

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

CHRISTOPHER SMITH,	)	
	)	
Plaintiff,	)	CIVIL ACTION
v.	)	NO. 07-10228-PBS
	)	
JEFFERSON PILOT FINANCIAL	)	
INSURANCE COMPANY,	)	
	)	
Defendant.	)	

**MEMORANDUM OF DECISION AND  
ORDER ON PLAINTIFF'S MOTION TO COMPEL**

August 2, 2007

DEIN, U.S.M.J.

**I. INTRODUCTION**

The plaintiff, Christopher Smith ("Smith"), has brought this action pursuant to the Employee Retirement Income Security Act, 29 U.S.C. §§ 1001 *et seq.* ("ERISA"), claiming that the defendant, Jefferson Pilot Financial Insurance Company ("Jefferson Pilot"), is obligated to pay him increased benefits under a group long-term disability insurance policy that Jefferson Pilot issued to Smith's employer. The matter is presently before the court on the "Plaintiff's Motion to Compel Disclosure of Documents Withheld by Defendant Under Claim of Attorney Client Communication Privilege or Attorney Work Product" (Docket No. 12). By his motion, Smith is seeking an order compelling Jefferson Pilot to disclose 13 documents that the defendant has withheld from production

based on the attorney-client privilege.<sup>1</sup> Smith claims that even if the documents consist of privileged communications, he is entitled to them under the so-called “fiduciary exception” to the attorney-client privilege.

Smith’s motion raises an issue of first impression in this Circuit, as the First Circuit Court of Appeals has not addressed the application of the fiduciary exception in the ERISA context. Although Jefferson Pilot does not dispute that the fiduciary exception may be applied to some ERISA fiduciaries, it contends that it should not apply to insurance companies, and it urges this court to adopt the reasoning of Wachtel v. Health Net, Inc., 482 F.3d 225 (3d Cir. 2007), in which the Third Circuit Court of Appeals held that the fiduciary exception does not apply when the fiduciary at issue is an insurer acting as a claim administrator rather than a trustee or plan administrator.

After consideration of the parties’ submissions, oral arguments and an *in camera* review of the disputed documents, this court finds that the disputed documents, while generally privileged, are discoverable under the fiduciary exception to the attorney-client privilege with one exception. This court declines to follow Wachtel under the circumstances of this case, and concludes that the fiduciary exception applies. Accordingly the motion to compel is ALLOWED, except for the first section of handwritten notes on document No. 12 which reflect settlement considerations and may be redacted.

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<sup>1</sup> The defendant initially had opposed the disclosure of the disputed documents on the grounds of both the attorney-client privilege and the work product doctrine. However, at oral argument the defendant agreed that it is claiming only attorney-client privilege, so that will be the only privilege addressed.

## **II. STATEMENT OF FACTS**

Smith filed a claim with Jefferson Pilot under his employer's "Group Long Term Disability Insurance Policy" on the grounds that he was totally disabled. After initially denying his short-term disability claim, Jefferson Pilot subsequently determined that Smith was entitled to both short term and long term benefits under the policy, and has been making such payments. However, Smith disputes the calculation of his monthly benefits under the insurance policy.

Smith hired an attorney to represent him in connection with discussions with Jefferson Pilot's claims personnel concerning the appropriate level of compensation. These claims personnel consulted with Jefferson Pilot's in-house counsel in preparing responses to Smith's counsel. The documents being withheld, for the most part, reflect these internal communications.

Jefferson Pilot describes its role in this case as a "claims administrator." (See Def.'s Opp. (Docket No. 17) at 2). Thus, under ERISA, a covered plan providing for disability benefits may be established or maintained by an employer "through the purchase of insurance or otherwise[.]" 29 U.S.C. § 1002(1). Jefferson Pilot is a fiduciary by virtue of the fact that it exercises authority or discretionary authority over the payment of benefits owed to plan beneficiaries. See 29 U.S.C. § 1002(21)(A)(iii) (defining a fiduciary under a plan to include anyone who "has any discretionary authority or discretionary responsibility in the administration of such plan").

Additional facts will be provided below where appropriate.

### III. ANALYSIS

#### A. The Attorney Client Privilege

Jefferson Pilot claims that the 13 documents at issue are protected by the attorney-client privilege. Therefore, this court must determine, as a threshold matter, whether the defendant was justified in withholding the documents as privileged in the first instance. “The attorney-client privilege . . . protects communications made between an attorney and a client for the sake of obtaining legal advice” and “extends to communications made to a representative of the attorney for the sake of obtaining the attorney’s advice.” City of Worcester v. HCA Mgmt. Co., Inc., 839 F. Supp. 86, 88 (D. Mass. 1993). Jefferson Pilot, “as the party asserting the privilege, has the burden of proving that the privilege attaches to the communications at issue.” Id.

After an *in camera* review, this court finds that the disputed documents are privileged.<sup>2</sup> For the most part, the documents reflect confidential communications between claims personnel at Jefferson Pilot and attorneys and their representatives in the defendant’s in-house legal department. They further establish that the communications generally were made for the purpose of seeking and providing legal advice in connection with Jefferson Pilot’s responses to plaintiff’s counsel’s requests for information and assertions regarding the plaintiff’s right to benefits under the applicable insurance policy.

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<sup>2</sup> Portions of some of the documents may not be privileged as they reflect business information instead of legal advice. Such parsing of each document is not necessary, however, in light of this court’s ruling on the issue of the fiduciary exception.

Thus, Jefferson Pilot has demonstrated a basis for withholding the documents under a claim of privilege.

**B. The Fiduciary Exception**

Smith argues that even if the attorney-client privilege attaches, the plaintiff is entitled to obtain the documents under the fiduciary exception. This exception to the attorney-client privilege is rooted in English trust law, but has since been applied to numerous fiduciary relationships, including those existing in the ERISA context. See United States v. Mett, 178 F.3d 1058, 1063 (9th Cir. 1999). “As applied in the ERISA context, the fiduciary exception provides that an employer acting in the capacity of ERISA fiduciary is disabled from asserting the attorney-client privilege against plan beneficiaries on matters of plan administration.” Id. (quoting In re Long Island Lighting Co., 129 F.3d 268, 272 (2d Cir. 1997)). The First Circuit has not addressed whether a fiduciary exception to the attorney-client privilege is applicable to non-employer ERISA fiduciaries, such as insurance companies. After reviewing the case law from other jurisdictions in light of the underlying policies of ERISA to protect participants in employee benefit plans and facilitate disclosure of information concerning plan administration, this court finds that the fiduciary exception applies in the instant case.

“The fiduciary exception is rooted in two distinct rationales. First, some courts have held that the exception derives from an ERISA trustee’s duty to disclose to plan beneficiaries all information regarding plan administration.” Id. (citation omitted). These courts reason that “[a]n ERISA fiduciary has an obligation to provide full and accurate

information to the plan beneficiaries regarding the administration of the plan[,]" including "any communications with an attorney that are intended to assist in the administration of the plan." Long Island Lighting, 129 F.3d at 271-72. Consequently, the "fiduciary cannot use the attorney-client privilege to narrow the fiduciary obligation of disclosure owed to the plan beneficiaries." Id. at 272. See also Bland v. Fiatallis N. Am., Inc., 401 F.3d 779, 787 (7th Cir. 2005) (fiduciary exception "is premised on the theory that the attorney-client privilege should not be used as a shield to prevent disclosure of information relevant to an alleged breach of fiduciary duty"). "Other courts have focused instead on the role of the trustee and have endorsed the notion that, '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.'" Mett, 178 F.3d at 1063 (quoting United States v. Evans, 796 F.2d 264, 266 (9th Cir. 1986)). Under this line of reasoning, "[w]hen an attorney advises a plan administrator or other fiduciary concerning plan administration, the attorney's clients are the plan beneficiaries for whom the fiduciary acts, not the plan administrator." Wildbur v. Arco Chem. Co., 974 F.2d 631, 645 (5th Cir. 1992). Accord Washington-Baltimore Newspaper Guild, Local 35 v. Washington Star Co., 543 F. Supp. 906, 909 (D.D.C. 1982). Thus, "[t]he very intention of the communication is to aid the beneficiaries" and the fiduciary "cannot subordinate the fiduciary obligations owed to the beneficiaries to their own private interests under the guise of attorney-client privilege." Washington Star, 543 F. Supp. at 909.

Under either rationale, however, the courts have determined that the fiduciary exception does not defeat the attorney-client privilege with respect to communications between a fiduciary and its attorneys on non-fiduciary matters. See e.g., Long Island Lighting, 129 F.3d at 271 (defendant's "ability to invoke the attorney-client privilege to resist disclosure sought by plan beneficiaries turns on whether or not the communication concerned a matter as to which the [defendant] owed a fiduciary obligation to the beneficiaries"). "In particular, courts have found that, '[w]hen an ERISA trustee seeks legal advice for his own protection, the legal fiction of trustee as representative of the beneficiaries is dispelled' and therefore the fiduciary exception is not applicable." Asuncion v. Metro. Life Ins. Co., No. 06 Civ. 13144 (SAS)(DF), 2007 WL 1834834, at \*3 (S.D.N.Y. June 25, 2007) (quoting Black v. Bowes, No. 05 Civ. 108 (GEL), 2006 WL 3771097, at \*1 (S.D.N.Y. Dec. 21, 2006)) (additional quotations and citation omitted). Therefore, "where a plan fiduciary retains counsel in order to defend herself against the plan beneficiaries (or the government acting in their stead), the attorney-client privilege remains intact." Mett, 178 F.3d at 1064. See also Wildbur, 974 F.2d at 645 (communications between attorney and plan administrator for purpose of defending lawsuit and having nothing to do with plan administration not subject to discovery).

In order to determine whether a particular attorney-client communication concerns a matter of plan administration or seeks legal advice for the fiduciary's own benefit, "courts engage in a fact-specific inquiry, examining both the content and context of the specific communication. Frequently, the key question is whether the communication was

made before or after the final decision to deny benefits.” Asuncion, 2007 WL 1834834, at \*3 (quotations and citations omitted). That is because after the challenged benefits determination occurs, “there should be little need for administrators to consult counsel regarding a specific benefits determination.” Id. (quoting Black, 2006 WL 3771097, at \*3).

In the instant case, Jefferson Pilot does not dispute, and this court’s *in camera* review has confirmed, that, with one exception, the documents at issue were generated in connection with Jefferson Pilot’s processing of Smith’s claim for benefits and before a final benefits determination was made.<sup>3</sup> (See Def.’s Mem. (Docket No. 17) at 4-5). Although they demonstrate that claims personnel were seeking advice for the purpose of responding to inquiries and assertions from Smith’s attorney, the documents concern issues of plan administration and are entirely unrelated to the defense of a pending legal action or other non-fiduciary matter. Therefore, pursuant to the reasoning of the courts discussed above, the fiduciary exception would defeat Jefferson Pilot’s claim of privilege.

**C. Analysis of the Wachtel Decision**

The defendant argues that this court should follow Wachtel and find that the fiduciary exception does not apply to insurers like Jefferson Pilot. This court finds that the rationale underlying the court’s decision in Wachtel is not persuasive given the status of the law in the First Circuit. Accordingly, as described in the next section, this court

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<sup>3</sup> The first section of handwritten notes on document no. 12 reflect internal settlement considerations and may be redacted.

declines to adopt the reasoning of the Third Circuit in Wachtel and finds that, consistent with the case law described above, the fiduciary exception applies in this case.

Until recently, courts considering the fiduciary exception in the ERISA context have applied the exception broadly, without regard to the type of fiduciary at issue. See e.g., Wildbur, 974 F.2d at 645 (“When an attorney advises a plan administrator or other fiduciary concerning plan administration, the attorney’s clients are the plan beneficiaries for whom the fiduciary acts, not the plan administrator. Therefore, an ERISA fiduciary cannot assert the attorney-client privilege against a plan beneficiary about legal advice dealing with plan administration.”) (citation omitted); Lewis v. Unum Corp. Severance Plan, 203 F.R.D. 615, 619 (D. Kan. 2001) (“courts generally have held that although the attorney-client privilege does not apply when an attorney advises a plan fiduciary about the administration of an employee benefit plan, the attorney-client privilege does apply when an attorney advises a plan fiduciary regarding issues that do not involve actual administration of the plan.”). However, in Wachtel, the Third Circuit noted that ERISA fiduciaries “come in many shapes and sizes” and it specifically rejected the notion that “the logic underlying the fiduciary exception applies equally to all.” Wachtel, 482 F.3d at 234. Although the court recognized that insurer fiduciaries, like plan administrators or ERISA trustees, “owe duties of loyalty and care to their beneficiaries” and “must act in furtherance of their beneficiaries’ interests[,]” it determined that “significant differences exist between insurance company fiduciaries . . . and other ERISA fiduciaries to whom the fiduciary exception has been applied.” Id. Consequently, the Wachtel court rejected

the application of the fiduciary exemption under both theories generally recognized by the courts — (1) that the real clients obtaining legal advice were really the plan beneficiaries, and (2) that there was a broad duty to disclose imposed on plan fiduciaries by ERISA.

**1. Identity of the Real Client**

The Wachtel court concluded that insurers were significantly different than other ERISA fiduciaries “because the plaintiff-beneficiaries are not the ‘real’ clients obtaining legal representation” in the case of an insurance company. Id. This holding is premised on the concept that the interests of the insurer and those of the plan beneficiaries are sufficiently divergent to justify withholding attorney-client communications between the insurer and its counsel, even though the communications may have been made while the insurer was acting in its capacity as a fiduciary and concern matters of plan administration. The court looked to four factors in reaching this conclusion. As detailed in the next section, this court does not find these arguments persuasive.

The Wachtel court first explained that, unlike other fiduciaries which are required to hold plan assets in trust under ERISA, insurance companies maintain legal title to the assets. Id. Consequently, although the insurer’s fiduciary obligations may place limits on the disposition of those assets, the insurer maintains “a substantial and legitimate interest in the management of its assets – even while it engages in fiduciary acts.” Id. Second, the court considered the “structural conflict of interests” that arises when an insurance company “determines eligibility for benefits and pays those benefits from its own

funds[.]” Id. It noted that because of this conflict, the Third Circuit applies a “heightened standard of review” to benefit claims decisions made by an insurer than it uses to review the acts of other ERISA fiduciaries. Id. at 235. The court also determined that such a structural conflict “undermines the argument that when an insurer retains counsel, the real clients being served are the beneficiaries.” Id.

The third factor that the Wachtel court identified to support its conclusion that the plan beneficiaries were not the true client was “the additional conflict of handling multiple ERISA benefit plans at once, not to mention other, non-ERISA regulated customers.” Id. The court emphasized that an insurer, “[e]ven while acting as a loyal fiduciary to the beneficiaries of one plan, . . . must be mindful of the duties it owes to the beneficiaries of other customer plans, all of whom are paid from the same pool of assets.” Id. Again it found that insurers “have interests larger and distinct from those of its beneficiaries.” Id. Finally, the court noted that the defendant insurers had paid for legal advice out of their own assets rather than the assets of their beneficiaries, and it found this payment scheme to be “an indicator (albeit only an indicator) that the fiduciary is the client, not a representative.” Id. at 236. Based on these four factors, the court concluded that “an insurer which sells insurance contracts to ERISA-regulated benefit plans is itself the sole and direct client of counsel retained by the insurer, not the mere representative of client-beneficiaries, and not a joint client with its beneficiaries.” Id.

## 2. Duty to Disclose