The Fiduciary Exception Can Ebb and Flow in an ERISA Context

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In his September 25, 2013 “Privilege Points” release, Tom Spahn discusses the “fiduciary exception” to the attorney client privilege, as applied in ERISA cases:

Under the "fiduciary exception," beneficiaries of a fiduciary duty may sometimes access otherwise privileged communications between the fiduciary and the fiduciary's lawyer. The exception arises most frequently in ERISA cases – in which ERISA beneficiaries seek access to communications between ERISA administrators and their lawyers.

However, the exception applies only when the administrator is acting in a fiduciary role. In Sizemore v. Pacific Gas & Electric Retirement Plan, No. C 13-00169 WHA, 2013 U.S. Dist. LEXIS 89996 (N.D. Cal. June 25, 2013), the ERISA plan denied an employee's claim for pension benefits. The court explained that "[u]nder normal circumstances, the fiduciary exception might have expired after that point," because that ended the plan’s fiduciary function. Id. at *16. But the court then noted that defendants had agreed to consider the employee's second appeal of the pension benefits denial. According to the court, "[d]efendants voluntarily stepped back into their role as fiduciaries during the pendency of that second appeal" – meaning that "during [that] same time period the fiduciary exception applies." Id. at *17. The court ultimately denied plaintiff's attempt to apply the fiduciary exception to documents created during the "period of time between plaintiff's first and second appeals" – because during that period "defendants had not yet stepped back into the role of non-adverse fiduciaries." Id.

Because the fiduciary exception depends on the fiduciary's role at the time, courts must carefully analyze the pertinent chronology.