Advanced ERISA Claims Handling

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I. Introduction

The aim of this presentation is to explore issues that courts and outside counsel often find significant in litigating ERISA benefit determination. There is no intent to recommend "best practices," as every claim fiduciary must determine, for itself, what procedures are appropriate for determining claims and reducing bias. However, fiduciaries can benefit by understanding the way in which these issues can be perceived and presented in court.

II. Use of In-House Counsel

Not infrequently, claim personnel find it necessary to consult with in-house counsel for advice on legal issues that arise in a claim. But case law leaves the enforceability of the attorney-client privilege in doubt in several circuits. In-house counsel should be aware of who might ultimately gain access to legal memoranda prepared during the administration of a claim. Fiduciaries should also consider the litigation benefits that can flow from producing evidence establishing that claim personnel sought and followed legal advice.

A. The Fiduciary Exception to the Attorney-Client Privilege

"The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law." *U.S. v. Jicarilla Apache Nation*, 131 S. Ct. 2313, 2320 (2011) (quotation marks omitted). Nonetheless, English common law has long recognized a "fiduciary exception" to this privilege, which generally provides "that when a trustee obtained legal advice to guide the administration of the trust, and not for the trustee's own defense in litigation, the beneficiaries were entitled to the production of documents related to that advice." *U.S. v. Jicarilla Apache Nation*, 131 S. Ct.at 2321. The reasoning was that "the legal advice was sought for the beneficiaries' benefit and was obtained at the beneficiaries' expense by using trust funds to pay the attorney's fees." *Id.*

It was not until the 1970's that courts in the U.S. began to adopt the fiduciary exception. *Id.* The leading American case on the subject is *Riggs Nat. Bank of Washington, D.C. v. Zimmer*, 355 A.2d 709 (Del.Ch.1976), and it is worthwhile to explore its reasoning in some detail, because the court's explanation for the exception would counsel against applying it in the ERISA claim context.

In *Riggs*, the beneficiaries of a trust sued to surcharge the trustees for breach of trust in connection with certain tax matters. The beneficiaries sought to compel production of a legal memorandum, which had been written a year before the surcharge litigation, and which concerned an action the trustees had commenced for instructions, and which also was "in anticipation of potential tax litigation on behalf of the trust with the State of Delaware" *Riggs*, 355 A.2d at 710. The tax issue addressed in the memorandum was the same tax issue that was the subject of the surcharge litigation.

Riggs held that the legal memorandum "was prepared ultimately for the benefit of the beneficiaries of the trust, and not for the purpose of the trustees' own defense in any litigation against themselves." 355 A.2d at 711. In explaining this determination, the court cited several factors:

- When the memorandum was prepared, none of the pending or threatened litigation involved the trustees personally, "suggest[ing] that the legal assistance to the trustees would be rendered only in their service to the beneficiaries." *Id.*

- "[T]here is nothing before the Court to suggest that the purpose of the … memorandum was defensive on the trustees' part." *Id.*

- "[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." *Id.* at 711-12.

The court reiterated the significance of the fact that the legal fees were paid from trust assets: "I conclude that the legal services were performed at the request of the trustee for the benefit of the beneficiaries of the trust. Indeed, were this not the case, it may have been improper to charge the trust estate with cost of the legal services." *Id.* at 712.

Following this analysis, the court held that the trustees could not invoke the attorney-client privilege to shield the memorandum from the beneficiaries:

> With these principles in mind, it is apparent that the trustee's claim of attorney-client privilege here is unfounded. 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. … 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 fiduciary obligations owed by the attorney at the time he prepared the memorandum were to the beneficiaries as well as to the trustees. In effect, the beneficiaries were the clients of Mr. Workman as much as the trustees were, and perhaps more so.

Riggs, 355 A.2d at 713-14.

As we will now discuss, various circuits, led by the Ninth, have applied the fiduciary exception in the ERISA context with little consideration of the actual factors that underlay the exception.

B. Rulings in the Circuits in ERISA Cases

The Ninth Circuit was the first circuit court to apply *Riggs* to ERISA trustees, but in so doing, it expanded the exception dramatically. *U.S. v. Evans*, 796 F.2d 264 (9th Cir. 1986), involved a criminal trial against the trustee of a Defined Benefit Pension Plan for embezzlement and other misconduct. The court, citing *Riggs*, held that the district court properly admitted testimony of the trustee's attorney, explaining: "[t]here is no attorney-client privilege between a pension trustee and an attorney who advises the trustee regarding the administration of the plan." 796 F.2d at 265-66.

Of course, *Riggs* did not establish an exception that broad. *Riggs* involved the question whether a trustee could shield relevant, but privileged, legal communications *from the trust beneficiary* in litigation with that beneficiary. *Evans* held that, when an ERISA trustee engaged counsel, there was no attorney-client privilege at all, so that a third party – the government – could compel production of the legal advice. The Ninth Circuit later confirmed that *Evans* had expanded the fiduciary exception beyond its roots. *See In re Grand Jury Proceedings Grand Jury No. 97-11-8*, 162 F.3d 554, 557 (9th Cir. 1998) ("Though *Riggs* does not apply to third parties, this circuit has extended the *Riggs* doctrine to permit the *government* to assert the 'trustee-beneficiary' exception when it is seeking to vindicate the rights of ERISA beneficiaries" [emphasis in original]). The Ninth Circuit tacitly retreated in *U.S. v. Mett*, 178 F.3d 1058, 1064 (9th Cir. 1999), holding that communications between a trustee and his attorney were privileged, and could not be produced unless an exception could be established by the party seeking production.

The Second, Fourth and Fifth Circuits have recognized the fiduciary exception in ERISA cases. Significantly, however, these circuits all recognize that the exception only applies to legal advice on matters of "plan administration." *In re Long Island Lighting Co.*, 129 F.3d 268, 272 (2d Cir. 1997) ("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"); *Solis v. Food Employers Lab. Rel. Ass'n*, 644 F.3d 221, 228 (4th Cir. 2011) (fiduciary exception applied to an ERISA trustee's communications with its attorney regarding plan administration"); *Wildbur v. ARCO Chem. Co.*, 974 F.2d 631, 645 (5th Cir. 1992) ("an ERISA fiduciary cannot assert the attorney-client privilege against a plan beneficiary about legal advice dealing with plan administration").

The Third Circuit has declined to decide whether the fiduciary exception should apply within that circuit. *Wachtel v. Health Net, Inc.*, 482 F.3d 225 (3d Cir. 2007). We will discuss this case further below, as it expressly ruled that the exception would not apply to insurance companies who were ERISA claim fiduciaries.

The Seventh Circuit has suggested that the fiduciary exception applies when ERISA administrators seek legal advice on matters of plan administration, but held that the exception did not apply in the case at hand because the communications at issue concerned non-fiduciary matters. *Bland v. Fiatallis N. Am., Inc.*, 401 F.3d 779, 787 (7th Cir. 2005).

The Sixth Circuit recently issued an unreported decision, *Moss v. Unum Life Ins. Co.*, 2012 WL 3553497 (6th Cir. 2012), in which it noted that the circuit had not addressed the fiduciary exception in the ERISA context, but that it had applied it in a corporate ownership dispute. Without directly discussing application of the exception in ERISA cases, it affirmed the district court's decision that the exception did not apply to the documents at issue.

C. Exceptions to the Fiduciary Exception

Various circuits have recognized situations in which a fiduciary can still assert the attorney-client privilege to shield legal communications from beneficiaries, notwithstanding the existence of the fiduciary exception to the privilege.

1. Advice Concerning the Fiduciary's Personal Liability

Where the legal advice concerns a fiduciary's personal liability (for breach of fiduciary duty, for example), the exception does not apply. *Solis v. Food Employers Lab. Rel. Ass'n*, 644 F.3d 221, 228 (4th Cir. 2011).

The question can arise about when the interests of the fiduciary and the beneficiary have diverged enough that the legal advice concerns the fiduciary's own potential liability, rather than administration of the plan. Sometimes the line is easy to draw. In *Moss v. Unum Life Ins. Co.*, 2012 WL 3553497 (6th Cir. Aug. 17, 2012), the exception did not apply to legal memoranda created after litigation had been filed, even though a final administrative determination had not been made. Pre-litigation, the line may be less clear. *Stephan v. Unum Life Ins. Co. of America*, 697 F.3d 917 (9th Cir. 2012), held that the claim fiduciary's interests do not diverge until after the final administrative determination.

2. Advice Concerning Non-Fiduciary Matters

The fiduciary exception does not apply when the fiduciary seeks advice concerning "non-fiduciary" matters, such as plan adoption, amendment or termination. *In re Long Island Lighting Co.*, 129 F.3d 268, 273 (2d Cir. 1997); *Solis v. Food Employers Lab. Rel. Ass'n*, 644 F.3d 221, 228 (4th Cir. 2011) ("Communications between ERISA fiduciaries and plan attorneys regarding non-fiduciary matters, such as adopting, amending, or terminating an ERISA plan, are not subject to the fiduciary exception"); *Bland v. Fiatallis N. Am., Inc.,* 401 F.3d 779, 788 (7th Cir. 2005) ("Decisions relating to the plan's amendment or termination are not fiduciary decisions").

3. Advice Sought By Insurance Companies

By far the most important exception for ERISA claim fiduciaries (which has been recognized by the Third Circuit but rejected by the Ninth Circuit) is that it does not apply to insurers who have discretionary authority to determine claims. *Wachtel v. Health Net, Inc.*, 482 F.3d 225, 230 (3d Cir. 2007); *Stephan v. Unum Life Ins. Co. of America*, 697 F.3d 917 (9th Cir. 2012).

Wachtel concerned a health plan insured by Health Net, which had discretionary authority to determine claims. The court found it significant that Health Net "is not a plan administrator or trustee." *Wachtel*, 482 F.3d at 230. Health Net argued that "an insurance company which contracts with multiple employee benefit plans to provide health insurance to employee-beneficiaries, processes and pays claims using its own assets, obtains legal advice using its own funds, and operates with an eye toward profits … falls outside the scope of the fiduciary exception." *Id.* The court noted that this was an issue of first impression in any court, which caused it to digress into a lengthy exposition on the development of the fiduciary exception in England and America. At the end of that exposition, it noted the two established exceptions to the fiduciary exception (*i.e.*, advice concerning the fiduciary's personal liability and concerning non-fiduciary matters), and stated that they share the common feature of permitting the privilege to remain intact when the fiduciary's interests diverge sufficiently from the beneficiary's interests.

Wachtel then got to the heart of the matter:

> ERISA fiduciaries, however, come in many shapes and sizes, and we do not believe that the logic underlying the fiduciary exception applies equally to all. We conclude that the fiduciary exception does not apply to an insurer like HN-NJ and its corporate parents because the plaintiff-beneficiaries are not the "real" clients obtaining legal representation.

Wachtel, 482 F.3d at 234.

Wachtel cited several factors to support its conclusion:

- An ERISA beneficiary has no ownership interest in the insurer's assets before a benefit is paid. "This convergence of management and ownership places an insurer like HN-NJ in a different position than other ERISA fiduciaries to whom the fiduciary exception has been applied, and demonstrates that HN-NJ has a substantial and legitimate interest in the management of its assets – even while it engages in fiduciary acts." 482 F.3d at 234.

- The rule that insurers have a structural conflict of interest in determining claims – *i.e.*, that they have a motivation to protect their own financial interests – "undermines the argument that when an insurer retains counsel, the real clients being served are the beneficiaries." 482 F.3d at 235. Thus, claimants cannot argue that fiduciaries are acting in their self-interest for abuse of discretion review, while simultaneously acting in the beneficiary's interest for purposes of the fiduciary exception.

- Insurers owe distinct duties to each of its customers. Accordingly: "[e]ven while acting as a loyal fiduciary to the beneficiaries of one plan, HN-NJ 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. Again, we see that HN-NJ and the Health Net companies have interests larger and distinct from those of its beneficiaries." *Id.*

- Insurers pay for legal services out of their own assets: "when a trustee pays counsel out of trust funds, rather than out of its own pocket, the payment scheme is strongly indicative of the beneficiaries' status as the true clients." 482 F.3d at 235-36.

Putting these factors together, the court held:

> Together, these four factors – unity of ownership and management, conflicting interests regarding profits, conflicting fiduciary obligations, and payment of counsel with the fiduciary's own funds – indicate 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. Were the insurer's counsel to also represent the beneficiaries who seek to maximize their benefit payments, that counsel would face a direct conflict of interest under any standard of legal ethics. It would be odd indeed if ERISA were to force lawyers into precisely this conflicted role.

Wachtel, 482 F.3d at 236.

Apart from the question whether the beneficiaries are the real clients, the court also held that the insurer-fiduciary's duties of disclosure did not support the fiduciary exception, primarily because "Congress did not intend to expand the full panoply of trustees' obligations to every entity which might be designated a fiduciary under ERISA. … [S]imply because an insurer has certain limited fiduciary obligations under ERISA, those obligations are not coextensive with the common law obligations of a trustee." *Wachtel*, 482 F.3d at 236. For example, it noted that insurers are not required to keep their assets in trust.

Wachtel then identified two additional factors supporting its determination. First, the fiduciary obligations of insurers who are claim administrators are not well-settled, and "[t]he need for the attorney-client privilege is at its height where the law with which the client seeks to comply is complicated and the penalties for noncompliance are great." *Wachtel*, 482 F.3d at 237.

Second, applying the fiduciary exception to insurers "will cause insurers to reevaluate their relationships with ERISA plans." *Id.* The court continued:

> Some may choose to cease providing insurance for benefit plans altogether. Others may increase their charges for ERISA-regulated customers to reflect the added risk that they may lose their ability to obtain confidential legal advice. Perhaps others will simply decline to fully inform their attorneys of all relevant facts. None of these outcomes is desirable for ERISA beneficiaries. These concerns, of course, are merely variations of ones that have been rejected by courts regarding the fiduciary exception as applied to trustees, corporate managers, and ERISA plan administrators. They are, however, thumbs on the scale and help to tip the balance.

Id.

The Fourth Circuit cited *Wachtel* favorably in *Solis*, 644 F.3d at 227. The Supreme Court also cited *Wachtel*, among other cases, as an example of federal Courts of Appeal applying the exception. *U.S. v. Jicarilla Apache Nation*, 131 S. Ct. 2313 (2011).

The Ninth Circuit, as noted above, disagreed with *Wachtel*. In *Stephan v. Unum Life Ins. Co. of America*, 697 F.3d 917, it first observed that "[e]very district court that has considered the question since [*Wachtel*], however, has rejected *Wachtel*'s approach and held that the fiduciary exemption does apply to insurance companies." 697 F.3d at 931, n. 6.

Stephan held that there was no reason to distinguish between ERISA trustees and insurance-company fiduciaries: "[t]he duty of an ERISA fiduciary to disclose all information regarding plan administration applies equally to insurance companies as to trustees." 697 F.3d at 931. More specifically, *Stephan* held that ERISA did not provide that disclosure was less important when an insurer is the decision-maker, nor did it impose a lesser fiduciary duty on an insurer than a trustee. As a result, "[t]here is therefore no principled basis for excluding insurers from the fiduciary exception." 697 F.3d at 932.

D. Has the Supreme Court Changed the Analysis?

The Supreme Court recently addressed the fiduciary exception. *U.S. v. Jicarilla Apache Nation*, 131 S. Ct. 2313 (2011), involved a dispute whether the US government, in its capacity as trustee of Native American funds, was required to disclose privileged material. *Jicarilla* noted that *Riggs* was the leading American case on the exception. Though *Jicarilla* dealt with a different law than ERISA, and though the federal government obviously differs from an ERISA fiduciary, much of the Court's language and reasoning is directly applicable to ERISA disputes.

Jicarilla observed that the government's "trustee" status is governed by statute rather than common law, and that "Congress may style its relations with the Indians a 'trust' without assuming all the fiduciary duties of a private trustee, creating a trust relationship that is 'limited' or 'bare' compared to a trust relationship between private parties at common law." 131 S. Ct. at 2323.

Jicarilla gave prominence to the source of funds to pay the attorney in the analysis: "[c]ourts 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." *Id.* (quotation marks omitted). *Jicarella* held that "[t]he payment structure confirms our view that the Government seeks legal advice in its sovereign capacity rather than as a conventional fiduciary of the Tribe." *Id.*

Regarding the duty of disclosure, the Court held: "The United States, however, does not have the same common-law disclosure obligations as a private trustee. As we have previously said, common-law principles are relevant only when applied to a specific, applicable, trust-creating statute or regulation." *Jicarilla*, 131 S. Ct. at 2329.

To be sure, there are differences between an ERISA fiduciary and the United States Government. As *Jicarilla* noted:

> The difference between a private common-law trust and the statutory Indian trust follows from the unique position of the Government as sovereign. The distinction between "public rights" against the Government and "private rights" between private parties is well established. The Government consents to be liable to private parties and may yield this consent upon such terms and under such restrictions as it may think just. This creates an important distinction between cases of private right and those which arise between the Government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments.
>
> Throughout the history of the Indian trust relationship, we have recognized that the organization and management of the trust is a sovereign function subject to the plenary authority of Congress.

Jicarilla, 131 S. Ct. at 2323 (quotation marks and citations omitted).

Though *Jicarilla* is not on all fours with claims of fiduciary exception in ERISA cases, it should provide help in arguing against the exception in those circuits that have not yet adopted it, and also give some impetus to ask for reconsideration or narrowing of the exception in circuits that have previously adopted it. At the very least, it should be useful in asserting that circuits should adopt the Third Circuit's limitation on the exception as applied to insurers who serve as claim fiduciaries.

III. Relying on Employers

Employers play an interesting role in ERISA benefit determinations. Of course, employers establish and maintain the plans, and are typically the Plan Administrators. One would think that a claim administrator could rely on the employer's input in claim determinations, but that is not as clear-cut as one might hope.

In *Bowling v. PBG Long-Term Disability Plan*, 584 F. Supp. 2d 797 (D. Md. 2008), the question was whether the claim fiduciary acted arbitrarily in accepting the employer's statement of the claimant's wages after the employer changed the amount reported, or whether it should have pressed for an explanation. The court called it “a close question,” but ultimately ruled that the plan language permitted the claim fiduciary to rely on the employer’s wage statement:

> VPA’s failure to request an explanation leaves a confusing record as to Bowling’s true annual base salary, making it more difficult to assess whether VPA’s decision resulted from a deliberate, principled reasoning process and was supported by substantial evidence. …
>
> However, the nature of the contested figure – an employee’s annual base salary – supports the reasonableness of VPA’s reliance on PBG’s statement of Bowling’s salary. The Plan itself states that “all decisions regarding a Participant’s ... Eligible Pay shall be made by [PBG]” … As the Plan dictates that the employer, not VPA, determines Eligible Pay, and the Plan does not require a fiduciary to inquire into information provided by the employer, it was not unreasonable for VPA to rely on PBG’s assertion that Bowling’s correct annual base salary was $30,056.

584 F. Supp. 2d at 808-09 (citations and quotation marks omitted).

Claim fiduciaries can be faulted for not investigating other matters that would appear to be equally within the exclusive purview of the employer. In *Cannon v. Wittek Cos., Int’l*, 60 F.3d 1282 (7th Cir. 1995), the coverage issue boiled down to the question whether the claimant had been terminated or laid off. The employer said the claimant had been terminated, but there was some evidence suggesting a layoff. The court held that the claim fiduciary could not rely on what the employer said:

> Blue Cross admits it owes a fiduciary obligation to Cannon under the plan, but argues that it was entitled to rely on information supplied by the employer, in this case Wittek, in assessing Cannon’s eligibility. Blue Cross ignores, however, the obligation created by the contract itself to review denials of claims when requested to do so by the insured. … Blue Cross admits that it failed to read the materials submitted by Cannon as part of her appeal and instead relied entirely on Wittek for information about Cannon’s employment status. But Blue Cross, an admitted fiduciary of Cannon, was contractually obliged to review her claim. Presumably, this contractual obligation extended to reviewing relevant documents submitted by Cannon as part of her appeal. Thus, we think that Cannon can make a strong case on remand for Blue Cross’ breach of fiduciary duty.

60 F.3d at 1285-86.

Employers can cause other types of difficulties for claim fiduciaries. In *Kellner v. First Unum Life Ins. Co.*, 589 F.Supp.2d 291 (S.D.N.Y. 2008), the employer, a law firm, generally supported the claim for disability benefits made by a former partner. Subsequently (after the firm learned the claim experience was increasing the cost of coverage), the firm told First Unum that Kellner had been caught stealing client funds, and the firm had "allowed her" to file for disability rather than be terminated. Kellner ultimately was disbarred when further theft of client funds came to light. First Unum reconsidered the claim, conducted additional medical reviews, and determined that Kellner did not qualify for benefits.

In court, Kellner argued, among other things, that First Unum was influenced by a conflict of interest because the employer was pushing to have the claim terminated. The court evaluated the argument closely before rejecting it:

> Kellner points to emails dated April 15, 2002 suggesting that, during Defendant's renegotiation of its contract with Nixon [the employer], her claim was targeted for reassessment. The Court finds these circumstances troubling. Nonetheless, these emails do not establish that the "high-dollar value" of Kellner's claim caused First Unum to terminate her benefits.
>
> There is … evidence in the record that it was Nixon's financial concerns—not First Unum's—that led Kellner's claim to be reassigned to Karen Antoine and reassessed by Dr. Reeder. Lastly, at oral argument Kellner conceded that the information relating to Kellner's misconduct, including her January 25, 2002 disbarment, justified Defendant's reevaluation of her claim.
>
> Moreover, the troubling nature of the correlation between these emails and Defendant's re-evaluation of Kellner's claim is tempered by other contemporaneous emails suggesting that at least some of Defendant's employees urged caution and deliberation with respect to its reassessment of Kellner's eligibility for benefits. For example, an April 12, 2002 email referring to Kellner's claim stated that "a thorough medical evaluation" was required and that "there's always the possibility that it is a fraudulent claim, but the investigation could take some time." … Thus, the evidence of a potential conflict affecting Kellner's claim does not outweigh the other evidence supporting Defendant's determination that Kellner was not entitled to benefits under the LTD Plan.

589 F. Supp. 2d at 310 (citations omitted).

In *McGravy v. Met. Life Ins. Co.*, 690 F.3d 176 (4th Cir. 2012), tension in the employer-insurer relationship percolates just below the surface. *McGravy* involved a seemingly straightforward case in which a parent paid premiums for dependent life insurance coverage for her daughter, even after her daughter was too old to be eligible under the plan terms. After the daughter's murder, the insurer denied the claim and sought to refund premiums paid (presumably to the employer). The Court held that plaintiff could sue for breach of fiduciary duty, and could seek to estop Met Life from denying benefits. Unstated was the fact that the employer was most likely tracking participants and collecting premiums, so that Met Life probably had no knowledge that McGravy was paying premiums for her daughter until after the claim was made.

IV. The Nature of the Sickness or Injury

Though impossible to quantify, and almost never expressly mentioned in a court's decision as a basis for its ruling, experience teaches that a court is more likely to find an abuse of discretion when confronted with a plaintiff with a particularly sympathetic sickness or injury. Not infrequently, such cases establish bad precedent. Consider the following claims:

- Bicycle accident resulted in a spinal cord injury, rendering plaintiff a quadriplegic. *Stephan v. Unum Life Ins. Co. of Am.*, 697 F.3d 917, 921 (9th Cir. 2012) (allegation of conflict of interest will often preclude summary judgment, and the fiduciary exception to the attorney-client privilege applies to insurers).

- Murder of life insurance plan participant's daughter. *McGravy v. Met. Life Ins. Co.*, 690 F.3d 176 (4th Cir. 2012) (participant can use collateral estoppel to recover benefits not provided in plan).

- Advanced colon cancer resulting in radical hemicolectomy and experimental chemotherapy, in which several gallons of drugs were inserted into plaintiff's peritoneal cavity. *McCauley v. First Unum Life Ins. Co.*, 551 F.3d 126, 128 (2d Cir. 2008) (holding that First Unum had a history of bias).

Perhaps these examples are merely instances of correlation without causation. And it is certainly true that courts uphold benefit denials involving severe injuries or unusual sicknesses. But counsel must be aware of issues, like the nature of the injury or sickness, that could motivate a court to find a reason to rule that the claim fiduciary abused its discretion.

V. Treating Physicians as Advocates

It is well-established that claim fiduciaries are not obligated to defer to the opinions of a treating physician. *Black & Decker Disability Plan v. Nord*, 538 U.S. 822, 833, 123 S. Ct. 1965, 1972, 155 L. Ed. 2d 1034, 1044 (2003) ("we hold, courts have no warrant to require administrators automatically to accord special weight to the opinions of a claimant's physician").

The presentation will discuss fact patterns in which treating physicians cross the line from reporting medical facts and opinions to advocacy, and consider what, if any, response is warranted.

VI. Conclusion

There is no simple answer to how a claim fiduciary, in-house counsel, or litigation counsel should respond when issues like those discussed in this paper arise in a claim. But experienced practitioners should recognize these issues when they do arise, and evaluate how (if at all) they should affect decisions in the claim administration, litigation, and/or settlement process.