THE FIDUCIARY EXCEPTION TO THE ATTORNEY-CLIENT PRIVILEGE

BY FREDERICK A. BRODIE AND KENNETH A. NEWBY

THOMSON REUTERS™

WEST®

EXECUTIVE SUMMARY

Recent years have seen widening judicial endorsement of a "fiduciary exception" to the attorney-client privilege. As a result, lawyers whose client represents the interests of others in a fiduciary capacity must carefully consider the circumstances under which communications may be found nonprivileged.

This paper examines the fiduciary exception as it has developed under the Employee Retirement Income Security Act of 1974, as amended (ERISA)[1] and in a variety of other contexts. It provides practical tips for attorneys representing fiduciary clients who desire to preserve the confidentiality of their attorney-client communications.

INTRODUCTION TO THE FIDUCIARY EXCEPTION TO THE ATTORNEY-CLIENT PRIVILEGE

The confidential relationship between client and attorney is a fundamental feature of U.S. law. Clients seeking legal advice rely on the confidentiality of their communications in sharing relevant information with their counsel, recognizing that this information may at times be private and sensitive.

The elements of the attorney-client privilege have most famously been catalogued as follows:

> (1) where legal advice of any kind is sought (2) from a professional legal advisor in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived.[2]

... in fiduciary cases, predispute legal advice obtained by the fiduciaries must no longer be assumed to be confidential.

Omitted from that catalogue, however, is a significant exception. A "fiduciary exception" to the attorney-client privilege has developed in U.S. courts beginning in the 1970s, and has become a frequent source of unpleasant surprises for attorneys who advise fiduciaries to employee benefit plans on their obligations under ERISA.

The fiduciary exception in U.S. law is widely considered to have originated in a shareholders' derivative action, *Garner v. Wolfinbarger*.[3] Relying on English cases, the Fifth Circuit in *Garner* reasoned that "management has duties which run to the benefit ultimately of the stockholders"; when corporate managers sought the advice of counsel in the course of performing their responsibilities as fiduciaries to the shareholders, the shareholder-plaintiffs in a derivative action were the ultimate beneficiaries of the advice and consequently could not be prevented, by assertion of the attorney-client privilege, from discovering that advice in litigation.[4] This exception has since been extended to fiduciary cases arising under ERISA, as well as disputes over trusts, partnerships and other fiduciary matters. The result is that, in fiduciary cases, predispute legal advice obtained by the fiduciaries must no longer be assumed to be confidential.

The remainder of this paper discusses this fiduciary exception in detail and provides some practical suggestions for maintaining confidentiality to fiduciaries and the attorneys who advise them. It examines the application of the fiduciary exception in the ERISA context then focuses on the fiduciary exception's application in the areas of shareholder derivative suits, trusts, and partnerships.

THE FIDUCIARY EXCEPTION UNDER ERISA

ERISA imposes on fiduciaries a duty of loyalty to the plan participants and beneficiaries.[5] To determine whether and when someone acts as a fiduciary, ERISA employs a functional test, under which discretionary authority or control over the plan, its assets and its administration results in the imposition of fiduciary duties.[6]

The Underlying Theory

Since 1981, federal courts have applied the fiduciary exception to the attorney-client privilege to claims brought by employee benefit plan participants alleging breaches of fiduciary duty under ERISA.[7] The exception was first applied in the ERISA context in *Donovan v. Fitzsimmons*,[8] when the Secretary of Labor moved to compel the production of records in a lawsuit against a union pension fund.[9] Applying *Garner*, the district court treated the Secretary of Labor as standing in the shoes of the plan participants and beneficiaries, and pierced the plan fiduciary's attorney-client privilege.[10]

Courts have relied on two different theories for applying the fiduciary exception in the ERISA context. The first theory is founded on duties of disclosure: because the fiduciary has a duty to disclose material information to the plan participants, the matters communicated by the fiduciary to the attorney should have been disclosed to the participants in the first place.[11] The second rationale is that, because a plan fiduciary acts for the benefit of plan participants, the participants are the "real" clients of the fiduciary's lawyer. Thus, when an ERISA fiduciary asks an attorney for advice on how to fulfill fiduciary responsibilities, the plan participants are entitled to see the attorney's communications with the fiduciary, who acted as their representative.[12] These two rationales play an important role in how and when courts will apply the fiduciary exception.

The rest of this section describes how the fiduciary exception has been applied in the ERISA context. The scope of the fiduciary exception in ERISA cases has varied in some respects, and fiduciaries to employee benefit plans should be aware of the nuances.

Scope of the Fiduciary Exception

- Is fiduciary activity present?

The key to application of the fiduciary exception is whether the attorney-client communication concerns fiduciary conduct. ERISA utilizes a functional test to determine when an individual acts as a fiduciary. Under ERISA, a person is a fiduciary to the extent that

1. he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets,
2. he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or
3. he has any discretionary authority or discretionary responsibility in the administration of such plan.[13]

The key to application of the fiduciary exception is whether the attorney-client communication concerns fiduciary conduct.

- The fiduciary exception potentially applies to communications that "reflect fiduciary functions, *i.e.,* ones related to plan management and administration," while it is inapplicable to legal advice on "non-fiduciary functions, *i.e.,* ones related to the plan's design or amendment."[14] Plan administration or management includes exercising fiduciary discretion in deciding claims for benefits. For example, in *Coffman v. Metropolitan Life Insurance Co.*,[15] the court applied the fiduciary exception to a series of communications between an employer and corporate counsel regarding the review of plan participants' insurance claims.[16] Plan design or amendment functions, which are not subject to ERISA's fiduciary duties,[17] include the adoption or termination of a plan, as well as changes to plan benefits.[18]
- Because the court determines fiduciary responsibility by looking at an individual's actions rather than the person's status, anyone who exercises discretion or control over the assets or administration of an ERISA-governed plan may be held responsible as a plan fiduciary for limited purposes. This includes the trustees who hold and invest plan assets, the members of committees who decide participants' claims for benefits, and the plan sponsor when it communicates information about the plan. If those persons or others in similar roles seek legal advice in the performance of those functions, that advice will likely be nonprivileged.
- An unusual extension of fiduciary status may not carry with it an extension of the fiduciary exception. In *Wachtel v. Health Net, Inc.,*[19] a health insurance company had been sued for using outdated information when calculating co-payments for out-of-network services. The insurer asserted the attorney-client privilege as to a large number of documents, but the plaintiffs argued that the fiduciary exception should apply. The insurer, however, had simply contracted with ERISA plans to provide health insurance; it was not the plan administrator. The court noted that "ERISA fiduciaries … come in many shapes and sizes, and we do not believe that the logic underlying the fiduciary exception applies equally to all."[20] The Third Circuit declined to extend the exception to defendants whose functions were not analogous to those types of fiduciary to which the exception has typically been applied.[21]
- Does the exception apply if the fiduciary is concerned about personal liability? The fiduciary exception should not preclude ERISA fiduciaries from seeking confidential legal advice when threatened with the imposition of personal liability for breach of fiduciary duty under ERISA.[22] Courts have declined to apply the exception to fiduciaries who seek legal counsel on their potential personal liability. These courts have reasoned that, once a fiduciary becomes concerned about personal liability for particular actions, his goals differ from those of the plan participants to a degree that renders the resulting communications undiscoverable. For example, in *United States v. Mett*,[23] the defendants appealed a district court decision compelling production of an analysis memorandum written to them by an attorney. The defendants had been embezzling money from their art gallery's pension fund and the memorandum concerned their potential civil and criminal liability for these actions. The court held that, when the attorney-client communications involved the fiduciary's personal liability, those communications were not discoverable through the fiduciary exception.[24]

Courts have declined to apply the exception to fiduciaries who seek legal counsel on their potential personal liability.

- On the same logic, however, once the prospect of litigation against a plan administrator arises, the fiduciary exception may no longer apply to the administrator's attorney-client communications regarding the threatened litigation.[25]
- What is the party asserting the fiduciary exception to the attorney-client privilege required to prove?
  A party invoking the fiduciary exception must prove the necessary elements:
  • an attorney-client communication
  • made to assist the fiduciary
  • fulfilling fiduciary duties
- Some courts have also required the party seeking the production of privileged information to demonstrate "good cause."[26] This requirement stems originally from *Garner*.[27] "Good cause" may include the fact that the information requested is not available to the participants by other means, and may require a showing that the information requested has been reasonably identified so fiduciaries will not be subjected to a "fishing expedition."[28] Other courts, however, have declined to require "good cause" before applying the fiduciary exception in ERISA cases.[29]

"Good cause" may include the fact that the information requested is not available to the participants by other means, and may require a showing that the information requested has been reasonably identified so fiduciaries will not be subjected to a "fishing expedition."

The Work Product Doctrine

The work product doctrine protects communications and other materials generated in preparation for litigation and trial.[30] It promotes an effective adversarial system by allowing the attorney and client to work with a "certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel."[31] To obtain the work product doctrine's protection, a party must demonstrate that the material at issue was prepared

> (1) in anticipation of litigation, and (2) by or for a party or a representative of that party.[32] Once litigation is anticipated, the work product doctrine affords protection to plan fiduciaries and their counsel that the fiduciary exception cannot strip away: courts generally have declined to apply the fiduciary exception to the work product doctrine,[33] because the work product doctrine upholds principles different from those underlying the fiduciary exception.[34]

Nevertheless, using the "real client" rationale, some courts have declined to allow attorneys to invoke the work product doctrine in the ERISA fiduciary context.[35] If the plan participants are the actual clients of an ERISA plan attorney, then work product cannot be withheld from those clients in discovery. In this context, some courts have not required the participants to demonstrate "good cause" or a substantial need for the documents in order to gain access to otherwise-protected work product.[36]

Yet, once the plan participants litigate against their fiduciaries, or even threaten to sue, it becomes unrealistic to say that the defense work of the fiduciaries' counsel is somehow undertaken for the benefit of plan participants. For the same reason that the fiduciary exception does not extend to fiduciaries' attorney-client communications relating to individual liability, the exception also should not affect materials prepared in contemplation of litigation against the participants.

If the participants are the "real" clients, then the attorney is "[f]aced with the conflict between the need of the [fiduciary's] attorneys to prepare documents in anticipation of litigation and the requirement that the [fiduciary] disclose to its beneficiaries any communications with its attorneys intended to assist in the administration of the trust."[37] To resolve that conflict, some courts have held that, for materials to qualify as work product, they must have been prepared *only for purposes other than the interests of the participants* and must have been solely to assist in litigation.[39]

THE FIDUCIARY EXCEPTION IN OTHER CONTEXTS

ERISA fiduciaries are not the only parties whose expectation of confidentiality in attorney-client communications is limited by the fiduciary exception. In differing forms, the exception has been applied to a number of fiduciary relationships. The variations in its application are instructive; three examples are discussed below.

Shareholder Derivative Suits

The fiduciary exception to the attorney-client privilege in U.S. litigation first arose in a shareholder derivative action, where shareholders claimed that their company had committed securities violations and fraud.[39] The shareholders sought to depose the corporation's inside counsel about legal advice given to management regarding the issuance and sale of stock.[40] The lawyers claimed that their communications with their corporate client were privileged, setting the wheels in motion for the Fifth Circuit to develop the fiduciary exception in *Garner*.

As announced in *Garner*, the fiduciary exception did not eliminate corporate privilege. Rather, "where the corporation is in suit against its [share]holders on charges of acting inimically to [share]holder interests, protection of those interests … require[d] that the … privilege be *subject to the right of the [share]holders to show cause why it should not be invoked in the particular instance.*"41 Thus, the fiduciary exception in *Garner* will apply where

> (1) a mutuality of interests exists between the "representative and the represented" (2) a fiduciary duty is owed; and (3) "cause" is found.[42] According to the Fifth Circuit, courts should consider the following factors in determining whether a shareholder has demonstrated "cause" to pierce the corporation's attorney-client privilege:
> - the number of shareholders and the percentage of stock they represent
> - the shareholders' good faith
> - the nature of the shareholders' claim and whether it is obviously colorable
> - the apparent necessity or desirability of the shareholders having the information and its availability from other sources
> - whether, if the shareholders claim wrongful action by the corporation, the alleged action is criminal, illegal, or of doubtful legality
> - whether the attorney-client communication is related to past or to prospective actions
> - whether the corporation's attorney conveyed advice concerning the litigation itself
> - whether the communication has been specifically identified, or whether the shareholders are blindly fishing
> - whether the communication concerned trade secrets or other information that the corporation had an independent interest in keeping confidential[43]

This list is not exhaustive, and no one factor or combination of factors holds greater weight than any other.

A frequent criticism is that the Garner *doctrine is really no more than a simple balancing test of whether "the corporation's interest in maintaining the privilege" carries more weight than "the shareholder's need for the evidence."*

In the more than 35 years since the *Garner* decision, application of the fiduciary exception to shareholder derivative actions has often been criticized. A frequent criticism is that the *Garner* doctrine is really no more than a simple balancing test of whether "the corporation's interest in maintaining the privilege" carries more weight than "the shareholder's need for the evidence."[44] More fundamentally, the fiduciary exception in the corporate context has been blamed for causing uncertainty, which in turn discourages open and candid communications between lawyer and client.[45] Conversely, some commentators have embraced the fiduciary exception, arguing that the policy behind the attorney-client privilege does not apply in the corporate context because "the attorney-client privilege *protects only* the corporate *entity*, not the individual officers, directors, and employees, who speak for the entity on matters within the scope of their corporate responsibilities."[46]

Despite criticism, the fiduciary exception has garnered widespread acceptance in the context of shareholder derivative suits.

Despite criticism, the fiduciary exception has garnered widespread acceptance in the context of shareholder derivative suits. Most federal courts have adopted the doctrine,[47] as have some state courts.[48]

It is less clear whether the fiduciary exception applies in nonderivative shareholder suits. Federal courts are divided over whether the *Garner* doctrine extends so far.[49] Nonderivative cases applying the *Garner* doctrine have included shareholder suits brought under the federal securities laws[50] and suits brought by minority shareholders against majority/controlling shareholders.[51]

Federal securities complaints often allege fraud in representations made regarding a stock before the plaintiffs purchased it. At that time, because they were not shareholders, the plaintiffs were not owed any fiduciary duty.[52] *Garner*, however, assumed a fiduciary relationship existing when the communications were made.[53] Hence, some courts have declined to apply the fiduciary exception in securities cases where no fiduciary duty to the plaintiff-shareholders existed when the attorney-client communications were made.[54] Further, as one commentator has argued, "[e]ven if one accepts the argument that management and the corporation owed special duties to individual shareholders, duties are also owed to nonplaintiff shareholders, who might be harmed by a large recovery."[55] A derivative suit is brought on behalf of the corporation; because any recovery is paid to the corporation, it ultimately benefits all shareholders. In the nonderivative context, that premise is not necessarily true.[56]

As in ERISA cases, courts have not applied the fiduciary exception indiscriminately to corporate disputes. The nature of the claims asserted and the timing of the statements sought to be discovered, as well as the numerous factors identified in *Garner*, could prove decisive in determining whether shareholder-plaintiffs may pierce the privilege that otherwise would protect consultations between corporate officers and company counsel.

Private Trusts

The *Garner* court compared the relationship of a corporation and its shareholders to that of a trustee and the trust beneficiaries.[57] In the context of private trusts, the trustee/fiduciary has a "duty to furnish information" to beneficiaries, and the beneficiaries, rather than the trustee, are considered a trust attorney's real clients.[58] Like an ERISA fiduciary, however, the trustee is not required to divulge communications acquired at his own expense and for his own protection.[59] Communications between a trust's fiduciary and his attorney are discoverable only when they pertain to administration of the trust.

In recent years, an increasing number of courts have retreated from applying the fiduciary exception in the area of private trusts. In 1996, the Supreme Court of Texas held that any communications between a trustee and the trustee's attorney retain the full protection of the attorney-client privilege, in spite of the trustee's fiduciary duty to the beneficiary.[60] In 2000, the California Supreme Court held that attorney-client privilege protects the trustee rather than the beneficiary, concluding that "the trustee's reporting duties do not trump the attorney-client privilege."[61] It is important to note, however, that the Texan and Californian courts grounded their decisions in state statutes that codify the attorney-client privilege.[62] Because the statutes did not recognize a fiduciary exception to the privilege, the courts found that none existed. Hence, states that have not codified a fiduciary exception could well do so in the future, and those state legislatures will determine the exception's viability in trust cases.[63] State lawmakers could also decide that an exception to the privilege should not exist: in 2002, the New York legislature rejected the fiduciary exception in the estates context by statute, declaring:

> The existence of a fiduciary relationship between the personal representative and a beneficiary of the estate does not by itself constitute or give rise to any waiver of the privilege for confidential communications made in the course of professional employment between the attorney or his or her employee and the personal representative who is the client.[64]

Thus, the area of law that gave birth to the fiduciary exception is quickly becoming an area where the exception is being rejected. This trend has implications for ERISA. ERISA's fiduciary responsibility provisions "codify and make applicable to ERISA fiduciaries certain principles developed in the evolution of the law of trusts."[65] *Garner*, the original source of the exception extended by the courts to ERISA cases, founded its reasoning on the law of trusts.[66] Without trust law as a basis for abrogating the privilege, the rationale for applying the fiduciary exception in ERISA cases may be questioned.

Without trust law as a basis for abrogating the privilege, the rationale for applying the fiduciary exception in ERISA cases may be questioned.

Partnerships

Partners owe each other fiduciary obligations.[67] As Judge (later Justice) Cardozo famously declared, a partner, as a fiduciary, "is held to something stricter than the morals of the marketplace. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior."[68] In lawsuits among partners of both general and limited partnerships,[69] courts have applied the fiduciary exception to strip the shield of the attorney-client privilege from communications that pertain to fiduciary matters.[70]

The reach of the exception in the partnership arena, however, has been inconsistent and unclear. Some courts have declined to apply the doctrine due to a lack of mutuality of interests among parties whose partnership is dissolving.[71] Other courts have refrained from employing the fiduciary exception in disputes among partners because the parties that sought production of privileged communications were not the "real clients." [72]

One court applying Louisiana law has concluded that, due to the strong fiduciary relationship existing between general partners, "good cause" for piercing the privilege exists automatically when the dispute involves members of a general partnership.[73] In the context of limited partnerships, in contrast, some courts have retained *Garner's* good cause requirement, analogizing the relationship between general and limited partners to that of shareholders and their corporation.[74]

Attorneys advising partnerships, especially during the period of the partnership formation, must keep the fiduciary exception in mind. Communications between the founding partners and their counsel may not be considered privileged, even as against partners who later join the business, if the communications relate to matters that arise subsequently.[75]

Communications between the founding partners and their counsel may not be considered privileged, even as against partners who later join the business, if the communications relate to matters that arise subsequently.

CONCLUSION

The future of the fiduciary exception to the attorney-client privilege remains uncertain. Attorneys, however, must remain on their guard when advising fiduciaries, lest the exception be applied in an unexpected matter. The above discussion suggests several steps that attorneys and their fiduciary clients may take to retain the confidentiality of their communications:

- Where appropriate, establish a foundation for application of the work-product doctrine as well as the attorney-client privilege. Identify when litigation is anticipated or has been threatened, and make clear when communications are undertaken in response to potential litigation. Where applicable, label communications as "ATTORNEY-CLIENT PRIVILEGED AND WORK PRODUCT."
- Identify the "real client." If the fiduciary is seeking advice in his or her individual capacity and not for purposes of administering the plan or trust, make that context clear in the advice.
- When a communication contains material that may be protected for reasons other than the attorney-client privilege or work-product doctrine (*e.g.*, trade secrets or confidential business information), make this clear at the beginning of the document.
- When advising a client on how to perform a fiduciary function, consider that the communications may be held discoverable, and exercise commensurate care and discretion in framing the advice provided.

ENDNOTES

[1] 29 U.S.C.A. §§ 1001-1461.

[2] JOHN HENRY WIGMORE, 8 EVIDENCE IN TRIALS AT COMMON LAW, § 2292, at 554 (Little, Brown & Co. 1961).

[3] 430 F.2d 1093 (5th Cir. 1970).

[4] Id. at 1101-04.

[5] ERISA § 404, 29 U.S.C.A. § 1104 (fiduciary must discharge duties with respect to a plan "solely in the interest of the participants and beneficiaries"); ERISA § 3(7), 29 U.S.C. § 1002(7) (2007) ("The term 'participant' means any employee or former employee of an employer, or any member or former member of an employee organization, who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer or members of such organization, or whose beneficiaries may be eligible to receive any such benefit.").

[6] *See* ERISA § 3(21)(A), 29 U.S.C.A. § 1002(21)(A) (quoted infra at §III.B.1); *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 262 (1993).

[7] *See Donovan v. Fitzsimmons*, 90 F.R.D. 583, 586 (N.D. Ill. 1981); *see, e.g., Bland v. Fiatallis N. Am., Inc.*, 401 F.3d 779 (7th Cir. 2005); *United States v. Mett*, 178 F.3d 1058 (9th Cir. 1999); *In re Long Island Lighting Co.*, 129 F.3d 268 (2d. Cir. 1997); *Fischel v. Equitable Life Assurance*, 191 F.R.D. 606 (N.D. Cal. 2000); *Geissal v. Moore Med. Corp.*, 192 F.R.D. 620 (E.D. Mo. 2000); *Washington-Baltimore Newspaper Guild v. Washington Star Co.*, 543 F. Supp. 906 (D.D.C. 1982).

[8] 90 F.R.D. 583 (N.D. Ill. 1981).

[9] *Id*. at 584.

[10] *See id*. at 586-87 ("at this point, both the DOL and the plan's participants have exactly the same interest, … Given this identity of interests there is no principled basis for precluding the Secretary from raising a *Garner*-type rationale to defeat [the plaintiff's] claims of attorney-client privilege.").

[11] *See, e.g., Mett,* 178 F.3d at 1063; In re *Long Island Lighting Co.*, 129 F.3d at 271-72.

[12] *See, e.g., Mett,* 178 F.3d at 1063; *Washington-Baltimore Newspaper Guild,* 543 F. Supp. at 909.

[13] 29 U.S.C. § 1002(21)(A).

[14] *Coffman v. Metropolitan Life Ins. Co.,* 2004 F.R.D. 296, 298-99 (S.D.W.Va. 2001); *see also Beesley v. Int'l Paper Co.*, No. 06-703(DRH), 2008 WL 2323849, at *3 (S.D. Ill. June 3, 2008) (refusing to apply fiduciary exception to communication between counsel and fiduciary about plan amendment); *In re Long Island Lighting Co.*, 129 F.3d at 271 ("The employer'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 employer owed a fiduciary obligation to the beneficiaries.").

[15] 204 F.R.D. 296.

[16] *Id*. at 299.

[17] *Lockheed Corp. v. Spink*, 517 U.S. 882, 889-90 (1996) (holding that when a sponsor of a plan alters terms of the plan, adopts, modifies, or terminates a welfare plan it is not acting as a fiduciary but more like a trust settler); *see also Bland*, 401 F.3d at 788 (noting that "[d]ecisions relating to the plan's amendment or termination are not fiduciary decisions").

[18] *See Bland*, 401 F.3d at 788. But *see id*. at 788 (noting that matters of plan management include investments of a pension fund and communicating to employees regarding administration of a plan).

[19] *Wachtel v. Health Net, Inc.*, 482 F.3d 225 (3d Cir. 2007).

[20] *Id*. at 234.

[21] The court noted four characteristics that made Health Net different from other fiduciaries. First, Health Net was seeking legal advice for itself and not the beneficiaries of the plan. Second, there is a structural conflict of interest because Health Net pays benefits from the same fund where it makes its profits. Third, insurers face the conflict of trying to manage multiple ERISA plans at once, sometimes with competing interests. Fourth, Health Net paid for its legal advice out of its own assets and not the assets of the beneficiaries. *See* 482 F.3d at 234-36.

[22] *See* ERISA § 409, 29 U.S.C.A. § 1109.

[23] 178 F.3d 1058 (9th Cir. 1999).

[24] *Id*. at 1065-66 (providing policy reasons for not following an expansive version of the fiduciary exception, for example, when a trustee seeks legal advice for himself he is no longer working on behalf of the beneficiaries); *see also Fischel*, 191 F.R.D. at 609 (endorsing the *Mett* analysis to determine is the fiduciary exception should be applied); *Geissal*, 192 F.R.D. at 624 (recognizing the *Mett* analysis as "protect[ing] the rights of the administrator where the interests of the administrator and the plan beneficiaries diverge").

[25] *Geissal*, 192 F.R.D. at 624-25; *see also Fortier v. Principal Life Ins. Co.*, No. 5:08-CV-5-D(3), 2008 WL 2323918, at *2 (E.D.N.C. June 2, 2008) (refusing to apply fiduciary exception where communication between fiduciary and counsel was in relation to threatened litigation).

[26] *See, e.g., Martin v. Valley Nat'l Bank of Ariz.*, 140 F.R.D. 291, 323-24 (S.D.N.Y. 1991); Donovan, 90 F.R.D. at 587.

[27] *See Garner*, 430 F.2d at 1104 (identifying indicia of "good cause" showing); *see generally Tatum v. R.J. Reynolds Tobacco Co.*, No. 1:02-CV-373, 247 F.R.D. 488, 495 (M.D.N.C. 2008) (acknowledging *Garner* as source of good cause analysis).

[28] *See Garner*, 430 F.2d at 1104 (identifying indicia of "good cause" showing).

[29] *See, e.g., Washington-Baltimore Newspaper Guild*, 543 F. Supp. at 909 n.5 (noting that the "good cause" requirement from *Garner* should be limited to the corporate setting, because in a trustee relationship there is no legitimate reason for the trustee to keep information from the trust beneficiaries). For a detailed discussion of the "good cause" requirement *see Craig C. Martin & Matthew H. Metcalf, The Fiduciary Exception to the Attorney-Client Privilege*, 34 TORT & INS. L.J. 827, 844-46 (1999).

[30] *See* Fed. R. Civ. P. 26(b)(3).

[31] *Hickman v. Taylor*, 329 U.S. 495, 510-11 (1947).

[32] In relevant part, Fed. R. Civ. P. 26(b)(3) provides:
"[A] party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent). But, subject to Rule 26(b)(4), those materials may be discovered if … the party shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means. … If the court orders discovery of those materials, it must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation."

[33] The first case to apply the fiduciary exception in the ERISA context specifically noted that the exception did not easily apply to the work-product doctrine as well. *See Donovan*, 90 F.R.D. at 587 (stating that the fiduciary exception "does not translate easily into the context of the work-product immunity," partly because the right to assert the fiduciary exception belongs to the client, while the right to assert the work-product doctrine "belongs at least in part, if not solely, to the attorney and not the client").

[34] *See Wildbur v. ARCO Chem. Co.*, 974 F.2d 631, 646 (5th Cir. 1992) ("Because the attorney work product doctrine fosters interests different from the attorney-client privilege, it may be successfully invoked against a pension plan beneficiary even though the attorney-client privilege is unavailable."); *In re Int'l Sys. & Controls Corp. Sec. Litig.*, 693 F.2d 1235, 1239 (5th Cir. 1982) (noting that "*Garner's* rationale indicates that it was not intended to apply to work product"); *Henry v. Champlain Enter., Inc.*, 212 F.R.D. 73, 88 (N.D.N.Y. 2003) (recognizing that the premise of the work product doctrine "is to protect the attorney's mental impressions and opinion," which argues for inapplicability of the fiduciary exception).

[35] *See, e.g., Cobell v. Norton,* 213 F.R.D. 1, 11 (D.D.C. 2003) (stating that the work product doctrine should not be used to shield trust documents from beneficiary as the "real client"); *Everett v. USAir Group, Inc.*, 165 F.R.D. 1, 5 (D.D.C. 1995) (stating that plan beneficiaries are the "real client[s]" and cannot be barred from seeing attorney work product); *Martin* 140 F.R.D. at 320 ("the rule does not give an attorney the right to withhold work product from his own client").

[36] *See Martin*, 140 F.R.D. at 326.

[37] *Cobell*, 213 F.R.D.at 11.

[38] *See id*. at 4-6.

[39] *Garner*, 430 F.2d at 1095.

[40] *Id.* at 1096. *See also* Robert R. Summerhays, *The Problematic Expansion of the Garner v. Wolfinbarger Exception to the Corporate Attorney-Client Privilege,* 31 TULSA L.J. 275, 284 (1995).

[41] *Garner*, 430 F.2d at 1103-04 (emphasis added).

[42] *Garner*, 430 F.2d at 1101 ("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.").

[43] *Id*. at 1104. Martin & Metcalf, supra note 30, at 836. *See also Aguinaga v. John Morrell & Co.,* 112 F.R.D. 671, 677 (D. Kan. 1986) (no one factor of the *Garner* test is dispositive).

[44] *See, e.g.,* Stephen A. Saltzberg, *Corporate Attorney-Client Privilege in Shareholder Litigation and Similar Cases: Garner Revisited,* 12 HOFSTRA L. REV. 817, 830, 832 (1984) (further criticizing the *Garner* doctrine for the vagueness of its good cause factors).

[45] Jack Friedman, *Is the Garner Qualification of the Corporate Attorney-Client Privilege Viable After Jaffee v. Redmond?,* 55 BUS. LAW, Nov. 1999, at 243. *See also Saltzberg, supra note 45*, at 842 (a special fiduciary exception to attorney-client privilege for shareholders is unnecessary because other doctrines exist which serve to limit the breadth of attorney-client privilege).

[46] Paul R. Rice, *The Corporate Attorney-Client Privilege: Loss of Predictability Does Not Justify Crying Wolfinbarger*, 55 BUS. LAW, Feb. 2000 at 735, 740 (emphasis in original).

[47] Martin & Metcalf, *supra note* 30, at 838; but *see Shirvani v. Capital Investing Corp.*, 112 F.R.D. 389, 391 (D. Conn 1986) *and Milroy v. Hanson,* 875 F. Supp. 646, 651-52 (D.Neb. 1995) (refusing to apply the *Garner* doctrine).

[48] *See, e.g., Stenovich v. Wachtell, Lipton, Rosen & Katz,* 756 N.Y.S.2d 367, 380-81 (Sup. Ct. 2003); *Zirn v. VLI Corp.*, 621 A.2d 773, 781 (Del. Sup. Ct. 1992), aff'd, 681 A.2d 1050 (Del. 1996).

[49] *See Jaffe Pension Plan v. Household Int'l, Inc.,* No 02-C-5893, 2006 WL 3524016, at *8 (N.D. Ill. Dec. 6, 2006) ("The Seventh Circuit has not decided whether this fiduciary exception applies where shareholders are suing a corporation in a nonderivative action. The Third and Fifth Circuits have held that it does, as have several district courts ... These courts have not, however, adopted a uniform method of applying the exception."); *compare Weil v. Inv. Indicators, Research and Mgmt Inc.*, 647 F.2d 18, 23 (9th Cir. 1981) (declining to apply *Garner* to action where plaintiff was not a current shareholder and action was not a derivative suit).

[50] SEC Rule 10b-5, 17 C.F.R. § 240.10b5-1 (2007); *see, e.g., Ward v. Succession of Freeman,* 854 F.2d 780, 784-90 (5th Cir. 1988); *RMED Int'l, Inc. v. Sloan's Supermarkets, Inc.,* No. 94-Civ-5587PKL-RLE, 2003 WL 41996, *4-6 (S.D.N.Y. Jan. 6 2003); *In re General Instrument Corp. Secs. Litig.,* 190 F.R.D. 527 (N.D.Ill. 2000); *In re Pfizer Inc. Sec. Litig.*, No. 90-Civ-1260(SS), 1993 WL 561125, *10-14 (S.D.N.Y. Dec. 23, 1993); *Cohen v. Uniroyal, Inc.,* 80 F.R.D. 480, 483-85 (E.D.Pa. 1978).

[51] *Fausek v. White,* 965 F.2d 126 (6th Cir. 1992).

[52] Summerhays, *supra* note 41, at 305-06.

[53] Summerhays, *supra* note 41, at n.154.

[54] *See, e.g., In re Omnicom Group, Inc. Secs. Litig.,* 233 F.R.D. 400, 412 (S.D.N.Y. 2006) (noting that plaintiffs in nonderivative cases "are complaining of alleged misconduct injurious to them as members of the investing public rather than injurious to the corporation"); *Moskowitz v. Lopp,* 128 F.R.D. 624, 637 (E.D. Pa. 1989); *In re Atlantic Fin. Mgmt Secs. Litig.*, 121 F.R.D. 141, 146 (D.Mass. 1988); *In re Colocontronis Tanker Secs. Litig.*, 449 F. Supp. 828, 833 (S.D.N.Y. 1978).

[55] Summerhays, *supra* note 41, at 308.

[56] *See In re Omnicom Group*, 233 F.R.D. at 411-12 (noting that "plaintiffs in such a case are seeking personal benefit and are not seeking to benefit the company").

[57] *Garner,* 430 F.2d at 1102, *see also* Summerhays, supra note 41, at 285. The Fifth Circuit relied on two British cases, *Gouraud v. Edison Gower Bell Tel. Co.*, 57 L.T.Ch. 498, 59 L.T. 813 (1888) and *W. Dennis & Sons, Ltd v. West Norfold Farmers' Manure & Chem. Co.*, 2 All E.R. 94, 112 L.J.Ch. 239 (1943) as authority for its conclusion.

[58] Restatement (Second) of Trusts § 173 (1959); *see, e.g., Torian v. Smith,* 564 S.W.2d 521, 526 (Ark. Sup. Ct. 1978); *Riggs Nat'l Bank v. Zimmer,* 355 A.2d 709, 714 (Del. Ch. Ct. 1976) (policy requiring full disclosure to beneficiaries is more important than the policy behind the attorney-client privilege).

[59] *See, e.g., Mett,* 178 F.3d at 1064 (attorney's advice to trustee privileged because sought in midst of federal criminal investigation of trustee); *see also Martin & Metcalf, supra* note 30, at 833, Restatement (Second) of Trusts § 173.

[60] *Huie v. DeShazo,* 922 S.W.2d 920, 921 (Tex. 1996).

[61] *Wells Fargo Bank v. Superior Court*, 990 P.2d 591, 597 (Cal. Sup. Ct. 2000). *See also* Jack A. Falk, Jr., *The Fiduciary's Lawyer-Client Privilege: Does it Protect Communications from Discovery by a Beneficiary?*, 77 FLA. B.J., Mar. 2003, n. 76 at 23, 24.

[62] *Wells Fargo Bank*, 990 P.2d at 599; Huie, 922 S.W.2d at 924-25.

[63] *Huie*, 922 S.W.2d at 921; Wells Fargo Bank, 990 P.2d at 597.

[64] N.Y. C.P.L.R. 4503(a)(2)(A)(ii) (McKinney 2007).

[65] *Firestone Tire and Rubber Co. v. Bruch,* 489 U.S. 101, 110 (1989) (citing to ERISA legislative history, H.R. REP. NO. 93-533, at 11 (1973)); *accord Mertens*, 508 U.S. at 255 (applying trust law principles to interpretation of ERISA statutory language, in light of "ERISA's roots in the law of trusts").

[66] *Garner*, 430 F.2d at 1103.

[67] Unif. Partnership Act § 404 (1997), 6 U.L.A. 1 (2001).

[68] *Meinhard v. Salmon*, 249 N.Y. 458, 464 (N.Y. 1928).

[69] *Lugosch v. Congel,* 219 F.R.D. 220, 243 (N.D.N.Y. 2003) ("The fiduciary exception is not limited to the corporate realm nor shareholder derivative actions. The exception encompasses fiduciary relationships such as ... general partners in both general and limited partnerships.").

[70] *Lugosch,* 219 F.R.D. at 244-45.

[71] *Continental Ins. Co. v. Rutledge & Co.*, No. Civ. A. 15539, 1999 WL 66528, at *2 (Del. Ch. Ct. Jan. 26, 1999) ("A clear-cut dispute between Plaintiffs and the Defendants arose ... when the Plaintiffs expressly indicated their intent to withdraw from [the partnership] ... Defendants [then] consulted their own legal counsel. At the point where an attempt to withdraw was imminently clear to both Plaintiffs and Defendants, the two no longer shared a mutuality of interests ... that mutuality of interest is a prerequisite to the fiduciary duty exception ... .").

[72] *In re Subpoena Duces Tecum Served on Rosenman & Colin,* No. M8-85 (RLE), 1996 WL 527331, at *7 (S.D.N.Y. Sept. 16, 1996) (finding that the attorney "did not undertake to represent the limited partners … no attorney-client relationship existed between the limited partners and [the attorney] … The limited partners have no right to [the attorney's] files because they have no authority to waive the attorney-client privilege of the actual clients. [The attorney] owed no duty to the plaintiffs because of their status as limited partners.").

[73] *Abbott v. Equity Group*, No. Civ. A. 86-4186, 1988 WL 86826, at *2 (E.D. La. Aug. 10 1988) (referencing provision of Louisiana civil code giving partners broad rights to inspect partnership records and books). *Compare Urban Box Office Network, Inc. v. Interfase Managers*, L.P., No. 01-Civ-8854 (LTS), 2004 WL 2375819 (S.D.N.Y. Oct. 21, 2004) (construing Texas law; declining to give plaintiffs an absolute right to inspect privileged documents absent good cause).

[74] *See In re ML-Lee Acquisition Fund II, L.P.*, 848 F. Supp. 527, 564 (D.Del 1994); *Ferguson v. Lurie*, 139 F.R.D. 362, 366 (N.D. Ill. 1991).

[75] *See In re ML-Lee Acquisition Fund II, L.P.*, 848 F. Supp. at 536-37 (granting limited partners' motion to compel production of partnership formation documents where plaintiffs were limited partners who joined partnership after formation and who alleged they were misled as to partnership worth and where plaintiffs demonstrated good cause).

ABOUT THE AUTHORS

FREDERICK A. BRODIE is a partner at Pillsbury Winthrop Shaw Pittman LLP in New York, NY. Mr. Brodie's practice covers a broad spectrum of commercial matters, including ERISA and employee benefits cases, state and federal appeals, contract disputes and class actions. Prior to beginning his practice at Pillsbury's predecessor firm in 1989, Mr. Brodie served as law clerk for Judge Joseph L. Tauro of the U.S. District Court for the District of Massachusetts and Judge Bruce M. Selya of the U.S. Court of Appeals for the First Circuit. Mr. Brodie has coauthored chapters in three treatises published by Thomson West: *Business and Commercial Litigation in Federal Courts* (2d) (Chapter 79, ERISA), *Commercial Litigation in New York State Courts* (2d) (Chapter 80, Theft or Loss of Business Opportunities) and *Successful Partnering Between Inside and Outside Counsel* (2000) (Chapter 55, Employee Benefits). He is also the Coeditor of *ERISA Fiduciary Law* (Second Edition), and coauthor of the New York Law Journal's quarterly column on developments in New York's intermediate appellate courts. Mr. Brodie graduated from Yale Law School, where he was Executive Editor of the Yale Journal on Regulation, and earned his undergraduate degree at Brown University.

WEST Key AUTHORS

KENNETH A. NEWBY is a senior associate in Pillsbury's Litigation practice. Mr. Newby has a wide range of experience in the federal and state courts, as well as in international arbitrations. His primary practice concentrates on representing large corporations in international project disputes, bondholder litigation, commercial lease disputes and other complex commercial disputes. Mr. Newby graduated from the University of Connecticut School of Law, where he was Notes & Comments Editor of the Connecticut Public Interest Law Journal. He earned his undergraduate degree at Morehouse College.

The authors gratefully acknowledge the contributions of Anne C. Lefever, a litigation associate at Pillsbury Winthrop Shaw Pittman LLP, in preparing this paper.

THOMSON REUTERS RESOURCES RELATED TO THIS TOPIC

For assistance in understanding the many issues surrounding The Fiduciary Exception to the Attorney-Client Privilege, please consult the following resources on Westlaw® and in West print publications.

- The Fiduciary Exception to the Attorney-Client Privilege
- Business and Commercial Litigation in Federal Courts (print and online)
- Successful Partnering Between Inside and Outside Counsel (print and online)
- Commercial Litigation in New York State Courts (print and online)
- Attorney-Client Privilege in the United States, 2d
- Corporate Counsel's Guide to the Attorney-Client, Work-Product and Self-Evaluative Privileges

FOR MORE INFORMATION ABOUT THOMSON REUTERS RESOURCES, CALL 1-800-248-2449 OR VISIT WEST.THOMSON.COM/CORPORATE.

Thomson Reuters is the world's leading source of intelligent information for businesses and professionals. Thomson Reuters shares are listed on the New York Stock Exchange® (NYSE: TRI); Toronto Stock Exchange (TSX: TRI); London Stock Exchange (LSE: TRI); and Nasdaq (NASDAQ: TRIN).

For more information visit **west.thomson.com/corporate**
or contact your West representative.

ANSWER AND ADVISE WITH CONFIDENCE

WEST®

THOMSON REUTERS™