

In *Advanced Physicians, S.C. v. Connecticut Gen. Life Ins. Co.*, 2020 WL 58698 (N.D. Tex. Jan. 3, 2020), U.S. District Judge Joe Fish, reversing a magistrate judge's decision, held that the assignee of life insurance beneficiaries could use the fiduciary exception to the attorney-client privilege to force the plan administrator to produce privileged documents regarding the administration of the plan because the administrator was not the "real client" and thus was not entitled to invoke the privilege.

This discovery dispute arose in an Employee Retirement Income Security Act (ERISA) suit in which Advanced Physicians, S.C. (AP), provider of chiropractic and medical diagnostic services to certain beneficiaries of the NFL Player Insurance Plan (the Plan), filed suit as assignee of Plan beneficiaries, alleging that the Plan and Cigna Health and Life Insurance Company (Cigna) had wrongfully denied Plan beneficiaries' claims. *Id.* at \*1.

During discovery, AP sought certain documents from Cigna, which Cigna argued included confidential communications concerning Plan administration protected by the attorney client privilege. AP invoked the fiduciary exception to the attorney-client privilege to seek these confidential communications. The magistrate judge denied AP's motion, finding that when the Plan beneficiaries assigned their rights as participants or beneficiaries to AP, they did not assign their rights to assert attorney-client privilege or to sue for breach of fiduciary duty. The fiduciary exception was thus, inapplicable to the case, a ruling that AP appealed to the district court. *Id.* at \*1 – \*2.

In his *de novo* review of the magistrate judge's order, Judge Fish reversed and held that AP could assert the fiduciary exception in this case. The fiduciary exception to the attorney client privilege exists because "when a trustee obtains legal advice relating to the exercise of fiduciary duties ...[,] the trustee cannot withhold attorney-client communications from the beneficiary of the trust." *Id.* at \*3 (quoting *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 165 (2011)). In reviewing the case law, Judge Fish found that courts had previously dealt with cases involving ERISA plan participants or the federal government bringing actions against ERISA plan fiduciaries. In these cases, courts in the Fifth Circuit had relied on the duty rationale (trustee's disclosure duty to plan participants), the client rationale (plan participant, not trustee, is real client) or a combination of the two to hold that ERISA fiduciaries are precluded from asserting the attorney-client privilege under the fiduciary exception. But he noted that no court had addressed whether an assignee of the right to receive payments under an ERISA plan could invoke the fiduciary exception against a plan fiduciary. *Id.* at \*3 – \*4.

Whereas the magistrate judge had based her reasoning on the duty rationale, Judge Fish focused on the client rationale: "Under the client rationale, the focus of the fiduciary exception analysis is on the role of the ERISA fiduciary, who acts in a representative rather than a personal capacity with respect to plan administration." *Id.* at \*5 (citation omitted). Thus, plan administrators cannot claim attorney-client privilege over communications related to administration of a plan and thus, cannot assert the privilege in those circumstances.

Applying this rationale, Cigna could not assert attorney-client privilege against AP regarding communications made between Cigna and its attorneys where those communications related to

administration of the Plan. Cigna was not the “real client” when it engaged in such communications with its attorneys. *Id.* at \*6. Attorney-client privilege promotes “full and frank communication between attorneys and their clients” and thus, had no role in this context. *Id.* (citations omitted). Furthermore, “there is no attorney-client privilege between a plan trustee and an attorney who advises the trustee regarding the administration of the plan.” *Id.* (citation omitted).

Judge Fish found support for this determination in cases in which courts had held that the federal government could assert the exception against ERISA fiduciaries, regardless of the fact that the plan fiduciaries did not owe the government the fiduciary duties they owed to plan beneficiaries. Allowing the federal government to assert the exception in these cases “serve[d] the interests that ERISA is designed to protect.” *Id.* (citations omitted).

Regarding AP’s status as assignee, rather than original beneficiary, Judge Fish determined that when the Plan beneficiaries assigned their rights to receive insurance payments and to sue to collect unissued insurance payments to AP, this aligned the interests of the beneficiaries and AP. They both sought payment for the cost of services provided to the Plan beneficiaries, and the interests were sufficiently similar to allow AP to rely on the fiduciary exception. *Id.* at \*6 – \*7.

Therefore, the court modified and set aside the magistrate judge’s opinion and held that AP can assert the fiduciary exception against Cigna, “or, stated differently, Cigna ‘cannot assert the attorney-client privilege against [AP] about legal advice dealing with plan administration.’” *Id.* at \*7 (citing *Wildbur v. ARCO Chemical Co.*, 974 F.2d 631, 645 (5th Cir. 1992)). Judge Fish noted that Cigna could still assert the attorney-client privilege with respect to attorney communications not dealing with plan administration.