and reflects the balance that Congress struck between the competing purposes of encouraging voluntary plan formation, on the one hand, and protecting plan assets and plan participants, on the other. ERISA did not authorize the courts to alter that balance by supplementing ERISA's comprehensive and thorough disclosure regime with common-law disclosure requirements like the fiduciary exception.

The courts that have applied the fiduciary exception to ERISA fiduciaries have:

- given undue weight to a common-law doctrine,
- failed to take into account the differences between fiduciary relationships under ERISA and other fiduciary relationships,
- disregarded ERISA's disclosure and fiduciary responsibility provisions, and
- failed to recognize that the fiduciary exception undermines ERISA's central objectives by discouraging plan fiduciaries from candidly disclosing their concerns to their lawyers, by discouraging lawyers from providing candid legal advice to plan fiduciaries, and by threatening to cause employee benefit plan administration to become more costly and complex.

THE ATTORNEY-CLIENT PRIVILEGE

The Privilege

Civil suits in federal court are governed by the Federal Rules of Civil Procedure. Rule 26(b)(1) of the Federal Rules provides that ''[p]arties may obtain discovery regarding any *nonprivileged* matter that is relevant to the party's claim or defense. . .'' (emphasis added).

Under the Federal Rules of Evidence, the federal courts are authorized to apply common-law rules of privilege in cases involving the adjudication of federal rights.[6] Rule 501 provides that:

> [e]xcept as otherwise provided by the Constitution of the United States or provided by Act of Congress, or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.

The attorney-client privilege originated in the courts of 16th-century England, and has been recognized by the courts of the United States since the 1820s.[7] Federal courts have referred to the attorney-client privilege as ''the oldest'' (or ''one of the oldest''), ''the most venerated,'' and ''the most sacred'' of the common-law privileges for confidential communications.[8]

The Restatement (Third) of the Law Governing Lawyers explains that the attorney-client privilege applies if there is (1) a communication, (2) between lawyer and client (or their agents), (3) in confidence, (4) for the purpose of obtaining or providing legal assistance for the client.[9]

As an evidentiary privilege, the attorney-client privilege differs from a lawyer's obligation under state law not to disclose client information voluntarily.[10] Every state has adopted the ABA's Model Rules in one form or another.[11] Rule 1.6 of the Model Rules provides that a lawyer shall not reveal information relating to the representation of a client unless (a) the client consents, (b) the disclosure is impliedly authorized in order to carry out the representation, or (c) the disclosure is covered by a specific exception.[12]

The attorney-client privilege protects clients from the risk that what they tell their lawyers or what their lawyers tell them will be involuntarily disclosed. By encouraging full and frank communication between lawyers and their clients, the privilege promotes the observance of law and the administration of justice. The attorney-client privilege reflects the view that sound and effective legal advice and advocacy serve the public interest and that a lawyer's ability to provide sound and effective legal advice or advocacy depends on the lawyer being fully informed and able to convey his or her position clearly. By encouraging in-

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dividuals to consult lawyers and to make candid disclosures to them, and by encouraging lawyers to convey their advice clearly, the privilege allows lawyers to help their clients to understand what the law requires. In this way, the attorney-client privilege facilitates voluntary compliance with the law.[13]

Because the privilege encourages communication that might not occur if there were no privilege, the privilege does not necessarily reduce access to evidence that would have been available if there were no privilege. In other words, rather than reduce access to pre-existing evidence, the privilege may prompt clients to disclose to their lawyers information that they would not otherwise reveal to them.[14]

The Importance of Certainty

The Supreme Court has emphasized that the attorney-client privilege will not have its intended effect unless the lawyer and the client can be certain at the time they communicate whether the privilege applies. The Court has observed that the lawyer and client must be able to predict ''with some degree of certainty'' whether their discussion will be considered privileged and that ''an uncertain privilege, *or one which purports to be certain but results in widely varying applications by the courts*, is little better than no privilege at all.''[15] The central Supreme Court decisions on this subject are *Upjohn Co. v. U.S.*, *Jaffee v. Redmond*, and *Swidler & Berlin v. U.S.*

Upjohn Co. v. U.S. After an audit revealed that one of Upjohn's foreign subsidiaries had made payments to foreign officials to secure government business, Upjohn's general counsel conducted an internal investigation, and Upjohn voluntarily filed a preliminary report with the SEC and the IRS regarding the payments.

The IRS issued a summons demanding that Upjohn produce information communicated by its employees to its general counsel. When Upjohn refused to comply on the ground that the communications were privileged, the IRS filed an action in district court seeking to enforce the summons, and the district court ruled that the summons should be enforced. On appeal, the Sixth Circuit reversed, but only in part, holding that the attorney-client privilege applied only to employees within Upjohn's ''control group,'' that is, only to employees with a ''substantial role'' in ''directing Upjohn's actions in response to legal advice.''[16]

The Supreme Court rejected the control group test and reversed the Sixth Circuit's ruling. The Court found that a major purpose of the privilege was ''to protect not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable him to give sound and informed advice,''[17] and ruled that the control group test frustrated the purpose of the privilege by discouraging the employer's employees from communicating pertinent facts to lawyers seeking to provide advice to the employer.

The Court also observed that the attorney-client privilege is designed to give clients the assurance required to encourage them to make full disclosure to their lawyers, and that in order for the privilege to accomplish this, the applicability of the privilege must be predictable ''with some degree of certainty.'' The Court found the Sixth Circuit's control group test to be unpredictable because of the difficulty of determining which employees have a ''substantial role'' in implementing a lawyer's advice.[18]

Jaffee v. Redmond. In *Jaffee*, the Supreme Court reviewed a Seventh Circuit decision that had used a balancing test to determine whether a psychotherapist-patient privilege applied. Under the balancing test, the privilege would not apply if the need for disclosure outweighed the patient's privacy interests.[19] Relying on *Upjohn*, the Supreme Court found that the unpredictable nature of an *ex post* balancing test subverted the purpose of the privilege:

> Making the promise of confidentiality contingent upon a trial judge's later evaluation of the relative importance of the patient's interest in privacy and the evidentiary need for disclosure would eviscerate the effectiveness of the privilege. As we explained in *Upjohn*, if the purpose of the [attorney-client] privilege is to be served, the participants in the confidential conversation ''must be able to predict with some degree of certainty whether particular discussions will be protected.''[20]

Swidler & Berlin v. U.S. In *Swidler & Berlin*, the Supreme Court ruled that the attorney-client privilege survives the death of the client. The Court rejected the use of an *ex post* balancing test that compared the importance of the communication with the client's interest in the confidentiality of the communication.[21] The Supreme Court reaffirmed its view that balancing tests make it uncertain whether the attorney-client privilege applies:

> [A] client may not know at the time he discloses information to his attorney whether it will later be relevant to a civil or criminal matter, let alone whether it will be of substantial importance. Balancing *ex post* the importance of the information against client interests, even limited to criminal cases, introduces substantial uncertainty into the privilege's application.[22]

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Limitations on the Privilege

The attorney-client privilege applies only to communications between lawyer and client, made in confidence to secure legal advice or services.[23] The privilege does not apply to communications regarding business or other non-legal matters.[24] The privilege does not bar inquiry into the underlying facts: ''The client cannot be compelled to answer the question, 'What did you say or write to the attorney?' but may not refuse to disclose any relevant fact within his knowledge merely because he incorporated a statement of such fact into his communication to his attorney.''[25] Moreover, the privilege does not apply at all if the client claims advice of counsel as a defense[26] or if the client waives the privilege.[27]

The scope of the attorney-client privilege is also limited by a number of exceptions.[28] Under the crime-fraud exception, the privilege does not apply to communications made to further the commission of a fraud or crime. The privilege ceases to apply if a party makes a prima facie case that the client attempted to use the lawyer to further a crime or fraud, or what the client reasonably should have known was a crime or fraud.[29]

Under the community of interest doctrine, when a lawyer represents the interests of two or more parties in connection with the same matter, the clients are treated as the lawyer's joint clients for purposes of the privilege, and confidential communications between one of the joint clients and the lawyer regarding the subject matter of the joint representation are not privileged among the joint clients, even though the confidential communications might be privileged vis-à-vis third parties.[30]

The fiduciary exception, the principal subject of this article, also limits the scope of the attorney-client privilege.

THE FIDUCIARY EXCEPTION

English Common-Law Origin

The fiduciary exception was developed by English courts of the 19th century as part of the common law of trusts. English courts ruled that when the beneficiary of a private trust sued the trustee for mismanagement of the trust, the trustee was required, notwithstanding the attorney-client privilege, to produce to the beneficiary any legal advice that the trustee had received regarding trust administration. The rationale for these rulings was that the attorney-client privilege should not apply to legal advice obtained for the benefit of the beneficiaries and (when paid for with trust assets) at the beneficiaries' expense.[31]

Adoption by U.S. Courts

Prior to the district court decision in *Garner v. Wolfinbarger* in 1968, there were no reported decisions in which a court in the United States applied the fiduciary exception.[32] Following the Fifth Circuit's decision on appeal in *Garner* in 1970, however, the fiduciary exception has been widely applied by courts in the United States.

Garner and *Riggs v. Zimmer* were the leading ''fiduciary exception'' cases in the United States. In adopting the fiduciary exception, the *Garner* and *Riggs* courts relied on English common-law authorities, the theory that the trust beneficiaries are the ''real clients'' of the trustee's lawyer, and a common-law policy favoring disclosure to trust beneficiaries of matters pertaining to trust management.

Garner v. Wolfinbarger

In *Garner v. Wolfinbarger*, the shareholders of First American Life Insurance Company (FALICO) filed a class action against the company's management. The shareholders alleged violations of federal and state securities laws and common-law fraud, and sought recovery of the price the shareholders had paid for FALICO stock. The shareholders also claimed that the company itself was damaged by alleged fraud in the purchase and sale of securities and asserted a derivative action on behalf of FALICO.[33]

When FALICO's former counsel was deposed, he was asked about legal advice he had given to the company regarding the issuance and sale of stock and related matters. When the defendants asserted the attorney-client privilege, the shareholders argued that FALICO was barred from asserting the privilege against them. The shareholders contended that a corporation was managed, not for its own benefit, but for the benefit of its shareholders, and that the relationship between a shareholder and a corporation was analogous to the relationship between a beneficiary and a trust.[34] The district court was persuaded by the shareholders' argument and ruled that the privilege was not available, relying solely on English common-law authorities that treated the relationship between shareholder and corporation as analogous to the relationship between beneficiary and trustee.[35] The defendants appealed.

On appeal, the Fifth Circuit found the English authorities persuasive and declared that management had no legitimate personal interest in the legal advice it obtained, that management was not managing for itself, and that management and the stockholders had a ''mutuality of interest'' in management's obtaining legal advice:

> The representative and the represented have a mutuality of interest in the representative's freely seeking advice when needed and putting it to use when received. This is not to say that management does not have allowable

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> judgment in putting advice to use. But management judgment must stand on its merits, not behind an ironclad veil of secrecy which under all circumstances preserves it from being questioned by those for whom it is, at least in part, exercised.[36]

The court drew an analogy to the crime-fraud and community of interest exceptions to the attorney-client privilege, but emphasized that, unlike the district court, it was not adopting a per se rule, and that shareholders' ability to overcome the privilege depended on their ability to show good cause for disclosure. The court identified nine indicia of good cause, but made clear that other indicia also could be taken into account:

> There are many indicia that may contribute to a decision of presence or absence of good cause, among them [1] the number of shareholders and the percentage of stock they represent; [2] the bona fides of the shareholders; [3] the nature of the shareholders' claim and whether it is obviously colorable; [4] the apparent necessity or desirability of the shareholders having the information and the availability of it from other sources; [5] whether, if the shareholders' claim is of wrongful action by the corporation, it is of action criminal, or illegal but not criminal, or of doubtful legality; [6] whether the communication related to past or to prospective actions; [7] whether the communication is of advice concerning the litigation itself; [8] the extent to which the communication is identified versus the extent to which the shareholders are blindly fishing; [and 9] the risk of revelation of trade secrets or other information in whose confidentiality the corporation has an interest for independent reasons.[37]

On remand, the district court found that the shareholders had shown good cause and rejected the defendants' attorney-client privilege claim. A number of the district court's findings suggest that the case might have been decided on the basis of the crime-fraud exception, but, consistent with the Fifth Circuit's opinion, the district court did not invoke that exception.[38]

Riggs v. Zimmer

In 1976, in *Riggs v. Zimmer*, the Delaware Court of Chancery ruled that, under state trust law, the beneficiaries of a testamentary trust were entitled to discovery of a legal memorandum to the trustees regarding potential tax litigation against the State of Delaware. The court found that the memorandum had been prepared for the beneficiaries' benefit, that the trustees were the ''mere representative[s]'' of the beneficiaries, and that the beneficiaries were the lawyer's ''real clients.'' The court's finding that the beneficiaries were the lawyer's real clients was based on (1) the absence of any adversarial proceeding between the trustees and the beneficiaries when the advice was obtained, (2) the memorandum's objective of benefiting the beneficiaries, and (3) the use of trust assets to pay the lawyer who had prepared the legal memorandum.

The Delaware Court of Chancery also relied on a policy favoring disclosure to trust beneficiaries. The court found that disclosure of the affairs of trust management was required ''[i]n order for the beneficiaries to hold the trustees to the proper standards of care and honesty and procure for themselves the benefits to which they are entitled'' and was ''more important than the protection of the trustees' confidence in the attorney for the trust.''[39]

In opposing discovery in *Riggs*, the trustees relied on *In re Prudence-Bonds Corp.*, a 1948 federal district court decision in an action for an accounting brought by the bondholders of a corporation. In *Prudence-Bonds*, the district court had held that the trustee for the bondholders could invoke the attorney-client privilege to defeat the bondholders' request for opinions of counsel that the trustee had received.[40]

The Delaware Chancery Court distinguished *Prudence-Bonds*, however. The Chancery Court emphasized that, in *Riggs*, ''the real clients [were] the beneficiaries themselves, unlike the situation in *Prudence-Bonds* where the trustee was the actual client. . . .''[41] The Chancery Court declared that, under the common law of trusts, a trustee had a duty to furnish opinions of counsel and other information to the trust's beneficiaries, citing a statement in Professor Scott's treatise that ''[a] beneficiary is entitled to inspect opinions of counsel procured by the trustee to guide him in the administration of the trust'' and rulings by English courts that trust beneficiaries have the right to inspect opinions of counsel.[42]

Subsequent decisions of the Delaware Court of Chancery emphasize that the legal advice in *Riggs* was provided for the benefit of the trust's beneficiaries. *In re Estate of Calloway*, decided in 1996, involved a motion by two trust beneficiaries to compel production of a memorandum to the trustee from the trustee's lawyers regarding the beneficiaries' objections to the trust's payment of the lawyers' fees. The memorandum had been prepared after the beneficiaries had objected to payment of the lawyers' fees and explained the beneficiaries' objections, assessed their merit, and discussed strategy. The Chancery Court ruled that the memorandum was protected by the attorney-client privilege because, unlike the *Riggs* memorandum, the *Calloway* memorandum had been

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prepared for the trustee's benefit. The Chancery Court observed that the attorney-client privilege serves the same purpose for a trustee as it does for other clients, that a trustee must be able to consult freely with counsel to obtain the best possible legal guidance, and that without the privilege, trustees might either forgo legal advice, thus adversely affecting the trust, or ''blindly follow counsel's advice, ignoring their own judgment and experience.''[43]

In 2010, in *N.K.S. Distributors v. Tigani*, the Chancery Court denied a motion by a beneficiary of a personal trust to compel production of correspondence between the trustee and his lawyers. In upholding the trustee's claim of attorney-client privilege, the Chancery Court distinguished *Riggs* on a number of grounds, observing that the legal services in *Riggs* were performed for the benefit of the trust's beneficiaries, who were the lawyer's ''ultimate clients,'' while the legal advice in *N.K.S.* was provided to the trustee in preparation for litigation against the beneficiary, who ''more closely resembled an adverse party.''[44]

Other Non-ERISA Decisions by U.S. Courts

Courts in the United States have continued to apply the fiduciary exception to fiduciaries other than ERISA fiduciaries. For example, the fiduciary exception has been applied to corporate managers who have asserted the attorney-client privilege against the corporation's shareholders, to unions that have asserted the privilege against union members, to trustees who have asserted the attorney-client privilege against trust beneficiaries, to executors who have asserted the privilege against beneficiaries, to insurance companies that have asserted the privilege against policyholders, to creditors' committees that have asserted the privilege against committee members, to general partners that have asserted the privilege against limited partners, and to the United States when it asserted the privilege against Indian tribes.[45]

APPLYING THE FIDUCIARY EXCEPTION TO ERISA FIDUCIARIES

ERISA

ERISA is the principal federal law governing employer-sponsored pension and welfare plans, including §401(k) and defined benefit pension plans and health, life insurance, and disability benefit plans. ERISA establishes a comprehensive enforcement regime; prescribes standards of conduct for the fiduciaries who manage or administer pension and welfare plans; imposes comprehensive and thorough disclosure requirements on plan administrators; specifies certain plan features in detail, governing such matters as the funding, vesting, and distribution of pension benefits; and provides plan termination insurance for pension plans.[46]

Congressional Objectives

Three of Congress's central objectives in enacting ERISA were to encourage voluntary plan formation, to protect plan assets, and to protect the interests of plan participants.

Encourage plan formation. ERISA does not require employers to offer employee benefits to their employees, but encourages employers to establish employee benefit plans voluntarily and to decide what kinds of plans to adopt. ERISA encourages voluntary plan formation by providing rules that facilitate efficient, predictable and uniform plan administration. As the Supreme Court explained in *Conkright v. Frommert*:

> Congress enacted ERISA to ensure that employees would receive the benefits they had earned, but Congress did not require employers to establish benefit plans in the first place. We have therefore recognized that *ERISA represents a careful balancing between ensuring fair and prompt enforcement of rights under a plan and the encouragement of the creation of such plans*. Congress sought to create a system that is [not] so complex that administrative costs, or litigation expenses, unduly discourage employers from offering [ERISA] plans in the first place.[47]

Protect plan assets. ERISA protects the assets of employee benefit plans by prescribing standards of conduct, largely based on the common law of trusts, for plan fiduciaries; by establishing minimum funding standards for pension plans; and by providing a comprehensive enforcement regime, including provisions for appropriate remedies. In *Massachusetts Mutual Life Ins. Co. v. Russell*, the Supreme Court ruled that where a participant had received all of the benefits to which she was contractually entitled, ERISA §409 did not authorize an award of consequential damages arising from a delay in processing her benefit claim. The Court observed that §409 of ERISA provides that if a plan fiduciary breaches a fiduciary duty under ERISA, the fiduciary is personally liable to make good *to the plan* any losses that *the plan* incurs as a result of the breach and to restore *to the plan* any profits that the fiduciary makes through the use of plan assets:

> [T]he crucible of congressional concern was misuse and mismanagement of plan assets by plan administrators and ERISA was designed to prevent these abuses in the future. . . . A fair contextual reading of the statute makes it

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> abundantly clear that its draftsmen were primarily concerned with the possible misuse of plan assets, and with remedies that would protect the entire plan, rather than with the rights of an individual beneficiary.[48]

Similarly, in *Lockheed Corp. v. Spink*[49] and *LaRue v. DeWolff, Boberg & Associates, Inc.*,[50] the Supreme Court later emphasized that the principal duties that ERISA imposes on plan fiduciaries relate to the protection of the plan and the plan's assets. More recently, in *Conkright v. Frommert*, the Court observed that plan administrators have a duty to preserve ''limited plan assets'' and to construe the plan in a way that prevents the plan from providing ''windfalls for particular employees''[51] at the expense of other employees.

ERISA, then, was designed primarily to protect employee benefit plans and their participants rather than to advance the general interests of employees. Although the two objectives are not necessarily inconsistent, in enacting ERISA, Congress sought to help employees by protecting their interests as participants in employee benefit plans.

Protect plan participants. ERISA protects the interests of plan participants through a variety of measures, such as specific funding and vesting standards for pension plans, fiduciary responsibility standards, and ''quite thorough'' and ''comprehensive'' disclosure requirements.[52] ERISA requires plan administrators to inform participants of their rights and obligations under the plan by distributing SPDs and SMMs. ERISA requires the SPD to be sufficiently accurate, comprehensive and understandable to inform the average participant of his or her rights and obligations under the plan.[53] ERISA's legislative history explains that the SPD provisions are designed ''so that the individual participant knows exactly where he stands with respect to the plan. . . .''[54] When there is a material change in the terms of the plan or a change in the information that must be included in the plan's SPD, the plan administrator is required to provide an updated SPD or an SMM that summarizes the change.[55] In addition, ERISA §104(b)(4) requires the plan administrator to furnish a copy of the latest updated SPD and certain other documents to any participant who requests them in writing.[56]

Differences Between Gratuitous Trusts and ERISA Plans

The fiduciary exception was created in a factual and legal context differing markedly from the context pertaining to the fiduciaries of contemporary employee benefit plans. Although the fiduciary exception might have been appropriate for the fiduciaries of 19th-century English trusts, the exception is not necessarily appropriate for the fiduciaries of contemporary employee benefit plans. The Supreme Court has cautioned that ERISA's fiduciary duty provisions should be interpreted not only in the light of the common law of trusts, but also in the light of ERISA's language, structure and purposes. In its 1996 opinion in *Varity Corp. v. Howe*, the Court stated that, in some instances, trust law offers only a starting point in interpreting ERISA's fiduciary standards:

> [T]he law of trusts often will inform, but will not necessarily determine the outcome of, an effort to interpret ERISA's fiduciary duties. In some instances, trust law will offer only a starting point, after which courts must go on to ask whether, or to what extent, the language of the statute, its structure, or its purposes require departing from common-law trust requirements. And, in doing so, courts may have to take account of competing congressional purposes, such as Congress' desire to offer employees enhanced protection for their benefits, on the one hand, and, on the other, its desire not to create a system that is so complex that administrative costs, or litigation expenses, unduly discourage employers from offering [ERISA] plans in the first place.[57]

Relationships between the trustees of the trusts of 19th-century England and the trusts' beneficiaries were typically far more intimate than are the relationships between the fiduciaries of the larger, more complex, more enduring, and economically-motivated ERISA-governed plans and their participants.[58] The trusts of 19th-century England typically were gratuitous trusts, often established upon the death of the settlor and used to convey the settlor's interest in specified property to designated beneficiaries. The relationship between the trustee and the beneficiary was closer to the relationship between a guardian and a ward than to the relationship between a fiduciary and participant under an ERISA-governed employee benefit plan.

Moreover, gratuitous trusts of 19th-century England were not subject to comprehensive disclosure and fiduciary duty requirements similar to those imposed by ERISA. In the absence of comprehensive disclosure and fiduciary responsibility requirements, it might have been appropriate for courts to adopt the fiduciary exception. Without access to relevant information, the beneficiaries of a testamentary trust might not have been able to hold the trustee to its obligations as the representative of the trust's beneficiaries.

ERISA-governed employee benefit plans, by contrast, are compensatory arrangements, established for

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the mutual benefit of the employer and the employee.[59] They typically provide for recurring contributions and for the on-going accrual and payment of benefits.[60] They can serve multiple objectives,[61] provide a variety of benefits,[62] and benefit large groups of employees, sometimes numbering in the tens or hundreds of thousands. An employer that sponsors a single-employer plan typically reserves the right to change the objectives, benefits and beneficiaries of the plan from time to time, as well as the right to terminate the plan altogether.[63]

In enacting ERISA, Congress formally recognized the robust economic character of 20th-century employee benefit plans. The statute set forth Congress's findings that the growth in size, scope and numbers of employee benefit plans had been rapid and substantial; that the continued well-being and security of millions of employees and their dependents were directly affected by employee benefit plans; that employee benefit plans had become an important factor affecting the stability of employment and the successful development of industrial relations; and that employee benefit plans had become an important factor in commerce.[64] Consistent with these findings, the conference report for ERISA stated that the courts were expected to interpret ERISA's fiduciary standards ''bearing in mind the special nature and purpose of employee benefit plans.''[65]

The enactment of ERISA's comprehensive disclosure and fiduciary responsibility requirements sharply curtailed any need or justification for common-law rulemaking for employee benefit plans. As the Supreme Court observed in its 2003 decision in *Black & Decker Disability Plan v. Nord*,

> Although Congress ''expect[ed]'' courts would develop ''a federal common law of rights and obligations under ERISA-regulated plans,'' *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 56 (1987), the scope of permissible innovation is narrower where other federal actors are engaged, cf. *Milwaukee v. Illinois*, 451 U.S. 304, 317–332 (1981) (because Congress has enacted a comprehensive regulatory program dealing with discharge of pollutants into the Nation's waters, the State could not maintain a federal common-law nuisance action against the city based on the latter's pollution of Lake Michigan).[66]

The Fiduciary Exception Under ERISA

When ERISA was enacted in 1974, the fiduciary exception had barely been recognized by American courts. Apart from *Garner*, which was decided by the Fifth Circuit in 1970, there was scant indication that the fiduciary exception had a place in the common law of trusts in America.[67] Although *Garner* was based on the common law of trusts, *Garner* was a securities law case that did not involve an employee benefit plan or even a trust. When the Delaware Chancery Court issued its opinion in *Riggs* in 1976 (two years after the enactment of ERISA), the court observed that ''American case law is practically nonexistent'' on the question of a trustee's obligation to produce a confidential legal memorandum to the trusts' beneficiaries.[68]

The first two reported decisions applying the fiduciary exception to ERISA fiduciaries were the district court decisions in *Donovan v. Fitzsimmons* and *Washington-Baltimore Newspaper Guild, Local 35 v. Washington Star Co.* Decided in the early 1980s, over a decade before the Supreme Court's *Varity* decision, *Fitzsimmons* and *Washington Star* relied primarily on the common law of trusts, *Garner*, and *Riggs*. Contrary to the Supreme Court's subsequent instructions in *Varity* and *Nord*, the district courts in *Fitzsimmons* and *Washington Star* gave little or no weight to ERISA's language, structure and purposes. The courts relied primarily on common-law authorities, probably because (1) ERISA's fiduciary standards were derived from the common law of trusts, (2) ERISA's legislative history stated that the courts were authorized to develop a federal common law of rights and obligations under ERISA, and (3) the fiduciary exception was a common-law doctrine.

Donovan v. Fitzsimmons. Fitzsimmons addressed an issue that arose as a result of a DOL enforcement action against former officials of the Central States, Southeast and Southwest Areas Pension Fund. Since its formation in 1955, the Central States Fund had been plagued by allegations of mismanagement and influence by organized crime. Reports on organized crime's exploitation of union-sponsored benefit funds helped to prompt the enactment of ERISA in 1974, and a joint Labor Department-Justice Department investigation of the Central States Fund began in 1975.[69]

In *Fitzsimmons*, the DOL alleged that the Central States Fund's trustees had engaged in ''massive breaches of fiduciary duties'' by entering into highly questionable investment transactions. The DOL sought restitution on behalf of the plan's 500,000 potential beneficiaries. When the DOL moved for an order to compel production of certain documents, the Central States Fund objected on the basis of attorney-client privilege. Relying primarily on *Garner* and *Riggs* and on its finding that the Secretary of Labor was acting on behalf of the Fund's beneficiaries, the court held that the privilege did not apply.[70]

Washington-Baltimore Newspaper Guild, Local 35 v. Washington Star Co. In *Washington Star*, a group of

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pension plan participants and their union representatives claimed that the plan's trustees and the employer (the Washington Star Co. or WASCO) had unlawfully amended the plan to provide that, upon termination of the plan, any residual assets would be paid to WASCO rather than to plan participants. WASCO had created and funded the plan and trust and had also appointed management employees to serve as the plan's trustees.

The law firm that served as WASCO's general counsel also provided legal services to the plan. When the plaintiffs proffered the proposed affidavit of a former associate at the law firm regarding the amendment to the plan, the defendants objected on the ground that the proposed affidavit violated the attorney-client privilege. Relying on *Garner*, *Riggs*, and *Fitzsimmons*, the district court rejected the defendants' privilege claim, stating broadly that ''[w]hen an attorney advises a fiduciary about a matter dealing with the administration of an employees' benefit plan, the attorney's client is not the fiduciary personally but, rather, the trust's beneficiaries.''[71]

Subsequent decisions. In the years following the *Fitzsimmons* and *Washington Star* decisions, courts have applied the fiduciary exception to ERISA fiduciaries in a variety of suits, including suits seeking plan benefits,[72] suits regarding alleged violations of ERISA's fiduciary standards[73] and other requirements,[74] suits regarding the recalculation and reduction of a participant's benefits,[75] and suits in which participants seek to clarify their rights to future benefits.[76]

Good cause. Fitzsimmons, *Washington Star*, and their progeny are divided on whether the fiduciary exception applies to an ERISA fiduciary only if the party seeking disclosure makes a showing of good cause.[77] For example, the court in *Fitzsimmons* did not question the need to show good cause and found that the plaintiffs had satisfied the good cause requirement,[78] while the court in *Washington Star* ruled that there was no justification for imposing a good cause requirement on trust beneficiaries.[79] Although many courts have taken a firm position on the good cause issue, some courts have concluded that because good cause had been shown, the court did not have to decide whether it was necessary to show good cause in order to overcome the privilege.[80]

The Supreme Court's rulings in *Upjohn* and its progeny appear to forbid a regime under which the fiduciary exception applies to an ERISA fiduciary only if the party seeking disclosure satisfies the *Garner* good cause requirement. Many of the indicia of good cause identified in *Garner* cannot be applied until after the attorney-client communication occurs. If courts rely on comparable indicia of good cause in ERISA cases, it will necessarily be uncertain, at the time a lawyer-client communication occurs, whether the communication is covered by the attorney-client privilege — contrary to the Supreme Court's instruction that the applicability of the attorney-client privilege not be assessed on the basis of an *ex post* requirement.[81]

At the same time, there are strong arguments against applying the fiduciary exception to ERISA fiduciaries *without* requiring a showing of good cause. The reasons that have been advanced for *not* requiring a showing of good cause have significant shortcomings:

- *Beneficiaries' conflicting interests.* It has been said that *Garner*'s good cause requirement was based on a concern that a corporation might be vulnerable to a suit by shareholders whose interests conflict with the interests of other shareholders and that this concern does not apply to ERISA suits — particularly suits filed by the DOL.[82]

  Comment. Participants who sue plan fiduciaries under ERISA frequently have interests that conflict with the interests of other participants.[83] Moreover, under *Upjohn* and its progeny, a fiduciary must be able to determine whether a communication is privileged at the time the communication occurs. The applicability of the privilege to a communication cannot depend on whether disclosure of the communication is later sought by a plan participant, on the one hand, or by the DOL, on the other.[84]

- *Risk of abuse*. It has been said that *Garner*'s good cause requirement was designed to prevent shareholders from abusing access to sensitive inside information (such as trade secrets) and that there is no comparable threat of abuse (and therefore no need for a good cause requirement) under ERISA.[85]

  Comment. Under ERISA, however, litigation brought to achieve objectives that are not consistent with ERISA's objectives, including litigation that could seriously harm the plan, is a very real threat.[86] Moreover, the plaintiffs in ERISA suits — who can be *former* employees as well as current employees — often make claims that are remarkably similar to claims that are actually made, or that might be made, in a suit against the issuer under the securities laws.[87]

- *Direct service to participants.* It has been said that the officers of a corporation serve the corporation directly and serve the corporation's shareholders only indirectly and that, by contrast, a fiduciary of an ERISA plan serves the plan's participants directly.[88]

  Comment. The Supreme Court has made it clear that an ERISA fiduciary's primary obligation is to

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discharge the duties assigned to the fiduciary under the terms of the plan, not to serve the interests of plan participants directly.[89]

- *Need for confidentiality.* It has been said that a trustee has no legitimate need to shield his or her actions from the participants he/she is obligated to serve.[90]

  Comment. The attorney-client privilege does not allow a fiduciary to shield his/her *actions* from plan participants; the privilege applies only to confidential communications between the fiduciary and the fiduciary's lawyer regarding legal matters, and a plan fiduciary needs confidential legal advice as much as anyone.[91]

- *Common law of trusts.* It has been said that good cause should not be required under ERISA because good cause was not required under the common law of trusts.[92]

  Comment. Even if good cause was not required under the common law of trusts, the Supreme Court made it clear in *Varity* that the common law of trusts may be the beginning, not the end, of the analysis under ERISA. Courts must consider the extent to which the language, structure and purposes of ERISA (including ERISA's detailed and comprehensive disclosure requirements) call for a departure from common-law trust requirements.[93]

The strong arguments against applying the fiduciary exception to an ERISA fiduciary either with or without a showing of good cause call into question the wisdom of applying the fiduciary exception to ERISA fiduciaries under any conditions (that is, with or without the *Garner* good cause requirement).

Limits on the fiduciary exception. In any event, courts have recognized that the fiduciary exception has limits and have ruled that the fiduciary exception applies to communications regarding *fiduciary* responsibilities, but not to communications regarding ''settlor'' (*nonfiduciary*) responsibilities, such as the responsibility for deciding whether to establish, amend or terminate a plan.[94] Courts have also ruled that when an ERISA fiduciary seeks legal advice for its own protection, the fiduciary is acting on its own behalf, and not as the representative of the plan's participants, and that in such circumstances, the fiduciary exception does not apply.[95] A number of the courts that have not required good cause have analyzed the ''context and content'' of the communication in question to determine whether the communication concerned plan administration, on the one hand, or a settlor responsibility or advice for the fiduciary's own benefit, on the other.[96]

Many of the appellate decisions that have been characterized as *recognizing* the fiduciary exception actually concluded that the exception did *not* apply to the case before the court. For example, a number of the appellate decisions concluded that the exception did not apply because the exception does not apply to settlor (nonfiduciary) conduct, or because the exception does not apply to advice a fiduciary obtains to protect itself from liability.[97]

Ironically, the legal advice at issue in *Washington Star* related to a decision to amend the plan, which is now recognized as a settlor responsibility.[98] If the *Washington Star* court had recognized that the legal advice concerned a subject that was not subject to ERISA's fiduciary standards, the court might have ruled that the advice was not covered by the fiduciary exception.[99] In a subsequent opinion in the same case, the court recognized that the decision to adopt the amendment was a settlor decision and, therefore, not governed by ERISA's fiduciary standards, but the court did not modify its prior ruling regarding the attorney-client privilege.[100]

RECONSIDERING THE FIDUCIARY EXCEPTION UNDER ERISA

Reconsideration of the fiduciary exception under ERISA is warranted. The fiduciary exception has generally been applied to ERISA fiduciaries without giving adequate attention to the law under ERISA, the differences between fiduciary relationships under ERISA and other fiduciary relationships, and the exception's practical consequences.

Shaky Foundation

Although courts have invoked a number of theories to justify applying the fiduciary exception to ERISA fiduciaries, none of these theories withstands scrutiny. The principal theories that courts have relied on are the real-client theory and the duty-to-disclose theory.[101] The essence of the real-client theory is that because plan participants are the ultimate beneficiaries of the advice that a plan fiduciary's lawyer gives to the plan fiduciary, the plan's participants are the ''real clients'' of the plan fiduciary's lawyer. Under the duty-to-disclose theory, the plan fiduciary is treated as the lawyer's client, but the fiduciary is subject to a common-law duty to disclose otherwise privileged information to plan participants. Both theories conflict with ERISA's fiduciary responsibility and disclosure provisions, and the real-client theory also conflicts with lawyers' professional responsibilities.

Some courts and commentators have endorsed a mutuality-of-interest theory.[102] The mutuality-of-interest theory is based on the view that it is appropriate to apply the fiduciary exception only when the fiduciary's interests and the participants' interests are aligned.

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However, the mutuality-of-interest theory conflicts with ERISA's fiduciary responsibility provisions and the Supreme Court's admonitions regarding the need for certainty in applying the attorney-client privilege.

Several courts have suggested that the DOL's claims procedure regulation authorizes the fiduciary exception.[103] Congress, however, has not authorized the DOL to modify the attorney-client privilege, and there is no suggestion, in either the claims procedure regulation or other DOL guidance, that the DOL believes that the regulation modifies, or creates an exception to, the attorney-client privilege.

Finally, in *Wachtel v. Health Net, Inc.*, the Third Circuit held that the fiduciary exception does not apply to an insurer-fiduciary under an insured ERISA plan. Although the Third Circuit's opinion addressed only the application of the fiduciary exception to an insurer-fiduciary, the logic of the Third Circuit's opinion suggests that the fiduciary exception should not apply to *any* ERISA fiduciaries.

Real-Client Theory

The real-client theory stems from the Delaware Chancery Court's ruling in *Riggs* that because the trust's beneficiaries were the ultimate beneficiaries of the lawyer's advice, they were the lawyer's real clients.[104] Under this theory, the fiduciary exception is not so much an exception to the attorney-client privilege as it is an extension of the privilege to the lawyer's ''real clients'' (the plan participants).[105]

Some courts have ruled that even if a plan fiduciary is also the lawyer's client, the plan fiduciary and the plan participants should be treated as the lawyer's joint clients.[106] Under the community of interest doctrine, confidential communications between one of the joint clients and the lawyer regarding the subject matter of the joint representation are not privileged among the joint clients.[107]

Lawyers' professional responsibilities. The real-client theory is based on the fiction that a plan fiduciary's lawyer necessarily serves as the lawyer for the plan's participants. This view conflicts with the prevailing understanding that the lawyer-client relationship is ordinarily a consensual relationship: a client ordinarily cannot be required to accept unwanted legal services, and a lawyer is generally as free as anyone else to choose the parties to whom he or she will provide services. According to the Restatement, a lawyer-client relationship arises when a person manifests to a lawyer the person's intent that the lawyer provide legal services for the person and the lawyer consents to do so (or fails to manifest lack of consent and the lawyer knows or should know that the person relies on the lawyer to provide the services).[108]

In addition, the Restatement provides that whether a lawyer who represents an organization also represents persons associated with the organization is a question of fact to be determined based on reasonable expectations under the circumstances. According to the Restatement, a lawyer's failure to clarify whom the lawyer represents might lead to a lawyer's representing someone the lawyer did not intend to take on as a client.[109] However, courts recognize a presumption that a lawyer for an entity represents only the entity, rather than the entity's constituents or members.[110] Consistent with that presumption, if a lawyer makes clear to an entity's constituents that the entity is the lawyer's sole client, a constituent's claim to be a co-client will be rejected.[111]

Typically in the ERISA context, the plan fiduciary's lawyer and the plan's participants do not communicate with each other. In these circumstances, the lawyer does not agree to represent the participants or give the participants any reason to believe that he represents them; and the participants do not engage the lawyer to represent them. If the lawyer communicates with any plan participants at all, the lawyer typically communicates with those participants who act on behalf of the plan sponsor or a plan fiduciary; the lawyer does not communicate with them (nor they with the lawyer) in their capacity as plan participants.

The circumstances of a typical corporate-sponsored pension plan are thus very different from the more intimate circumstances of a typical gratuitous trust like the trust involved in *Riggs*, where the real-client theory originated in the United States. Whatever the merits of the real-client theory might be in the context of a gratuitous trust, it is certainly more plausible to characterize the beneficiaries of a gratuitous trust as the ''real clients'' of the trustee's lawyer than it is to characterize 5,000 participants in a corporate-sponsored pension plan as the ''real clients'' of a plan fiduciary's lawyer. Typically, the vast majority of plan participants have never met the lawyer, have never communicated with the lawyer, and do not even know who the lawyer is.

The real-client theory is also inconsistent with the American Bar Association's Model Rules. ABA Model Rule 1.13(a) provides that a lawyer employed or retained by an organization represents the organization. Model Rule 1.13(g) permits a lawyer representing an organization (such as an employee benefit plan) to represent the organization's constituents (such as the plan's participants) only if the lawyer does so in accordance with Model Rule 1.7.

If the interests of a plan conflict with the interests of a benefit claimant, ABA Model Rule 1.7(a) would bar the lawyer from representing both the fiduciary and the claimant in connection with the benefit claim. Model Rule 1.7(a) provides that, in general, a lawyer may not represent a client if the representation involves a concurrent conflict of interest. Under Model

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Rule 1.7(a), there is a concurrent conflict of interest if (1) the representation of one client will be directly adverse to another client, *or* (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client.[112] As a result, if a participant makes a claim for benefits under a plan, a lawyer for the plan could not represent the participant as well as the plan in connection with the claim.[113]

Plan participants with claims against benefit plans and plan fiduciaries have sought to disqualify the lawyers representing the plans and plan fiduciaries on the ground that the lawyers also represented (or previously represented) the participants by reason of representing the plan or its fiduciaries. The participants seeking to disqualify the lawyers have relied on attorney-client privilege decisions to support their argument that a lawyer who represents an ERISA plan or plan fiduciary also represents the plan's participants. Although the results at the district court level have been mixed,[114] the Second Circuit's 2009 decision in *Murray v. Metropolitan Life Ins. Co.* indicates that plan participants should *not* be treated as a lawyer's clients merely because that lawyer represents the plan or a plan fiduciary.

Murray involved the demutualization of MetLife (the conversion of MetLife from a mutual insurance company to a stock insurance company). The plaintiffs, a class of MetLife policyholders, alleged that MetLife violated the federal securities laws by misrepresenting or omitting information from the materials that were provided to policyholders during the demutualization process.[115] The district court ruled in 2007 that the plaintiffs could pursue discovery of communications between MetLife and its inside and outside counsel (Debevoise & Plimpton LLP). The district court rejected MetLife's claim of attorney-client privilege: the court concluded that, prior to MetLife's demutualization, MetLife's policyholders were the clients of MetLife's inside and outside counsel.[116]

The plaintiffs later moved to disqualify the Debevoise firm, in part on the basis of the same theory that the district court had invoked to support its discovery ruling. The plaintiffs argued that Debevoise had been counsel to the plaintiffs in the demutualization and could not become adverse to the plaintiffs at trial. The district court granted the plaintiffs' motion, but stayed the order and certified the disqualification question to the Second Circuit.[117] The Court of Appeals reversed, ruling that, under New York law, a mutual insurance company's policyholders were *not* the clients of the company's outside counsel:

> It is well-settled that outside counsel to a corporation represents the *corporation*, not its shareholders or other constituents. . . . These principles apply as well to a mutual insurance company. Under New York law, ''[a] mutual insurance company is a cooperative enterprise in which the policyholders constitute the members for whose benefit the company is organized, maintained and operated.'' But a policyholder, ''even in a mutual company, [is] in no sense a partner of the corporation which issued the policy, and . . . the relation between the policy — holder and the company [is] one of contract, measured by the terms of the policy.'' . . . Not every beneficiary of a lawyer's advice is deemed a client.[118]

Likewise, any benefits that plan participants receive from the advice that a lawyer gives to a plan fiduciary do not make the participants the lawyer's clients.[119] For example, when a fiduciary's lawyer provides advice to the fiduciary regarding the requirements of a plan document or ERISA, the lawyer's obligation is to provide advice on what the terms of the plan or ERISA require (that is, to help the fiduciary comply with the law) — not to represent the interests of participants or to help participants to recover greater benefits under the plan.[120]

ERISA's fiduciary responsibility provisions. The real-client theory conflicts with ERISA's fiduciary responsibility provisions. ERISA's fiduciary standards are comprehensive and detailed. They include broad and detailed definitions of ''fiduciary'' and ''party in interest'' (which includes lawyers and other service providers).[121] Quite appropriately, the real-client theory does not treat the lawyer for a plan fiduciary (or the lawyer for a plan) as a fiduciary. A lawyer's representation of an ERISA fiduciary or an ERISA plan does not make the lawyer an ERISA fiduciary. Plan documents rarely, if ever, confer fiduciary status on a person acting as a lawyer, and a lawyer who represents the plan or a plan fiduciary rarely, if ever, possesses or exercises the discretionary authority or control required by ERISA's definition of ''fiduciary.''[122]

The fact that ERISA's fiduciary duty provisions do not impose duties on non-fiduciaries strongly suggests that ERISA does not authorize the courts to impose common-law duties on non-fiduciary lawyers. To be sure, ERISA's legislative history states that the courts are authorized to develop a federal common law of rights and obligations under ERISA-regulated plans. At most, however, this authorizes courts to fill gaps in the statute, not to amend detailed and comprehensive statutory provisions, such as ERISA's fiduciary duty provisions.[123]

Just as ERISA does not provide that a lawyer for a fiduciary (or a lawyer for a plan) is to be treated as a fiduciary, ERISA does not provide that a lawyer for a

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fiduciary (or a lawyer for a plan) is to be treated as the lawyer for the plan's participants. To the contrary, under ERISA, the plan is a separate entity, with interests that are distinct from the interests of its participants.[124] When a fiduciary of an ERISA-governed plan engages a lawyer to provide advice or assistance in connection with the administration of the plan, the fiduciary engages the lawyer to represent the fiduciary or the plan, not the plan's participants.[125]

The Supreme Court has emphasized that plan administrators have a fiduciary duty ''to preserve limited plan assets,'' to pay only the benefits prescribed by the terms of the plan document, and to oppose unjustified claims that would produce windfall recoveries for some participants at the expense of others or the plan as a whole.[126] The fiduciary duty to preserve limited plan assets undermines the premise of the real-client theory: that the fiduciary's lawyer represents participants who make claims against the plan. The fiduciary has a duty to resist claims that it does not consider meritorious, and the fiduciary's lawyer has a duty to assist the fiduciary in opposing such claims. A fiduciary would risk violating ERISA's duties of prudence and loyalty if it engaged a lawyer for the plan's participants to represent the fiduciary in connection with the participants' claims against the plan.[127]

ERISA's disclosure provisions. The real-client theory also conflicts with ERISA's disclosure provisions. ERISA makes the plan administrator — not the fiduciaries' lawyers — responsible for disclosure and does not entitle plan participants to copies of communications between plan fiduciaries and their lawyers.[128] If Congress had intended to make plan participants the ''real clients'' of the plan fiduciaries' lawyers, it is implausible that Congress would have failed either to express that intent or to impose a disclosure obligation on the fiduciaries or the fiduciaries' lawyers.

In determining whether the fiduciary exception applies, a number of courts have taken into account whether the plan or trust fund paid for the legal advice in question.[129] In a recent non-ERISA case where trust assets were *not* used to pay legal fees, the Supreme Court stated that the source of funds — outside the trust fund — was ''significant'' and ''highly relevant'' in identifying the lawyer's ''real client,''[130] but appeared to give comparable weight to the ownership of the documents reflecting the lawyer's advice:

> Just as the source of funds used to pay for legal advice is highly relevant in identifying the ''real client'' for purposes of the fiduciary exception, we consider ownership of the resulting records to be a significant factor in deciding who ''ought to have access to the document.''[131]

ERISA's disclosure provisions are based on the premise that the plan administrator controls the plan's documents and records, and that plan participants have the right to inspect only specified documents. The documents that participants have a right to inspect are specified by ERISA §104(b)(4). Communications between plan fiduciaries and their counsel are not among them:

> The administrator shall, upon a written request of any participant or beneficiary, furnish a copy of the latest updated summary plan description, plan description, and the latest annual report, any terminal report, the bargaining agreement, trust agreement, contract, or other instrument under which the plan is established or operated.[132]

Communications between plan fiduciaries and their counsel do not qualify as ''other instruments under which the plan is established or operated'' under ERISA §104(b)(4). Courts have interpreted that phrase to include only the plan's governing documents, which do not include confidential legal advice to a plan fiduciary — regardless of whether the plan was the source of the funds that were used to pay for the advice.[133]

Duty-to-Disclose Theory

Under the duty-to-disclose theory, a plan fiduciary has a common-law duty to inform plan participants of the fiduciary's confidential communications with the fiduciary's lawyers regarding plan administration — a duty that supersedes the fiduciary's rights under the attorney-client privilege.[134] Under this theory, the fiduciary's duty to disclose trumps the fiduciary's right to invoke the attorney-client privilege.

The duty-to-disclose theory appears to have influenced the rulings in both *Garner* and *Riggs*. In *Garner*, the Fifth Circuit explained that management's duty to stockholders superseded management's right to obtain confidential legal advice:

> [W]hen all is said and done management is not managing for itself. This is not to say that management does not have allowable judgment in putting advice to use. But management judgment must stand on its merits, not behind an ironclad veil of secrecy which under all circumstances preserves it [management] from being questioned by those for whom it [management judgment] is, at least in part, exercised.[135]

Similarly, in *Riggs*, the Delaware Chancery Court observed that ''[t]he policy of preserving the full dis-

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closure necessary in the trustee-beneficiary relationship is here ultimately more important than the protection of the trustees' confidence in the attorney for the trust.''[136]

ERISA's fiduciary responsibility provisions. The duty-to-disclose theory conflicts with ERISA's fiduciary responsibility provisions. The duty-to-disclose theory is based on the view that trustees represent the trust beneficiaries and that the beneficiaries must have access to trustees' communications with their lawyers in order to be able to hold the trustees accountable for adhering to appropriate standards of conduct. In *Riggs*, for example, the Chancery Court offered the following description of a trustee:

> The trustee has been described as a mere representative whose function it is to attend to the disposition and maintenance of the trust property so that it may be enjoyed by the beneficiaries in the manner provided by the settlor. In order for the beneficiaries to hold the trustee to the proper standards of care and honesty and procure for themselves the benefits to which they are entitled, their knowledge of the affairs and mechanics of the trust management is crucial.[137]

Riggs, however, concerned a testamentary trust that was not regulated by a comprehensive and thorough statutory scheme similar to ERISA. In this context, it might have been appropriate for courts to adopt a rule like the fiduciary exception. Without access to relevant information, the beneficiaries of a testamentary trust might not have been able to hold the trustee to its obligations under the trust instrument and the law. Indeed, one of the reasons why Congress enacted ERISA was Congress's dissatisfaction with the protection that the common law of trusts offered to plan participants. As the Supreme Court observed in *Varity*,

> ERISA's standards and procedural protections partly reflect a congressional determination that the common law of trusts did not offer completely satisfactory protection. See ERISA §2(a). See also H. R. Rep. No. 93-533, *supra*, at 3–5, 11–13, 2 Leg. Hist. 2350–2352; 2358–2360; H. R. Conf. Rep. No. 93-1280, pp. 295, 302 (1974), 3 Leg. Hist. 4562, 4569.[138]

ERISA's fiduciary responsibility provisions were designed to supersede the common law of trusts as the body of law governing employee benefit plans and, in a departure from the common law, provided that an ERISA fiduciary was *not* the ''representative'' of the plan's participants. In *NLRB v. Amax Coal Co.*, the Supreme Court ruled that the trustees of a collectively-bargained employee benefit plan were not ''mere representatives'' and did not represent the interests of the party (the employer or the union) that appointed them. The Court emphasized that a fund trustee must overcome any loyalty to the interests of the party that appointed the trustee and that the trustees are not representatives of management or labor.[139]

Similarly, in *Kennedy v. Administrator for DuPont Savings & Investment Plan*, the Court ruled that ERISA requires a fiduciary to be guided by the terms of the plan, not by what the participants want or by the fiduciary's personal assessment of what is in the participants' interest.[140] *Kennedy* involved a dispute over the §401(k) account of William Kennedy, a deceased DuPont employee who had participated in DuPont's §401(k) plan. The plan allowed each participant to designate a beneficiary and to replace or revoke a previous beneficiary designation. The plan required all beneficiary designations to be made in the manner prescribed by the plan administrator, and the plan's SPD required beneficiary designations to be made on forms approved by the administrator.

William designated his wife (Liv) as his beneficiary on the appropriate beneficiary designation form. Although William and Liv were subsequently divorced and the divorce decree specified that Liv was divested of any interest in William's §401(k) account, William never changed his designation of Liv as his beneficiary. After William's death, the plan paid William's account balance to Liv.

The Supreme Court viewed the ensuing dispute between the plan and William's estate as essentially a contract dispute that was resolved by the terms of the governing plan document.[141] Both the plan document and the SPD made clear that, after a participant's death, benefits would be distributed to the beneficiary whom the deceased participant had designated in accordance with the plan's requirements. Accordingly, the Court ruled that William's beneficiary designation form controlled the disposition of his account balance. The Court emphasized that ERISA was designed to allow plans to be administered on the basis of straight-forward, objective rules that allow benefits to be paid efficiently and promptly without the uncertainty, cost and delay that would be entailed by investigating each deceased participant's intent.[142]

ERISA's fiduciary responsibility provisions actually *forbid* a plan fiduciary from representing both the plan and a plan participant in connection with the settlement of a claim that the participant makes against the plan. ERISA §406(b)(2) provides that a fiduciary may not ''in his individual or in any other capacity act in any transaction involving the plan on behalf of a party (or represent a party) whose interests are adverse to the interests of the plan or its participants or benefi-

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ciaries.'' According to ERISA's legislative history, this provision ''prevents a fiduciary from being put in a position where he has dual loyalties, and, therefore, he cannot act exclusively for the benefit of a plan's participants and beneficiaries.''[143] Consistent with the legislative history, courts have interpreted ''adverse'' broadly. One court has ruled that, in order to be ''adverse,'' interests need not be ''antithetical,'' but only ''different.''[144]

If a participant claims that the plan has violated a provision of ERISA (for example, if a participant claims that a defined benefit plan deprived the participant of an appropriate share of the plan's residual assets in connection with the termination of the plan),[145] §406(b)(2) bars a plan fiduciary with a role in resolving the claim from representing the participant in connection with the settlement of the claim. Representation of the participant in these circumstances would subject the fiduciary to the ''dual loyalties'' that §406(b)(2) was intended to forbid.[146]

Moreover, §406(b)(2) recognizes that the interests of the plan can differ from the interests of the plan's participants. That is why §406(b)(2) bars a fiduciary from representing a party ''whose interests are adverse to the interests of the plan *or* its participants or beneficiaries'' (emphasis added). If the interests of the plan were always identical with the interests of each plan participant, there would have been no need to refer separately to the plan and its participants.

Some courts have treated a fiduciary's responsibility for a participant as akin to a guardian's responsibility for a ward.[147] In *Washington Star*, for example, the court distinguished the position of a pension plan trustee from the position of a corporate manager and ruled that, although a ''good cause'' requirement was appropriate in ''a corporate setting, in which the management of a sizable corporation clearly cannot 'pleas[e] all of its shareholders all of the time,' and management requires 'protection from those who might second-guess or even harass in matters purely of judgment,' '' a pension plan trustee ''directly serves the fund beneficiaries,'' much as a guardian directly serves a ward.[148] Similarly, a number of courts have justified their application of the fiduciary exception on the ground that a plan administrator or trustee must administer the plan in the beneficiaries' ''best interests.''[149]

The responsibilities of an ERISA fiduciary for a plan participant are *not* equivalent to the responsibilities of a guardian for a ward, however.[150] ERISA fiduciaries do not ''directly serve'' plan participants and are not required to administer the plan in the beneficiaries' ''best interests.'' Under ERISA, a fiduciary is required to discharge its duties with respect to the plan solely in the interest of participants and in accordance with the documents and instruments governing the plan to the extent that those documents and instruments are consistent with ERISA — not to act as a guardian of the plan's participants.[151] ERISA's fiduciary standards do not require, or even permit, a fiduciary to do whatever the fiduciary thinks is in the interest of participants.[152]

ERISA's disclosure provisions. The duty-to-disclose theory also conflicts with ERISA's disclosure provisions. ERISA imposes comprehensive and detailed disclosure requirements on plan administrators. ERISA specifies the documents that plan administrators must furnish to participants and the DOL, and it does not authorize courts to create federal common-law rules requiring plan administrators or plan fiduciaries to turn over additional materials,[153] which is what courts have done in justifying the fiduciary exception on the basis of a fiduciary's common-law duty to disclose information.[154]

For example, ERISA's disclosure provisions require plan administrators to distribute SPDs and SARs to participants and specify what must be included in an SPD and an SAR; they require plan administrators to make specified documents available to plan participants and the DOL upon request; and they impose additional disclosure requirements on the administrators of participant-directed individual account plans. None of these provisions require privileged communications to be disclosed to plan participants or the DOL. As explained earlier, ERISA §104(b)(4) sets forth a comprehensive list of the documents that a plan administrator is required to furnish to participants. Section 104(b)(4) does not suggest that courts are authorized to expand the list.[155]

The Supreme Court's opinion in *Curtiss-Wright* supports this view. There, the Court considered whether Curtiss-Wright's retiree medical plan complied with the requirement of ERISA §402(b)(3) that a plan specify a procedure for amending the plan and a procedure for identifying the persons who are authorized to amend the plan.

Although Curtiss-Wright's plan identified the company as the person authorized to amend the plan, the plaintiffs argued that this was not good enough. The plaintiffs contended that §402(b)(3) was intended to assure not only that a plan has an amendment procedure but also that there is enough detail to enable participants and beneficiaries to learn what their rights and obligations are. The Court rejected this argument on the ground that ERISA's comprehensive disclosure provisions made it evident that Congress did not intend other parts of ERISA to supplement the disclosure provisions. According to the Supreme Court, ERISA's disclosure scheme ''may not be a foolproof informational scheme, although it is quite thorough. Either way, it is the scheme that Congress devised. And we do not think Congress intended it to be

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supplemented by a far-away provision in another part of [ERISA].''[156]

Consistent with *Curtiss-Wright*, the Second, Fourth, Fifth and Sixth Circuits have held that ERISA's general fiduciary standards do not impose disclosure requirements that supplement the requirements of §104(b)(4). These courts have reasoned that a general statutory provision should not be treated as applying to a matter specifically addressed by another part of the statute and have, on that basis, rejected the argument that ERISA incorporates the common-law principle that beneficiaries are entitled to any information that is reasonably necessary to enforce their rights or to prevent a breach of trust.[157] As the Sixth Circuit put it, ''[i]t would be strange indeed if ERISA's fiduciary duty standards could be used to imply a duty to disclose information that ERISA's detailed disclosure provisions do not require to be disclosed.''[158]

The Supreme Court's recent decision in *U.S. v. Jicarilla Apache Nation* also supports the view that courts are not authorized to amend ERISA's disclosure provisions. In *Jicarilla*, the Court ruled that the fiduciary exception does not apply to the general trust relationship between the United States and the Indian tribes. Insofar as the Indian tribes are concerned, the Government is subject to both detailed reporting requirements and a statutory ''catch-all'' provision that provides that the statutory list of the Government's responsibilities is nonexhaustive.[159] The Court ruled, however, that the statute leaves no room for a fiduciary exception:

> When Congress provides specific statutory obligations, we will not read a ''catchall'' provision to impose general obligations that would include those specifically enumerated. . . . Reading the statute to incorporate the full duties of a private, common-law fiduciary would vitiate Congress' specification of narrowly defined disclosure obligations.[160]

The Court cited two ERISA decisions, *Massachusetts Mut. Life Ins. Co. v. Russell*,[161] and *Mackey v. Lanier Collection Agency & Service, Inc.*,[162] as authority for this point. Because both *Russell* and *Mackey* recognized that ERISA's comprehensive and detailed enforcement provisions left no room for the development of common-law doctrines, the Court's reliance on those decisions in *Jicarilla* indicates that at least some of the Justices will be receptive to the argument that ERISA's comprehensive and detailed disclosure regime leaves no room for the fiduciary exception under ERISA.

Mutuality-of-Interest Theory

The mutuality-of-interest theory stems from the Fifth Circuit's observation in *Garner* that ''[t]he representative [management] and the represented [shareholders] have a mutuality of interest in the representative seeking advice when needed and putting it to use when received.''[163] However, as the Supreme Court's rulings in *NLRB v. Amax Coal Co.* and *Kennedy* made clear, the fiduciaries of an ERISA plan are not permitted to represent, and do not represent, the plan's participants under ERISA. Moreover, the mutuality-of-interest theory conflicts with the Supreme Court's instruction in *Upjohn* regarding the attorney-client privilege: a lawyer and client must be able to predict ''with some degree of certainty'' whether their discussion will be considered privileged. But when a fiduciary communicates with the fiduciary's lawyer before litigation is threatened or initiated, the fiduciary and the lawyer typically cannot have *any* degree of certainty that there will be no conflict between the fiduciary's interests and the interests of at least some plan participants. As one group of commentators has pointed out,

> Realistically, any difficult decision a trustee must make (one that will require legal advice) normally has the potential of being adverse to the interest of at least one beneficiary. . . . Therefore, . . . normally a trustee seeks legal advice concerning a difficult question to avoid trouble with the beneficiaries.[164]

The Supreme Court has emphasized that evidentiary privileges for confidential communications can be fully effective in promoting candid communications only to the extent that the confidentiality of those communications is assured. In order for a client to have this assurance, the client must be able to ascertain, at the time the client and the attorney begin to communicate, whether the attorney-client privilege applies to their communications.[165] A mutuality-of-interest standard, based on the interests that will be advanced by a participant or group of participants in the future, is not an acceptable basis for applying the fiduciary exception to communications between a fiduciary of an ERISA-governed plan and the fiduciary's lawyer. As the Supreme Court observed in *Swidler & Berlin*, ''a client may not know at the time he discloses information to his attorney whether it will later be relevant to a civil or criminal matter, let alone whether it will of substantial importance.''[166]

Claims Procedure Regulation

The DOL's claims procedure regulation requires an ERISA-governed benefit plan to provide a claimant with access to, and copies of, documents, records and other information ''relevant'' to the claimant's claim. The regulation defines as ''relevant'' any document, record or other information that: (1) was relied on in making the benefit determination; (2) was submitted,

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considered or generated in the course of making the benefit determination, without regard to whether it was relied on in making the benefit determination; (3) demonstrates compliance with the plan's administrative processes and safeguards for ensuring consistent decision making; or (4) in the case of a group health plan or a plan providing disability benefits, constitutes a statement of policy or guidance with respect to the plan concerning the denied treatment option or benefit for the claimant's diagnosis, regardless of whether it was relied on in making the benefit determination.[167]

The claims procedure regulation does not modify (or create an exception to) the attorney-client privilege for a number of reasons. First, Congress has not authorized the DOL to modify the attorney-client privilege. Rule 501 of the Federal Rules of Evidence assigns to the courts and the Congress, not federal agencies, the exclusive responsibility for modifying common-law privileges. Rule 501 provides that ''[t]he common law — as interpreted by the United States courts in the light of reason and experience — governs a claim of privilege unless any of the following provides otherwise: the United States Constitution, a federal statute; or a rule promulgated by the Supreme Court.'' When it enacted Rule 501, Congress expressed its intent that the federal courts continue to carry out their traditional responsibility for developing the law of testimonial privileges through adjudication of particular cases.[168] Congressman Hungate, the principal sponsor of the rules of evidence in the House, explained:

> Rule 501 is not intended to freeze the law of privilege as it now exists. The phrase ''governed by the principles of the common law as they may be interpreted by the courts of the United States in light of reason and experience,'' is intended to provide the courts with the flexibility to develop rules of privilege on a case-by-case basis.[169]

Rule 501 reflects Congress's intent that the courts continue to carry out their traditional responsibility for developing the law of testimonial privileges through case-by-case adjudication.[170] If Congress had intended to authorize the DOL or other federal agencies to modify or create an exception to the attorney-client privilege, surely Congress would have expressed its intent in ERISA or in the contemporaneously-enacted Federal Rules of Evidence.[171]

Second, the regulation does not refer to the attorney-client privilege and does not suggest that the regulation was intended to modify or create an exception to the attorney-client privilege. The term ''relevant'' was added to the regulation in 2001, when the DOL overhauled a regulation that it had issued in 1977. The 1977 regulation stated that a claimant must be provided, upon receiving an adverse benefit determination, with access to ''pertinent documents.'' The preamble to the DOL's 1998 notice of proposed rulemaking explained that the amendment to the regulation was designed to clarify that:

> [c]laimants are entitled to review all documents, records, and information relevant to their claims for benefits, whether or not such documents, records, and information were in fact relied upon in making the adverse benefit determination. Such information would include internal rules, guidelines, protocols, and criteria under which the plan is operated and any documents or records that may be favorable to the claimant's position.[172]

The preamble contains no suggestion that the regulation required disclosure of otherwise privileged communications. If the DOL had intended to modify an ancient and venerated common-law privilege, it can be presumed that the DOL would have made its intentions clear. The DOL's brief in *Solis*, in which the DOL advocated its authority to assert the fiduciary exception, does not even mention the DOL's claims procedure regulation.[173]

Third, the Internal Revenue Code provision authorizing the Internal Revenue Service to examine ''relevant'' documents and to summon persons to give ''relevant'' testimony has been consistently and repeatedly construed to be subject to traditional privileges and limitations, including the attorney-client privilege.[174] This makes the silence of the DOL regulation all the more significant. If the DOL had intended to depart from the established understanding of what ''relevant'' means, it is likely that the DOL would have said something about it.

Treatment of Insured Plans

In 2007, the Third Circuit ruled in *Wachtel v. Health Net, Inc.* that the fiduciary exception does not apply to an insurer-fiduciary under an insured ERISA plan. The court acknowledged that an insurer providing benefits under an ERISA-governed plan was a fiduciary, but observed that fiduciaries ''come in many shapes and sizes'' and concluded that because of significant differences between insurer-fiduciaries and other fiduciaries, the logic underlying the fiduciary exception did not apply to the fiduciaries of insured plans. Although the Third Circuit's opinion addressed only the application of the fiduciary exception to insurer-fiduciaries, the logic of the Third Circuit's opinion suggests that the fiduciary exception should not apply to *any* ERISA fiduciaries.

In *Wachtel*, the Third Circuit evaluated insured arrangements under both the real-client and duty-to-

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disclose theories described above. With respect to the real-client theory, the court concluded that the participants in employee benefit plans sponsored by an insurer's customers were not the ''real clients'' of the insurer's lawyers. The court's conclusion was based on the following findings:

- Unlike a trustee that holds plan assets in trust, an insurer has a substantial interest in the plan assets that it holds;
- An insurer derives profits from the fund from which it pays insured benefits, creating a ''structural conflict of interests'' that undermines the argument that the plan's participants are the insurer's lawyers' ''real clients'';
- Because an insurer also holds the assets of numerous plans and non-ERISA customers, the insurer's interests differ from the interests of its customers, further undermining the argument that plan participants are the insurer's lawyers' ''real clients''; and
- The insurer in *Wachtel* paid for the legal advice out of its own assets, indicating that the insurer was a ''real client'' and not a mere representative of the plan's participants.[175]

With respect to the duty-to-disclose theory, the Third Circuit found that when Congress included a broad definition of ''fiduciary'' in ERISA, Congress did not intend to extend all of a trustee's common-law obligations to other plan fiduciaries, such as insurers, as evidenced by ERISA §403(b), which exempts the assets held by an insurance company from ERISA's generally-applicable requirement that plan assets be held in trust.[176]

The Third Circuit also identified two additional factors that it found persuasive. First, the court observed that the fiduciary obligations of insurers were not well settled, and that it would not be prudent to craft an evidentiary privilege in a way that made the application of the privilege turn on the answers to difficult legal questions, such as the fiduciary obligations of an insurer under ERISA:

> ''An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all.'' *Upjohn*, 449 U.S. at 393. We are reluctant to ask lawyers to read tea leaves and predict how courts will resolve the imponderables of ERISA before they can take the most preliminary step of advising their clients as to whether their communications will remain confidential.[177]

Second, the court expressed concern that an expansive and uncertain attorney-client privilege would harm participants in ERISA-governed plans. The court observed that some insurers might cease providing insurance to ERISA plans; others might increase their charges to compensate for the risk that they might lose the ability to obtain confidential legal advice; and still others might decline to inform their lawyers of all the relevant facts. The court acknowledged that these considerations were similar to those that had been taken into account by courts that had applied the fiduciary exception to trustees and plan administrators, but characterized them as ''thumbs on the scale'' that helped to tip the balance.[178]

The Third Circuit's reasoning in *Wachtel* is powerful — so powerful, in fact, that *Wachtel* calls into question the applicability of the fiduciary exception to *all* ERISA plans, both insured and uninsured. District courts in other circuits have disagreed with *Wachtel*, however. The grounds for disagreement include the following:

- There is no provision in ERISA indicating that the disclosure obligations of an insurer differ from those of other fiduciaries;
- There is no provision in ERISA indicating that the attorney-client privilege should be used to narrow the scope of a fiduciary's disclosure obligations under the DOL's claims procedure regulation, which requires that a claimant be provided with copies of all documents, records and other information ''relevant'' to the claim;[179] and
- The Third Circuit's opinion in *Wachtel* overstated the difference between an insurer's obligations under an insured plan and a trustee's obligations under an uninsured plan and, in consequence, overstated the case for exempting insured plans from the fiduciary exception. Just as an insurer might have competing obligations to multiple plans or to other non-ERISA customers, non-insurer fiduciaries have obligations to other plan participants.[180]

Although these district court opinions support the view that insurer-fiduciaries and non-insurer fiduciaries have the same disclosure obligations under ERISA, the opinions offer very little support for applying the fiduciary exception to both insurer-fiduciaries and non-insurer-fiduciaries. For this proposition, the district court opinions rely largely on the DOL's claims procedure regulation — which, as observed earlier, does not address the fiduciary exception.[181]

Practical Consequences

The risk that a court will apply the fiduciary exception to the fiduciaries of ERISA-governed plans has

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practical consequences that are contrary to the objectives of ERISA, the objectives of the attorney-client privilege, and the interests of plan participants. The concern that fiduciaries and their lawyers cannot communicate in confidence reduces the likelihood that ERISA fiduciaries will seek and obtain the best possible legal advice, discourages attorneys from providing candid legal advice, complicates plan administration, and makes plan administration more costly.

Fiduciaries Discouraged from Obtaining Best Possible Legal Advice

There is an acute public interest in fiduciaries receiving sound legal advice under ERISA. Because ERISA regulates critically important benefit arrangements in an extraordinarily complex way,[182] plan fiduciaries must be able to consult freely with their lawyers to obtain the best possible legal guidance.

The fiduciary exception discourages such consultation. Because the fiduciary exception makes it uncertain whether communications between fiduciaries and their lawyers are privileged, the fiduciary exception discourages plan fiduciaries from obtaining legal advice regarding their duties and thwarts the privilege's objective of encouraging candid communication between fiduciaries and their lawyers.[183] As the Ninth Circuit has recognized,

> an uncertain attorney-client privilege will likely result in ERISA trustees shying away from legal advice regarding the performance of their duties. The outcome ultimately 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 an unwillingness to serve at all or an insistence on contractual protections [from the employer] aimed at diluting the trustee's accountability. Neither option serves the interest of beneficiaries.[184]

In *Garner*, the Fifth Circuit ruled that the plaintiffs could defeat the defendants' attorney-client privilege claim only if the plaintiffs showed good cause for disclosure. Many of the indicia of good cause identified in *Garner* cannot be applied, however, until after the attorney-client communication occurs.[185] If courts rely on comparable indicia of good cause in ERISA cases, it will necessarily be uncertain, at the time a lawyer-client communication occurs, whether the communication is covered by the attorney-client privilege. This is contrary to the Supreme Court's instruction that the applicability of the attorney-client privilege should not be assessed on the basis of an *ex post* requirement.[186]

The fact that courts disagree over whether a party must show good cause in order to overcome the attorney-client privilege[187] creates additional uncertainty. When an attorney-client communication occurs, not only is it uncertain whether the good cause requirement will be satisfied, it is also uncertain whether a court will even require a showing of good cause.[188]

The courts that have not required a showing of good cause have imposed other requirements in place of a good cause requirement. These requirements make it difficult, if not impossible, for either a fiduciary or the fiduciary's lawyer to predict with confidence whether their communications will be protected by the attorney-client privilege. Some courts have ruled that once the participant and the fiduciaries have become adversaries, they do not have the ''mutuality of interest'' that might otherwise justify applying the fiduciary exception.[189] Other courts have ruled that *pre-decisional* legal advice regarding a participant's claim for benefits is not privileged, even if the pre-decisional advice was secured for the purpose of defending prospective post-decisional litigation.[190] Still other courts have ruled that, although the time period in which communications occur might be relevant, it is not dispositive and that the key issue is whether the communication relates to plan administration or generalized concern for liability, on the one hand, or concern for the fiduciaries' liability as result of as specific threat of liability, on the other.[191] A number of these courts have acknowledged that their approach might be ''untidy.''[192]

In difficult cases (where the need for legal advice is greatest), fiduciaries often seek legal advice for multiple reasons: they do not seek legal advice only for the purpose of obtaining guidance on plan administration or only for the purpose of defending themselves. In such circumstances, a test based on the fiduciary's purpose in seeking legal advice is likely to leave fiduciaries in doubt as to whether communications between them and their lawyers are privileged.[193]

As a result, under current law, ERISA fiduciaries are exposed to a significant risk that otherwise privileged communications will be determined, after the fact, to be covered by the fiduciary exception. Exposure to this risk encourages fiduciaries to act (or to refrain from acting) without the benefit of legal advice or to refrain from being candid with their lawyers. It might even cause some fiduciaries to disregard their own judgment and experience and simply follow their lawyers' potentially unprivileged advice.[194] All of these consequences are inconsistent with Congress's intent when it enacted ERISA.

Lawyers Discouraged from Providing Candid Legal Advice

The attorney-client privilege is designed not only to encourage clients to communicate with their lawyers,

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but also to encourage lawyers to give candid legal advice to their clients. Because the fiduciary exception significantly increases the risk that a lawyer's advice to an ERISA fiduciary regarding plan administration will not be considered privileged, and will be used against the fiduciary, the exception discourages lawyers from providing candid legal advice. For the same reason, the fiduciary exception also discourages lawyers from providing written advice, which generally is less likely than oral advice to be misunderstood or to be remembered incorrectly.

In *U.S. v. Jicarilla Apache Nation*, the Supreme Court ruled that because specific statutory and regulatory provisions defined the Government's disclosure obligations to Indian tribes, the fiduciary exception did not apply to the fiduciary relationship between the United States and the Indian tribes. Neither party in *Jicarilla* disputed the existence of the fiduciary exception. The Indian tribe, which sought to obtain documents from the Government, relied on the exception. Although the Solicitor General opposed the tribe's position, the Solicitor General sought to protect the DOL's position that the fiduciary exception applies to the fiduciaries of ERISA-governed plans. Thus, the Solicitor General did not contest the existence of the exception, and argued only that the exception did not apply to the case before the Court. As neither party disputed the existence of the fiduciary exception, the Court decided the case by assuming the existence of the exception.[195]

At oral argument, however, a number of the Justices questioned counsel for the Indian tribe regarding the fiduciary exception:

CHIEF JUSTICE ROBERTS: Our system has concluded that it works best if people have candid advice from their lawyers, and my concern here is if you're a lawyer . . . and — you're asked for your advice by a trustee . . . and if you know that is going to be shared with the beneficiary, you're going to give bland, mushy, hedging advice rather than direct and candid advice to the trustee. . . . And . . . that hurts not only the trustee, but also the beneficiaries, whose trustee does not have candid legal advice.

MR. GORDON: . . . . [T]he whole issue is if there is a suit for breach of trust . . . whether in that circumstance the trustee is obliged to produce the legal advice that it has received. . .

JUSTICE SCALIA: The trustee cannot hire his own lawyer, you're saying. So long as he's a trustee, he cannot hire his own lawyer to get advice on how to manage the trust in a way that will avoid his liability. He just can't do it right?. . .

CHIEF JUSTICE ROBERTS: So I'm the trustee, and I say I would like legal advice as to whether I should renegotiate this lease with the government. . . . Now, I want that advice so I manage the trust correctly, and I'm concerned if I don't manage the trust correctly I'm going to be sued. Now is the document from the lawyer responding to that inquiry privileged or not?

MR. GORDON: I think, Your Honor, that if it focuses on how to manage it properly, then — and it's prospective, then I think that the — it — it is not privileged. If, instead, you posit, you know, this is what I did and I'm concerned I may have screwed up, do you think I'm liable, then I think a different answer may obtain.

CHIEF JUSTICE ROBERTS: So if he says this is what I did and I might be liable, it's privileged. If he says this is what I'm going to do —

MR. GORDON: Please tell me what to do, yes.

JUSTICE KENNEDY: Which means you can't get preventative advice, which is one of the most important kinds of advice an attorney can give.[196]

Justice Kennedy's observation is telling. If a lawyer cannot give a fiduciary preventative advice that is protected by the attorney-client privilege, fiduciaries will

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be deprived of one of the most important kinds of advice a lawyer can give: clear and candid advice that keeps the client out of trouble.

Complicating Plan Administration and Increasing Plan Costs

Because the fiduciary exception complicates plan administration, the exception subverts Congress's intent ''to create a system that is [not] so complex that administrative costs, or litigation expenses, unduly discourage employers from offering [ERISA] plans in the first place.''[197]

Under the real-client theory, a fiduciary's lawyer will often have clients with conflicting interests. In the event of litigation between the plan (or a plan fiduciary) and plan participants, the plan and the plan fiduciaries will have two costly, and potentially unattractive, alternatives. They can act on the assumption that the lawyer for the plan (or plan fiduciary) may not accept an engagement in which the lawyer would oppose the position of the plan participants — which would require the plan to incur the cost of engaging new counsel. Alternatively, they can act on the assumption that the real-client theory is invalid or inapplicable — and be prepared to litigate the issue if the participants move to disqualify the lawyer. Either way, plan costs will increase.

Moreover, if plan participants are treated as the ''real clients'' of the plan fiduciary's lawyer, it is not clear why the lawyer's disclosure obligation should be limited to responding to discovery demands. If the fiduciary's lawyer has information that the plan's participants would consider material and helpful, and if the participants actually are his ''real clients,'' the lawyer would be obliged, as a matter of professional responsibility, to pass the information along to the participants.[198]

Of course, for similar reasons, the plan fiduciary's lawyer would also be obliged to inform the fiduciary that the lawyer has a disclosure obligation to the participants, and once the lawyer so informs the fiduciary, it is unlikely that the lawyer will receive confidential information from the fiduciary regarding any matter in which some participants have an adverse interest. These absurd consequences strongly suggest that there is something wrong with the theory.

Moreover, under the duty-to-disclose theory, fiduciaries may be subject to substantially expanded, and potentially burdensome, disclosure obligations that go well beyond the disclosure obligations imposed by the text of ERISA. If plan fiduciaries have a duty to disclose confidential information in the course of litigation, it is not clear why the duty to disclose would not apply in the absence of litigation — for example, if a participant simply asks a fiduciary for copies of written advice that the fiduciary has received from the fiduciary's lawyer, or perhaps even in the absence of such a request. The burdens that would be imposed by such a duty — which has no support in the text of ERISA's disclosure requirements — are so substantial that they strongly suggest that there is something wrong with the duty-to-disclose theory.

CONCLUSION

In enacting ERISA, Congress intended to encourage voluntary plan formation, to protect plan assets, and to protect the interests of plan participants. Applying the fiduciary exception to ERISA fiduciaries undermines each of these objectives. It threatens to make plan administration more complex and costly; it discourages plan fiduciaries from engaging in candid discussions with their lawyers; and it discourages lawyers from providing candid legal advice.[199]

ERISA is comprehensive and thorough. It reflects the balance that Congress struck between the competing purposes of encouraging voluntary plan formation, on the one hand, and protecting plan assets and plan participants, on the other. Congress did not authorize the courts to alter that balance by supplementing ERISA's disclosure regime with common-law disclosure requirements like the fiduciary exception.

ERISA is also dense and detailed. Compliance with its numerous technical requirements is challenging. Compliance should not be made more difficult by applying a doctrine that discourages fiduciaries from obtaining sound legal counsel, that makes it harder to obtain candid legal advice, and that complicates plan administration. As the Third Circuit observed in *Wachtel*, ''[a]n entity's ability to secure confidential legal advice should not be at its lowest when complex legal obligations are at their highest.''[200]

Little, if anything, will be lost if ERISA fiduciaries are permitted to invoke the attorney-client privilege without being encumbered by the fiduciary exception. The scope of the attorney-client privilege is limited, and plan participants ordinarily can obtain the information they seek without relying on the fiduciary exception. The privilege applies only to communications between lawyer and client, and only to communications made in confidence to secure legal advice or services. The privilege does not apply to communications regarding non-legal matters and does not bar inquiry into the underlying facts. The privilege does not apply if the client claims advice of counsel as a defense, if the client waives the privilege, or if the communication furthered the commission of a fraud or crime.

Allowing ERISA fiduciaries to invoke the attorney-client privilege should produce substantial dividends: better advised fiduciaries, improved plan management and administration, and better funded plans. Plan par-

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ticipants will be better off if communications between plan fiduciaries and their lawyers are protected by the attorney-client privilege on the terms that apply to communications between non-fiduciaries and their lawyers.

END NOTES

[1] The following acronyms and short-hand expressions are used in this article: "ABA" (for the American Bar Association); "DOL" (for the U.S. Department of Labor); "ERISA" (for the Employee Retirement Income Security Act of 1974, as amended, 29 USC §§1001 et seq.); "Model Rules" (for the ABA's Model Rules of Professional Conduct); "Restatement" (for Restatement (Third) of the Law Governing Lawyers); "SAR" (for summary annual report); "SMM" (for summary of material modifications); "SPD" (for summary plan description); "*Conkright*" (for *Conkright v. Frommert,* 130 S. Ct. 1640 (2010)); "*Curtiss-Wright*" (for *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73 (1995)); "*Fitzsimmons*" (for *Donovan v. Fitzsimmons*, 90 F.R.D. 583 (N.D. Ill. 1981)); "*Garner*" (for *Garner v. Wolfinbarger*, 430 F.2d 1093 (5th Cir. 1970)); "*Jicarilla*" (for *U.S. v. Jicarilla Apache Nation*, 131 S. Ct. 2313 (2011)); "*Kennedy*" (for *Kennedy v. Plan Admin. for DuPont Savings & Investment Plan,* 555 U.S. 285 (2009)); "*Murray*" (for *Murray v. Metro. Life Ins. Co.*. 583 F.3d 173 (2d Cir. 2009)); "*Riggs*" (for *Riggs Nat'l Bank v. Zimmer*, 355 A.2d 709 (Del. Ch. 1976)); "*Solis*" (for *Solis v. Food Employers Labor Relations Ass'n & United Food & Commercial Workers Pension Fund,* 644 F.3d 221 (4th Cir. 2011)); "*Upjohn*" (for *Upjohn Co. v. U.S.*, 449 U.S. 383 (1981)); "*Varity*" (for *Varity Corp. v. Howe*, 516 U.S. 489 (1996)); "*Wachtel*" (for *Wachtel v. Health Net, Inc.*, 482 F.3d 225 (3d Cir. 2007)); "*Washington Star*" (for *Washington-Baltimore Newspaper Guild, Local 35 v. Washington Star Co.*, 543 F. Supp. 906 (D.D.C. 1982)). In addition, "participants" refers to both participants and beneficiaries in ERISA-governed employee benefit plans.

[2] This article addresses only the effect of the fiduciary exception to the attorney-client privilege on ERISA fiduciaries; it does not address the fiduciary exception to the work product doctrine or the application of the fiduciary exception to corporate managers and other fiduciaries. As far as ERISA fiduciaries are concerned, even if the attorney-client privilege does not protect the confidentiality of the material in question, the work product doctrine might protect the material from mandatory disclosure. *See Upjohn* at 397 ("To the extent that the material subject to the summons is not protected by the attorney-client privilege as disclosing communications between an employee and counsel, we must reach the ruling by the Court of Appeals that the work-product doctrine does not apply. . . ."); *U.S. v. Deloitte LLP*, 610 F.3d 129, 139–40 (D.C. Cir. 2010) ("[T]he attorney-client privilege and the work-product doctrine serve different purposes: the former protects the attorney-client relationship by safeguarding confidential communications, whereas the latter promotes the adversary process by insulating an attorney's litigation preparation from discovery. Voluntary disclosure waives the attorney-client privilege because it is inconsistent with the confidential attorney-client relationship. Voluntary disclosure does not necessarily waive work-product protection, however, because it does not necessarily undercut the adversary process" (citations omitted).).

[3] *See, e.g., In re Raytheon Co. Securities Lit.*, 2003 U.S. Dist. 28065, at *10 (D. Mass. Aug. 26, 2003) ("*Garner* represents a minority position not accepted by any other Court of Appeals, and which is not uniformly accepted by other courts nor the commentators as well" (footnotes omitted).); *Opus Corp. v. IBM*, 956 F. Supp. 1503, 1509 n.9 (D. Minn. 1996) ("[T]here is some suggestion within this Circuit that the rule espoused in *Garner* may no longer reflect viable authority in view of more recent holdings by the United States Supreme Court. . . ."); *Milroy v. Hanson*, 875 F. Supp. 646, 651 (D. Neb. 1995) ("I will not follow *Garner*. . . .' "); *Lefkowitz v. Duquesne Light Co.*, 1988 U.S. Dist. LEXIS 17251, at *15 (W.D. Pa. June 14, 1988) ("We disagree with the reasoning of *Garner*."); *Shirvani v. Capital Inv. Co.*, 112 F.R.D. 389, 391 (D. Conn. 1986) ("On further reflection, there seems no sufficient reason to craft such a special exception to attorney-client privilege in order to safeguard shareholder interests in any event."); Friedman, "Is the *Garner* Qualification of the Corporate Attorney-Client Privilege Viable After *Jaffee v. Redmond*?" 55 *Bus. Law.* 243, 281 (1999) ("[T]he *Garner* doctrine is not viable and its utilization by federal courts should cease."); Saltzburg, "Corporate Attorney-Client Privilege in Shareholder Litigation and Similar Cases: *Garner* Revisited," 12 *Hofstra L. Rev.* 817, 840 (1984) ("My judgment, then, is that *Garner* was wrong and that the attorney-client privilege in shareholder cases should apply just as it does in any other litigation."); Kirby, "New Life for the Corporate Attorney-Client Privilege in Shareholder Litigation," 69 *A.B.A.J.* 174, 177 (1983) ("The simplest approach would be to overrule *Garner* outright."); Sexton, "A Post-*Upjohn* Consideration of the Corporate Attorney-Client Privilege," 57 *N.Y.U. L. Rev.* 443, 515–16 (1982) ("To the extent that information-holders communicate only because their statements are protected by the privilege, the *Garner* rule may undercut their willingness to speak, especially since information disclosed in shareholder litigation can be used by nonshareholders in subsequent

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litigations.''); Dallas, Note, ''The Attorney-Client Privilege and the Corporation in Shareholder Litigation,'' 50 S. *Cal. L. Rev.* 303, 324 (1977) (''[T]he *Garner* good cause test should be rejected.''); *cf.* Martin & Metcalf, ''The Fiduciary Exception to the Attorney-Client Privilege,'' 34 *Tort & Ins. L.J.* 827, 859 (1999) (''Although the case law on the fiduciary exception to the attorney-client privilege within the context of ERISA litigation is not particularly well reasoned, persuasive, or reflective of the purposes of the privilege, it nevertheless exists and must be anticipated by attorneys practicing in this field.'').

[4] H.R. Rep. No. 93-1280, at 302 (1974) (Conf. Rep.); *Varity* at 497.

[5] *See Varity* at 497; *Curtiss-Wright* at 84.

[6] *See Jaffee v. Redmond*, 518 U.S. 1, 8-9 (1996) (''Rule 501 . . . did not freeze the law governing the privileges of witnesses in federal trials at a particular point in our history, but rather directed federal courts to continue the evolutionary development of testimonial privileges'' (internal quotation marks omitted).); *Univ. of Pa. v. EEOC*, 489 U.S. 182, 189 (1990) (''Rule 501 manifests a congressional desire . . . to provide the courts with flexibility to develop rules of privilege on a case-by-case basis. . . .'').

[7] 8 Wigmore, Evidence §2290 (McNaughton rev. 1961) (''The history of this privilege goes back to the reign of Elizabeth I, where the privilege already appear as unquestioned. It is therefore the oldest of the privileges for confidential communications'' (footnote omitted).); *Chirac v. Reinicker*, 24 U.S. 280, 294 (1826) (''The general rule is not disputed, that confidential communications between client and attorney, are not to be revealed, at any time. The privilege . . . is indispensable for the purposes of private justice.'').

[8] *See, e.g., Mohawk Indus. v. Carpenter*, 130 S. Ct. 599, 606 (2009) (''one of the oldest'') (internal quotation marks omitted); *Swidler & Berlin v. U.S.*, 528 U.S. 399, 403, 410 (1998) (same); *U.S. v. Zolin*, 491 U.S. 554, 562 (1989) (''the oldest''); *Upjohn* at 389 (same); *In re Grand Jury Proceedings,* 616 F.3d 1172, 1182 (10th Cir. 2010) (same); *In re Grand Jury Subpoena*, 419 F.3d 329, 338 (5th Cir. 2005) (''the oldest and most venerated''); *U.S. v. Edwards*, 303 F.3d 606, 618 (5th Cir. 2002) (same); *U.S. v. Doe*, 162 F.3d 554, 556 (9th Cir. 1998) (''the oldest'' and ''perhaps, the most sacred'') (internal quotation marks omitted); *U.S. v. Mett*, 178 F.3d 1058, 1062 (9th Cir. 1999) (''perhaps, the most sacred'') (internal quotation marks omitted); *U.S. v. Bauer*, 132 F.3d 504, 510 (9th Cir. 1997) (same); *see also Haines v. Liggett Group, Inc.*, 975 F.2d 81, 89–90 (3d Cir. 1992) (''the oldest'' and ''so sacred and so compellingly important that courts must, within their limits, guard it jealously'').

[9] Restatement §§68–72; *see also U.S. v. White*, 950 F.2d 426, 430 (7th Cir. 1991) (quoting *U.S. v. Lawless*, 709 F.2d 485, 487 (7th Cir. 1983) (citing 8 Wigmore, Evidence §2292 (McNaughton rev. 1961)).

[10] State law governs the provision of legal advice under ERISA. Although ERISA includes a broad preemption provision, ERISA does not preempt state disciplinary rules for lawyers. *See Custer v. Sweeney*, 89 F.3d 1156, 1167 (4th Cir. 1996) (legal malpractice claim not preempted); *cf. Gerosa v. Savasta & Co.*, 329 F.3d 317, 324–30 (2d Cir. 2003) (malpractice claim against actuary not preempted).

[11] Handelman, Minc, Selwyn and Steele, ''Standards of Lawyer Conduct in Employee Benefits Practice: Part I,'' 24 *J. Pension Planning & Compliance*, 10, 12 (Summer 1998).

[12] For example, under certain conditions, a lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes to be necessary (1) to prevent the client from committing a crime or fraud; or (2) to prevent, mitigate or rectify substantial injury to the financial interests or property of another. *See* Model Rule 1.6.

[13] *See Upjohn* at 389–91; *Fisher v. U.S.*, 425 U.S. 391, 403 (1976).

[14] *Upjohn* at 390 (''[T]he privilege exists to protect not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable him to give sound and informed advice.'').

[15] *Upjohn* at 393 (emphasis added).

[16] 600 F.2d 1223, 1226–28 (6th Cir. 1979).

[17] *Upjohn* at 390.

[18] *Id.* at 393.

[19] 518 U.S. 1 (1996).

[20] *Id.* at 17–18 (footnote omitted).

[21] *In re Sealed Case*, 124 F.3d 230, 233–34 (D.C. Cir. 1997).

[22] 524 U.S. 399, 409 (1998).

[23] *See Wachtel* at 230–31 (''[I]t is well established that confidential disclosures by a client to an attorney made in order to obtain legal assistance are privileged'' (internal quotation marks omitted).); *U.S. v. United Shoe Mach. Corp.*, 89 F. Supp. 357, 359 (D. Mass. 1950) (''[I]n so far as these letters to or from independent lawyers were prepared to solicit or give an opinion on law or legal services, such parts of them are privileged as contain, or have opinions based on, information furnished by an officer or employee of the defendant in confidence and without the presence of third persons. However, in so far as the subject of these communications was the giving of legal or other advice upon the basis of facts disclosed to the attorney by a person outside the organization of defendant and its affiliates[,] the communication is not privileged.'') (citation omitted).

[24] *SCM Corp. v. Xerox Corp.*, 70 F.R.D. 508, 517 (D. Conn. 1976) (''To protect the business compo-

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nents in the decisional process would be a distortion of the privilege. The attorney-client privilege was not intended and is not needed to encourage businessmen to discuss business reasons for a particular course of action.''), *appeal dism'd*, 534 F.2d 1031 (2d Cir. 1976); *U.S. v. United Shoe Mach. Corp.*, 89 F. Supp. 357, 359 (D. Mass. 1950) (''Where a communication neither invited nor expressed any legal opinion whatsoever, but involved the mere soliciting or giving of business advice, it is not privileged.'').

[25] *Upjohn* at 395 (quoting *Phila. v. Westinghouse Elec. Corp.*, 205 F. Supp. 830, 831 (E.D. Pa. 1962)); Restatement §69 (defining ''communication''); *see also Fisher v. U.S.*, 425 U.S. 391, 403–04 (1976) (''This Court and the lower courts have thus uniformly held that pre-existing documents which could have been obtained by court process from the client when he was in possession may also be obtained from the attorney by similar process following transfer by client in order to obtain more informed legal advice.'').

[26] *See, e.g., U.S. v. Mierzwicki*, 500 F. Supp. 1331, 1335 (D. Md. 1980) (privilege waived when defendant in tax-evasion case claimed tax returns were amended on advice of counsel); *Panter v. Marshall Field & Co.*, 80 F.R.D. 718, 721 (N.D. Ill. 1978) (''Where, as here, a party asserts as an essential element of his defense reliance upon the advice of counsel, we believe the party waives the attorney-client privilege with respect to all communications, whether written or oral, to or from counsel concerning the transactions for which counsel's advice was sought.''); Restatement §80(1) (waiver when client asserts it acted on advice of lawyer).

[27] *See, e.g., In re Von Bulow*, 828 F.2d 94, 100–04 (2d Cir. 1987) (waiver of attorney-client privilege); Restatement §§77–80 (waiver of privilege).

[28] *Wachtel* at 231–36 (describing exceptions); *Garner* at 1102 (traditional exceptions for communications in contemplation of a crime and communications to a joint attorney); Restatement §81–85 (exceptions).

[29] *See U.S. v. Zolin*, 491 U.S. 554, 563 (1989) (''It is the purpose of the crime-fraud exception to the attorney-client privilege to assure that the seal of secrecy between lawyer and client does not extend to communications made for the purpose of getting advice for the commission of a fraud or crime'' (internal quotation marks and citations omitted).); *In re Spalding Sports Worldwide, Inc.*, 203 F.3d 800, 807 (Fed. Cir. 2000) (''To invoke the crime-fraud exception, a party challenging the attorney-client privilege must make a *prima facie* showing that the communication was made 'in furtherance of' a crime or fraud.''); *In re Grand Jury Subpoena Duces Tecum*, 731 F.2d 1032, 1039 (2d Cir. 1984) (reasonable basis to suspect the perpetration or attempted perpetration of a crime or fraud and that the communication was in furtherance thereof); Restatement §82 (privilege inapplicable to communication occurring when a client consults a lawyer to obtain assistance to engage in a crime or fraud or uses lawyer's advice to engage in a crime or fraud).

[30] *See In re Regents of the Univ. of Cal.*, 101 F.3d 1386, 1389 (Fed. Cir. 1996) (''When the same attorney represents the interests of two or more entities on the same matter, those represented are viewed as joint clients for purposes of privilege.''); *Wachtel* at 231 (''As for two clients having a common legal interest who are represented by the same attorney, the confidentiality requirement means that, although communications between a client and the attorney may be privileged as to outsiders, they are not privileged *inter sese*.''); Restatement §75 (If two or more persons are jointly represented by the same lawyer in a matter, an otherwise privileged communication regarding matters of common interest is privileged as to third persons, but is not privileged as between co-clients.).

[31] *See Jicarilla* at 2321; *Talbot v. Marshfield*, 2 Dr. & Sm. 549, 551 (1865) (''[A]ll the *cestuis que trust* have an interest in the due administration of the trust, and in that sense it was for the benefit of all, as it was for the guidance of the trustees in their execution of their trust. Besides, if a trustee properly takes the opinion of counsel to guide him in the execution of the trust, he has a right to be paid the expense of doing so out of the trust estate; and that alone would give any *cestuis que trust* a right to see the case and opinion.''); *Wynne v. Humberston*, 27 Beav. 421, 423 (1858) (''[W]here the relation of trustee and *cestui que trust* is established, all cases submitted and opinions taken by the trustee to guide himself in the administration of the trust, and not for the purpose of his own defense in any litigation against himself, in any litigation against himself, must be produced to the *cestui que trust*.''); *Devaynes v. Robinson*, 20 Beav. 42, 43 (1855) (''[A]ll the cases and opinions taken by the original trustees, must be produced; but as to their representatives the case is different, for they may have taken them to defend themselves.'').

[32] *Garner v. Wolfinbarger*, 280 F. Supp. 1018 (N.D. Ala. 1968), *vacated*, 430 F.2d 1093 (5th Cir. 1970).

[33] *Garner* at 1095. The Fifth Circuit's opinion observed, without elaboration, that the district court had not ruled on motions to dismiss the derivative claim, but that the Fifth Circuit's decision did not turn on whether the derivative claim was in or out. *Id.* at 1097 n.11. The Ninth Circuit later ruled, however, that *Garner* was ''inapposite'' where a plaintiff files a securities law class action rather than a derivative action. *See Weil v. Inv./Indicators, Research & Mgmt., Inc.*, 647 F.2d 18, 23 (9th Cir. 1981) (''Without passing on the merits of *Garner*, we find it inapposite to the case

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before us. Weil is not currently a shareholder of the Fund, and her action is not a derivative suit. The *Garner* plaintiffs sought damages from other defendants in behalf of the corporation, whereas Weil seeks to recover damages from the corporation for herself and the members of her proposed class.''). By contrast, other courts have ruled that *Garner* does apply to nonderivative actions, at least where the plaintiff class represents a substantial majority of the corporation's shareholders. *See Lawrence E. Jaffe Pension Plan v. Household Int'l, Inc.*, 244 F.R.D. 412, 421–23 (N.D. Ill. 2006) (citing cases).

[34] *Garner* at 1095–97.

[35] *Garner v. Wolfinbarger*, 280 F. Supp. 1018 (N.D. Ala. 1968), *vacated*, 430 F.2d 1093 (5th Cir. 1970).

[36] *Garner* at 1101.

[37] *Id.* at 1104 (footnote omitted). The court's decision might have been influenced by the plaintiffs' allegations of civil fraud against FALICO's management. The plaintiffs claimed that ''some of the matter claimed to be privileged concerned prospective criminal transactions.'' Although the court ruled that it did ''not consider unavailability of the privilege to be confined to the narrow ground of prospective criminal transactions,'' the court observed that the crime-fraud exception was ''particularly instructive because it covers advice concerning prospective action.'' *Id.* at 1103.

[38] *See* 56 F.R.D. 499, 504 (S.D. Ala. 1972). For example, the district court found that the corporation had engaged in a public offering without registering the shares with the SEC; that the SEC had refused to grant counsel's request for a ''no-action'' letter regarding the offering; that the corporation continued to sell the stock after the SEC staff requested assurances that the offering be discontinued; that a former president of the company stated that it was run for the benefit of a parent company; that some defendants received payments in connection with the registration of the stock with the state securities commission; and that the defendants had invoked their privilege against self-incrimination and refused to answer questions in depositions. *See id.*

[39] *Riggs* at 712–14.

[40] 76 F. Supp. 643 (E.D.N.Y. 1948), *aff'd*, 174 F.2d 288 (2d Cir. 1949).

[41] *Riggs* at 714.

[42] *Id.* at 712, *citing* II Scott on Trusts, 3d Ed., §173, and *Talbot v. Marshfield*, 2 Drew & Sm. 549, 62 Eng. Rep. 728 (Ch. 1865), among other authorities.

[43] *In re Estate of Calloway*, 1996 Del. Ch. LEXIS 72, at *6 (Del. Ch. June 19, 1996) (quoting *Huie v. DeShazo*, 922 S.W. 2d 920, 924 (Tex. 1996)).

[44] *N.K.S. Distribs., Inc. v. Tigani*, 2010 Del. Ch. 104, at *4 (Del. Ch. May 7, 2010); *Garner* at 1101–04; *Riggs* at 711–14.

[45] *See, e.g., Jicarilla* (Indian trusts); *In re Metlife Demutualization Litig.*, 495 F. Supp. 2d 310, 312–16 (E.D.N.Y. 2007) (mutual insurance company); *Lawrence v. Cohn,* No. 90 Civ. 2396, 2002 U.S. Dist. LEXIS 1226 (S.D.N.Y. Jan. 24, 2002); *Aguinaga v. John Morrell & Co.*, 112 F.R.D. 671, 679–81 (D. Kan. 1985) (union and union-represented employees); *Riggs* (private trust).

[46] *Hughes Aircraft Co. v. Jacobson,* 525 U.S. 432, 447 (1999); *Varity* at 496; *Curtiss-Wright* at 83–84.

[47] *Conkright* at 1648–49 (citations and internal quotation marks omitted) (emphasis added); *see also Black & Decker Disability Plan v. Nord*, 538 U.S. 822, 833 (2003) (''In contrast to the obligatory, nationwide Social Security program, [n]othing in ERISA requires employers to establish employee benefit plans. Nor does ERISA mandate what kind of benefits employers must provide if they choose to have such a plan. Rather, employers have large leeway to design disability and other welfare plans as they see fit. In determining entitlement to Social Security benefits, the adjudicator measures the claimant's condition against a uniform of federal criteria. [T]he validity of a claim to benefits under an ERISA plan, on the other hand, is likely to turn, in large part, on the interpretation of terms in the plan at issue. It is the Secretary of Labor's view that ERISA is best served by preserv[ing] the greatest flexibility possible for . . . operating claims processing systems consistent with the prudent administration of a plan'' (citations and internal quotation marks omitted).); *Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355, 379 (2002) (''ERISA's policy of inducing employers to offer benefits by assuring a predictable set of liabilities, under uniform standards of primary conduct and a uniform regime of ultimate remedial orders and awards when a violation has occurred''); *Lockheed Corp. v. Spink*, 517 U.S. 882, 887 (1996) (''Nothing in ERISA requires employers to establish employee benefits plans. Nor does ERISA mandate what kind of benefits employers must provide if they choose to have such a plan.'').

[48] 473 U.S. 134, 142 (1985) (footnote omitted).

[49] 527 U.S. 882, 893 (1996) (''Section 406(a) forbids fiduciaries from engaging the plan in the 'sale,' 'exchange,' or 'leasing' of property . . . with a party in interest. These are commercial bargains that present a special risk of plan underfunding because they are struck with plan insiders, presumably not at arm's length. What the 'transactions' identified in §406(a) thus have in common is that they generally involve uses of plan assets that are potentially harmful to the plan'' (citations omitted).).

[50] 552 U.S. 248, 253 (2008) (''The principal statutory duties imposed on fiduciaries by that section 're-late to the proper management, administration, and in-

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vestment of fund assets,' with an eye toward ensuring that 'the benefits authorized by the plan' are ultimately paid to participants and beneficiaries.'').

[51] *Conkright* at 1650.

[52] *See Curtiss-Wright* at 83–84.

[53] *See* ERISA §§101(a), 102, 104(b), 29 USC §§1021(a), 1022, 1024(b); 29 CFR §2520.102-2(b).

[54] H.R. Rep. No. 93-533, at 11 (1973).

[55] *See* ERISA §§102, 104(b), 29 USC §§1022, 1024(b) (SPD and SMM); 29 CFR §§2520.102-2(a)–(b), 2520.104b-3 (same).

[56] ERISA §104(b)(4), 29 USC §1024(b)(4) (''The administrator shall, upon a written request of any participant or beneficiary, furnish a copy of the latest updated summary plan description, plan description, and the latest annual report, any terminal report, the bargaining agreement, trust agreement, contract, or other instrument under which the plan is established or operated.''). A plan administrator who fails to furnish a document requested pursuant to §104(b)(4), within 30 days of receiving the request, may be penalized up to $110 per day for each day of delay. ERISA §502(c)(1), 29 USC §1132(c)(1).

[57] *Varity* at 497; *compare* Martin & Metcalf, ''The Fiduciary Exception to the Attorney-Client Privilege,'' 34 *Tort & Ins. L.J.* 827, 840–41 (1999) (''The Supreme Court has noted that Congress intended courts to draw upon trust law principles in general to give content to ERISA's fiduciary obligations'' (citing *Varity*).) *with id.* at 843 (''The Supreme Court has clearly held that ERISA's fiduciary standards are to be interpreted 'bearing in mind the special nature and purpose of employee benefit plans' '' (citing *Varity*).).

[58] *See* Langbein, ''The Supreme Court Flunks Trusts,'' 1990 *Sup. Ct. Rev.* 207, 211 (''Alas, there are important differences between the private trust and the pension trust, and ERISA is sometimes insensitive to these differences. . . The conventional private trust — created, for example, in my will for the support of my widow and children — is a donative transfer. . . . Pension and employee benefit plans, by contrast, arise from contract rather than from equity.'').

[59] *See Lockheed Corp. v. Spink*, 517 U.S. 882, 893–95 (1996) (employer may receive benefits from employees through the operation of a pension plan.); Fischel and Langbein, ''ERISA's Fundamental Contradiction: The Exclusive Benefit Rule,'' 55 *U. Chi. L. Rev.* 1105, 1157 (1988) (''Despite the exclusive benefit rule, there is nothing exclusive about employees' interests in pension and welfare benefit plans. These are complex multiparty arrangements, and it was unwise for ERISA to attempt to capture the complex responsibilities of plan fiduciaries by analogy to the simpler world of the private gratuitous trusts.''); *id.* at 1118 (''The plans are established for the mutual advantage of employer and employee. . . . In the private trust situation, the settlor's welfare is maximized if the beneficiaries capture all the benefits flowing from the trust.'').

[60] *See Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1 (1987) (Maine statute requiring a one-time severance payment in the event of a plant closing does not require establishment of an ERISA-governed plan because a plan under ERISA contemplates an ongoing administrative scheme.); *id.* at 11–12 (''Only a plan embodies a set of administrative practices vulnerable to the burden that would be imposed by a patchwork scheme of regulation. The Maine statute neither establishes, nor requires an employer to maintain, an employee benefit *plan*. The requirement of a one-time, lump-sum payment triggered by a single event requires no administrative scheme whatsoever to meet the employer's obligation. The employer assumes no responsibility to pay benefits on a regular basis, and thus faces no periodic demands on its assets that create a need for financial coordination and control. Rather, the employer's obligation is predicated on the occurrence of a single contingency that may never materialize. The employer may well *never* have to pay the severance benefits. To the extent that the obligation to do so arises, satisfaction of that duty involves only making a single set of payments to employees at the time the plant closes. To do little more than write a check hardly constitutes the operation of a benefit plan'' (footnote omitted).).

[61] *See Lockheed Corp. v. Spink*, 517 U.S. 882, 893–95 (1996) (''attracting and retaining employees, paying deferred compensation, settling or avoiding strikes, providing increased compensation without increasing wages, increasing employee turnover, and reducing the likelihood of lawsuits'' and ''waivers of employment-related claims'').

[62] *See* ERISA §§3(1), 3(2), 29 USC §§1002(1), 1002(2); 26 CFR §1.401-1.

[63] *See, e.g., Cent. Laborers' Pension Fund v. Heinz*, 541 U.S. 739 (2004) (amendment to definition of disqualifying employment); *Thornton v. Graphic Commc'ns Conf. of Int'l Bhd. of Teamsters Supp. Ret. & Disab. Fund*, 566 F.3d 597 (6th Cir. 2009) (post-retirement benefit increase not an accrued benefit); Rev. Rul. 92-66, 1992-2 C.B. 93 (temporary early retirement incentive). If a single-employer plan is collectively bargained, as some plans are, the right to change or terminate the plan is subject to any restrictions imposed by the applicable bargaining agreements.

[64] ERISA §2(a), 29 USC §1001(a).

[65] H.R. Rep. No. 93-1280, at 302 (1974) (Conf. Rep.); *Varity* at 497.

[66] 538 U.S. 822, 831-32 (2003).

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[67] *See Bailey v. Meister Brau, Inc.*, 55 F.R.D. 211 (N.D. Ill. 1972) (securities law case).

[68] *Riggs* at 712.

[69] *See* Jacobs and Peters, ''Labor Racketeering: The Mafia and the Unions,'' 30 *Crime & Just.* 229, 237–39 (2003); *Sec'y of Labor v. Fitzsimmons*, 805 F.2d 682, 684–85 (7th Cir. 1986) (''The DOL claimed the alleged mismanagement caused losses of between $50 [and] $70 million due to imprudent loans and improper investments in various real estate syndicates, hotels, including gambling casinos in Las Vegas, and other businesses.''). After the Internal Revenue Service sought to revoke the Fund's tax-exempt status, the matter was settled when three-quarters of the Fund's trustees resigned and the Fund agreed to hire an independent fiduciary to handle investments.

[70] The court also found that the documents in question were necessary to address the trustees' potential defense that they had relied on the advice of counsel in entering into the questionable transactions. *Fitzsimmons* at 586.

[71] *Washington Star* at 909.

[72] *See, e.g., Tebo v. Sedgwick Claims Mgmt. Services, Inc.*, 2010 U.S. Dist. LEXIS 50834, at *1 (D. Mass. May 20, 2010) (long-term disability benefits); *Buzzanga v. Life Ins. Co. of No. Am.*, 2010 U.S. Dist. LEXIS 33089, at *1 (E.D. Mo. Apr. 5, 2010) (accidental benefits); *Stoffels v. SBC Communs., Inc.*, 263 F.R.D. 406, 410 (W.D. Tex. 2009) (retirement benefits); *Soc'y of Prof'l Eng'g Employees in Aerospace, IFPTE Local 2001 v. Boeing Co.,* 2009 U.S. Dist. LEXIS 102345 (D. Kan. Nov. 3, 2009) (retirement and severance benefits); *Redd v. Bhd. Maint. of Way Employees Div. of the Int'l Bhd. of Teamsters*, 2009 U.S. Dist. LEXIS 46288, at *4 (E.D. Mich, June 2, 2009) (pension benefits); *Maltby v. Absolut Spirits Co.*, 2009 U.S. Dist. LEXIS 29106, at *2–*3 (S.D. Fla. Mar. 25, 2009) (retirement benefits); *Smith v. Jefferson-Pilot Fin. Ins. Co.*, 245 F.R.D. 45, 47–48 (D. Mass. 2007) (long-term disability benefits); *Black v. Pitney Bowes*, 2006 U.S. Dist. LEXIS 92263 (S.D.N.Y. Dec. 21, 2006) (long-term disability benefits); *Anderson v. Sotheby's Inc. Severance Plan*, 2005 U.S. Dist. LEXIS 9033 (S.D.N.Y. May 13, 2005) (severance benefit); *Lewis v. UNUM Corp. Severance Plan,* 203 F.R.D. 615, 617 (D. Kan. 2001) (severance benefits); *Coffman v. Metro. Life Ins. Co.*, 204 F.R.D. 296, 298 (S.D.W.Va. 2001) (disability benefits); *Geissal v. Moore Med. Corp.*, 192 F.R.D. 620, 623 (E.D. Mo. 2000) (continued health plan coverage).

[73] *See, e.g., David v. Alphin*, 2010 U.S. Dist. LEXIS 102278, at *4 (W.D.N.C. Sept. 17, 2010) (alleged breach of fiduciary duty by causing plan to invest in mutual funds with high fees and inferior returns); *Tatum v. R.J. Reynolds Tobacco Co.*, 247 F.R.D. 488, 497 (M.D.N.C. 2008) (alleged breach of fiduciary duty by eliminating employer stock fund); *Henry v. Champlain Enters.*, 212 F.R.D. 73, 86 (N.D.N.Y. 2003) (alleged breach of fiduciary duty by causing stock ownership plan to buy employer stock at inflated price); *Fischel v. Equitable Life Assur.*, 191 F.R.D. 606, 607 (N.D. Cal. 2000) (alleged breach of fiduciary duty by falsely representing that agents would receive benefits if certain requirements were met); *Martin v. Valley Nat'l Bank*, 140 F.R.D. 291, 299 (S.D.N.Y. 1991) (alleged breach of fiduciary duty by causing stock ownership plan to participate in leveraged buyout).

[74] *See, e.g., Allen v. Honeywell Ret. Earnings Plan*, 698 F. Supp. 2d 1197, 1199 (D. Ariz. 2010) (''numerous statutory provisions''); *Petz v. Ethan Allen, Inc.*, 113 F.R.D. 494 (D. Conn. 1985 (action for infliction of emotional distress and violations of ERISA); *Engers v. AT&T*, 2004 U.S. Dist. LEXIS 29538, at *2 (D.N.J. Mar. 3, 2004) (claim based on alleged violations of ERISA provisions regarding plan amendments); *see also U.S. v. Doe*, 162 F.3d 554 (9th Cir. 1998) (criminal investigation regarding receipt of kickbacks); *U.S. v. Evans*, 796 F.2d 264 (9th Cir. 1986) (embezzlement).

[75] *See, e.g., Redd v. Bhd. of Maint. of Way Employees Div. of the Int'l Bhd. of Teamsters*, 2009 U.S. Dist. LEXIS 46288 (E.D. Mich. June 2, 2009).

[76] *See, e.g., Maltby v. Absolut Spirits Co.*, 2009 U.S. Dist. LEXIS 29106 (S.D. Fla. Mar. 25, 2009).

[77] *See Solis* at 228 (''In the context of the Secretary's investigative or enforcement activity under ERISA, however, the concerns that inspired the good cause requirement in the corporate context do not obtain. . .''); *In re Occidental Petrol. Corp.*, 217 F.3d 293, 298 (5th Cir. 2000) (*Garner* court's concern about the potential for conflicting interests in a corporate context was not triggered in an ERISA case); *U.S. v. Evans*, 796 F.2d 264, 265–66 (9th Cir. 1986) (''There is no attorney-client privilege between a pension trustee and an attorney who advises the trustee regarding the administration of the plan.''); *Thompson v. Avondale Indus., Inc.*, 2001 U.S. Dist. LEXIS 15674, at *7–*15 (E.D. La. Sept. 25, 2001) (good cause required); *Harper-Wyman Co. v. Conn. Gen. Life Ins. Co.*, 1991 U.S. Dist. LEXIS 5007, at *5–*6 (N.D. Ill. Apr. 17, 1991) (good cause required); *Felts v. Masonry Welfare Trust,* 1982 U.S. Dist. LEXIS 18319 (D. Or. Jan. 13, 1982) (*Garner* factors must be considered in determining whether good cause has been shown.).

[78] *See Fitzsimmons* at 587.

[79] *See Washington Star* at 909 n.5.

[80] *See Martin v. Valley Nat'l Bank,* 140 F.R.D. 291, 326 (S.D.N.Y. 1991); *Helt v. Metro. Dist. Comr.* , 113

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F.R.D. 7, 10 n.2 (D. Conn. 1986); *cf. Fitzpatrick v. Am. Int'l Group, Inc.*, 272 F.R.D. 100, 112 (S.D.N.Y. 2010) (Involvement of an employee benefit trust "might eliminate the burden of proving good cause. . . .").

[81] See the discussion under the heading "The Importance of Certainty," above. *But see* Martin and Metcalf, "The Fiduciary Exception to the Attorney-Client Privilege," 34 *Tort & Ins. L.J.* 827, 845–46 (1999) ("Although sometimes criticized for adding uncertainty to the privilege analysis, a good cause inquiry applied properly could help courts maintain the attorney-client privilege except in those cases where disclosure of such communications is truly justified. Obviously the 'good cause' analysis cannot be borrowed wholesale from the *Garner* decision, but its list of good cause factors could inform an ERISA analysis; at the very least the nine *Garner* factors provide a starting point for discussion" (footnotes omitted).).

[82] *See, e.g.,* Solis at 228 (*Garner* rejected "unqualified fiduciary exception out of concern, in part, that corporations may be 'vulnerable to suit by shareholders whose interests or intention may be inconsistent with those of other shareholders.' "); *In re Occidental Petrol Corp.*, 217 F.3d 293, 298 (5th Cir. 2000) ("The concern expressed in *Garner* was with a shareholder's attempt to pierce the attorney-client privilege to vindicate interests other than those of a shareholder. . . ."); *Martin v. Valley Nat'l Bank*, 140 F.R.D. 291, 326 (S.D.N.Y. 1991) ("[T]here are likely to be significant differences of interests among different classes of shareholders."); *Washington Star* at 909 n.5 (A good cause requirement "is properly limited to a corporate setting in which the management of a sizable corporation clearly cannot 'pleas(e) all of its stockholders all of the time'. . . .").

[83] *See, e.g., Cooper v. IBM Personal Pension Plan*, 457 F.3d 636 (7th Cir. 2006) (rejecting claim that cash balance pension plan discriminates against older workers); *Borneman v. Principal Life Ins. Co.*, 291 F. Supp. 2d 935, 945–48 (S.D. Iowa 2003) (upholding restriction on market-timing trading); *Straus v. Prudential Employee Sav. Plan*, 253 F. Supp. 2d 438, 453–54 (E.D.N.Y. 2003) (dismissing motion for preliminary injunction to enjoin market-timing policies); *see also John Blair Commc'ns, Inc. Profit Sharing Plan v. Telemundo Group, Inc.*, 26 F.3d 360 (2d Cir. 1994) (allocation of portion of investment gains to spun-off defined contribution plan); *Bigger v. Am. Commercial Lines, Inc.*, 862 F.2d 1341 (8th Cir. 1988) (allocation of surplus assets to spun-off defined benefit plan); *Trapani v. Consol. Edison Employees' Mut. Aid Soc'y, Inc.* 693 F. Supp. 1509, 1515 (S.D.N.Y. 1988) (employees' claim to share of assets); Fischel and Langbein, "ERISA's Fundamental Contradiction: The Exclusive Benefit Rule," 55 *U. Chi. L. Rev.* 1105, 1157 (1988) ("[W]ithin the class of participants that ERISA's exclusive benefit rule does identify, there are frequent conflicts of interest, especially between older and younger employees and between retirees and active employees."); *id.* at 1158 ("[T]he exclusive benefit rule should not be interpreted to mean that the trustee should decide all controversies between employees and the employer in favor of the employees. Such a rule would benefit particular complaining employees ex post, but it would operate to the detriment of employees as a class ex ante.").

[84] See the discussion under the heading "The Importance of Certainty," above.

[85] *See, e.g., Martin v. Valley Nat'l Bank*, 140 F.R.D. 291, 326 (S.D.N.Y. 1991) ("[T]he Fifth Circuit was properly concerned not to permit harassing efforts by a shareholder. . . ."); *Washington Star* at 909 n.5 (A good cause requirement "is properly limited to a corporate setting in which . . . management requires 'protection from those who might second-guess or even harass in matters purely of judgment' " (citation omitted).).

[86] *See, e.g., Conkright* at 1650 (duty to preserve "limited plan assets" and to construe the plan in a way that prevents the plan from providing "windfalls for particular employees"); *Young v. Verizon's Bell Atl. Cash Balance Plan*, 615 F.3d 808, 819 (7th Cir. 2010) (denying participants' attempt to recover windfall benefits at the expense of other participants); *Cooper v. IBM Personal Pension Plan*, 457 F.3d 636, 642 (7th Cir. 2006) ("It is possible . . . for litigation about pension plans to make everyone worse off.").

[87] *See LaRue v. DeWolff, Boberg & Assocs.*, 552 U.S. 248, 256 n.6 (2008) ("A plan 'participant,' as defined by §3(7) of ERISA, may include a former employee with a colorable claim for benefits."); Bravo, "ERISA Misrepresentation and Nondisclosure Claims: Securities Litigation Under the Guise of ERISA?" 26 *Hofstra Lab. & Emp. L.J.* 497, 498 (2009) ("[S]ubstantial overlap and potential conflict between [ERISA and securities law] actions warrants substantive clarification and procedural clarification to prevent plaintiffs' lawyers from using ERISA to evade the protections that the federal securities laws provide against abusive litigation.").

[88] *See, e.g., Martin v. Valley Nat'l Bank*, 140 F.R.D. 291, 326 (S.D.N.Y. 1991) ("In a corporate setting, the officers serve the corporation directly but the shareholder only indirectly. . . ."); *Washington Star* at 909 n.5 ("[W]hile corporate managers perform duties which run to the benefit ultimately of the stockholders, a pension plan trustee directly serves the fund beneficiaries" (citation and internal quotation marks omitted).).

[89] See the discussion under the heading "Duty-to-Disclose Theory," below.

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[90] *See, e.g., Washington Star* at 909 n.5 (''In a trustee relationship, . . . there exists no legitimate need for a trustee to shield his actions from those whom he is obligated to serve.''); *Solis* at 228 (same); *Martin v. Valley Nat'l Bank*, 140 F.R.D. 291, 326 (S.D.N.Y. 1991) (same).

[91] See the discussion under the heading ''Practical Consequences,'' below; *Huie v. DeShazo*, 922 S.W.2d 920, 924 (Tex. 1996) (''The attorney-client privilege serve the same important purpose in the trustee-attorney relationship as it does in other attorney-client relationships.'').

[92] *Martin v. Valley Nat'l Bank*, 140 F.R.D. 291, 326 (S.D.N.Y. 1991) (''[T]he common-law principles governing required disclosure of trustee communications do not impose a 'good cause' limitation. . . .''); *Washington Star* at 909 n.5 (''[N]o such showing of 'good cause' has ever, to our knowledge, been required under the common law of trusts.'').

[93] *See Varity* at 497; see also the discussion under the heading ''Differences Between Gratuitous Trusts and ERISA Plans,'' above.

[94] *See, e.g., Becher v. Long Island Lighting Co.*, 129 F.3d 268, 271–72 (2d Cir. 1997); *Bland v. Fiatallis No. Am., Inc.*, 401 F.3d 779, 788 (7th Cir. 2005); *Cottillion v. United Refining Co.*, 2011 U.S. Dist. LEXIS 15159, at *15–*16 (W.D. Pa. Dec. 21, 2011); *Stoffels v. SBC Commc'ns, Inc.*, 263 F.R.D. 406 (W.D. Tex. 2009); *Everett v. USAir Group, Inc.*, 165 F.R.D. 1, 4 (D.D.C. 1995); *Hudson v. Gen. Dynamics,* 73 F. Supp. 2d 201, 202–03 (D. Conn. 1999); *In re Unisys Corp. Retiree Med. Benefits ERISA Litig.*, 1994 U.S. Dist. LEXIS 1344 (E.D. Pa. Jan. 5, 1994); *see also Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 444 (1999) (''The act . . . of amending of [a plan] . . . does not constitute the action of a fiduciary. . . .''); *Lockheed Corp. v. Spink*, 517 U.S. 882, 891 (1996) (''Lockheed acted not as a fiduciary but as a settlor when it amended the terms of the Plan to include the early retirement programs.'').

[95] The Ninth Circuit offered four reasons for this position. First, a more expansive view of the fiduciary exception would threaten to eliminate the attorney-client privilege altogether. Second, when a trustee seeks legal advice for the trustee's own protection, the notion that the trustee is acting on behalf of the beneficiaries evaporates, and the core purposes of the attorney-client privilege are implicated. Third, hard cases should be resolved in favor of the privilege, not in favor of disclosure. Fourth, an uncertain attorney-client privilege will likely harm plan participants either because fiduciaries will shy away from obtaining legal advice regarding the performance of their duties or because it will be increasingly difficult to find persons willing to serve as fiduciaries. *See U.S. v. Mett,* 178 F.3d 1058, 1065 (9th Cir. 1999); *see also Wildbur v. ARCO Chem. Co.*, 974 F.2d 632, 645 (5th Cir. 1992), *reh'g denied*, 979 F.2d 1013 (5th Cir. 1992); *Cottillion v. United Refining Co.*, 2011 U.S. Dist. LEXIS 15159, at *16–*18 (W.D. Pa. Dec. 21, 2011); *Black v. Pitney Bowes*, 2006 U.S. Dist. LEXIS 92263, at *6–*9 (S.D.N.Y. Dec. 21, 2006); *Halbach v. Great-West Life & Annuity Ins. Co.*, 2006 U.S. Dist. LEXIS 84591, at *17–*18 (E.D. Mo. Nov. 21, 2006); *Lewis v. UNUM Corp. Severance Plan*, 203 F.R.D. 615, 619–21 (D. Kan. 2001); *Geissal v. Moore Med. Corp.*, 192 F.R.D. 620, 624–25 (E.D. Mo. 2000); *Coffman v. Metro. Life Ins. Co.*, 204 F.3d 296, 300 (E.D. Mo. 2000); *Hudson v. Gen. Dynamics*, 73 F. Supp. 2d 201, 202–03 (D. Conn. 1999); *Martin v. Valley Nat'l Bank*, 140 F.R.D. 291, 326 (S.D.N.Y. 1991).

[96] *See, e.g., Solis* at 229 (''[A]pplication of the fiduciary exception to the attorney-client privilege in the context of a subpoena issued by the Secretary of Labor under ERISA does not require a showing of good cause; instead, its application turns on the context and content of the individual communications at issue.''); *U.S. v. Mett*, 178 F.3d 1058, 1964 (9th Cir. 1999) (''Both the context and content of the Foley memoranda indicate that they ought to have been treated as privileged matter.''); *Carr v. Anheuser-Busch Cos.*, 2011 U.S. Dist. LEXIS 59609, at *4 (E.D. Mo. June 3, 2011) (''In order to determine whether a particular attorney-client communication concerns either a matter of plan administration or legal advice for the fiduciary's own benefit, both the content and the context of the communication must be examined.''); *Tatum v. R.J. Reynolds Tobacco Co.*, 247 F.R.D. 488, 495 (M.D.N.C. 2008) (''[E]ven in the absence of the *Garner* good cause analysis, courts examine 'the context and content' of the disputed communications to determine whether there is reason to apply the fiduciary exception and abrogate the attorney-client privilege in the circumstances. . . . [T] his court considers it appropriate to recognize the existence of a fiduciary exception where an ERISA plan administrator asserts attorney-client privilege to withhold from plan beneficiaries communications related to matters on which a fiduciary duty is owed to the beneficiaries. The application of the exception to any particular communication is a matter of context and content, and *includes consideration* of whether the communication is related to fiduciary functions of managing or administering the plan, or to settlor functions of adopting or amending the plan, or to legal advice to protect the plan administrator from personal liability where the administrator's interests are adversarial to those of the plan beneficiaries'' (emphasis added).); *Engers v. AT&T*, 2004 U.S. Dist. LEXIS 29538, at *16 (D.N.J. Mar. 3, 2004) (context and content of documents must be examined); *Hudson v. Gen. Dynamics*, 73 F. Supp. 2d 201, 202–03 (D. Conn. 1998) (same).

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[97] *See Solis* at 227 (''Several of our sister circuits, moreover, have recognized the exception to assertions of attorney-client privilege by ERISA fiduciaries. *See, e.g., Bland v. Fiatallis N. Am Inc.*, 401 F.3d 779, 787–88 (7th Cir. 2005) (recognizing fiduciary exception but finding it did not apply to communications relating to non-fiduciary actions, including amendments to plan benefits); *U.S. v. Mett*, 178 F.3d 1058, 1062 (9th Cir. 1999) (finding fiduciary exception applied in ERISA context, but did not extend to 'any advice that a fiduciary obtains in an effort to protect herself from civil or criminal liability'); *U.S. v. Doe*, 162 F.3d 554, 557 (9th Cir. 1998) (applying fiduciary exception to claims of privilege in context of ERISA enforcement action); *Becher v. Long Island Lighting Co.*, 129 F.3d 268, 272 (2d Cir. 1997) (recognizing fiduciary exception to attorney-client privilege in ERISA context was limited to fiduciary matters); *Wildbur v. ARCO Chem. Co.*, 974 F.2d 631, 645 (5th Cir. 1992) (recognizing fiduciary exception but finding it did not apply to communications that were 'made for the purpose of defending the pending lawsuit and did not deal with plan administration'); *Harvey v. Std. Ins. Co.*, 2011 U.S. Dist. LEXIS 107834, at *5–*6 n.2 (N.D. Ala. Sept. 15, 2011); *cf. Wachtel* at 234 (describing evolution of fiduciary exception in ERISA context and finding exception did not reach communications of ERISA plan insurer with plan attorneys regarding benefit claims).'').

[98] *See, e.g., Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 444 (1999) (''The . . . act of amending [a plan] does not constitute the action of a fiduciary. . . .'').

[99] *See Becher v. Long Island Lighting Co.*, 129 F.3d 268 (2d Cir. 1997).

[100] 555 F. Supp. 257 (D.D.C. 1983); *see also* Martin and Metcalf, ''The Fiduciary Exception to the Attorney-Client Privilege,'' 34 *Tort & Ins. L.J.* 827, 847–48 (1999).

[101] *See Jicarilla* at 2326 (''two features justifying the fiduciary exception''); *id.* at 2333 (''two rationales'') (Sotomayor, J., dissenting); *Solis* at 227 (''two related rationales''); *In re United States*, 590 F.3d 1305, 1312 (Fed. Cir. 2009) (''two justifications''); *U.S. v. Mett*, 178 F.3d 1058, 1063 (9th Cir. 1999) (''two distinct rationales''); *Buzzanga v. Life Ins. Co. of No. Am.*, 2010 U.S. Dist. LEXIS 33089, at *5 (E.D. Mo. Apr. 5, 2010) (same); *Tatum v. R.J. Reynolds Tobacco Co.,* 247 F.R.D. 488, 493 (M.D.N.C. 2008) (''two rationales''); *Fischel v. Equitable Life Assur.*, 191 F.R.D. 606, 608 (N.D. Cal. 2000) (''two competing rationales'' from *Riggs*); *Riggs* at 713–14 (''As a representative of the beneficiaries of the trust which he is administering, the trustee is not the real client in the sense that *he* is not personally being served. And the beneficiaries are not simply incidental beneficiaries who *chance* to gain from the professional services rendered. The very intention of the communication is to aid the beneficiaries. The trustees here cannot subordinate the fiduciary obligations owed to the beneficiaries to their own private interests under the guise of attorney-client privilege. The policy of preserving the full disclosure necessary in the trustee-beneficiary relationship is here ultimately more important than the trustees' confidence in the attorney for the trust.'').

[102] *See, e.g., Fausek v. White*, 965 F.2d 126, 132 (6th Cir. 1992) (''There is a mutuality of interests between a corporation and its shareholders that precludes use of the privilege by management to deprive shareholders of information relating to their investments in the corporation.''); *In re Int'l Sys. & Controls Corp. Sec. Litig.*, 693 F.2d 1235, 1239 (5th Cir. 1982) (''*Garner* is premised upon the 'mutuality of interest' between shareholder and management.''); *Moskowitz v. Lopp*, 128 F.R.D. 624, 637 (E.D. Pa. 1989) (''[T]he existence of a fiduciary duty or mutuality of interest [is] dispositive to the application of the *Garner* doctrine.''); *Margaret Hall Found., Inc. v. Strong*, 121 F.R.D. 141, 146 (D. Mass. 1988) (''[I]n order for the *Garner* rationale to apply, the mutuality of interest must exist at the time the communications to counsel are made.''); Martin and Metcalf, ''The Fiduciary Exception to the Attorney-Client Privilege,'' 34 *Tort & Ins. L.J.* 827, 853–56 (1999) (''One method of refining privilege issues in the ERISA fiduciary context lies in a 'mutuality of interests' inquiry. . . . To the extent that the fiduciary-nonfiduciary activity is inadequate, or the case law under ERISA is unclear as to the scope or extent of statutory fiduciary responsibilities, a 'mutuality' inquiry is another approach that courts might use to determine whether the fiduciary exception should be invoked.''). *But see Wildbur v. ARCO Chem. Co.*, 974 F.2d 631, 646 (5th Cir. 1992) (''Neither the magistrate judge in her ruling nor defendants in their brief cite any authority approving an exception to the rule that the attorney-client privilege is not implicated when plan members seek to discover communications between a plan's administrator and its lawyer merely because the interests of the plan administrator [are] not then coincidental to the interests of all plan beneficiaries.'').

[103] *See, e.g., Allen v. Honeywell Ret. Earnings Plan*, 698 F. Supp. 2d 1197, 1203 (D. Ariz. 2010); *Smith v. Jefferson Pilot Fin. Ins. Co.*, 245 F.R.D. 45, 51 (D. Mass. 2007); *cf. Maltby v. Absolut Spirits Co.*, 2009 U.S. Dist. LEXIS 29106 at *9 (S.D. Fla. Mar. 25, 2009) (''The full and fair review exemption to the work product doctrine requires a fiduciary who denies a claim for benefits to afford the beneficiary an opportunity for a full and fair review of the decision denying the claim, and this review includes the right to review all documents relevant to the claims administra-

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tion process.''); *Anderson v. Sotheby's, Inc. Severance Plan*, 2006 U.S. Dist. LEXIS 64535, at *15 (S.D.N.Y. Sept. 16, 2006) (''[I]f the work-product doctrine protected these documents, no ERISA plan beneficiary could ever obtain discovery into records of an Administrator's investigations of the claim because an administrator could almost always claim that it anticipated possible litigation.'').

[104] *Riggs* at 713 (''As a representative for the beneficiaries of the trust which he is administering, the trustee is not the real client in the sense that *he* is personally being served. And, the beneficiaries are not simply incidental beneficiaries who *chance* to gain from the personal services rendered.''); *see also Black v. Pitney Bowes*, 2006 U.S. Dist. LEXIS 92263, at *3–*4 (S.D.N.Y. Dec. 21, 2006) (''Some courts see this doctrine not as a true exception to the attorney-client privilege, but as an extension of the privilege to the beneficiary, who by virtue of the administrator's fiduciary duty is the true client of the attorney providing the advice.''); *cf. Jicarilla* at 2322; *id.* at 2333 (Sotomayor, J., dissenting).

[105] *Wildbur v. ARCO Chem. Co.* 974 F.2d 631, 645 (5th Cir. 1992); *see also U.S. v. Mett*, 178 F.3d 1058, 1063 (9th Cir. 1999); *U.S. v. Doe*, 162 F.3d 554, 556 (9th Cir. 1998); *Lewis v. UNUM Corp. Severance Plan*, 203 F.R.D. 615, 619–20 (D. Kan. 2001); *Geissal v. Moore Med. Corp.*, 192 F.R.D. 620, 624 (E.D. Mo. 2000); *Helt v. Metro. Dist. Comm'n*, 113 F.R.D. 7, 9 (D. Conn. 1986); *Washington Star* at 909.

[106] *See, e.g., Martin v. Valley Nat'l Bank*, 140 F.R.D. 291, 319 n. 18 (S.D.N.Y. 1991).

[107] See the discussion under the heading ''Limitations on the Privilege,'' above.

[108] *See* Restatement §14 (2000); *id.* cmt. b; *Shirvani v. Capital Investing Corp.*, 112 F.R.D. 389, 390–91 (D. Conn. 1986) (''The *Garner* problem is perhaps that the shareholder or other owed a duty of trust becomes too readily and artificially recognized as the 'client' for purposes of privilege. Although corporate management is expected to act for the shareholder's benefit, a hasty resort to *Garner* concepts will confuse who corporate counsel's clients realistically are. . . .'').

[109] *See* Restatement §14, cmt. f (2000).

[110] *See, e.g., In re Grand Jury Subpoena (Custodian of Records, Newparent, Inc.*), 274 F.3d 563, 571 (1st Cir. 2001) (''The default assumption is that the attorney only represents the corporate entity, not the individuals within the corporate sphere, and it is the individuals' burden to dispel that presumption.'') (citing cases).

[111] *See, e.g., Sheet Metal Workers Int'l Ass'n v. Sweeney*, 29 F.3d 120 (4th Cir. 1994).

[112] Model Rule 1.7(b) provides that if there is a concurrent conflict, a lawyer may represent a client if (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client, (2) the representation is not prohibited by law, (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal, *and* (4) each affected client gives written informed consent. Restatement §§121–22.

[113] Handelman, Minc, Selwyn and Steele, ''Standards of Lawyer Conduct in Employee Benefits Practice: Part I,'' 24 *J. Pension Planning & Compliance*, 10, 23–73 (Summer 1998). Moreover, a group of participants might have an interest under the plan that conflicts with the interests of other participants. For example, if a group of defined benefit plan participants makes a benefit claim that other participants do not consider to be meritorious, the other participants might have an interest in defeating the claim because the plan will lose the benefit of any assets that are used to fund the benefits being claimed. *See Chiles v. Ceridian Corp.*, 95 F.3d 1505, 1519 (10th Cir. 1996).

[114] *McGinn v. DeSoto, Inc.*, 1990 U.S. Dist. LEXIS 17580, at *5 (N.D. Ill. Dec. 21, 1990). *See id.* *8 (''[P]laintiffs conclude that, as beneficiaries of the ERISA plans, they were actually represented by the Arnstein attorneys who drafted plan documents and advised the fiduciary defendants regarding the plans' administration. While this may be true for overcoming a claim of attorney-client privilege, the court cannot conclude that [*Petz v. Ethan Allen, Inc.*, 113 F.R.D. 494 (D. Conn. 1985)] compels disqualification.''); *Mason Tenders Dist. Council Pension Fund v. Messera*, 958 F. Supp. 869, 890–94 (S.D.N.Y. 1997) (''An essential element of the Funds' malpractice claims against the Albanese Defendants is an attorney-client relationship between those Defendants and the Funds. According to the Albanese Defendants, they served as counsel only to Anthony Zotollo, in his capacity as a Fund trustee. . . . According to the Funds, an attorney who renders advice to an ERISA fund trustee concerning the administration of the fund is presumed to have an attorney-client relationship with the fund and/or its beneficiaries. . . . The cases upon which the Funds rely, however, address only whether communications between trustees of a pension fund and their counsel are protected by the attorney-client privilege from disclosure to the fund's beneficiaries. . . . The authorities cited by the Funds indicate that, notwithstanding the above-described exception to the attorney-client privilege, a trustee's status as a fiduciary does not create a presumed attorney-client relationship between the trustee's counsel and either the trust or its beneficiaries'' (citing *Weingarten v. Warren*, 753 F. Supp. 491, 496–97 (S.D.N.Y. 1990).); *Mason Tenders Dist. Council Pension Fund*

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v. Messera, 4 F. Supp. 2d 293, 298–303 (S.D.N.Y. 1998) (same). *See Niagara-Genesee & Vicinity Carpenters Local 280 v. United Bhd. Carpenters & Joiners*, 843 F. Supp. 855, 857 (W.D.N.Y. 1994) (''As the Funds' attorney, Mr. Herrmann has a fiduciary responsibility to represent the interests of *all* the beneficiaries; and neither he nor LeBlanc, his law partner, may ethically represent some beneficiaries against others in a matter that is inextricably linked to his role as legal counsel to the Funds.'').

[115] *See In re Metlife Demutualization Litig.*, 495 F. Supp. 2d 310 (E.D.N.Y. 2007).

[116] *Id.* at 313–15.

[117] *Murray* at 174–75.

[118] *Id.* at 177 (citations omitted). Like the rights of a policyholder of a mutual insurance company, the rights of a participant in an ERISA-governed employee benefit plan are determined initially by the terms of the plan. See note 141, below.

[119] *See Shirvani v. Capital Investing Corp.*, 112 F.R.D. 389, 390–91 (D. Conn. 1986) (''The *Garner* problem is perhaps that the shareholder or other owed a duty of trust becomes too readily and artificially recognized as the 'client' for purposes of privilege. Although corporate management is expected to act for the shareholder's benefit, a hasty resort to *Garner* concepts will confuse who corporate counsel's clients realistically are. . . .'').

[120] *See, e.g., Wells Fargo Bank, N.A. v. Super. Court*, 22 Cal. 4th 201, 208, 990 P.2d 591, 595 (2000) (''The court's suggestion that the trustee 'is not the real client' . . . of the attorney retained by the trustee directly contradicts California law.''); *Huie v. DeShazo*, 922 S.W.2d 920, 924 (Tex. 1996) (''The attorney-client privilege serve the same important purpose in the trustee-attorney relationship as it does in other attorney-client relationships.''); *see also Jicarilla* at 2321 n.3.

[121] *See Mertens v. Hewitt Assocs.*, 508 U.S. 248, 251–54, 262 (1993).

[122] *See* ERISA §3(16), 29 USC §1002(16) (defining ''fiduciary''); 29 CFR §2509.75-5, D-1 (attorneys ordinarily not considered fiduciaries); *Custer v. Sweeney*, 89 F.3d 1156, 1162 (4th Cir. 1996) (''While an attorney's duty to his client is that of a fiduciary, . . . the mere fact that an attorney represents an ERISA plan does not make the attorney an ERISA fiduciary because legal representation of ERISA plans rarely involves the discretionary authority or control required by the statute's definition of 'fiduciary' '' (citation omitted).); H.R. Rep. No. 93-1280, at 323 (1974) (Conf. Rep.) (''While the ordinary functions of consultants and advisers to employee benefit plans (other than investment advisers) may not be considered as fiduciary functions, it must be recognized that there will be situations where such consultants and advisers may, because of their special expertise, in effect, be exercising discretionary authority or control with respect to the management or administration of such plan or some or authority or control regarding its assets.'').

[123] *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 259 (1993) (''The authority of courts to develop a 'federal common law' under ERISA . . . is not the authority to revise the text of the statute.''); *Kennedy* at 303 (same); *cf. Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 146 (1985) (ERISA is a ''comprehensive and reticulated statute.''); *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 110 (1989) (''federal common law of rights and obligations'').

[124] *See* ERISA §502(d)(1), 29 USC §1132(d)(1) (''An employee benefit plan may sue or be sued under this title as an entity. . . . Any money judgment under this title against an employee benefit plan shall be enforceable only against the plan as an entity and shall not be enforceable against any other person. . . .''); *Mackey v. Lanier Collection Agency & Service, Inc.*, 486 U.S. 825, 832 (1988) (§502 ''clearly contemplates the enforcement of money judgments against benefit plans.''); *Washington Star* at 910 (Under ERISA, a pension plan is an ''independent,'' ''fully separate legal entity.'').

[125] *Cf. Huie v. DeShazo*, 922 S.W.2d 920, 925–26 (Tex. 1996).

[126] *Conkright* at 1650 (2010) (citation omitted).

[127] *See* ERISA §404(a)(1), 29 USC §1104(a)(1). Because a plan fiduciary often has interests that conflict with the interests of some or all plan participants, a lawyer who represents both plan fiduciaries and plan participants in connection with plan administration matters skates on thin ice. *Cf. In re Pressman-Gutman Co.*,439 F.3d 383, 400–03 (3d Cir. 2006) (''This case presents the obvious potential for a . . . conflict of interest inasmuch as the Plan's administrators have been sued in their capacities as Plan fiduciaries in a third-party complaint, thus potentially compromising their ability to act 'solely in the interest of the participants and beneficiaries' of the Plan. . . . Moreover, inasmuch as we believe that the beneficiaries of the Plan have an interest in the Plan being represented separately from an attorney aligned or even previously aligned with the [owners of the plan sponsor], we would not grant a writ of mandamus to require the district court to undo the disqualification of [the law firm] even if the [owners] had consented to [the law firm] representing [the plan sponsor].''). Even if a plan fiduciary wanted to engage a lawyer to represent plan participants and beneficiaries, it is unclear that the lawyer could represent all of them. If some participants and beneficiaries have interests that conflict with the interests of other participants and beneficia-

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ries or with the interests of the plan itself, as is often the case, the plan's lawyer could not represent the interests of all plan participants and beneficiaries as well as the interests of the plan and its fiduciaries.

[128] *See* ERISA §104(b)(4), 29 USC §1024(b)(4) (''The administrator shall, upon a written request of any participant or beneficiary, furnish a copy of the latest updated summary plan description, plan description, and the latest annual report, any terminal report, the bargaining agreement, trust agreement, contract, or other instrument under which the plan is established or operated.''). *See also Wells Fargo Bank, N.A. v. Super. Court*, 22 Cal. 4th 201, 213, 990 P.2d 591, 598–99 (2000) (''[T]he assumption that the payment of legal fees by the trust is equivalent to direct payment by the beneficiaries is of dubious validity. . . . When the law gives the trustee the right to use trust funds, or to reimbursement, the funds do not in law belong the beneficiaries.''); *Lasky, Haas, Cohler & Munter v. Super. Court*, 172 Cal. App. 3d 264, 285, 218 Cal. Rep. 205, 218 (Ct. App. 1985) (''Trust funds paid for [the cost of legal counsel] are not assets of particular trust beneficiaries.'').

[129] *See Jicarilla* at 2326 (''Courts look to the source of funds as a 'strong indicator of precisely who the real clients were' and a 'significant factor' in determining who ought to have access to the legal advice'' (citing *Riggs*).); Brief of Petitioner at 28, *Jicarilla*; *cf. Engers v. AT&T*, 2004 U.S. Dist. LEXIS 29538, at *12 (D.N.J. Mar. 3, 2004) (''Although the origination of the fees may in some instances act as a secondary indicator of whether legal counsel is being sought for plan design or plan administration, it is by no means dispositive on that issue. The more relevant inquiry . . . is the nature of the attorney's work rather than the source of his fees.'').

[130] *Jicarilla* at 2326.

[131] *Id.* at 2330 (citing *Riggs* at 712) (''[T]he payment to the law firm out of the trust assets is a significant factor, not only in weighing ultimately whether the beneficiaries ought to have access to the document, but also it is in itself a strong indication of precisely who the real clients were.'').

[132] ERISA §104(b)(4), 29 USC §1024(b)(4).

[133] *See, e.g., Board of Trs. of the CWA/ITU Negotiated Pension Plan v. Weinstein*, 107 F.3d 139, 143 (2d Cir. 1997) (The ''clause was meant to refer to formal documents that govern the plan, not to all documents by means of which the plan conducts operations.''); *Faircloth v. Lundy Packing Co.*, 91 F.3d 648, 654 (4th Cir. 1996) (''The clear and unambiguous language of this statutory language encompasses only formal or legal documents under which a plan is set up or managed.''); *cf. Shaver v. Operating Eng'rs Local 428 Pension Trust Fund*, 332 F.3d 1198, 1202 (9th Cir. 2003) (''We continue to believe that 'instruments' refers to '. . .documents that provide individual participants with information about the plan and benefits.''); *Hughes Salaried Retirees Action Comm. v. Adm'r of Hughes Non-Bargaining Ret. Plan*, 72 F.3d 686, 690 (9th Cir. 1995) (same); *see also Murphy v. Verizon Commc'ns, Inc.*, 2010 U.S. Dist. LEXIS 111122, at *18–*19 (N.D. Tex. Oct. 18, 2010) (following *Weinstein* and *Faircloth*).

[134] *See, e.g., Wachtel* at 236; *Becher v. Long Island Lighting Co.*, 129 F.3d 268, 271–72 (2d Cir. 1997); *Buzzanga v. Life Ins. Co. of No. Am.*, 2010 U.S. Dist. LEXIS 33089, at *6–*7 (E.D. Mo. Apr. 5, 2010); *Smith v. Jefferson-Pilot Fin. Ins. Co.*, 245 F.R.D. 45, 47–48 (D. Mass. 2007); *Black v. Pitney Bowes*, 2006 U.S. Dist. LEXIS 92263 (S.D.N.Y. Dec. 21, 2006); *Fitzsimmons* at 586.

[135] *Garner* at 1101.

[136] *Riggs* at 714; *cf. Jicarilla* at 2322; *id.* at 2333 (Sotomayor, J., dissenting). If the fiduciary exception is based on the client's fiduciary duty to plan participants, the exception will apply only if the client acts in a fiduciary capacity in connection with the attorney-client communication. Under ERISA, a person is responsible for acting in accordance with ERISA's fiduciary standards only if the person ''was acting as a fiduciary (that is, was performing a fiduciary function) when taking the action. . . .'' *Pegram v. Herdrich*, 530 U.S. 211, 226 (2000); *Bland v. Fiatallis No. Am., Inc.*, 401 F.3d 779, 787–88 (7th Cir. 2005) (''The magistrate judge determined that the fiduciary exception was not available here since the amendment or termination of plan benefits is not a fiduciary action. . . . [W]e cannot find that the magistrate judge erred in concluding that an employer acts as a fiduciary only when it undertakes plan management or administration. An employer acts in a dual capacity as both the manager of its business and as a fiduciary with respect to unaccrued welfare benefits, is free to alter or eliminate such benefits without considering employees' interests and does not owe its employees a fiduciary duty when it amends or abolishes unaccrued benefits.''); *Comrie v. IPSCO, Inc.*, 2009 U.S. Dist. LEXIS 111965, at *7 (N.D. Ill. Nov. 30, 2009) (''[T]he fiduciary exception applies only when the plan administrator acts in her capacity as a fiduciary.''). As a practical matter, it must be possible to determine a client's status as a fiduciary no later than the date of the attorney-client communication. Otherwise, the applicability of the privilege would depend on events occurring after the attorney-client communication, and the client would be subject to unacceptable uncertainty about the applicability of the privilege.

[137] *Riggs* at 712.

[138] *Varity* at 497.

[139] *See NLRB v. Amax Coal Co.,* 453 U.S. 322, 333 n. 16 (1981) (''Although §408(c)(3) of ERISA permits

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a trustee of an employee benefit fund to serve as an agent or representative of the union or employer, that provision in no way limits the duty of such a person to follow the law's fiduciary standards while he is performing his responsibilities as trustee.''); *id.* at 333 (''In sum, ERISA vests the 'exclusive authority and discretion to manage and control the assets of the plan' in the trustees alone, and not the employer or the union. 29 U.S.C. §1103(a).''); *id.* at 333–34 (''The legislative history of ERISA confirms that Congress intended in particular to prevent trustees 'from engaging in actions where there would be a conflict of interest with the fund, such as representing any party dealing with the fund.' S. Rep. No. 93-383, pp. 31, 32 (1973). In short, the fiduciary provisions of ERISA were designed to prevent a trustee 'from being put into a position where he has dual loyalties, and, therefore, he cannot act exclusively for the benefit of a plan's participants and beneficiaries.' H. R. Conf. Rep. No. 93-1280, at 309'' (footnote omitted).).

[140] *See* ERISA §§402(a)(1) and (b)(4), 404(a)(1), 29 USC §§1102(a)(1) and (b)(4), 1104(a)(1); *Kennedy* at 303 (''The plan administrator is obliged to act 'in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of [Titles I and IV of ERISA],' §1104(a)(1)(D), and the Act provides no exceptions from this duty when it comes time to pay benefits . . . a straightforward rule of hewing to the directives of the plan documents. . . .''); *Raymond B. Yates, M.D., P.C., Profit Sharing Plan v. Hendon*, 541 U.S. 1, 22 (2004) (Anti-inurement provision in ERISA §403(c)(1) ''demands only that plan assets be held for supplying benefits to plan participants.''); 29 CFR §2509.08-1 (''ERISA's plain text . . . establishes a clear rule that in the course of discharging their duties, fiduciaries may never subordinate the economic interests of the plan to unrelated objectives. . . .'').

[141] *See Conkright* at 1659 (''ERISA was enacted 'to protect contractually defined benefits' '' (quoting *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 148 (1985)).); *Black & Decker Disability Plan v. Nord*, 538 U.S. 822, 830 (2003) (same); *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 113 (1989) (same).

[142] *Kennedy* at 300–01; *see also NLRB v. Amax Coal Co.*, 453 U.S. 322, 336–37 (1981) (''The atmosphere in which employee benefit trust fund fiduciaries must operate, as mandated by §302(c)(5) and ERISA, is wholly inconsistent with this process of compromise and economic pressure. The management-appointed and union-appointed trustees do not bargain with each other to set the terms of the employer-employee contract; they can neither require employer contributions not required by the original collectively bargained contract, nor compromise the claims of the union or the employer with regard to the latter's contributions. Rather, the trustees operate under a detailed written agreement, 29 U.S.C. §186(c)(5)(B), which is itself the product of bargaining between the representatives of the employees and those of the employer. Indeed, the trustees have an obligation to *enforce* the terms of the collective-bargaining agreement regarding employee fund contributions against the employer 'for the sole benefit of the beneficiaries of the fund.' *U.S. v. Carter*, 353 U.S. 210, 220'' (footnote omitted).).

[143] H.R. Rep. No. 93-1280, at 309 (1974) (Conf. Rep.).

[144] *Sandoval v. Simmons*, 622 F. Supp. 1174, 1213–14 (N.D. Ill. 1985); *see also Reich v. Compton*, 57 F.3d 270, 287–88 (3d Cir. 1995) (§406(b)(2) is a ''blanket prohibition'' and ''applies regardless of whether the transaction is 'fair' to the plan.''); *Cutaiar v. Marshall*, 590 F.2d 523, 528 (3d Cir. 1979) (''When identical trustees of two employee benefit plans whose participants and beneficiaries are not identical effect a loan between the plans without a §408 exemption, a per se violation of ERISA exists.''); *Tibble v. Edison Int'l*, 639 F. Supp. 2d 1074, 1094 n.10 (C.D. Cal. 2009) (''An adverse party is one whose interests conflict with those of the plan and its members. *Donovan v. Walton*, 609 F. Supp. 1221, 1246 (S.D. Fla. 1985). [T]he interests need not directly conflict but must be sufficiently different. *Int'l Bhd. of Painters & Allied Trades Union & Indus. Pension Fund v. Duval*, 925 F. Supp. 815, 825 (D.D.C. 1996). Here, the interests of SCE could have conflicted with the interests of the plan Participants, if SCE had an interest in choosing mutual funds that offered revenue sharing, if those mutual funds were of poorer quality than others available in the market'') (internal quotation marks omitted).).

[145] *See Mead Corp. v. Tilley*, 490 U.S. 714 (1989).

[146] *See Iron Workers Local #272 v. Bowen*, 624 F.2d 1255, 1261 (5th Cir. 1980) (''Section 406(b)(2), moreover, forbids a fiduciary to 'act in any transaction involving the plan on behalf of a party . . . whose interests are adverse to the interest of the plan.' Since we regard '(acting) on behalf of a party' to encompass acting on behalf of oneself, and since we consider a desire not to be sued by a plan to be an interest 'adverse' to that of the plan, we would hold that active participation in a decision whether to bring suit against oneself that is directed toward thwarting such a suit constitutes a violation of the statute.''); *Cutaiar v. Marshall*, 590 F.2d 523, 530 (3d Cir. 1979) (''Section 406(b)(2) speaks of 'the interests of the plan or the interests of its participants or beneficiaries.' It does not speak of 'some' or 'many' or 'most' of the participants. If there is a single member who partici-

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pates in only one of the plans [involved in a transaction between the plans], his plan must be administered without regard for the interests of any other plan.''); *see also In re Pressman-Gutman Co., Inc. Employer/ Sponsor of the Pressman-Gutman Co., Inc. Profit Sharing Plan*, 439 F.3d 383, 399–401 (3d Cir. 2006) (following *Iron Workers Local #272*).

[147] Although every guardian of a ward might be a fiduciary, every fiduciary is not a guardian of a ward. *See U.S. v. Chestman*, 947 F.2d 551, 568 (2d Cir. 1991) (''The common law has recognized that some associations are inherently fiduciary. Counted among these hornbook fiduciary relations are those existing between attorney and client, executor and heir, guardian and ward, principal and agent, trustee and trust beneficiary, and senior corporate official and shareholder.''). *Reed*, 601 F. Supp. at 704 (citing Coffee, ''From Tort to Crime: Some Reflections on the Criminalization of Fiduciary Breaches and the Problematic Line Between Law and Ethics,'' 19 *Am. Crim. L. Rev.* 117, 150 (1981); and Scott, ''The Fiduciary Principle,'' 37 *Cal. L. Rev.* 539, 541 (1949)); *Black's Law Dictionary* 564 (5th ed. 1979).'').

[148] *Washington Star* at 909 n.5.

[149] *See, e.g., Klein v. Northwestern Mut. Life Ins. Co.*, 2011 U.S. Dist. LEXIS 71586, at *24 (S.D. Cal. June 29, 2011); *Geissal v. Moore Med. Corp.*, 192 F.R.D. 620, 625 (E.D. Mo. 2000).

[150] *See* Reid, Mureiko and Mikeska, ''Privilege and Confidentiality Issues When a Lawyer Represents a Fiduciary,'' 30 *Real Prop., Prob. & Trust J.* 541, 589 (1996) (''It might be appropriate to consider a ward the client of an attorney hired by a guardian, or a general partner the client of an attorney hired by another general partner, because the law and facts that characterize those fiduciary relationships can justify such an assumption. However, the relationship between a trustee and a beneficiary, who is not the settlor, is quite different and cannot justify the same assumption.'').

[151] *See* ERISA §404(a)(1), 29 USC §1104(a)(1); *Kennedy* at 300 (''The plan administrator is obliged to act in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of [Title I] and [Title IV] of [ERISA]. . .'' (citations, footnote, and internal quotation marks omitted).).

[152] *See* Fischel and Langbein, ''ERISA's Fundamental Contradiction: The Exclusive Benefit Rule,'' 55 *U. Chi. L. Rev.* 1105, 1158 (1988) (''[T]he exclusive benefit rule should not be interpreted to mean that the trustee should decide all controversies between employees and the employer in favor of the employees. Such a rule would benefit particular complaining employees ex post, but it would operate to the detriment of employees as a class ex ante. A rule favoring employees that overrides the initial understanding between the parties, whether explicit or implicit, will actually harm employees by discouraging plan formation.'').

[153] See the discussion under the heading ''Real-Client Theory,'' above.

[154] *See, e.g., U.S. v. Mett*, 178 F.3d 1058, 1063 (9th Cir. 1999); *Becher v. Long Island Lighting Co.*, 9 F.3d 268, 271–72 (2d Cir. 1997); *Buzzanga v. Life Ins. Co. of No. Am.*, 2010 U.S. Dist. LEXIS 33089 (E.D. Mo. Apr. 5, 2010); *Smith v. Jefferson-Pilot Fin. Ins. Co.*, 245 F.R.D. 45, 47–48 (D. Mass. 2007); *Black v. Pitney Bowes*, 2006 U.S. Dist. LEXIS 92263, at *4 (S.D.N.Y. Dec. 21, 2006); *Martin v. Valley Nat'l Bank*,140 F.R.D. 291, 322 (S.D.N.Y. 1991) (citations omitted).

[155] By contrast, Congress inserted a catch-all phrase (''including but not limited to'') in ERISA §104(a)(6), 29 USC §1024(a)(6), which requires a plan administrator to furnish certain documents at the request of the Secretary of Labor: ''The administrator of any employee benefit plan subject to this part shall furnish to the Secretary [of Labor], upon request, any documents relating to the employee benefit plan, *including but not limited to*, the latest summary plan description (including any summaries of plan changes not contained in the summary plan description), and the bargaining agreement, trust agreement, contract, or other instruments under which the plan is established or operated'' (emphasis added). In response to concerns that the DOL might request confidential information, the DOL issued a regulation under §104(a)(6) that excludes requests for confidential information. *See* 29 CFR §2520.104a-8; 67 Fed. Reg. 777, 778 (Jan. 7, 2002). The DOL has relied on the fiduciary exception to obtain privileged documents under ERISA §504, however. *See Solis* at 224–31.

[156] *Curtiss-Wright* at 84; *cf. Mead Corp. v. Tilley*, 490 U.S. 714, 723 (1989) (''Title I of ERISA sets forth elaborate provisions to determine an employee's right to benefits. Those provisions describe in detail the accrual of benefits and the vesting of accrued benefits after service of a fixed number of years. Title IV, which contains §4044(a), simply provides for insurance for benefits created elsewhere. It is inconceivable that this section was designed to modify the carefully crafted provisions of Title I.'').

[157] *Ehlmann v. Kaiser Found. Health Plan*, 198 F.3d 552, 554–56 (5th Cir. 2000) (''It is for Congress to determine whether to impose such a duty to disclose under ERISA and this court will not encroach on that authority by imposing a duty which Congress has not chosen to impose.''); *Board of Trs. of the CWA/ ITU Negotiated Pension Plan v. Weinstein*, 107 F.3d 139, 147 (2d Cir. 1997) (''Since we have concluded that Congress intentionally fashioned §104(b)(4) to

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limit the categories of documents that administrators must disclose on demand of plan participants, we think it inappropriate to infer an unlimited disclosure obligation on the basis of general provisions that say nothing about disclosure.''); *Faircloth v. Lundy Packing Co.*, 91 F.3d 648, 654–56 (4th Cir. 1996) (''We decline to use §404(a)(1)(A) to expand the duties imposed under §104(b)(4), the ERISA section that specifically governs the situation at issue here.''); *see also Murphy v. Verizon Commc'ns, Inc.*, 2010 U.S. Dist. LEXIS 111122, at *26 (N.D. Tex. Oct. 18, 2010) (''ERISA section 404(a)(1), however, does not create additional disclosure obligations beyond those found in ERISA section 104(b)(4).'').

[158] *Sprague v. Gen. Motors Co.*, 133 F.3d 388, 405 (6th Cir. 1998). Some courts have ruled that ERISA's duty of loyalty requires a fiduciary to disclose material facts that would help to dispel confusion or misunderstanding by a participant or another beneficiary. These cases do not involve requests for documents similar to a discovery request or a request for documents under §104(b)(4), and they do not stand for the proposition that §404(a)(1)(A) authorizes the courts to supplement the disclosure requirements of §104(b)(4). For example, in *Glazier & Glassworkers Union Local No. 252 Annuity Fund v. Newbridge Securities Inc.*, the Third Circuit ruled that union-sponsored funds had stated a claim under ERISA when they alleged that a fiduciary had breached its fiduciary duty by failing to disclose to the funds the suspicious circumstances surrounding the resignation of one of the fiduciary's employees. 93 F.3d 1171, 1181–82 (3d Cir. 1996) (''[A] fiduciary has a legal duty to disclose to the beneficiary only those material facts, known to the fiduciary but unknown to the beneficiary, which the beneficiary must know for its own protection.''). In *Shea v. Esensten*, the Eighth Circuit concluded that a participant's widow had stated a claim under ERISA when she alleged that an HMO had failed to disclose that the HMO had offered financial incentives that might have influenced a doctor's judgment about the urgency for a cardiac referral. 107 F.3d 625, 628–29 (8th Cir. 1997) (''When an HMO's financial incentives discourage a treating doctor from providing essential health care referrals for conditions covered under the plan benefit structure, the incentives must be disclosed and the failure to do so is a breach of ERISA's fiduciary duties.''). And in *Eddy v. Colonial Life Ins. Co.*, the D.C. Circuit ruled that an insurance company violated its fiduciary duty under ERISA when it erroneously informed a plan participant that he could not extend the coverage previously provided under his employer's group health and life insurance plans after his employer terminated the plans. 919 F.2d 747, 750–51 (D.C. Cir. 1990) (decided before *Curtiss-Wright*) (''A fiduciary has a duty to . . . advise [a beneficiary] of circumstances that threaten interests relevant to the relationship. For example, a fiduciary bears an affirmative duty to inform a beneficiary of the fiduciary's knowledge of prejudicial acts by an employer — such as the failure of an employer to contribute to a fund as required.''); *cf. Pocchia v. NYNEX Corp.*, 81 F.3d 275, 278 (2d Cir. 1996) (''It is well-settled that plan fiduciaries may not affirmatively mislead plan participants about changes, effective or under consideration, to employee pension benefit plans. . . . Courts that have held that fiduciaries must disclose proposed changes absent a request have done so in the limited context of cases where confusion has been created on the part of the beneficiary by prior actions of the fiduciary. . . . Such cases provide limited guidance for dealing with the more frequent situation in which no such confusion was created by the fiduciary but where the beneficiary simply believes that he should have been provided with more information to enable him to make a more informed decision with respect to the financial consequences of his retirement.''); *In re Am. Express Co. ERISA Litig.*, 2010 U.S. Dist. LEXIS 117013, at *41 (S.D.N.Y. Nov. 2, 2010) (''Even if the disclosure requirements of ERISA go beyond the specific requirements of [ERISA's disclosure provisions], the requirement is no more than a duty to refrain from making affirmative misrepresentations to plan participants.'').

[159] The ''catch-all'' provision stated that the Government's responsibilities ''are not limited to'' those enumerated in the statute.

[160] *Jicarilla* at 2329–30.

[161] 473 U.S. 134, 141–42 (1985).

[162] 486 U.S. 825, 837 (1988).

[163] *Garner* at 1101.

[164] Reid, Mureiko and Mikeska, ''Privilege and Confidentiality Issues When a Lawyer Represents a Fiduciary,'' 30 *Real Prop., Prob. & Trust J.* 541, 590 (1996); see the discussion under the heading ''Practical Consequences,'' below; *see also Milroy v. Hanson*, 875 F. Supp. 646, 651–52 (D. Neb. 1995) (''[W]hatever the utility of the *Garner* rationale, it has no applicability where the plaintiff stockholder asserts claims primarily to benefit himself, particularly where such claims will undoubtedly harm *all* of the stockholders if successful . While it is true that Milroy has asserted a stockholder derivative action in this case, such an assertion does not invoke the *Garner* policy rationale because Milroy's suit is intended primarily to benefit Milroy personally, to the detriment of all remaining stockholders who are defendants'') (citing *Cox v. Adm'r U.S. Steel & Carnegie*, 17 F.3d 1386, 1415–16 (11th Cir.), *modified on other grounds*, 30 F.3d 1347 (11th Cir. 1994) and *Weil v. Investment/ Indicators, Research & Mgmt., Inc.*, 647 F.2d 18, 23 (9th Cir. 1981).).

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[165] See the discussion under the heading "The Importance of Certainty," above; *cf. Margaret Hall Found., Inc. v. Strong*, 121 F.R.D. 141, 146 (D. Mass. 1988) ("The key element is the mutuality of interest between a fiduciary and beneficiary. Therefore, in order for the *Garner* rational to apply, the mutuality of interest must exist at the time the communications to counsel are made.").

[166] *Swidler & Berlin v. U.S.*, 524 U.S. 399, 409 (1998).

[167] 29 CFR §§2560.503-1(h)(2)(iii) and (m)(8).

[168] *See Jaffee v. Redmond*, 518 U.S. 1, 9 (1996); *Trammel v. U.S.*, 445 U.S. 40, 47 (1980); *Jicarilla* at 2338 (Sotomayor, J., dissenting).

[169] 120 Cong. Rec. 40891 (1974) (statement of Rep. Hungate).

[170] *Id.*; S. Rep. No. 93-1277, at 11 (1974); H.R. Rep. No. 93-650, at 8 (1973); *Trammel v. U.S.*, 445 U.S. 40, 47–48 (1980).

[171] Even if the claims procedure regulation did require the disclosure of privileged communications, the regulation would require only "relevant" documents, records and information to be disclosed. The regulation would not require disclosure of communications made (1) to or by the settlor as long as the communication was not provided to the claims administrator; (2) in connection with legal advice to fiduciaries in their personal capacity as long as the communication was not provided, considered or generated in the course of making the benefit determination; (3) before a benefit claim was made as long as the communication was not provided, considered or generated in the course of making the benefit determination; (4) after a final decision was made; or (5) regarding a participant or beneficiary who did not invoke the claims procedure.

[172] 63 Fed. Reg. 48390, 48395 (Sept. 9, 1998).

[173] If the regulation were the basis for the fiduciary exception, the exception would apply only where the regulation applies (that is, only to benefit claims).

[174] *See* §7602(a) of the Internal Revenue Code of 1986, as amended, 26 USC §7602(a) ("[F]or the purpose of . . . determining the liability of any person for any internal revenue tax . . . the Secretary is authorized — (1) To examine any books, papers, records, or other data which may be *relevant* or material to such inquiry; [and] (2) To summon the person . . . to appear before the Secretary . . . to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be *relevant* or material to such inquiry" (emphasis added).); *U.S. v. Arthur Young & Co.*, 465 U.S. 805, 816 (1984) ("[Internal Revenue Code] §7602 is subject to the traditional privileges and limitations. . ." (internal quotation marks omitted).); *Upjohn* at 398 ("[T]he obligation imposed by a tax summons remains subject to the traditional privileges and limitations" (internal quotation marks omitted).); *U.S. v. Euge*, 444 U.S. 707, 712 (1980) ("Through §7602, Congress has imposed a duty on persons possessing information 'relevant or material' to an investigation of federal tax liability to produce that information at the request of the Secretary or his delegate. That duty to provide relevant information expressly obligates the person summoned to produce documentary evidence and to 'appear' and 'give testimony.' Imposition of such an evidentiary obligation is, of course, not a novel innovation attributable to §7602. The common law has been the source of a comparable evidentiary obligation for centuries. In determining the scope of the obligation Congress intended to impose by use of this language, we have previously analogized, as an interpretive guide, to the common-law duties attaching to the issuance of a testimonial summons . . . . The scope of the 'testimonial' or evidentiary duty imposed by common law or statute has traditionally been interpreted as an expansive duty limited principally by relevance and privilege" (citations and footnotes omitted).).

[175] *Wachtel* at 234–36. *See also Liberty Mut. Ins. Co. v. Tedford*, 2009 U.S. Dist. LEXIS 72129, at *21 (Aug. 6, 2009 N.D. Miss.) ("Although case law may support an exception . . . in other fiduciary/beneficiary relationships, the application of that policy to an insurer/insured relationship in questions of whether a policy covers a specific scenario would severely limit an insurer's ability to seek legal counsel regarding its duties. . . .").

[176] *Wachtel* at 236–37.

[177] *Id.* at 237.

[178] *Id.*

[179] 29 CFR §2560.503-1(h)(2)(iii).

[180] *Smith v. Jefferson Pilot Fin. Ins. Co.*, 245 F.R.D. 45, 51–53 (D. Mass. 2007); *see also Klein v. Northwestern Mut. Life Ins. Co.*, 2011 U.S. Dist. LEXIS 71586, at *17–*22 (S.D. Cal. June 29, 2011); *Buzzanga v. Life Ins. Co. of No. Am.*, 2010 U.S. Dist. LEXIS 33089, at *7–*9 (E.D. Mo. Apr. 5, 2010); *cf. Harvey v. Std. Ins. Co.*, 2011 U.S. Dist. LEXIS 107834, at *9–*10 (N.D. Ala. Sept. 15, 2011); *Moss v. Unum Life Ins. Co.*, 2011 U.S. Dist. LEXIS 8635, at *11–*12 (W.D. Ky. Jan. 28, 2011).

[181] *Smith v. Jefferson Pilot Fin. Ins. Co.*, 245 F.R.D. 45, 51 (D. Mass. 2007); See the discussion under the heading "Claims Procedure Regulations," above.

[182] *Conkright* at 1644 (ERISA "is an enormously complex and detailed statute, and the plans that administrators must construe can be lengthy and complicated.").

[183] *U.S. v. Mett*, 178 F.3d 1058, 1065 (9th Cir. 1999) ("[F]rom a policy perspective, an uncertain

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attorney-client privilege will likely result in ERISA trustees shying away from legal advice regarding the performance of their duties. This outcome ultimately 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.''); *see also Wachtel* at 237 (''[W]hen dealing with the attorney-client privilege, courts must be particularly careful not to craft rules that cause application of the privilege to turn on the answers to extremely difficult substantive legal questions. . . . We are reluctant to ask lawyers to read tea leaves and predict how courts will resolve the imponderables of ERISA before they can take the most preliminary step of advising their clients as to whether their communications will remain confidential.'').

[184] *U.S. v. Mett*, 178 F.3d 1058, 1065 (9th Cir. 1999).

[185] Among the indicia of good cause that the Fifth Circuit identified are the number of plaintiff-shareholders and the percentage of the company's stock that they hold; the bona fides of the plaintiff-shareholders; the nature and strength of their claim; the availability of the requested information from other sources; and the extent to which the plaintiff-shareholders are fishing for evidence. *See Garner* at 1103–04.

[186] *See Opus v. IBM Corp.*, 956 F. Supp. 1503, 1509 n.9 (D. Minn. 1996) (questioning whether *Garner* continues to be viable); *Milroy v. Hanson*, 875 F. Supp. 646, 652 (D. Neb. 1995) (same); Friedman, ''Is the *Garner* Qualification of the Corporate Attorney-Client Privilege Viable After *Jaffee v. Redmond*?'' 55 *Bus. Law.* 243, 281 (1999) (''[T]he *Garner* doctrine is not viable and its utilization by federal courts should cease.''); Sexton, ''A Post-*Upjohn* Consideration of the Corporate Attorney-Client Privilege,'' 57 *N.Y.U. L. Rev.* 443, 515 (1982) (''Though the *Garner* 'good cause' rule has been sharply criticized, it represents the prevailing rule today. Yet the rule threatens one of the basic assumptions of the *Upjohn* Court, to wit, that the corporate attorney-client privilege induces communication with the corporation's attorney would not otherwise occur'' (footnote omitted).).

[187] See the discussion under the heading ''The Fiduciary Exception Under ERISA,'' above.

[188] A fiduciary ordinarily cannot know in advance what court will decide any future litigation. *See* ERISA §502(e)(2), 29 USC §1132(e)(2) (An action under ERISA may be brought in the district where the plan is administered, where the breach took place, or where a defendant resides or may be found.).

[189] In *Wildbur v. ARCO Chemical Co.*, for example, the Fifth Circuit held that the exception did not apply to in-house counsel after the participant initiated litigation and that the exception did not apply at all to outside litigation counsel because all of his communications were for the purpose of defending the litigation. 974 F.2d 631, 634–35 (5th Cir. 1992), *reh'g denied*, 979 F.2d 1013 (5th Cir. 1992); *see also U.S. v. Doe*, 162 F.2d 554, 556 (9th Cir. 1998); *Tebo v. Sedgwick Claims Management Services, Inc.*, 2010 U.S. Dist. LEXIS 50834, at *9 (D. Mass. May 20, 2010) (''[B]ecause the relevant communications . . . arose after Sedgwick had issued its initial decision to deny plaintiff benefits, the fiduciary exception does not apply. In other words, the interests of the beneficiary and those of the plan administrator first diverged when Sedgwick issued a decision denying plaintiff any benefits.''); *Smith v. Jefferson Pilot Fin. Ins. Co.*, 245 F.R.D. 45, 48 (D. Mass. 2007) (''Frequently, the key question is whether the communication was made before or after the decision to deny benefits.''); *Bell v. Pfizer, Inc.*, 2006 U.S. Dist. LEXIS 62611, at *6–*7 (S.D.N.Y. Aug. 31, 2006) (fiduciary exception not applicable to communications occurring after the challenged determination has been made).

[190] *See, e.g., Allen v. Honeywell Ret. Earnings Plan*, 698 F. Supp. 2d 1197, 1201 (D. Ariz. 2010) (''If the mere prospect of litigation were enough to overcome the fiduciary exception, the administrative claim files associated with all benefit denials would be privileged.''); *Redd v. Bhd. Maint. of Way Employees Div. of the Int'l Bhd. of Teamsters*, 2009 U.S. Dist, LEXIS 46288, at *4 n.1 (E.D. Mich, June 2, 2009) (''[T]he courts have found that the same 'fiduciary' exception may overcome each of [the attorney-client and work-product] privileges, at least as to materials prepared in the 'pre-decisional phase of a benefit determination. In contrast, attorney-client communications made *after* a decision is final . . . have been deemed privileged and exempt from disclosure'' (citations omitted)); *Geissal v. Moore Med. Corp.*, 192 F.R.D. 620, 625 (E.D. Mo. 2000) (''The prospect of post-decisional litigation against the plan by a disappointed beneficiary can exist whenever the plan denies a claim. Because the denial of claims is as much a part of the administration of a plan as the decision-making which results in no unhappy beneficiary, the prospect of post-decisional litigation against the plan is an insufficient basis for gainsaying the fiduciary exception to the attorney-client privilege.''); *see also Lewis v. UNUM Corp. Severance Plan*, 203 F.R.D. 615, 620 (D. Kan. 2001) (following *Geissal*); *Soc'y of Prof'l Eng'g Employees in Aerospace, IFPTE Local 2001 v. Boeing Co.*, 2009 U.S. Dist. LEXIS 102345 (D. Kan. Nov. 3, 2009) (following *Lewis*).

[191] *See, e.g., Carr v. Anheuser-Busch Cos.*, 2011 U.S. Dist. LEXIS 59609, at *4–*7 (E.D. Mo. June 3,

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2011) (''In order to determine whether a particular attorney-client communication concerns either a matter of plan administration or legal advice for the fiduciary's own benefit, both the content and the context of the communication must be examined. . . . The December 2009 emails . . . discuss the content and drafting of the . . . letter . . . affirming the initial denial of severance benefits. . . . At this point, plaintiff's interest had become sufficiently adverse to that of the plan administrator's because the final decision had effectively been made and plaintiff's only recourse . . . was litigation.''); *Moore v. Metro. Life Ins. Co.*, 2011 U.S. Dist. LEXIS 75725, at *16–*17 (M.D. Ala. July 13, 2011) (''[E]ven after litigation commenced Met Life was considering administratively Moore's claim for benefits. . . . That is a fiduciary act.''); *Fitzpatrick v. Am. Int'l Group, Inc.*, 272 F.R.D. 100, 111 (2010) (''[I]f the role of [the] attorneys was to advise AIG as to how to protect its own interests when they potentially diverged from those of the beneficiaries of any fiduciary relationship, then communications to that end are not subject to the fiduciary exception.''); *Tatum v. R.J. Reynolds Tobacco Co.*, 247 F.R.D. 488, 495 (M.D.N.C. 2008) (''[E]ven in the absence of the *Garner* good cause analysis, courts examine the context and content of the disputed communications to determine whether there is reason to apply the fiduciary exception and abrogate the attorney-client privilege in the circumstances'' (internal quotation marks omitted).); *id.* at 498 (''The fiduciary exception is grounded in the identity of interests between the fiduciary and beneficiary, and the fact that the beneficiary is the real client of legal advice concerning plan administration. That grounding vanishes where the fiduciary is faced with a threat of litigation and seeks legal advice for its own protection against plan beneficiaries, regardless of whether that threat of litigation occurs before, during, or after the administrative claim process'' (internal quotation marks and citations omitted).); *Asuncion v. Metro. Life Ins. Co.*, 493 F. Supp. 2d 716, 722 (S.D.N.Y. 2007) (mere prospect of litigation not enough to avoid the fiduciary exception); *Black v. Pitney Bowes*, 2006 U.S. Dist. LEXIS 92263 (S.D.N.Y. Dec. 21, 2006) (''[C]ourts must undertake a fact-specific inquiry to determine whether the purpose of the withheld communications was to seek legal advice with respect to specific litigation. There should be little need for administrators to consult counsel regarding a specific benefits determination after that benefits determination is made, and so in some cases, courts have considered it highly relevant that communications occurred after the challenged benefits determination took place. Of course, the fact that a consultation took place after the commencement of litigation would be even more suggestive of a concern with personal exposure, rather than plan administration. In other cases, courts have found that even communications that occurred prior to a challenged decision and prior to the initiation of litigation were protected by attorney-client privilege when [t]rouble was in the air. What emerges from these cases is an inquiry that centers on whether the purpose of the communications was legal advice regarding the legal liability of plan administrators in imminent or pending litigation, as opposed to advice concerning a general fear of liability or advice concerning plan administration itself'' (citations and internal quotation marks omitted).); *Anderson v. Sotheby's Inc. Severance Plan*, 2005 U.S. Dist. LEXIS 9033, at *27–*33. (S.D.N.Y. May 13, 2005) (the purpose for which legal advice is sought is decisive.).

[192] *U.S. v. Mett*, 178 F.3d 1058, 1065 (9th Cir. 1999); *Tatum v. R.J. Reynolds Tobacco Co.*, 247 F.R.D. 488, 498 (M.D.N.C. 2008).

[193] *See, e.g., U.S. v. Mett*, 178 F.3d 1058, 1062 (9th Cir. 1999) (legal memoranda both (1) advised clients that certain transactions needed to be disclosed to the IRS and (2) identified the penalties associated with failure to report.); *Moore v. Metro. Life Ins. Co.*, 2011 U.S. Dist. LEXIS 75725 at *16–*17 (M.D. Ala. July 13, 2011) (''[E]ven after litigation commenced Met Life still was considering administratively Moore's claim for benefits. . . . That is a fiduciary act.'').

[194] See the discussion under the heading ''*Riggs v. Zimmer*,'' above.

[195] *Jicarilla* at 2321 n.3.

[196] Transcript of Oral Argument at 29–33, *Jicarilla*. *But see id.* at 2336 (Sotomayor, J., dissenting) (''I would hold as a matter of federal common law that the fiduciary exception is applicable in the Indian trust context, and thus the Government may not rely on the attorney-client privilege to withhold communications related to trust management.'').

[197] *Conkright v. Frommert*, 130 S. Ct. 1640, 1649 (2010).

[198] *See* Model Rule 1.4(a)(3) (lawyer's obligation to keep client reasonably informed).

[199] *Wachtel* at 237.

[200] *Id.*

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