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United States District Court,
S.D. New York.

In re JP MORGAN CASH BALANCE LITIGATION

No. 06 Civ. 0732 HB DFE. | April 30, 2007. |
Adhered to On Reconsideration May 21, 2007.

Opinion

MEMORANDUM AND ORDER

EATON, Magistrate J.

***1** Judge Baer's opinion of October 30, 2006 described the "notice" claims in the Consolidated Complaint (Counts IV, V and VI). *In re J.P. Morgan Cash Balance Litigation,* 460 F.Supp.2d 479, 490-92 (S.D.N.Y.2006). These Counts primarily complain about inadequate notice concerning amendments that Defendants and their predecessors made to ERISA Plans prior to 1999. In discovery, Plaintiffs have requested documents related to later amendments, ones that were made to the Plans during the years 1999 through 2005. At this early stage, Defendants are not contesting the relevance of those requests. Defendants have supplied copies of drafts of ERISA section 204(h) notices and drafts of Summary Plan Descriptions ("SPDs") concerning Plan amendments that were made during 1999-2005. They have withheld attorney-client communications written about those drafts. But they are not claiming privilege as to any communication that specifically discussed a prior section 204(h) notice, or a completed SPD, or a past Summary of Material Modification.

On April 20, 2007, Defendants submitted the disputed documents for my *in camera* review. I have reviewed 78 of the 80 documents listed on the updated April 20 privilege log; Plaintiffs' March 15 letter at footnote 2 said they are not moving to compel Documents 100 and 118, and therefore Defendants did not submit those two documents. I have also reviewed the redacted and unredacted versions of the 15 documents listed on the updated April 20 redaction log.

I find that the attorney-client privilege attached to each of the disputed documents (and to each of the redacted portions of the 15 redacted documents). In moving to compel production, Plaintiffs invoke the fiduciary exception to the attorney-client privilege. "[T]here is general agreement that the burden of proving the preliminary facts of exceptions to the privilege is on the opponent of the privilege claim." 24 Wright & Graham, *Federal Practice and Procedure: Evidence* § 5507, text at n. 45 (2006 ed.). For example, Judge Haight has written: "The burden shifts to the party seeking disclosure when that party contends that communications to which the attorney-client privilege would otherwise attach fall within the crime-fraud exception...." *Renner v. Chase Manhattan Bank,* 2001 WL 388044, *2 (S.D.N.Y. Apr.17, 2001), citing *United States v. Jacobs,* 117 F.3d 82, 87 (2d Cir.1997).

The Second Circuit rejected an invocation of the fiduciary exception in an ERISA case named *In re Long Island Lighting Co.,* 129 F.3d 268 (2d Cir.1997). Judge Jacobs wrote in pertinent part:

> After sorting out and directing the production of certain unprivileged documents that are not at issue here, Magistrate Judge Orenstein ruled that the remaining documents concern *amendments* to the plan-as to which LILCO did not act in a fiduciary capacity-rather than *administration* of the plan-as to which LILCO did act as a fiduciary. Relying on *Siskind v. Sperry Retirement Program,* 47 F.3d 498, 505 (2d Cir.1995), which holds that amendment of a retirement plan is not a fiduciary function under ERISA, the magistrate judge concluded that the documents were insulated from discovery by the attorney-client privilege (and adhered to that conclusion following a motion for reconsideration).
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> ***2** ... The district court did not question the magistrate judge's determination that the documents related to plan amendment rather than plan administration, but found that LILCO "waived its privilege over the documents in question by using the same lawyer for amendment purposes as it used to represent the fiduciary of the employees."
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> ... [B]y authorizing the employer to act as plan fiduciary in the first place, *see* ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A), ERISA has surely absolved the employer of the lesser conflict of using a single lawyer (or its in-house counsel) to advise it in both capacities. Instead, the issue presented here is a discovery question that depends on the existence (or not) of a fiduciary duty that is located in the employer, not the lawyer.
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> In *M.A. Everett v. USAir Group, Inc.,* 165 F.R.D. 1, 4 (D.D.C.1995) (decided by a court within the same district as *Washington Star*), the district court recognized that an employer does not act as a fiduciary when it decides to form, amend, or terminate a plan, and concluded therefore that "when an employer seeks

> legal counsel solely in its role as employer regarding issues other than plan administration, the employer (not the beneficiaries) is the client and may legitimately assert the attorney-client privilege." *Everett,* 165 F.R.D. at 4. See *In re Unisys Corp. Retiree Medical Benefits Erisa Lit.,* 1994 WL 6883, at *3 (E.D.Pa.1994) (noting the critical distinction between communications regarding fiduciary matters and those regarding non-fiduciary matters). In *Everett,* the administrator of the plan failed to show that any of the disputed documents "relate solely to its nonfiduciary activities or to the formation, amendment or termination of the pension plan." *Everett,* 165 F.R.D. at 4. But in LILCO's case, the magistrate judge specifically found (and no one has questioned) that the disputed documents clearly relate to non-fiduciary matters only. As to those matters, the fiduciary exception does not overcome the attorney-client privilege.

In re Long Island Lighting Co. ["LILCO"], 129 F.3d at 270, 272-73 (emphases in the original).

Two years later, in *Hudson v. General Dynamics,* 73 F.Supp.2d 201, 203 (D.Conn.1999), Judge Arterton conducted an *in camera* examination of documents that gave "legal advice regarding many aspects of potential plan amendments or enhancements, including their disclosure." (Emphasis added.) She ruled:

> ... While such communication could arguably be broadly viewed as "relating to" fiduciary matters insofar as disclosures of plan amendments would affect current plan participants, the Court, however, rejects such an expansive interpretation of the fiduciary exception....

Ibid (emphasis added).

In the case at bar, Plaintiffs' March 21 letter attempted to distinguish *Hudson:*

> ... The Hudson court's holding prohibiting disclosure of legal advice regarding plan changes that were under 'consideration' has no bearing on Plaintiffs' challenge here. Plaintiffs seek disclosure of [attorney-client] documents that are expressly related to the fiduciary function of communicating to plan participants the *impact of completed plan amendments.*

***3** During my *in camera* review of the attorney-client communications, I found none that were discussing the impact of plan amendments that had already been completed. At my request, Defendants confirmed this by letter to me dated April 27, 2007:

> .... We ... confirm that Defendants are not claiming privilege with respect to any communications that specifically discuss completed Summary Plan Descriptions ("SPDs"), past Summaries of Material Modifications ("SMMs"), or prior ERISA § 204(h) notices....
>
> The SPD-related communications for which the privilege is asserted do not specifically discuss the plan amendment process or past ERISA § 204(h) notices. By their nature, SPDs do discuss the then current plan, which is of course in part the result of prior amendments. The SPD communications that are subject to our claim of privilege ... relate to draft future SPDs or the distribution of future SPDs and concern counsels' efforts to ensure that the Plan Administrator complied with the various applicable statutes and regulations with respect to the yet-to-be issued SPD.

I am not sure whether Plaintiffs are satisfied with the above assurances from me and from defense counsel. Plaintiffs waited until 2006 to sue. It may be that, as of 2006, Defendants no longer possessed drafts of the most pertinent amendments (which were made prior to 1999), let alone attorney-client communications about those drafts. Plaintiffs' argument seems to run as follows. In 2001, Defendants had "under consideration" new plan amendments that in some sense may have been "related to" the challenged amendments that were completed prior to 1999. The new amendments could not become effective without a section 204(h) notice. Therefore, Plaintiffs argue that any attorney communication about the draft 204(h) notice was "related to the fiduciary function of communicating to plan participants," and in some sense was "related to" the continuing impact of the amendments that were completed prior to 1999.

In my view, Plaintiffs' argument lacks any sensible limiting principle. Plaintiffs rely heavily on a decision by Magistrate Judge Zimmerman in *Fischel v. Equitable Life Assurance,* 191 F.R.D. 606 (N.D.Cal.2000). However, I see three problems with *Fischel.* First. It acknowledged that in the seminal case of *Riggs Nat'l Bank v. Zimmer,* 355 A.2d 709 (Del.Ch.1976), "the Chancellor was impressed by the facts that the trust paid for the advice...." 191 F.R.D. at 608. Yet Judge Zimmerman did not mention whether the attorneys in *Fischel* had been paid by the Plan or by the Plan Sponsor. In the case at bar, the attorneys were paid entirely by the Plan Sponsor and its predecessor entities; this is "a significant factor" in deciding whether the Plan Sponsor was the real client. *Riggs,* 355 A.2d at 711-12, discussed at Part III B(1) of *Wachtel v. Health Net, Inc.,* 482 F.3d 225, 2007 WL

958572 (3d Cir. Apr.2, 2007). Second. *Fischel* (191 F.R.D. at 609) chose to depart from the *Long Island Lighting* test, an option that is not open to judges within the Second Circuit. Third. *Fischel* (191 F.R.D. at 610 n. 3) relied on page 934 of *Bins v. Exxon Co.,* 189 F.3d 929 (9th Cir.1999), a portion that was rejected five months after *Fischel* by the *en banc* decision in *Bins,* 220 F.3d 1042, 1053 (9th Cir. *en banc* Aug. 10, 2000).

***4** For the reasons stated above, I sustain Defendants' invocation of the attorney-client privilege. None of the disputed documents comes within the fiduciary exception. I deny Plaintiffs' motion to compel production.