

NOTES

READING THE TEA LEAVES: SIFTING THROUGH *JICARILLA* AND *GARNER* TO CONSTRUCT A WORKABLE FIDUCIARY EXCEPTION FRAMEWORK FOR ERISA INSURERS

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READING THE TEA LEAVES: SIFTING THROUGH *JICARILLA* AND *GARNER* TO CONSTRUCT A WORKABLE FIDUCIARY EXCEPTION FRAMEWORK FOR ERISA INSURERS

Ted A. Hages*

INTRODUCTION

Mark secures a new manager-level job with a \$200,000 base salary and a guaranteed bonus of \$300,000 for his first full year of employment. His employer also offers a competitive benefits package, which includes a long-term disability plan. Unfortunately, after only three months on the job, Mark gets into a terrible bicycling crash, rendering him permanently disabled.

Mark informs human resources that he will be applying for disability benefits under the disability plan, but he is told that the administration of the plan has been outsourced to an insurance company. He applies for disability benefits with the insurer responsible for evaluating his eligibility for benefits under the plan and paying them if appropriate. The insurer approves Mark's claim, but deems him eligible for a monthly benefit payment based on only his \$200,000 base salary. Feeling cheated, Mark files an appeal arguing that his benefits should be based on his total compensation of \$500,000. The insurer denies his appeal, stating that he did

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not work a full year prior to the accident and any bonus paid to him would be mere goodwill by his employer.

Mark decides to sue the insurance company. During discovery, he requests to see a memo written by the insurance company's lawyer for the claims analyst that oversaw Mark's claim. The insurer, however, contends that this memo is protected by the attorney-client privilege.

What happens next, strangely enough, depends on where the suit takes place. If Mark's claim is litigated in a federal court in Pennsylvania, New Jersey, or Delaware, then Mark is out of luck. His request to compel production of the memo will be automatically rejected. But, if he happens to be on the West Coast, he will automatically prevail through a common law fiduciary exception to the attorney-client privilege. If he is somewhere in between, the result is uncertain.

This inconsistency and uncertainty in the law denotes a current circuit split in the federal courts of appeal. The Third and Ninth Circuits disagree as to whether a beneficiary of an employee benefit plan can defeat an insurer's assertion of the attorney-client privilege, where the insurer is tasked with evaluating and paying benefit claims as a third-party claims administrator. In the Ninth Circuit, beneficiaries automatically defeat the privilege pursuant to Ninth Circuit caselaw on the fiduciary exception to the attorney-client privilege, and in the Third Circuit, just the opposite. Where the fiduciary exception applies, it precludes fiduciaries who obtain legal advice in the execution of their fiduciary obligations from asserting the attorney-client privilege against their beneficiaries. No circuit beyond the Third and Ninth has yet examined this issue, leaving much uncertainty for benefit plan participants and insurer-fiduciaries across the country.

Many perspectives have been written on whether the Ninth or Third Circuit "got it right," in holding the fiduciary exception *per se* applicable to insurers and *per se* not, respectively. This Note, however, focuses not on which court came to the right result, but rather, it scrutinizes the underlying legal framework that allowed the courts to divide. After reviewing the basic doctrinal test—a two-rationale framework which determines the fiduciary exception's applicability—and how it has been applied both historically and in the circuit split, this Note "reads the tea leaves" that is an uncertain fiduciary exception jurisprudence in an effort to establish uniformity. This is accomplished by a two-part solution. First, this Note extracts the key principles from the Supreme Court's only fiduciary exception case to define the proper doctrinal elements for each part of the two-rationale framework. But even if the courts are in accord as to the exact legal test by which the fiduciary exception should be applied, uncertainty still remains given the pliability of that framework. To resolve this shortcoming, a new prong to the fiduciary exception test for ERISA insurers is proposed: a good cause prong, borrowed from the shareholder derivative

suit context, but modified so that the insurer bears the burden of showing cause for nondisclosure.

Part I of this Note provides background on the fiduciary exception. Part I-A traces the doctrine's trust law origins, whereby the two-rationale framework was established as the legal test for the exception. Part I-B discusses how that test has been extended, focusing on its use in shareholder derivative suits through the *Garner* doctrine. Part II explores the fiduciary exception in ERISA cases, with Part II-A covering trustee-like ERISA cases. Part II-B dives into an ERISA context where the doctrine has not been so easily applied: the insurer-fiduciary context of the circuit split. Part II-C discusses the uncertainty surrounding the split and its causes. Finally, Part III offers a two-part solution to rework the doctrine. In Part III-A, the Supreme Court's *Jicarilla* decision is probed to establish the proper elemental tests for the two-rationale framework. Part III-B then proposes a new doctrinal prong for the fiduciary exception framework in the ERISA insurer context: a good cause prong deriving from *Garner*, but with a modified burden standard.

I. BACKGROUND ON THE FIDUCIARY EXCEPTION TO THE ATTORNEY-CLIENT PRIVILEGE

The attorney-client privilege, in protecting confidential communications between lawyer and client, is one of “the oldest of the privileges for confidential communications known to the common law,”¹ “rank[ing] among the oldest and most established evidentiary privileges.”² The common law governs its application.³ Under the common law, the purpose of the privilege is “to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice.”⁴ The underlying assumption is that sound legal advice depends on a lawyer being fully

¹ *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981).

² *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 165 (2011).

³ FED. R. EVID. 501; *Fisher v. United States*, 425 U.S. 391, 402 n.8 (1976).

⁴ *Upjohn*, 449 U.S. at 389. Courts have construed this purpose narrowly. *See Teleglobe Commc'ns Corp. v. BCE, Inc. (In re Teleglobe Commc'ns Corp.)*, 493 F.3d 345, 360–61 (3d Cir. 2007) (“Communication between counsel and client is not, in and of itself, the purpose of the privilege; rather, it only protects the free flow of information *because* it promotes compliance with law and aids administration of the judicial system.”).

informed by her client, and without an expectation of privacy, clients are less likely to honestly, openly, and fully discuss their circumstances with their lawyer.⁵

While serving important policies, the attorney-client privilege is not without limits.⁶ “[S]ince the privilege has the effect of withholding relevant information from the factfinder, it applies only where necessary to achieve its purpose.”⁷ Courts have recognized several instances where it will give way.⁸ One such instance is the fiduciary exception to the attorney-client privilege.⁹ Where the exception applies, a fiduciary is prohibited from withholding attorney-client correspondence related to the exercise of his fiduciary duties.¹⁰ In other words, “fiduciaries who obtain legal advice in the execution of their fiduciary obligations are precluded from asserting the attorney-client privilege against their beneficiaries.”¹¹

A. *Origins of the Fiduciary Exception in Common Law Trustee Cases*

While American courts were at first skeptical to recognize the fiduciary exception and its English common law origins, American jurisdictions came to adopt the exception in the 1970s.¹² In 1976, *Riggs National Bank v. Zimmer*, the “leading American case on the fiduciary exception,” recognized the doctrine and expounded

⁵ *Upjohn*, 449 U.S. at 389; *Fisher*, 425 U.S. at 403.

⁶ See *Wachtel v. Health Net, Inc.*, 482 F.3d 225, 231 (3d Cir. 2007) (stating that “well-established limitations . . . all are consistent with the purpose of encouraging clients to speak fully with their lawyers without concern” and “[w]here this purpose ends, so too does the protection of the privilege”); *Riggs Nat’l Bank v. Zimmer*, 355 A.2d 709, 713 (Del. Ch. 1976) (stating that “the privilege is an exception to the usual rules requiring full disclosure and its scope can be limited where circumstances so justify”).

⁷ *Fisher*, 425 U.S. at 403; see *Teleglobe*, 493 F.3d at 360 (“Because the privilege carries through policy purposes . . . the Supreme Court has not applied it mechanically.”).

⁸ See, e.g., *Clark v. United States*, 289 U.S. 1, 15 (1933) (ruling the privilege inapplicable where a client “consults an attorney for advice that will serve him in the commission of a fraud”); *Wachtel*, 482 F.3d at 231 (stating that “because the purpose of the privilege is to promote the dissemination of sound legal advice, the privilege will extend only to advice which is legal in nature”); *Laughner v. United States*, 373 F.2d 326, 327 (5th Cir. 1967) (recognizing that the privilege is waived when a “client alleges a breach of duty to him by [his] attorney” in a lawsuit against the attorney).

⁹ *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 171 (2011).

¹⁰ *Id.* at 165.

¹¹ *Wachtel*, 482 F.3d at 226.

¹² *Jicarilla*, 564 U.S. at 170–71.

the primary rationales for it.¹³ In *Riggs*, beneficiaries of a trust estate sought to compel their trustees to reimburse the estate for alleged breaches of the trust.¹⁴ They requested the production of a legal memorandum related to trust administration, but the trustees asserted the attorney-client privilege.¹⁵ Applying the fiduciary exception, the court ruled the memorandum discoverable.¹⁶ In doing so, *Riggs* established the two core rationales for the exception.

The court first relied on what has come to be known as the real client rationale. The *Riggs* court found that the trustees had “obtained the legal advice as ‘mere representative[s]’ of the beneficiaries, because the trustees had a fiduciary obligation to act in the beneficiaries’ interest when administering the trust.”¹⁷ Since the trustees represented the interests of the beneficiaries and acted for their benefit, the trustees were not personally served by the legal advice. Rather, it was the beneficiaries who received the true benefit of the advice, since counsel advised the trustees on matters related to the exercise of their fiduciary duties, which ultimately served the beneficiaries’ interests.¹⁸ Thus, as a mere representative acting on behalf of another, a trustee is not the “real client” in that it is being personally served by the lawyer; rather, it is the beneficiaries who receive the true benefit of the legal advice. In arriving at this conclusion that the beneficiaries were the “real clients,” the *Riggs* court gave weight to multiple factors:

¹³ *Id.* at 171.

¹⁴ *Riggs Nat’l Bank v. Zimmer*, 355 A.2d 709, 710 (Del. Ch. 1976).

¹⁵ *Id.*

¹⁶ *Id.* at 714.

¹⁷ *Jicarilla*, 564 U.S. at 171–72 (explaining *Riggs*); see Mike W. Bartolacci et al., *The Attorney-Client Privilege and the Fiduciary Exception: Why Frank Discussions Between Fiduciaries and Their Attorneys Should Be Protected by the Privilege*, 48 REAL PROP. TR. & EST. L.J. 1, 29 (2013) (“[T]he trustee serves as a representative or proxy for the beneficiary, and thus, the beneficiary is the real client.”).

¹⁸ *Jicarilla*, 564 U.S. at 172. As the *Riggs* court stated, a trustee is only “a mere representative whose function is to attend to the disposition and maintenance of the trust property so that it may be enjoyed by the beneficiaries in the manner provided by the settlor.” 355 A.2d at 712. For this reason, calling the fiduciary exception an “exception” to attorney-client privilege may be a misnomer, as the rationale indicates that no attorney-client privilege exists between the fiduciary and counsel in the first place. See Tyrone Crawford, *Whose Privilege Is It Anyway: How the Fiduciary Exception to the Attorney-Client Privilege Protects ERISA Participants and Beneficiaries*, 30 ABA J. LAB. & EMP. L. 121, 130 (2014). Nevertheless, since the “fiduciary exception” term is the most widely-accepted name by courts and scholars, it will be used here.

(1) [w]hen the advice was sought, no adversarial proceedings between the trustees and beneficiaries had been pending, and therefore there was no reason for the trustees to seek legal advice in a personal rather than a fiduciary capacity; (2) the court saw no indication that the memorandum was intended for any purpose other than to benefit the trust; and (3) the law firm had been paid out of trust assets.¹⁹

Next, as a second rationale for applying the fiduciary exception, the *Riggs* court ruled that “the trustees’ fiduciary duty to furnish trust-related information to the beneficiaries outweighed their interest in the attorney-client privilege.”²⁰ The “substantive fiduciary duties” of the trustees “put[] [the *Riggs*] case in an entirely different context than a simple motion for discovery against a claim of privilege.”²¹ Rather, the “special relationship” between trustee and beneficiary had to prevail, because “[t]he policy of preserving the full disclosure necessary in the trustee-beneficiary relationship [was] ultimately more important than the protection of the trustees’ confidence in the attorney for the trust.”²² “Because more information helped the beneficiaries to police the trustees’ management of the trust, disclosure was, in the court’s judgment, ‘a weightier public policy than the preservation of confidential attorney-client communications.’”²³ As such, the privilege could not be

¹⁹ *Jicarilla*, 564 U.S. at 172. *Riggs* emphasized the third factor: “the 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.” 355 A.2d at 712. The factor draws a “distinction . . . between legal advice procured at the trustee’s own expense and for his own protection and the situation where the trust itself is assessed for obtaining opinions of counsel where interests of the beneficiaries are presently at stake.” *Id.*

²⁰ *Jicarilla*, 564 U.S. at 172; see RESTATEMENT (SECOND) OF TRUSTS § 173 (AM. LAW INST. 1959) (“The trustee is under a duty to the beneficiary to give him upon his request at reasonable times complete and accurate information as to the nature and amount of the trust property, and to permit him or a person duly authorized by him to inspect the subject matter of the trust and the accounts and vouchers and other documents relating to the trust.”).

²¹ *Riggs*, 355 A.2d at 712.

²² *Id.* at 714; see *United States v. Mett*, 178 F.3d 1058, 1063 (9th Cir. 1999) (“[T]he fiduciary exception can be understood as an instance of the attorney-client privilege giving way in the face of a competing legal principle.”). *Riggs* did not truly explain, however, why the duty to disclose was more important.

²³ *Jicarilla*, 564 U.S. at 173 (citing *Riggs*, 355 A.2d at 714).

used to circumvent the disclosure duty owed to beneficiaries, who would be deprived of the informational access afforded to them by the fiduciary relationship.²⁴

This two-rationale framework of (1) determining the “real client” and (2) weighing the fiduciary’s duty to disclose against its interest in the attorney-client privilege, is the prevailing legal test for the fiduciary exception.²⁵ Thus, to determine whether the exception will defeat the attorney-client privilege, courts first identify the real client—the party for whose benefit the legal advice was given. In that analysis, courts usually consider some variant of the *Riggs* real client factors: (i) whether the fiduciary had reason to seek legal advice in a personal rather than fiduciary capacity, such as where litigation was pending or threatened; (ii) the purpose for which the advice was sought; and (iii) the source of payment for the advice.²⁶ As a second prong in the analysis, courts determine whether a duty to disclose outweighs the attorney-client privilege.²⁷

B. *Extending the Fiduciary Exception Beyond Trustees: The Garner Doctrine*

While the two-rationale framework was most clearly established in *Riggs*, it has not been limited to trustees.²⁸ Even before *Riggs*, the Fifth Circuit applied the doctrine in a shareholder derivative suit. In *Garner v. Wolfinbarger*, shareholders of the First American Life Insurance Company of Alabama (“FAL”) brought a derivative action against FAL and its management.²⁹ They sought to discover advice provided by FAL’s legal counsel regarding the issuance and sale of stock.³⁰ FAL asserted the attorney-client privilege, which plaintiffs argued to be unavailable to FAL against its own shareholders.³¹ Relying on English cases that treated the shareholder-

²⁴ See *Riggs*, 355 A.2d at 712 (“In order for the beneficiaries to hold the trustee to the proper standards of care and honesty and procure for themselves the benefits to which they are entitled, their knowledge of the affairs and mechanics of the trust management is crucial.”).

²⁵ See *Jicarilla*, 564 U.S. at 173.

²⁶ The *Riggs* real client factors have survived as the principles which guide the real client analysis, although their wording and order has varied in subsequent constructions. See *id.* at 178–79.

²⁷ *Id.* at 172–73.

²⁸ *Wachtel v. Health Net, Inc.*, 482 F.3d 225, 232 (3d Cir. 2007).

²⁹ *Garner v. Wolfinbarger*, 430 F.2d 1093, 1095 (5th Cir. 1970). Specifically, they alleged violations of securities laws and fraud, and that corporate managers damaged the firm through their misconduct. *Id.*

³⁰ *Id.* at 1096.

³¹ *Id.* at 1096–97.

corporation relationship as analogous to that of the trustee-beneficiary, the district court agreed.³²

On appeal, the Fifth Circuit held that

where [a] corporation is in suit against its stockholders on charges of acting inimically to stockholder interests, protection of those interests as well as those of the corporation and of the public require that the availability of the privilege be subject to the right of the stockholders to show cause why it should not be invoked in the particular instance.³³

Thus, the court established a multi-factor test, commonly known as the “*Garner* doctrine,”³⁴ where plaintiff-shareholders in a derivative suit can overcome the attorney-client privilege upon a requisite showing of good cause.³⁵

In fashioning this good cause test, *Garner* echoed the two rationales established in *Riggs*. At the outset, the Fifth Circuit agreed with the English principle that the shareholder-corporation relationship follows that of trustees and their beneficiaries.³⁶ Just as a trustee acts in the interest of its beneficiaries, corporate “management does

³² *Garner v. Wolfenbarger*, 280 F. Supp. 1018, 1019 (N.D. Ala. 1968), *vacated*, 430 F.2d 1093 (5th Cir. 1970).

³³ *Garner*, 430 F.2d at 1103–04.

³⁴ See David M. Greenwald, *The Garner Doctrine—The Fiduciary Exception*, in 1 TESTIMONIAL PRIVILEGES § 1:44 (3d ed. 2017).

³⁵ The court provided a list of nine non-exhaustive factors to guide the analysis of determining whether good cause had been properly shown:

[1] the number of shareholders and the percentage of stock they represent; [2] the bona fides of the shareholders; [3] the nature of the shareholders’ claim and whether it is obviously colorable; [4] the apparent necessity or desirability of the shareholders having the information and the availability of it from other sources; [5] whether, if the shareholders’ claim is of wrongful action by the corporation, it is of action criminal, or illegal but not criminal, or of doubtful legality; [6] whether the communication related to past or to prospective actions; [7] whether the communication is of advice concerning the litigation itself; [8] the extent to which the communication is identified versus the extent to which the shareholders are blindly fishing; [9] the risk of revelation of trade secrets or other information in whose confidentiality the corporation has an interest for independent reasons.

Garner, 430 F.2d at 1104.

³⁶ *Id.* at 1102.

not manage for itself,” but does so for shareholders.³⁷ *Garner*’s reasoning, thus, embodies real client rationalization, as shareholders ultimately receive the benefit of legal advice given to the corporation’s officers and directors.

Garner also assessed the duties owed by a corporation to its shareholders and their weight relative to the attorney-client privilege,³⁸ mirroring the second rationale. Just as *Riggs* concluded that a trustee’s duty to disclose outweighed the privilege, the Fifth Circuit also found that the “obligations, however characterized, that run from corporation to shareholder . . . must be given recognition in determining the applicability of the privilege.”³⁹ While recognizing a legitimate interest in managerial privacy, the Fifth Circuit was not persuaded that management’s want for confidentiality overtakes the disclosure duty owed by a corporation to shareholders.⁴⁰

Additionally, the Fifth Circuit considered other exceptions to the attorney-client privilege and how their justifications align with those for the fiduciary exception. First, it examined the crime-fraud exception, which holds that “[c]ommunication[s] made by a client to his attorney during or before the commission of a crime or fraud for the purpose of being guided or assisted in its commission are not privileged.”⁴¹ The *Garner* shareholders alleged various frauds, such as using bribes to secure state registrations of stock and issuing a misleading prospectus.⁴² While the court did not resolve the issue on the crime-fraud exception, its analysis shows how this exception relies on the same logic as the fiduciary exception’s second rationale—*i.e.* that duties arising from the parties’ relationship can outweigh the privilege. Per the crime-fraud exception, management’s

³⁷ *Id.* at 1101.

³⁸ *See id.* at 1102 (addressing an amicus curiae argument that “that the benefits of disclosure are outweighed by the harm done to both client and attorney”).

³⁹ *Id.* Despite *Garner* not characterizing these duties as “fiduciary,” courts have held them to be subject to the fiduciary exception. *See* Robert R. Summerhays, *The Problematic Expansion of the Garner v. Wolfenbarger Exception to the Corporate Attorney-Client Privilege*, 31 *TULSA L.J.* 275, 288, 289–95 (1995).

⁴⁰ *See Garner*, 430 F.2d at 1101 (while the “managerial preference is a rational one, because it is difficult to envision the management of any sizeable corporation pleasing all of its stockholders all of the time, and management desires protection from those who might second-guess or even harass in matters purely of judgment,” “management judgment must stand on its merits, not behind an ironclad veil of secrecy which under all circumstances preserves it from being questioned by those for whom it is, at least in part, exercised.”).

⁴¹ *Id.* at 1102.

⁴² *Id.* at 1103.

“obligation to the corporation, to the stockholders and to the public to do what is lawful” outweighs an interest in privacy.⁴³ Thus, the idea of gauging the weight of competing legal principles is a common doctrinal basis of exceptions to the attorney-client privilege.

Next, the court considered the joint attorney exception. It applies where a single lawyer acts for multiple parties with a common interest and precludes one party from using the attorney-client privilege in a subsequent case against another.⁴⁴ In its analysis, the Fifth Circuit discussed *Pattie Lea, Inc. v. District Court of Denver*, where the Colorado Supreme Court relied on an analogy to the joint attorney exception to rule that a “statutory privilege for communications between a certified public accountant and his corporate client did not protect the corporation from being required to disclose to its own stockholders . . . communications from the corporation to the CPA.”⁴⁵ The *Pattie Lea* holding “relied on the joint attorney exception and pointed out that employment of certified public accountants . . . was for the benefit of all the stockholders.”⁴⁶ Using similar real client reasoning, the court held that the statutory “privilege does not protect a corporation from being required to disclose to its own stockholders . . . communications made by the corporation to its certified public accountant,” because a “corporate entity acts only for its stockholders.”⁴⁷ Thus, both *Garner* and *Pattie Lea* were based on the concept that shareholders, as owners of the corporation, are effectively the real client of the corporation’s legal counsel.

While the *Garner* analysis echoes *Riggs*’ two-rationale framework, *Garner* requires an additional step: those moving to compel production of privileged communications must show good cause as to why the privilege should give way under the circumstances. This extra step is necessary, as a “corporation is not barred from asserting [the privilege] merely because those demanding information enjoy the status of stockholders.”⁴⁸ In other words, the existence of a certain relationship

⁴³ *Id.*

⁴⁴ *Id.*; *see, e.g.*, *Pattie Lea, Inc. v. Dist. Court of Denver*, 423 P.2d 27, 28 (Colo. 1967).

⁴⁵ *Garner*, 430 F.2d at 1103.

⁴⁶ *Id.*

⁴⁷ *Pattie Lea*, 423 P.2d at 30.

⁴⁸ *Garner*, 430 F.2d at 1103.

between the parties does not itself categorically defeat the privilege.⁴⁹ Rather, shareholders must “show cause why it should not be invoked in the particular instance,” as *Garner* established a qualified privilege presumed valid unless overcome by good cause.⁵⁰

Thus, in declining to hold the fiduciary exception categorically applicable to corporate management, the *Garner* court invoked three analyses. It (1) considered who the “real client” of advising counsel was; (2) weighed the corporation’s duties towards shareholders against the attorney-client privilege; and (3) applied a series of non-exclusive factors to determine whether good cause had been shown to overcome the privilege.⁵¹ This *Garner* doctrine has subsequently been applied to other shareholder suits as well as non-shareholder cases.⁵²

II. APPLICATION OF THE FIDUCIARY EXCEPTION FRAMEWORK IN ERISA CASES

Just as *Garner* and *Riggs* relied upon a real client analysis and a duty-versus-privilege weighing analysis, those same inquiries have guided fiduciary exception jurisprudence in the Employee Retirement Income Security Act of 1974 (“ERISA”) context.⁵³ The exception has found a natural application in ERISA, which imposes

⁴⁹ *See id.* at 1104 n.21 (explaining that a good cause requisite “is neither new nor world-shaking,” because the common law gave a shareholder a limited right to see corporate records, subject to the limits that a request “be germane to his interest as [a] stockholder, and the interests of the corporation and other shareholders may control to deny inspection”).

⁵⁰ *Id.* at 1104.

⁵¹ Applying the *Garner* doctrine on remand, the district court found that good cause had been shown and thus, the privilege was overcome. *See Garner v. Wolfenbarger*, 56 F.R.D. 499, 504 (S.D. Ala. 1972).

⁵² *See infra* notes 203–04 and accompanying text.

⁵³ ERISA sets the minimum standards for most voluntarily established employee benefit plans, so as to protect plan participants and their beneficiaries. *Employee Retirement Income Security Act (ERISA)*, U.S. DEP’T OF LAB., <https://www.dol.gov/general/topic/retirement/erisa> (last visited Oct. 3, 2018). To achieve those ends, the statute

requires plans to provide participants with plan information including important information about plan features and funding; sets minimum standards for participation, vesting, benefit accrual and funding; provides fiduciary responsibilities for those who manage and control plan assets; requires plans to establish a grievance and appeals process for participants to get benefits from their plans; gives participants the right to sue for benefits and breaches of fiduciary duty; and, if a defined benefit plan is terminated, guarantees payment of certain benefits through a federally chartered corporation, known as the Pension Benefit Guaranty Corporation (PBGC).

fiduciary duties that “draw much of their content from the common law of trusts.”⁵⁴ Under ERISA, a party acts as a fiduciary if it (i) exercises discretionary authority or control over the management of a benefit plan or its assets; (ii) is paid to render investment advice with respect to any property of a plan, or has authority to do so; or (iii) has discretionary authority or responsibility to administer a plan.⁵⁵

A. *Early Applications of the Fiduciary Exception to Trustee-Like ERISA Fiduciaries*

The first federal court to apply the fiduciary exception in an ERISA case was *Donovan v. Fitzsimmons*, where the Secretary of Labor brought an action against a union pension fund and moved to compel the production of records.⁵⁶ The fund unsuccessfully raised the attorney-client privilege, as the court held it to be defeated by the “wide[ly] accept[ed]” *Garner* doctrine.⁵⁷ Because the Secretary sued under ERISA’s enforcement regime, which delegates authority to the Secretary to sue on behalf of plan beneficiaries, the interests of the Secretary and beneficiaries were in alignment and there was “no principled basis for precluding the Secretary from raising a *Garner*-type rationale.”⁵⁸ Applying *Garner*, the court held that there was “little doubt” that the Secretary had met its burden of showing good cause.⁵⁹ The court rejected the pension fund’s arguments that *Garner* was poorly reasoned or alternatively, limited to only corporate fiduciaries in derivative suits.⁶⁰ Rather, the common law of trust relationships makes “apparent that the pension fund trustee

Id.

⁵⁴ *Varity Corp. v. Howe*, 516 U.S. 489, 496 (1996). Specifically, an ERISA fiduciary has four statutory obligations: (1) to fulfill its duty of loyalty, by acting for the exclusive purpose of providing benefits to plan participants and their beneficiaries and defraying reasonable expenses of administering the plan; (2) to fulfill its duty of care, by acting with care, skill, prudence, and diligence under the circumstances; (3) to diversify plan assets so as to minimize the risk of large losses; and (4) to discharge its duties in accordance with the documents and other instruments governing the plan. 29 U.S.C. § 1104(a)(1).

⁵⁵ 29 U.S.C. § 1002(21)(A). Fiduciary status under ERISA is determined through a functional test which focuses upon a party’s specific actions and authority, and not by a more rigid structure that formally designates persons to be fiduciaries. *See Mertens v. Hewitt Assocs.*, 508 U.S. 248, 262 (1993).

⁵⁶ *Donovan v. Fitzsimmons*, 90 F.R.D. 583, 584 (N.D. Ill. 1981).

⁵⁷ *Id.* at 586.

⁵⁸ *Id.* at 587; *see* 29 U.S.C. § 1132(a) (2018).

⁵⁹ *See Donovan*, 90 F.R.D. at 584.

⁶⁰ *Id.* at 586.

analogue to the derivative action is particularly well-suited.”⁶¹ The *Donovan* court did note, however, that while it found *Garner* to be applicable to pension fund trustees, it was not tasked with deciding whether *Garner* extends to other types of ERISA fiduciaries.⁶²

While the *Donovan* court was the first to extend the fiduciary exception to an ERISA case, it certainly was not the last. Rather, *Donovan* was the first among a long line of cases to find that the attorney-client privilege exception applies to various types of ERISA fiduciaries.⁶³

B. Where the Fiduciary Exception Has Not Been So Easily Applied: The Insurer-Fiduciary Context

While the fiduciary exception has been applied with little controversy to most types of ERISA fiduciaries,⁶⁴ given that an ERISA trustee “strong[ly] parallels” the common law trustee of *Riggs*,⁶⁵ one type of ERISA fiduciary has not been so straightforward. Notably, where an insurance company is contracted to make benefit claims decisions for an ERISA plan⁶⁶ and, thus, gains an “unusual extension of fiduciary status” as a limited-purpose statutory fiduciary, there has been significant controversy as to whether the fiduciary exception is applicable.⁶⁷

The U.S. Courts of Appeals for the Third and Ninth Circuits stand as the only federal appellate courts to have addressed whether the attorney-client privilege

⁶¹ *Id.*

⁶² *Id.*; see *Wachtel v. Health Net, Inc.*, 482 F.3d 225, 233 (3d Cir. 2007) (stating that the *Donovan* “court recognized that the *Garner* rule might not apply in every fiduciary situation”).

⁶³ *Bartolacci et al.*, *supra* note 17, at 14.

⁶⁴ See, e.g., *In re Occidental Petroleum Corp.*, 217 F.3d 293, 297–98 (5th Cir. 2000) (holding that the privilege did not preclude discovery in relation to an employee stock option plan); *Becher v. Long Is. Lighting Co. (In re Long Is. Lighting Co.)*, 129 F.3d 268, 272 (2d Cir. 1997) (“[A]n employer acting in the capacity of ERISA fiduciary is disabled from asserting the attorney-client privilege against plan beneficiaries on matters of plan administration.”); *Wildbur v. ARCO Chem. Co.*, 974 F.2d 631, 645 (5th Cir. 1992) (applying the exception “[w]hen an attorney advises a plan administrator or other fiduciary concerning plan administration”); *Wash.-Balt. Newspaper Guild, Local 35 v. Wash. Star Co.*, 543 F. Supp. 906, 909 (D.D.C. 1982) (applying the fiduciary exception to a plan sponsor).

⁶⁵ *Wachtel*, 482 F.3d at 233.

⁶⁶ In this capacity, the insurer is often called a “third-party claim administrator,” “claims fiduciary,” “insurer-fiduciary,” or “ERISA insurer.” These terms will be used interchangeably in this Note.

⁶⁷ FREDERICK A. BRODIE & KENNETH A. NEWBY, THE FIDUCIARY EXCEPTION TO THE ATTORNEY-CLIENT PRIVILEGE 7 (2009); *Wachtel*, 482 F.3d at 233.

protects communications between counsel and insurers acting in a fiduciary capacity as third-party claim administrators. And while each court applied the classic two-rationale framework for the fiduciary exception, neither the doctrinal methods nor holdings of the courts were in accord.

1. The Third Circuit's *Wachtel* Rule: The Fiduciary Exception Does Not Apply to an Insurer-Fiduciary

In 2007, the Third Circuit became the first federal appellate court to address the fiduciary exception in the ERISA insurer context. In *Wachtel v. Health Net, Inc.*, plaintiff-beneficiaries sued Health Net of New Jersey, Inc. and its subsidiaries (collectively "Health Net"), which sell and maintain health insurance policies for employee benefit plans.⁶⁸ Health Net was neither a plan administrator nor trustee and never held or managed plan assets.⁶⁹ Rather, it was a limited-purpose statutory fiduciary as a third-party claims administrator, where it processed participants' benefits claims and paid out such claims from its own funds where appropriate.⁷⁰

The relevant issue in *Wachtel* arose when Health Net asserted that the attorney-client privilege protected certain documents requested by beneficiaries.⁷¹ A court-appointed special master determined that the documents were discoverable pursuant to the fiduciary exception, as they related to fiduciary acts of Health Net; the district court affirmed that finding and Health Net appealed.⁷²

On appeal, Health Net conceded that it was a "claims fiduciary" under 29 U.S.C. § 1133 because it maintained authority to process beneficiaries' insurance claims.⁷³ Health Net's main argument, however, was that because it was neither a plan administrator nor trustee, and because its fiduciary status arose solely out of its discretion to make claims decisions, the fiduciary exception did not apply to it.⁷⁴ The appellant argued that its unique status as an insurer "which contracts with multiple employee benefit plans to provide health insurance to employee-beneficiaries,

⁶⁸ *Wachtel*, 482 F.3d at 227.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.* at 228.

⁷² *Id.* at 227–28.

⁷³ *Id.* at 229–30. See *Aetna Health Inc. v. Davila*, 542 U.S. 200, 220 (2004) (ruling that an insurer which holds discretionary responsibility over the award of benefits is fiduciary under ERISA).

⁷⁴ *Wachtel*, 482 F.3d at 230.

processes and pays claims using its own assets, obtains legal advice using its own funds, and operates with an eye toward profits” made it markedly different so as to fall “outside the scope of the fiduciary exception.”⁷⁵ In other words, something about Health Net’s unique fiduciary status was deserving of different treatment than the fiduciaries of a majority of ERISA cases where the exception applies.

After discussing the fiduciary exception’s history, the *Wachtel* court began by addressing a district court case, *Washington Star*,⁷⁶ which theorized that the fiduciary exception “applies to any ERISA fiduciary acting in its fiduciary capacity, regardless of whether the fiduciary is a plan administrator, trustee, or a limited-purpose statutory fiduciary.”⁷⁷ Rejecting that theory, the Third Circuit criticized such “broad, sweeping language” and stated that *Washington Star* was limited to its facts, which involved only an ERISA trustee and plan sponsor and which “did not consider whether the fiduciary exception applied with equal force to all ERISA fiduciaries.”⁷⁸

Wachtel then harkened back to the two rationales, the basis by which courts before it applied the exception to other types of ERISA fiduciaries.⁷⁹ Those same courts recognized two situations where the fiduciary exception will not apply to an ERISA fiduciary.⁸⁰ The first is the liability exception, which holds that a fiduciary will retain the attorney-client privilege where it seeks advice for its own defense in adversarial proceedings with beneficiaries.⁸¹ The second is the settlor exception, which allows the privilege to remain where a fiduciary performs settlor acts, such as

⁷⁵ *Id.*

⁷⁶ Wash.-Balt. Newspaper Guild, Local 35 v. Wash. Star Co., 543 F. Supp. 906 (D.D.C. 1982).

⁷⁷ *Wachtel*, 482 F.3d at 233.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.* These situations are essentially exceptions to the fiduciary exception—*i.e.*, certain scenarios where the fiduciary exception will not apply and the attorney-client privilege will remain in place.

⁸¹ *Id.* The liability exception mirrors the reasoning of *Riggs*. See *supra* note 19 and accompanying text (discussing *Riggs*’ real client factors, including the factor that “[w]hen the advice was sought, no adversarial proceedings between the trustees and beneficiaries had been pending, and therefore there was no reason for the trustees to seek legal advice in a personal rather than a fiduciary capacity”); see also *United States v. Mett*, 178 F.3d 1058, 1065 (9th Cir. 1999) (“When an ERISA trustee seeks legal advice for his own protection, the legal fiction of ‘trustee as representative of the beneficiaries’ is dispelled, notwithstanding the fact that the legal advice may relate to the trustee’s administration of the trust. Similarly, where a fiduciary seeks legal advice for her own protection, the core purposes of the attorney-client privilege are seriously implicated and should trump the beneficiaries’ general right to inspect documents relating to plan administration.”).

those which involve the design, adoption, modification, or termination of a plan, as these are more akin to non-fiduciary trust settlor tasks.⁸² The liability and settlor exceptions to the fiduciary exception are important, because they reveal how limits to the fiduciary exception are bound in a common justification—the two rationales:

[B]oth [exceptions] allow the attorney-client privilege to remain intact for an ERISA fiduciary when its interests diverge sufficiently from those of the beneficiaries that the justifications for the fiduciary exception no longer outweigh the policy underlying the attorney-client privilege. The beneficiaries are no longer the real clients, and disclosure of attorney-client communications is no longer an obligation.⁸³

Thus, the same two rationales which served as the backbone of *Riggs*, *Garner*, and *Donovan* also serve as the foundation for *Wachtel*'s limit on the fiduciary exception. But unlike *Donovan*, which found that the two rationales resulted in the fiduciary exception's application, the Third Circuit came to a different conclusion. According to *Wachtel*, an insurer-fiduciary, while sharing similarities to other ERISA fiduciaries, nonetheless has sufficient differences such that "the logic underlying the fiduciary exception [does not] appl[y] equally to" it.⁸⁴ Something about the very nature of a third-party claims administrator makes the two justifications for the exception no longer hold true.

The *Wachtel* court first determined that the real client rationale, which postulates that plan beneficiaries are effectively the real clients of the advising lawyer because they receive the true benefit of the advice shared with fiduciaries acting for their interests, fails to hold water when applied to insurers.⁸⁵ The Third Circuit relied on four factors for this conclusion: "[1] unity of ownership and management, [2] conflicting interests regarding profits, [3] conflicting fiduciary obligations, and [4] payment of counsel with the fiduciary's own funds."⁸⁶ Beginning

⁸² *Wachtel*, 482 F.3d at 233; see Patricia C. Kussmann, Annotation, *Construction and Application of Fiduciary Duty Exception to Attorney-Client Privilege*, 47 A.L.R.6TH 255, § 12 (2009) (listing settlor exception cases).

⁸³ *Wachtel*, 482 F.3d at 234.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ See *id.* at 236. In other words, the *Wachtel* court evaluated (1) whether the funds whereby a benefits claim is paid are owned entirely by the fiduciary; (2) whether a structural conflict of interest exists relating to economic or profit-oriented interests; (3) whether the insurer faces the additional conflict of managing

with the first factor, the court noted that in traditional fiduciary exception cases (*i.e.* trustee cases), “the fiduciary is managing assets over which it lacks ownership rights.”⁸⁷ But where insurance companies are contracted to administer claims for ERISA plans, ERISA specifically exempts such insurers from the usual requirement that assets be held in trust.⁸⁸ Thus, ownership over the funds at issue remains with the insurer until a benefit claim is paid out. This difference, per *Wachtel*, places insurers in a different economic and legal position than traditional fiduciaries; because benefit payments come directly from the insurers’ own purse, insurers necessarily maintain a “substantial and legitimate interest” in the payment source.⁸⁹

Turning to the second factor, the court held that a “structural conflict of interests” exists where an insurer is a fiduciary yet makes benefit payments from its own funds according to its own discretion over participants’ eligibility.⁹⁰ This unique status creates conflicting interests, as the insurer’s profit-seeking motive, which is advanced when claims are denied, opposes the insurer’s duty to act in the best interest of plan beneficiaries.⁹¹ The Third Circuit mitigates the resulting increased risk of fiduciary misconduct through a heightened standard of review over insurers, as compared to other ERISA fiduciaries.⁹² According to *Wachtel*, this conflict undermines any argument that plan beneficiaries are the “real clients” of counsel

multiple ERISA plans; and (4) the source of payment for the legal advice procured. These real client factors share commonalities with those used in non-ERISA cases. *See infra* pp. 434–36.

⁸⁷ *Wachtel*, 482 F.3d at 234. To be more technically precise as to the property rights involved, a trustee actually maintains legal title over property held in trust, while beneficiaries are the equitable owners of the trust property. *See* 76 AM. JUR. 2d *Trusts* § 1 (2018) (“The fundamental nature of a trust is the division of title, with the trustee being the holder of legal title and the beneficiary that of equitable title. By definition, the creation of a trust must involve a conveyance of property.”); RESTATEMENT (SECOND) OF TRUSTS § 2 (AM. LAW INST. 2012); *see also In re Gen. Coffee Corp.*, 828 F.2d 699, 706 (11th Cir. 1987) (“In a trust relationship the trust beneficiary possesses an equitable ownership interest in the trust property, while the trustee possesses legal title to the property.”).

⁸⁸ *Wachtel*, 482 F.3d at 234; 29 U.S.C. § 1103(a) and (b)(1)–(2) (2018).

⁸⁹ *Wachtel*, 482 F.3d at 234.

⁹⁰ *Id.*

⁹¹ *Id.* at 235.

⁹² *See* *Pinto v. Reliance Standard Life Ins. Co.*, 214 F.3d 377 (3d Cir. 2000) (creating a more scrutinous level of review where the fund from which benefits are paid is the same fund from which the insurer reaps its profits). Traditional ERISA fiduciaries, which are often the employer/plan sponsor itself, face no such structural conflict, because they maintain “actuarially determined benefit funds . . . that usually cannot be recouped by the employer or directly redound to its benefit.” *Id.* at 378–79.

retained by insurers.⁹³ As the economic interests of fiduciary and beneficiary come further into conflict, the beneficiaries' ability to claim they are the persons receiving the true benefit of the fiduciary's legal counsel "must diminish."⁹⁴

Beyond that economic conflict, another divergence of interests occurs when insurers serve multiple clients—the third factor.⁹⁵ Because an insurer usually administers benefit plans from multiple clients at the same time, the fiduciary is pulled in different directions as it attempts to serve the diverging interests of various clients (and really, their plan participant beneficiaries).⁹⁶ As a result, insurers serve interests "larger and distinct" from those of any single group of beneficiaries, further undermining the theory that insurer's advising counsel is for the benefit of the participants of a single benefit plan.⁹⁷ These conflicting fiduciary obligations distinguish a claims fiduciary from other fiduciaries to which the fiduciary exception applies.⁹⁸

Finally, the fourth *Wachtel* real client factor was that the insurer paid for the legal advice using its own funds, *not* plan assets.⁹⁹ This payment scheme was directly opposite of the trustee archetype for which the real client rationale was fashioned.¹⁰⁰

⁹³ *Wachtel*, 482 F.3d at 235.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *See id.* ("An insurer . . . owes distinct duties to each of its customers Even while acting as a loyal fiduciary to the beneficiaries of one plan, [the insurer] 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."); *see also* Bartolacci et al., *supra* note 17, at 29–30 (explaining this conflict to result from the fact that "the approval of one claim may reduce a plan's ability to satisfy another claim").

⁹⁷ *Wachtel*, 482 F.3d at 235; *see Riggs Nat'l Bank v. Zimmer*, 355 A.2d 709, 712 (Del. Ch. 1976) (noting, in its second real client factor, that there was no indication that the legal advice was intended for any purpose other than to benefit the trust). Here, the act of retaining counsel to support the fulfilment of duties owed to multiple ERISA and non-ERISA regulated clients alone indicate that the advice could have been used for a multitude of purposes other than to benefit a single benefit plan's beneficiaries.

⁹⁸ *See Wachtel*, 482 F.3d at 235 (stating that an insurer's conflict is "far different from that of a corporation whose shareholders have different interests because . . . corporate managers know that they owe their fiduciary obligations to a single, discrete group—the shareholders of the corporation. Similarly, although the trustee of a benefit plan must take care to ensure that all the plan's beneficiaries receive the benefits which they are owed, management of the overall trust is meant to be a conflict-free endeavor.").

⁹⁹ *Id.*

¹⁰⁰ *See supra* pp. 412–15 (discussing the *Riggs* trustee archetype, where counsel was paid from trust assets).

According to *Wachtel*, when the fiduciary itself foots the legal bill, this “payment scheme is an indicator (albeit only an indicator) that the fiduciary is the client, [and] not [just] a representative” of plan beneficiaries.¹⁰¹

These four factors, per *Wachtel*, reveal that an insurer-fiduciary “is itself the sole and direct client of counsel retained by the insurer,” because “[w]ere 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.”¹⁰²

Next, the *Wachtel* court explored the fiduciary exception’s second rationale. But just as the court found that the real client rationale did not hold true when applied to Health Net, so too was the underlying logic of the second rationale absent. Since the fiduciary exception and the duty of disclosure owed to a beneficiary derive from the common law of trusts, the Third Circuit deemed it appropriate to apply a trustee’s disclosure obligations to ERISA plan administrators *who operate as trustees*.¹⁰³ The court, however, refused to extend the trustee-analogue any farther:

Congress did not intend to expand the full panoply of trustees’ obligations to every entity which might be designated a fiduciary under ERISA. Specifically, Congress provided that the assets of an insurance company need not be held in trust. 29 U.S.C. § 1103(b)(1)–(2). For that reason, we do not believe that Congress intended to impose upon insurance companies doing business with ERISA-regulated plans the same disclosure obligations that have been imposed upon trustees at common law. Section 1103(b)(1)–(2) excepts insurers from trustee-like obligations; we see no reason to impose trustee-like disclosure obligations upon an entity excepted from ERISA’s analogy to trust.¹⁰⁴

While reining in the common law trustee-analogue, the court did concede that a claims fiduciary does in fact have some disclosure duties.¹⁰⁵ But just because insurers are subject to some statutory disclosure requirements does not mean that all obligations of the insurer can “be defined through rote application of the common

¹⁰¹ *Wachtel*, 482 F.3d at 236.

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 237 (citing 29 U.S.C. § 1133(1) (2018), which requires an insurer denying a claim for benefits to disclose the specific reasons for the denial).

law of trusts.”¹⁰⁶ Rather, it was Congress’ intent that insurer-fiduciaries be treated uniquely, as fiduciaries “come in many shapes and sizes” with varying degrees of fit to the underlying rationales for the fiduciary exception.¹⁰⁷

The Third Circuit supported its finding of Congress’ intent by two pragmatic factors.¹⁰⁸ We begin with the second. *Wachtel* posits that an expansive fiduciary exception which applies indiscriminately to all ERISA fiduciaries will lead to greater unavailability of the attorney-client privilege.¹⁰⁹ As a result, insurers will reevaluate their business with ERISA plans and some will leave the market, ultimately harming plan participants due to a lack of competition.¹¹⁰

The other pragmatic factor turned on the court’s concern for creating judge-made law in an area with much uncertainty.¹¹¹ Since insurers’ fiduciary duties were not well-settled, it would be “imprudent to craft an evidentiary privilege in such a way as to require the difficult task of defining fiduciary obligations to be met at the discovery stage.”¹¹² Doing so would “cause application of the privilege to turn on the answers to extremely difficult substantive legal questions” resulting in an “uncertain privilege” which “is little better than no privilege at all.”¹¹³ *Wachtel* was “reluctant to ask lawyers to read tea leaves and predict how courts will resolve the imponderables of ERISA before they can take the most preliminary step of advising their clients as to whether their communications will remain confidential.”¹¹⁴ While that intention was certainly noble, the *Wachtel* holding—*i.e.* that the fiduciary exception does not apply to ERISA insurer-fiduciaries—has done just the opposite of avoiding uncertainty. Rather, *Wachtel* has been often challenged in the courts,

¹⁰⁶ *Wachtel*, 482 F.3d at 237.

¹⁰⁷ *Id.* at 234.

¹⁰⁸ *Id.* at 237.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.* at 237. When *Wachtel* was decided, the Third Circuit had yet to recognize the fiduciary exception. *Id.* at 229. Adopting it would, thus, also require treading into uncharted waters for the doctrine itself.

¹¹³ *Id.* at 237 (quoting *Upjohn Co. v. United States*, 449 U.S. 383, 393 (1981)).

¹¹⁴ *Id.*

creating further conflict in the doctrine across the country.¹¹⁵ This became most evident five years later when the Ninth Circuit took up this very same issue.

2. The Ninth Circuit's *Stephan* Rule: The Fiduciary Exception Does Apply to an Insurer-Fiduciary

In *Stephan v. Unum Life Insurance Company of America*, the Ninth Circuit addressed the same question of the fiduciary exception's applicability in the ERISA insurer context, but came to an opposing conclusion.¹¹⁶ In *Stephan*, an employee who participated in his employer's long-term disability plan challenged a benefit calculation made by defendant Unum Life Insurance Company, which was responsible for evaluating benefits claims and paying them from its own funds.¹¹⁷ Plaintiff-employee Mark Stephan moved to compel discovery of internal memoranda created by Unum's in-house counsel at the request of a claims analyst responsible for Stephan's benefit calculation.¹¹⁸ The district court found that the fiduciary exception, while generally applicable to wholly-insured ERISA plans, did not defeat the attorney-client privilege's here, because "the interests of plaintiff and defendant had sufficiently diverged."¹¹⁹

The Ninth Circuit reversed on appeal, holding that the fiduciary exception applies equally to insurers as it does to other ERISA fiduciaries.¹²⁰ The court's analysis, albeit brief, rationalized that neither of the primary justifications for the fiduciary exception—the real client and duty-versus-privilege rationales—provides

¹¹⁵ See *Stephan v. Unum Life Ins. Co. of Am.*, 697 F.3d 917, 931 n.6 (9th Cir. 2012) (listing a series of post-*Wachtel* district court decisions that rejected it); Crawford, *supra* note 18, at 149–50, 149 n.220 (stating that a majority of post-*Wachtel* decisions have taken issue with *Wachtel*'s analysis and holding).

¹¹⁶ *Stephan v. Unum Life Ins. Co. of Am.*, 697 F.3d 917, 932 (9th Cir. 2012).

¹¹⁷ *Id.* at 921. Specifically, the plaintiff-employee challenged Unum's decision to base his benefits on just his \$200,000 base salary while not including a \$300,000 annual bonus guaranteed in his offer letter. *Id.* at 922. Unum's reason for not including the \$300,000 annual bonus in its calculation was that the plaintiff went on disability before completing a full-year of employment and the bonus was contingent on a level of performance over the 12 months of employment. *Id.* at 922–23. These general facts were borrowed for this Note's introductory section.

¹¹⁸ *Id.* at 923.

¹¹⁹ *Id.*

¹²⁰ *Id.* at 931. As such, the Ninth Circuit extended its precedent which held the fiduciary exception to apply generally in the ERISA context. See *United States v. Mett*, 178 F.3d 1058, 1062–63 (9th Cir. 1999).

a basis for distinguishing insurers serving as ERISA fiduciaries from ERISA trustees, to whom the exception has already been found to apply.¹²¹

According to *Stephan*, the second rationale applies equally to insurance companies as evidenced by their statutory treatment in ERISA. The “broad disclosure requirements” of ERISA § 503 require that plan participants be afforded a reasonable opportunity to receive a full and fair review of the appropriately named ERISA fiduciary’s decision to deny a claim.¹²² Corresponding Department of Labor regulations require that a participant be provided all information relevant to his claim for benefits upon his request.¹²³ The court reasoned that these disclosure requirements do not change when an ERISA fiduciary happens to be an insurance company, nor do they offer any reason as to why the sought-for information would be any less important when the fiduciary role is taken up by an insurer rather than the plan sponsor itself.¹²⁴

The Ninth Circuit’s real client analysis was even more brief. The court merely extended its prior decision in *United States v. Mett*, which determined that plan beneficiaries are the “real client” in the prototypical ERISA trustee context, because an ERISA trustee is merely a representative of the beneficiaries of the trust that is administers.¹²⁵ Accordingly, since “the obligation that an ERISA fiduciary act in the interest of the plan beneficiary does not differ depending on whether that fiduciary is a trustee or an insurer,” there is “no principled basis for excluding insurers from the fiduciary exception.”¹²⁶

Stephan, in forgoing mechanical tests, relies instead on comparative reasoning to craft its rule that the fiduciary exception applies to insurer-fiduciaries. Unlike *Wachtel*, the Ninth Circuit did not invoke factor tests, but rather, was persuaded by the consistent rejection of *Wachtel* by district courts.¹²⁷ Rather than deeply exploring whether the two rationales and their subparts remained valid when applied to insurer

¹²¹ *Stephan*, 697 F.3d at 931; see *Donovan v. Fitzsimmons*, 90 F.R.D. 583 (N.D. Ill. 1981) (being the first of many courts to find the fiduciary exception applicable to ERISA trustees).

¹²² *Stephan*, 697 F.3d at 931; see also 29 U.S.C. § 1133 (2018).

¹²³ *Stephan*, 697 F.3d at 931–32; see also 29 C.F.R. § 2560.503-1(h)(2)(ii) (2018).

¹²⁴ *Stephan*, 697 F.3d at 932.

¹²⁵ *United States v. Mett*, 178 F.3d 1058, 1063 (9th Cir. 1999).

¹²⁶ *Stephan*, 697 F.3d at 932.

¹²⁷ *Id.* at 931 n.6.

Unum, the Ninth Circuit reasoned by analogy. It relied on its *Mett* decision which held the fiduciary exception applicable to ERISA trustees,¹²⁸ and simply asked, if we and other courts are in agreement that the fiduciary exception applies to ERISA trustees, what makes an ERISA insurer-fiduciary any different? The *Stephan* court found nothing in the statutory language of ERISA regarding a fiduciary's disclosure obligations and duty to act in the best interest of plan participants that would suggest that a trustee and insurer should be treated differently.¹²⁹ As such, the court was unpersuaded that the fiduciary exception should not apply equally to both.¹³⁰

*C. The Current State of Affairs: Uncertainty and Inconsistency
After Wachtel and Stephan*

No other federal appellate court has yet weighed in on whether the fiduciary exception applies to ERISA insurers. The circuit split has nevertheless had a national effect. District courts in other circuits have tried to apply the diverging *Wachtel* and *Stephan* rules, creating uncertainty across the country.¹³¹ This lack of uniformity is magnified by the fact that the insurers in *Wachtel* and *Stephan* were factually similar.¹³² Creating even greater confusion is the fact that the Third and Ninth Circuits used different methods of analysis. *Wachtel* used a factor-driven analysis of how each doctrinal component of the rationales was or was not applicable to the specific fiduciary in the case.¹³³ Quite differently, *Stephan* relied on precedent which firmly held the doctrine to apply to ERISA trustees, and then explored whether any difference in the statutory treatment of the two types of fiduciaries warranted unique treatment for insurers.¹³⁴

These diverging methodologies reveal the core problems of the two-rationale test. The two rationales are, by their nature, abstract. They focus on pliable concepts

¹²⁸ This reliance was hardly surprising, as *Mett*'s assumption that fiduciary exception applies to ERISA trustees is in accord with the vast majority of cases that have with little controversy applied the *Riggs* traditional trustee analogue to ERISA trustees. See cases cited *supra* note 64.

¹²⁹ See *supra* pp. 429–30.

¹³⁰ *Stephan*, 697 F.3d at 933.

¹³¹ STEUART H. THOMSEN & MATTHEW O. GATEWOOD, ATTORNEY-CLIENT PRIVILEGE IN THE ERISA CONTEXT: THE "FIDUCIARY EXCEPTION" (2016).

¹³² Both Health Net and Unum were limited-purpose claim fiduciaries given discretion to deny claims while also being responsible to make benefit payments themselves. They thus shared the same economic conflicts arising from conflicting motives of profit and dutifully serving benefit plan beneficiaries.

¹³³ See *supra* Part II-B-1.

¹³⁴ See *supra* Part II-B-2.

of who truly benefits from legal advice and whether one legal principle supersedes another, despite no clearly-defined ruler by which to value each's importance.¹³⁵ Further, courts lack uniformity as to the proper weight to be given to each rationale and whether both are required.¹³⁶ There is also a lack of uniformity as to the proper doctrinal tests for each rationale. Some courts use factor tests, while others use less formulaic approaches.¹³⁷ Much of this inconsistency derives from the seminal *Riggs* case. While *Riggs* established the two rationales as the foundation for the exception, it did not concretely articulate how and by what standards those analyses should be undertaken.¹³⁸

Commentators have theorized that while the two-rationale framework is a workable legal test “in the simplest trust arrangements in which all beneficiaries stand in the same position,” the framework’s viability “may begin to break down as courts address cases in which ERISA trustees and private trustees balance competing interests.”¹³⁹ The two rationales’ inability to produce a uniform output in *Wachtel* and *Stephan* seemingly validates that theory.

A variety of perspectives have been authored as to whether *Wachtel* or *Stephan* “got it right”—*i.e.* which holding is correct.¹⁴⁰ The deeper problems noted above,

¹³⁵ While the real client analysis is somewhat more definite when a factor test is used, its application remains murky as courts do not always use the same factors nor is the weight to be given to each factor certain. See *Riggs Nat'l Bank v. Zimmer*, 355 A.2d 709, 712 (Del. Ch. 1976) (placing much weight on the who pays factor); *Wachtel v. Health Net, Inc.*, 482 F.3d 225, 236 (3d Cir. 2007) (calling the who pays factor “only an indicator”). *But see Stephan*, 697 F.3d at 931–32 (applying no real client factors).

¹³⁶ See *Wachtel*, 482 F.3d at 236 (“Even though we conclude that [Health Net] [is] the sole and direct clients of their retained counsel, we must also consider a second rationale for applying the fiduciary exception—the fiduciary’s duty of disclosure.”) (emphasis added); *United States v. Mett*, 178 F.3d 1058, 1063 (9th Cir. 1999) (using language which suggests that one rationale may be enough: “some courts have” used the duty to disclose rationale, while “[o]ther courts have focused” on the real client rationale).

¹³⁷ See *supra* pp. 424–28 (discussing *Wachtel*’s factor-based approaches); see *supra* p. 430 (discussing how *Stephan* used no factors, but relied on analogy to another type of ERISA fiduciary).

¹³⁸ *Riggs* did hint as to the key considerations in the real client inquiry, resulting in various lists of factors based on three points emphasized by the Delaware Chancery Court. See *supra* pp. 413–14. *Riggs* offers no concrete guide to the second rationale, though, having failed to “explain[] the reason that the duty of disclosure was more important in this situation than the attorney-client privilege.” Bartolacci et al., *supra* note 17, at 29.

¹³⁹ Bartolacci et al., *supra* note 17, at 29.

¹⁴⁰ See, e.g., Crawford, *supra* note 18 (arguing *Wachtel* to be wrongly decided); John M. Vine, *The Fiduciary Exception*, 40 COMPENSATION PLAN. J. 31 (2012) (arguing that *Wachtel* was rightly decided, and should be expanded to all ERISA fiduciaries).

however, suggest that our scrutiny should not be on the correctness of the categorical application (*Stephan*) or categorical exclusion (*Wachtel*) of the fiduciary exception to ERISA insurers. Rather, we should scrutinize and seek to fix the ill-defined legal framework which led the two courts to diverge.

III. SOLVING THE *WACHTEL/STEPHAN* CONUNDRUM: A TWO-PART FIX OF (1) ESTABLISHING A UNIFORM APPROACH TO THE TWO-RATIONALE FRAMEWORK FOR THE FIDUCIARY EXCEPTION, AND (2) ADDING A GOOD CAUSE PRONG ONTO THAT FRAMEWORK

When tasked with reworking the doctrinal underpinnings of the fiduciary exception, it becomes apparent that the doctrine's contours have yet to be fully fleshed out. This is largely due to its relative youth in American law¹⁴¹ and the dearth of guiding cases from the Supreme Court, which has only once taken up the fiduciary exception, that being in *United States v. Jicarilla*.¹⁴² In that 2011 case, the Jicarilla Apache Nation brought a breach-of-trust action against the U.S. Government for alleged mismanagement of funds held in trust for the Tribe.¹⁴³ The general trust relationship between the Government and Tribe was a purely statutory construct, the result of the American Indian Trust Fund Management Reform Act of 1994.¹⁴⁴ In the suit, the Government withheld documents based on the attorney-client privilege, and the Tribe moved to compel production based on the fiduciary exception.¹⁴⁵ Justice Alito, writing for a five-justice majority (in which Justices Ginsburg and Breyer concurred), ruled that the fiduciary exception was inapplicable to the trust-like relationship between the Government and Indian tribes.¹⁴⁶

A. *Clarifying the Doctrinal Elements of Each Rationale for the Fiduciary Exception*

Jicarilla, despite its unique facts, and despite being just the tip of the iceberg in fiduciary exception jurisprudence, nevertheless provides sufficient foundational guidance to clarify, to a meaningful degree, the proper analytic tests for each

¹⁴¹ See *supra* note 12 and accompanying text.

¹⁴² *United States v. Jicarilla Apache Nation*, 564 U.S. 162 (2011).

¹⁴³ *Id.* at 166.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 167.

¹⁴⁶ *Id.* at 165.

rationale. Establishing the proper tests is a key step in resolving *Wachtel* and *Stephan*, given that their doctrinal methods were so different.

First, the Supreme Court, by recognizing and applying the two rationales, effectively conveyed that the rationales, despite their limitations, cannot be discarded.¹⁴⁷ While the Court did not directly clarify each rationale's relative importance or whether a single rationale may be sufficient on its own, *Jicarilla* offers some guidance as to how each rationale is to be evaluated. *Jicarilla* seemingly sanctions a *Riggs* and *Wachtel*-type formulation of the real client analysis, whereby the first rationale is analyzed through a factor test.¹⁴⁸ As for the second rationale, the Court did not actually perform a weighing analysis. It seemingly deemed that unnecessary, given that the Government was not subject to a common law duty to disclose information to the Tribe.¹⁴⁹ Without a model weighing analysis, the second rationale remains cloudy.

1. Establishing a Uniform Legal Test for the Real Client Rationale

Jicarilla's real client analysis, however, provides a solid model by which the *Wachtel* and *Stephan* approaches may be reviewed. While this Note is focused less on whether *Wachtel* or *Stephan* "got it right," understanding the good and the bad of each opinion helps to define the contours of the doctrinal framework that should prevail in ERISA insurer-fiduciary cases.

Beginning with the Third Circuit's approach, there is much overlap between *Jicarilla* and *Wachtel*, as both use a factor test to determine the ultimate beneficiary of legal advice. Their factors were also mostly in accord. *Wachtel* focused on (1) whether the assets by which the claim was paid out were owned entirely by the fiduciary; (2) whether a structural conflict of interest exists relating to economic or profit-oriented interests; (3) whether the insurer faces additional conflicts from managing multiple plans with beneficiaries who have diverging interests; and (4) the source of payment for the legal advice procured.¹⁵⁰ *Jicarilla* asks similar questions

¹⁴⁷ See *id.* at 172–73; see *supra* pp. 431–32 (discussing the shortcomings of the two rationale framework).

¹⁴⁸ See *id.* at 178–79 (listing factors by which "courts identify the 'real client'"); see *infra* pp. 434–36 (discussing how the *Jicarilla* Court applied these three real client factors).

¹⁴⁹ See *infra* pp. 438–39.

¹⁵⁰ See *Wachtel v. Health Net, Inc.*, 482 F.3d 225, 236 (3d Cir. 2007) (listing the real client factors as "[1] unity of ownership and management, [2] conflicting interests regarding profits, [3] conflicting fiduciary obligations, and [4] payment of counsel with the fiduciary's own funds").

as *Wachtel*'s second, third, and fourth factors, albeit in a different order and wording.¹⁵¹ Using a divergence of interests inquiry (the second factor for each court), the Supreme Court in *Jicarilla* found that the Government has a sovereign interest in administering Indian trusts distinct from the interests of those benefiting from it.¹⁵² As such, the Government's independent economic and political motives gave reason for it to seek advice in a personal rather than a fiduciary capacity.¹⁵³ *Jicarilla* likewise echoed the third *Wachtel* factor, stating that "[w]hen 'multiple interests' are involved in a trust relationship, the equivalence between the interests of the beneficiary and the trustee breaks down."¹⁵⁴ This applies with "particular force to the Government" due to "the multiple interests it must represent."¹⁵⁵ Just as an insurer often faces conflicting duties in servicing multiple benefit plans and a multitude of beneficiaries for each plan, so too does the Government "face conflicting obligations to different tribes or individual Indians."¹⁵⁶ Finally, *Jicarilla*, like *Wachtel*, relied on a "who pays" factor.¹⁵⁷ The fact that counsel was "paid out of congressional appropriations at no cost to the Tribe" served as a "strong indication of precisely who the real client[] [was]."¹⁵⁸ While the language used to define the factors translates over easier with some factors more than others, the principles behind *Wachtel* factors two, three, and four are all endorsed in *Jicarilla*.

Jicarilla did not, however, list a factor that directly corresponds to *Wachtel*'s first factor: unity of ownership and management. This absence, however, is easily explainable. In traditional trustee scenarios, as well as the Government-Tribe

¹⁵¹ See *Jicarilla*, 564 U.S at 178–79 (citing *Riggs Nat'l Bank v. Zimmer*, 355 A.2d 709, 711–12 (Del. Ch. 1976) (asking "whether the advice was bought by the trust corpus, whether the trustee had reason to seek advice in a personal rather than a fiduciary capacity, and whether the advice could have been intended for any purpose other than to benefit the trust").

¹⁵² See *id.* at 181 ("We cannot agree . . . that '[t]he government . . . ha[s] no stake in [the] substance of the [legal] advice, beyond [its] trustee role,' . . . or that 'the United States' interests in trust administration were identical to the interests of the tribal trust fund beneficiaries, The United States has a sovereign interest in the administration of Indian trusts distinct from the private interests of those who may benefit from its administration While one purpose of the Indian trust relationship is to benefit the tribes, the Government has its own independent interest in the implementation of federal Indian policy.").

¹⁵³ *Id.*

¹⁵⁴ *Id.* at 182 (citing *Riggs*, 355 A.2d at 714).

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 179.

¹⁵⁸ *Id.* (citing *Riggs*, 355 A.2d at 712).

relationship, the trustee has only a nominal and disinterested ownership right in trust assets.¹⁵⁹ It holds legal title to trust property merely to carry out obligations set out in the trust deed or in the Government's case, by statute.¹⁶⁰ Contrastingly, the *Wachtel/Stephan* fiduciary maintains an absolute ownership right over the pool of assets by which benefits are paid, as payment comes directly out of the insurance company's own funds.¹⁶¹ Thus, the ERISA insurer presents a rare deviation from the classic property ownership regime of trust law and was not directly relevant to *Jicarilla*. Nevertheless, the main idea behind *Wachtel's* first factor—*i.e.* that an insurer is unique to other fiduciaries because it retains full ownership over the assets by which benefits are paid—still has a place in *Jicarilla's* factors. The fact that a fiduciary pays benefits from its own purse can simply be encompassed in the second factor, which asks if there is a structural conflict of interest such that the fiduciary would have had reason to seek advice in a personal rather than a fiduciary capacity.¹⁶² Where payment is made directly from the insurer, a conflict can exist between the fiduciary, who gains by denying claims, and beneficiaries, who desire as large a benefit as possible.¹⁶³ Thus, *Jicarilla's* second factor can absorb *Wachtel's* first, while maintaining the original three-factor test espoused in *Riggs* and refined in *Jicarilla*.

Next, we turn to *Stephan*, where it becomes apparent that there is a greater disparity in the Supreme Court's and Ninth Circuit's approaches to the real client rationale. As previously discussed, *Stephan* ignored the real client factors in favor of analogy.¹⁶⁴ While analogy is a common analytic tool, *Jicarilla* suggests that overreliance on comparative reasoning can lead to perilous results.¹⁶⁵ In fact, the lower court in *Jicarilla*, which based its ruling largely by analogizing the

¹⁵⁹ See *Greenough v. Tax Assessors of Newport*, 331 U.S. 486, 494 (1947) (explaining the duality of ownership interests in a trust, which “consists of separate interests, the equitable interest in the *res* of the beneficiary and the legal interest of the trustee.”).

¹⁶⁰ See *In re Gen. Coffee Corp.*, 828 F.2d 699, 706 (11th Cir. 1987) (“[T]he trust beneficiary possesses an equitable ownership interest in the trust property, while the trustee possesses legal title to the property.”).

¹⁶¹ 29 U.S.C. § 1103(b)(1)–(2) (2018) (exempting insurers from the requirement that assets be held in trust).

¹⁶² See *infra* pp. 437–38 (describing how this Note's proposed hybrid second factor would function).

¹⁶³ See *Wachtel v. Health Net, Inc.*, 482 F.3d 225, 234 (3d Cir. 2007).

¹⁶⁴ See *supra* pp. 430–31.

¹⁶⁵ See *Jicarilla*, 564 U.S. at 165 (“Although the Government's responsibilities with respect to the management of funds belonging to Indian tribes bear some resemblance to those of a private trustee, this analogy cannot be taken too far.”).

Government to a private trustee, was reversed.¹⁶⁶ This does not necessarily mean that *Wachtel* was rightly decided and *Stephan* was not. Rather, *Stephan*'s analogy is likely more viable, given that the Government-to-private-trustee analogue is a far greater leap than that of ERISA insurer-fiduciary to ERISA trustee.¹⁶⁷ Further, just because *Wachtel*'s method was closer to the one used in *Jicarilla* does not necessarily mean that the Third Circuit's application of the factors was done without error.¹⁶⁸ Nevertheless, *Jicarilla*, like *Riggs* before it, indicates that the real client rationale is to be evaluated according to the three real client factors.

Thus, in this Note's effort to define a uniform framework for the fiduciary exception's application in ERISA insurer cases, the real client prong should be evaluated according to a hybrid *Jicarilla/Wachtel* three-factor test. This Note's proposed hybrid factors would ask:

- (1) whether the legal advice was paid for with the insurer's own funds;
- (2) whether the parties' economic interests diverge such that there was reason for the insurer to seek advice in a personal rather than fiduciary capacity; and
- (3) whether the insurer faced conflicting fiduciary obligations such that the advice could have been intended for a purpose other than to benefit the particular plan beneficiary(ies).

¹⁶⁶ *Id.* at 173; see *In re United States*, 590 F.3d 1305, 1313 (Fed. Cir. 2009) ("The United States' relationship with the Indian tribes is sufficiently similar to a private trust to justify applying the fiduciary exception.").

¹⁶⁷ For example, there is a whole body of law showing just how limited the Government-to-private-trustee analogue is. See *Cherokee Nation of Okla. v. United States*, 21 Cl. Ct. 565, 573 (1990) ("The general relationship between the United States and the Indian tribes is not comparable to a private trust relationship. *Eastern Band of Cherokee Indians v. United States*, 16 Cl. Ct. 75, 78 (1988). 'When the source of substantive law intended and recognized only the general, or bare, trust relationship, fiduciary obligations applicable to private trustees are not imposed on the United States.' *Montana Bank of Circle, N.A. v. United States*, 7 Cl. Ct. 601, 613-14 (1985). Rather, the general relationship between Indian tribes and defendant traditionally has been understood to be in the nature of a guardian-ward relationship. *Klamath & Moadoc Tribes of Indians v. United States*, 296 U.S. 244, 254 (1935); *United States v. Kagama*, 118 U.S. 375, 383 (1886). 'A guardianship is not a trust.' Restatement (Second) of Trusts § 7 (1959)."). Because the U.S. Government is really more like a guardian than a traditional trustee, reasoning by analogy was a far steeper hill to climb in *Jicarilla*. On the other hand, both insurance companies who serve as third-party claims administrators and traditional ERISA trustees are arguably far more similar, given their parallel fiduciary responsibilities. See *Stephan v. Unum Life Ins. Co. of Am.*, 697 F.3d 917, 932 (9th Cir. 2012) ("[T]he obligation that an ERISA fiduciary act in the interest of the plan beneficiary does not differ depending on whether that fiduciary is a trustee or an insurer.").

¹⁶⁸ See Crawford, *supra* note 18, at 138-43 (arguing that there were a series of flaws in the *Wachtel* court's application of each real client factor).

This hybrid test derives from *Jicarilla*'s polished version of the *Riggs* real client factors,¹⁶⁹ while borrowing the ERISA-insurer-specific language used in *Wachtel* factors two, three, and four.¹⁷⁰ The first *Wachtel* factor, unity of ownership and management, is no longer a stand-alone factor. However, the existence of a business model by which an insurer-fiduciary pays beneficiaries out of its own funds can and should be considered as part of the second factor's divergent interests inquiry.¹⁷¹ While no single factor is dispositive, the first is to be given significant weight.¹⁷² A strong showing of the other factors can overcome an adverse payment scheme.

2. Establishing a Uniform Legal Test for the Duty to Disclose Versus Privilege Rationale

Jicarilla has not delivered the same degree of clarity for the second rationale, as the Court did not actually perform a weighing analysis. Still, *Jicarilla* offers a skeletal guide to the elusive duty to disclose versus attorney-client privilege weighing analysis. *Jicarilla* makes clear the precise duty which is to be pitted against the privilege: a trustee's duty under the common law to produce trust-related information to beneficiaries on a reasonable basis.¹⁷³ In *Jicarilla*, the Government

¹⁶⁹ See *Jicarilla*, 564 U.S. at 172, 178–79 (listing the *Riggs*' real client factors as: "(1) When the advice was sought, no adversarial proceedings between the trustees and beneficiaries had been pending, and therefore there was no reason for the trustees to seek legal advice in a personal rather than a fiduciary capacity; (2) the court saw no indication that the memorandum was intended for any purpose other than to benefit the trust; and (3) the law firm had been paid out of trust asset," and redefining them as: "[1] whether the advice was bought by the trust corpus, [2] whether the trustee had reason to seek advice in a personal rather than a fiduciary capacity, and [3] whether the advice could have been intended for any purpose other than to benefit the trust.").

¹⁷⁰ See *Wachtel v. Health Net, Inc.*, 482 F.3d 225, 236 (3d Cir. 2007) (listing the real client factors as "[1] unity of ownership and management, [2] conflicting interests regarding profits, [3] conflicting fiduciary obligations, and [4] payment of counsel with the fiduciary's own funds.").

¹⁷¹ See *supra* pp. 435–36 (discussing how this consideration is absorbed into the second factor).

¹⁷² See *Jicarilla*, 564 U.S. at 179 ("We similarly find it significant that the attorneys were paid by the Government The payment structure confirms our view that the Government seeks legal advice in its sovereign capacity rather than as a conventional fiduciary of the Tribe."); *Riggs Nat'l Bank v. Zimmer*, 355 A.2d 709, 712 (Del. Ch. 1976) ("[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."). But see *Jicarilla*, 564 U.S. at 191 (Sotomayor, J., dissenting) ("[I]t is well settled that who pays for the legal advice, although 'potentially relevant,' is not determinative in resolving issues of privilege." RESTATEMENT (THIRD) OF TRUSTS § 82, cmt. f, p. 188 (AM. LAW. INST. 2005)."); *Wachtel*, 482 F.3d at 236 ("[T]he payment scheme is an indicator (albeit only an indicator)"); Bartolacci et al., *supra* note 17, at 30 (arguing that "the who pays test has its own flaws and seems to be losing its importance in the ERISA cases.").

¹⁷³ *Jicarilla*, 564 U.S. at 183–84 (citing RESTATEMENT (THIRD) OF TRUSTS § 82 (AM. LAW. INST. 2005)).

did not have that duty, since its disclosure obligations were statutorily defined by 25 U.S.C. § 162a(d) and “[t]he common law of trusts does not override the . . . statute and regulations.”¹⁷⁴ After determining that no common law duty was implicated, the Court did not perform a weighing analysis, stating that “[t]he fiduciary exception applies where [the common law] duty of disclosure overrides the attorney-client privilege.”¹⁷⁵

The contours of this cryptic rule, however, are not entirely clear. Does *Jicarilla* hold that the *fiduciary exception itself* only applies where the common law duty overrides the privilege? This would make the second rationale a necessary requirement for the exception’s application. Perhaps, the rule is more limited, in that *the second rationale* is met only where the common law duty outweighs the privilege. This interpretation is supported by the fact that the rule was stated within the section of the opinion which analyzed the second rationale and which was distinctly separated by the use of subheading “B”.¹⁷⁶ Maybe the rule is not exclusive—*i.e.* the rationale is met where the common law duty overrides the privilege, but that is not the only instance where it can be satisfied. This reading may arguably be at odds with the fact that the Court, having found the common law duty irrelevant to the Government, did not then perform a weighing analysis.

The narrowest reading would simply be that where § 162a(d) governs disclosure and the common law does not, the weighing analysis is not to be done and, thus, the second rationale is not met. But such a construal provides little help beyond lawsuits between Indian tribes and the Government. Extending this one step further, it appears that where a statute replaces the common law duty to disclose, courts cannot invoke the common law duty as a duty which can be weighed for the rationale. Another possibility is that the weighing analysis is to be disregarded only where a statute imposes disclosure obligations that are less strict than those of the common law, given that § 162a(d)’s requirements are narrower than the common law duty to disclose.¹⁷⁷

¹⁷⁴ *Id.* at 184–85 (citing 25 U.S.C. § 162a(d)(5) (2018) (Section 162a(d) obligates the Government not by a general common law duty of disclosure, but by a duty to “‘suppl[y] account holders with periodic statements of their account performance’ and [to] make ‘available on a daily basis’ the ‘balances of their account.’”)).

¹⁷⁵ *Id.* at 184.

¹⁷⁶ *See id.* at 183.

¹⁷⁷ *See id.* at 185–86 (“Reading [§ 162a(d)] to incorporate the full duties of a private, common-law fiduciary would vitiate Congress’ specification of narrowly defined disclosure obligations.”). § 162a(d) only requires the Government to “suppl[y] account holders with periodic statements of their account

Jicarilla leaves much uncertainty where a fiduciary's disclosure duties are governed by statute. For example, *Jicarilla* does not instruct what is to be done when a statute merely adopts the common law trustee's duty. Substance over form reasoning suggests that a functionally-identical statutory duty could be weighed against the privilege, just as the common law duty would. Other scenarios, however, are trickier. We know that § 162a(d)'s disclosure duties do not result in a weighing analysis. In the ERISA insurer context, lower courts have generally not read this part of the *Jicarilla* opinion expansively, such that any time Congress deviates from the common law duty, no weighing should take place. *Stephan*, for example, holds the second rationale to be met when ERISA § 503 imposes "broad disclosure requirements" that require a beneficiary, upon his request, to be provided all information relevant to his claim.¹⁷⁸ Almost all courts agree that the fiduciary exception applies to ERISA trustees subject to § 503's disclosure duty.¹⁷⁹

Jicarilla offers little help in answering these questions. It does, however, pinpoint the focus of the second rationale to be on the common law duty of a trustee, as "[t]he fiduciary exception applies where *this* duty of disclosure overrides the attorney-client privilege."¹⁸⁰ Further proving that this duty is at the heart of the analysis, *Jicarilla*'s introductory section states "[t]he reasons for the fiduciary exception" to be "that the trustee has no independent interest in trust administration and that the trustee is subject to a general common-law duty of disclosure."¹⁸¹

Thus, in analyzing the second rationale, courts should make a preliminary assessment as to whether the common law trustee's duty of disclosure is implicated

performance" and to make "available on a daily basis" the "balances of their account." 25 U.S.C. § 162a(d)(5) (2018). Corresponding regulations require that each tribe be provided with a quarterly statement of performance, that identifies "the source, type, and status of the trust funds deposited and held in a trust account; the beginning balance; the gains and losses; receipts and disbursements; and the ending account balance of the quarterly statement period." 25 C.F.R. §§ 115.801, 115.803 (2018). Under § 115.802, tribes may request more frequent statements or further "information about account transactions and balances." Contrastingly, the common law duty broadly requires trustees "to inform the beneficiary of important matters concerning the trust, and the beneficiary is entitled to demand of the trustee all information about the trust and its administration for which the beneficiary has any reasonable use." A. NEWMAN, G. BOGERT, G. BOGERT & A. HESS, LAW OF TRUSTS AND TRUSTEES § 962 (2017).

¹⁷⁸ *Stephan v. Unum Life Ins. Co. of Am.*, 697 F.3d 917, 931–32 (9th Cir. 2012); 29 U.S.C. § 1133 (2018); see also 29 C.F.R. § 2560.503-1(h)(2)(ii) (2018) (implementing ERISA's disclosure requirements).

¹⁷⁹ See Kussmann, *supra* note 82, § 6.

¹⁸⁰ *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 184 (2011) (emphasis added).

¹⁸¹ *Id.* at 165–66 (emphasis added).

in some way, *before* deciding whether a duty to disclose is to be weighed against the attorney-client privilege. Whether the fiduciary exception *only* applies where this common law duty is applicable (either by caselaw or by statute) or whether a modified variant of that duty may suffice is unclear under *Jicarilla*. The lower courts do suggest, however, that ERISA's § 503 disclosure regime suffices when the case involves an ERISA trustee.¹⁸² Whether § 503 also suffices for an insurance company acting as a claims fiduciary is a core disagreement in the *Wachtel/Stephan* circuit split, one in which *Jicarilla*'s limited second rationale analysis offers no direct answer.

As a final part of its analysis, the *Jicarilla* Court considered another point which does not neatly fit within either of the two rationales. The Court was persuaded by the fact that the documents at issue were classified as "property of the United States," while other records were listed as "property of the tribe" pursuant to the ownership of records classification rules of the Department of the Interior.¹⁸³ The Court stated that "[j]ust as the source of the funds used to pay for legal advice is highly relevant in identifying the 'real client' . . . we consider ownership of the resulting records to be a significant factor in deciding who 'ought to have access to the document.'"¹⁸⁴ Thus, while it is unclear exactly where this factor fits within the framework, when a statutory or rulemaking authority controls the ownership classification of the documents in dispute, *Jicarilla* suggests that it should be given consideration.

This Note's attempt at expounding the legal tests most likely to prevail in future Supreme Court fiduciary exception caselaw is important, because it provides a more uniform model by which courts can address the issue of the fiduciary exception's applicability to ERISA insurers. Since only two of the federal courts of appeals have taken up this question at this time, reaching some certainty provides the opportunity for the remaining courts to analyze this issue through the same lens. Although this undertaking cannot resolve every doctrinal nuance of the two rationales, it shows where the Supreme Court has given its blessing and where lower courts are still in the dark.

¹⁸² See *Wachtel v. Health Net, Inc.*, 482 F.3d 225, 236 (3d Cir. 2007) (stating that since the disclosure duty owed derives from the common law of trusts, it is appropriate to apply a trustee's duty to plan administrators operating as trustees, but not insurer-fiduciaries); *Stephan*, 697 F.3d at 932 (ruling that since ERISA's disclosure requirements do not change when the fiduciary happens to be an insurance company, it is also appropriate to apply a trustee's disclosure duty to insurer-fiduciaries).

¹⁸³ *Jicarilla*, 564 U.S. at 186; see 25 C.F.R. § 115.1000 (2018).

¹⁸⁴ *Jicarilla*, 564 U.S. at 186 (citing *Riggs Nat'l Bank v. Zimmer*, 355 A.2d 709, 712 (Del. Ch. 1976)).

B. *Adding a New Doctrinal Element to the Two-Rationale Framework: A Garner-Style Good Cause Requirement*

Even after illuminating, where possible, the proper doctrinal tests for the two-rationale framework, an inherent opaqueness remains. Even if courts use the same *Jicarilla* blueprint, the rationales' pliability and borderline philosophical inquiries still present an inescapable degree of uncertainty.¹⁸⁵ The real client analysis ventures into a legal fiction of who is really benefiting from legal advice. The second rationale puts courts in a tenuous role of deciding, without any defined scale, which of two prominent legal principles, the duty to disclose and the interest in confidential communication with a lawyer, is more important than the other.

In addressing these concerns, *Jicarilla*, once again, offers guidance. The 2011 decision was written with restraint as the Court's first venture into the fiduciary exception. Justice Alito's majority opinion ruled only to the extent necessary to resolve the narrow issue of whether the exception applied to the general trust relationship between the United States and the tribes.¹⁸⁶ *Jicarilla* is, thus, more of a "tip of an iceberg" than a treatise, and was not meant to occupy the entire jurisprudential field. The Court was able to write as it did because *Jicarilla* was a relatively easy fiduciary exception case. With little dispute (only Justice Sotomayor dissented), it held the attorney-client privilege prevailing.¹⁸⁷ Five Justices agreed that the logic behind both rationales were missing, and seven agreed that real client principles showed the attorney-client privilege to prevail.¹⁸⁸

But as *Wachtel* and *Stephan* show, the insurer-beneficiary relationship is not so clear-cut. The two-rationale test has failed to produce a uniform result in this context. This is because the rationales only prove truly workable where the fiduciary at issue either closely aligns with the trustee archetype of *Riggs*¹⁸⁹ or is very far-removed

¹⁸⁵ See Bartolacci et al., *supra* note 17, at 27–30 (arguing the two rationales to be unworkable).

¹⁸⁶ Justices Ginsburg and Breyer suggest the majority could have exercised even more restraint in its analysis of the second rationale. See *Jicarilla*, 564 U.S. at 187–88 (Ginsburg, J., concurring).

¹⁸⁷ *Id.* at 165–66.

¹⁸⁸ See *id.* at 187 (Ginsburg, J., concurring) ("I agree with the Court that the Government is not an ordinary trustee . . . [because it] has its own 'distinct' interest' . . . [a] unique 'national interest,' . . . [that] obligates Government attorneys, in rendering advice, to make their own 'independent evaluation of the law and facts' in an effort 'to arrive at a single position of the United States,' . . . 'For that reason,' as the Court explains, 'the Government seeks legal advice in a 'personal' rather than a fiduciary capacity.' . . . The attorney-client privilege thus protects the Government's communications . . .").

¹⁸⁹ See Bartolacci et al., *supra* note 17, at 29 (arguing that the test works best in simple trustee cases).

from that model, as was the Government in *Jicarilla Riggs* and *Jicarilla*, thus, mark the far ends of the doctrinal spectrum. Common law trustees are on one end where the fiduciary exception surely applies, following a long line of cases dating back to 19th century England.¹⁹⁰ Entities with only distant trustee-like obligations, such as the Government in *Jicarilla*, mark the other end where the exception does not apply. At these extremes, the two-rationale test works with little uncertainty; the courts can rule, pursuant to either well-established historical authority or Supreme Court precedent, that the exception categorically does or does not apply to these bookend fiduciaries. But, the test's workability breaks down as one moves away from these endpoints and into an uncertain middle zone. Fiduciaries in this grey area do not easily compare to *Riggs* trustees or the Government, making it difficult for courts to hold the fiduciary exception *per se* applicable to them or *per se* not.

One scenario in this grey area has led to a modification of the two-rationale test to account for the fact that the relationship at issue, a corporation-shareholder relationship, was not as black-and-white as those of *Riggs* and *Jicarilla*. This is the case of *Garner v. Wolfenbarger*, where the Fifth Circuit added a good cause prong,¹⁹¹ embracing the idea that categorical rules have limited viability. They work at the far ends of the spectrum, but in greyer cases, there is a need for a flexible test that allows for a case-by-case analysis. Under such a test, fiduciaries are not automatically subject to, or exempt from, the fiduciary exception simply based on the type of fiduciary they are; rather, the specific circumstances of the dispute drive the analysis.

In crafting any rule, there are pragmatic consequences. Categorical rules, when well-defined, offer predictability. Achieving certainty and predictability is a laudable goal, one which the Court has deemed important in the attorney-client privilege context.¹⁹² Where, however, a legal framework is so opaque and ineffectual, such that it outputs categorical rules which are in direct conflict with each other, certainty is hardly achieved. This is exactly what has transpired with *Wachtel* and *Stephan*. The elusive two-rationale test, which proves only to be workable at the far ends of the spectrum of possible fiduciaries, outputted opposing categorical rules. Under

¹⁹⁰ See *Talbot v. Marshfield*, (1865) 62 Eng. Rep. 549, 549.

¹⁹¹ See *Garner v. Wolfenbarger*, 430 F.2d 1093, 1103–04 (5th Cir. 1970).

¹⁹² See *Jicarilla*, 564 U.S. at 164 (“For the attorney-client privilege to be effective, it must be predictable.”); *Jaffee v. Redmond*, 518 U.S. 1, 18 (1996) (quoting *Upjohn Co. v. United States*, 449 U.S. 383, 393 (1981)) (“[I]f the purpose of the privilege is to be served, the participants in the confidential conversation ‘must be able to predict with some degree of certainty whether particular discussions will be protected. An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all.’”).

Wachtel, the fiduciary exception simply does not apply to insurers, and under *Stephan*, just the opposite.¹⁹³

Interestingly enough, several Supreme Court Justices foreshadowed this exact problem years before the circuit split took shape. At oral argument for the *Jicarilla* case, several Justices showed concern that any rule which rigidly holds the fiduciary exception *per se* applicable to a class of fiduciaries may undercut the policies and purpose of the attorney-client privilege:

CHIEF JUSTICE ROBERTS: Counsel, the attorney-client privilege is policy-based . . . it works best if people have candid advice from their lawyers, and my concern here is if you're a lawyer . . . and you're asked for your advice by a trustee . . . and if you know that is going to be shared with the beneficiary, you're going to give bland, mushy hedging advice rather than direct and candid advice to the trustee. . . . And . . . that hurts not only the trustee, but also the beneficiaries . . .

JUSTICE SCALIA: The trustee cannot hire his own lawyer . . . So long as he's a trustee, he cannot hire his own lawyer to get advice on how to manage the trust in a way that will avoid his liability. He just can't do it right? . . .

MR. GORDON [counsel for Respondent Jicarilla Apache Nation]: Yes, Your Honor, that's the position. And that puts the government in no different position than private beneficiaries or ERISA beneficiaries or any other sorts of beneficiaries. . . .

CHIEF JUSTICE ROBERTS: So I'm the trustee, and I say I would like legal advice as to whether I should renegotiate this lease with the government. . . . Now, I want that advice so I manage the trust correctly, and I'm concerned if I don't manage the trust correctly I'm going to be sued. Now is the document from the lawyer responding to that inquiry privileged or not?

MR. GORDON: I think, Your Honor, that if it focuses on how to manage it properly . . . and it's prospective, then . . . it is not privileged. If, instead, you posit, you know, this is what I did and I'm concerned I may have screwed up, do you think I'm liable, then I think a different answer may obtain . . .

JUSTICE KENNEDY: Which means you can't get preventative advice, which is one of the most important kinds of advice an attorney can give.¹⁹⁴

¹⁹³ See *supra* Part II-B.

¹⁹⁴ Transcript of Oral Argument at 28–33, *United States v. Jicarilla Apache Nation*, 564 U.S. 162 (2011) (No. 10-382).

These concerns are not unique to the federal government. The Justices made that clear through their generic and even trustee-specific language.¹⁹⁵ Rather, they call into question the fiduciary exception itself, or at least the way in which it is usually applied—categorically. When it *per se* applies to a certain fiduciary, the exception causes an inescapable degradation in the quality of attorney-client communication because counsel and clients will censor their talks, mindful of the fact that they might as well be broadcasting them to opposing counsel in a future breach of duty suit. The giving and receiving of candid and preventative advice is thus stifled, with only the liability exception readily available to protect confidentiality.¹⁹⁶ Without proper counseling, a fiduciary is more likely to make mistakes and breach a duty, ultimately harming beneficiaries.¹⁹⁷

Justices Roberts, Scalia, and Kennedy were not the only Justices to raise concern for categorical rules in fiduciary exception jurisprudence. Justice Sotomayor, in her dissenting opinion, scrutinized the policy shortcomings of a categorical rule even more explicitly:

The majority's categorical approach fails to appreciate that privilege determinations are by their very nature made on a case-by-case—indeed, document-by-document—basis. Government attorneys, like private counsel, must review each requested document and make an individualized assessment of privilege, and courts reviewing privilege logs and challenges must do the same. “While such a ‘case-by-case’ basis may to some slight extent undermine desirable certainty in the boundaries of the attorney-client privilege, it obeys the spirit of” of Rule 501, *Upjohn*, 449 U.S., at 396–397, . . . which “provide[s] the courts with the flexibility to develop rules of privilege on a case-by-case basis,” *Trammel v. United States*, 445 U.S. 40, 47 . . .¹⁹⁸

Though writing on her own, Justice Sotomayor articulates an important idea that several other Justices have, at the very least, expressed significant concern over: that categorical rulings may wrongly constrict the fiduciary exception's application according to rigid fiduciary-by-fiduciary cataloging, which ultimately marginalizes the communication-by-communication basis by which claims of privilege are to be

¹⁹⁵ *See id.* at 29 (“So long as he’s a trustee, he cannot hire his own lawyer.”).

¹⁹⁶ *See Solis v. Food Emp’rs. Labor Relations Ass’n*, 644 F.3d 221, 228 (4th Cir. 2011) (“The [fiduciary] exception will not apply . . . to a fiduciary’s communications with an attorney regarding her personal defense in an action for breach of fiduciary duty.”).

¹⁹⁷ *See* Transcript of Oral Argument, *supra* note 194, at 28–29.

¹⁹⁸ *Jicarilla*, 564 U.S. at 200 (Sotomayor, J., dissenting).

analyzed. While a communication-focused approach is not as black-and-white as one which indexes fiduciaries into two groups of (a) subject to the exception or (b) exempt from it, it offers the flexibility needed to more consistently achieve the right result.

This flexibility is especially important in cases like *Wachtel* and *Stephan*, where categorizing the ERISA insurer-fiduciary has proven difficult, since it shares characteristics of those to which the fiduciary exception applies and also to those which it does not. As both the *Wachtel* and *Stephan* decisions make clear, the statutory scheme Congress has constructed for the insurer-fiduciary does not allow it to neatly fit on either the *Riggs* trustee-side or *Jicarilla* end of the spectrum. On one hand, insurers are allowed to serve as claims fiduciaries subject to generally the same disclosure requirements and fiduciary duties as an ERISA trustee.¹⁹⁹ In this regard, they look like a common law trustee. But Congress also exempts insurers from ERISA's requirement that assets be held in trust, thereby encouraging a business model which prioritizes the insurer's profit-motive and which is naturally adverse to the interests of plan participants.²⁰⁰ With such a divergence of interests, the ERISA insurer scenario resembles that of the federal government and Native American tribes.

ERISA has put insurer-fiduciaries in a limbo between the *Riggs* and *Jicarilla* ends of the spectrum.²⁰¹ It is this middle point of having one foot in the fiduciary space and another in the profit space, which calls for a test that allows for some other option besides a categorical rejection of one of the two congressionally-sanctioned hats that insurers simultaneously wear.²⁰² The two-rationale framework, as it has been developed by the courts, cannot be that test, as it is inherently designed to output categorical rules; either the rationales are met and the exception applies to that type of fiduciary, or the rationales' logic fails to hold water and the attorney-client privilege is rigidly unbeaten. Thus, to account for the unique, uncategorizable status

¹⁹⁹ See *Stephan v. Unum Life Ins. Co. of Am.*, 697 F.3d 917, 932 (9th Cir. 2012).

²⁰⁰ See *Wachtel v. Health Net, Inc.*, 482 F.3d 225, 234 (3d Cir. 2007).

²⁰¹ See *id.* ("ERISA fiduciaries, however, come in many shapes and sizes.").

²⁰² This dual-hat role is comparable to the corporate fiduciary context of *Garner*. Corporate management acts for its own interests, lacking the sole focus of a trustee. As such, the shareholders' "protected status . . . does not automatically entitle them to all corporate secrets," but rather, where management has been accused of acting "inimically to shareholder interests, . . . shareholders may show 'good cause' why the corporation or its officers should not be permitted to invoke the attorney-client privilege." *Sandberg v. Va. Bankshares*, 979 F.2d 332, 351 (4th Cir. 1992).

of the ERISA insurer, this Note proposes the addition of a *Garner*-style good cause requirement onto the two-rationale framework in ERISA insurer-fiduciary cases.

Applying *Garner*'s good cause test beyond its shareholder derivative suit origins is not unprecedented.²⁰³ *Donovan v. Fitzsimmons* did just that with ERISA trustees.²⁰⁴ While *Donovan* only briefly explains its decision to use a good cause test, it posited that this prong "adequately assures the public interest in attorney-client confidentiality, yet acknowledges that disclosure must prevail in those limited circumstances in which beneficiaries of corporate fiduciaries show a valid need for information."²⁰⁵ Thus, the good cause test is really about achieving a balance between confidentiality and the need to access information, with good cause being the scale by which those policies are balanced against one another.²⁰⁶ The requisite good cause showing acts as a filter, separating worthy demands for information from their frivolous counterparts.

Donovan, however, has been highly criticized and rarely followed,²⁰⁷ with two main critiques offered against it by courts and commentators. First, they argue that the good cause test is an exceptional mutation of the two-rationale framework meant only for shareholder cases.²⁰⁸ They posit that *Garner*'s good cause prong was fashioned so as to prevent harassing derivative claims where a small class of shareholders, through the fiduciary exception, gain automatic access to confidential

²⁰³ See Summerhays, *supra* note 39, at 303–12 (explaining that "the fiduciary language employed in *Garner* is sufficiently broad and universal that the exception can also be interpreted as a general exception to the attorney-client privilege" and listing extensions in non-derivative shareholder suits, partnerships, ERISA, unions, and non-ERISA insurance companies).

²⁰⁴ See *Donovan v. Fitzsimmons*, 90 F.R.D. 583, 584 (N.D. Ill. 1981); see also *supra* pp. 420–21 (discussing *Donovan*, the first case to apply the fiduciary exception in an ERISA context, in more detail).

²⁰⁵ *Donovan*, 90 F.R.D. at 586.

²⁰⁶ See *Tatum v. R.J. Reynolds Tobacco Co.*, 247 F.R.D. 488, 494 (M.D.N.C. 2008) ("[T]he Fourth Circuit adopted . . . *Garner* . . . as a means of balancing . . . the fiduciary's need for confidential communications with its attorneys, and the interests of the beneficiaries of the fiduciary relationship.").

²⁰⁷ See *Solis v. Food Emp'rs Labor Relations Ass'n*, 644 F.3d 221, 228–29 (4th Cir. 2011) (rejecting the good cause test and listing other courts which have done the same); Kussmann, *supra* note 82, § 11.

²⁰⁸ See, e.g., *Martin v. Valley Nat'l Bank*, 140 F.R.D. 291, 326 (S.D.N.Y. 1991) ("The *Garner* test was devised in the significantly different context of a shareholder derivative suit, and the concerns animating the Fifth Circuit's decision there are not applicable [to ERISA trustees]."); Summerhays, *supra* note 39, at 314–15 ("The *Garner* decision is strongly rooted in the unique problems of intra-corporate relationships. In contrast, the nature of the attorney-client privilege in the fiduciary context is sufficiently different from the corporate setting of *Garner* to call into question whether *Garner* is adequate precedent for a broad fiduciary-beneficiary exception.").

information.²⁰⁹ Disclosure, in this context, harms anyone with an equity stake in the enterprise, as publicizing sensitive records may cause blowback in the markets and share price decline.²¹⁰ The good cause prong, as another barrier to compelled disclosure,

serves an important function in corporate derivative suits because management cannot be expected to fully satisfy all shareholders all of the time and cannot get mired down in second-guessing by disgruntled shareholders, but the same concerns are not applicable in the case of ERISA plans because plan participants rely on ERISA fiduciaries in a more direct manner.²¹¹

This critique, however, is largely based on a comparison to ERISA trustees,²¹² which are markedly different from the *Wachtel/Stephan* fiduciary. At the outset, the shareholder-specific issues discussed provide only a backdrop for *Garner*, as the “animating rationale for imposing the ‘good cause’ test is that there may well be divergences of interest between the plaintiff shareholder in a derivative action and the corporation itself.”²¹³ Thus, while an ERISA trustee can be distinguished from the *Garner* approach due to trustees’ lack of a personal interest in trust assets, the same cannot be said for insurers who are exempt from ERISA’s requirement that

²⁰⁹ *Cox v. Adm’r U.S. Steel & Carnegie*, 17 F.3d 1386, 1414 (11th Cir. 1994); *Martin*, 140 F.R.D. at 326.

²¹⁰ *Martin*, 140 F.R.D. at 326.

²¹¹ Bruce D. Pingree & Mark L. Mathis, *Discovery and Privilege Issues Arising from Plan and Employer Representation: Who Is the Client?*, A.L.I.-A.B.A. COURSE MATERIALS J. SK012 (July 2004).

²¹² See *Martin*, 140 F.R.D. at 326 (quoting *Wash.-Balt. Newspaper Guild, Local 35 v. Wash. Star Co.*, 543 F. Supp. 906, 909 n.5 (D.D.C. 1982) (“[T]hese concerns are not readily applicable in a trust context. Indeed, ‘in a trustee relationship there exists no legitimate need for a trustee to shield his actions from those whom he is obligated to serve.’”); see also *Solis*, 644 F.3d at 228–29 (4th Cir. 2011) (relying also on *Washington Star’s* trustee theory); *Tatum v. R.J. Reynolds Tobacco Co.*, 247 F.R.D. 488, 495 (M.D.N.C. 2008) (same); Summerhays, *supra* note 39, at 310–11 (“These courts apparently base their rejection of the good cause requirement on a combination of the strength of the fiduciary relationship created by ERISA and on an assumption that the plan trustee—in contrast to corporate management—can claim little interest in obtaining legal advice free from the interference of plan beneficiaries.”).

²¹³ *Lawrence v. Cohn*, No. 90CIV.2396 (CSHMHD), 2002 WL 109530, at *5 (S.D.N.Y. Jan. 25, 2002). The *Garner* decision itself suggests that a divergence of interests is the touchstone for imposing a good cause test, as the Fifth Circuit addressed the attorney-client privilege in a “particularized context: where the client asserting the privilege is an entity which in the performance of its functions acts wholly or partly in the interests of others, and those others, or some of them, seek access to the subject matter of the communications.” *Garner v. Wolfenbarger*, 430 F.2d 1093, 1101 (5th Cir. 1970).

assets be held in trust.²¹⁴ Additionally, courts citing this critique have also relied heavily on a *Washington Star* footnote.²¹⁵ But, that decision was written overbroadly, seeking to occupy the entire field of fiduciary exception jurisprudence despite the case's limited facts, and the ruling also overlooked nuanced differences between the types of ERISA fiduciaries.²¹⁶ This critique, thus, falls short.

Second, the good cause test is frequently attacked as making the fiduciary exception even less black-and-white.²¹⁷ Specifically, it has been argued that the good cause prong, as a balancing test, lacks the certainty of a categorical approach, and that Supreme Court caselaw on other exceptions to the attorney-client privilege denounce balancing tests.²¹⁸ But, this view overlooks the fact that the fiduciary exception, unlike other exceptions to the privilege, is at its very core, founded upon a balancing analysis, namely, the second rationale which requires courts to gauge the relative importance of a common law duty to disclose and the attorney-client privilege.²¹⁹ By its very nature, the fiduciary exception lacks certainty,²²⁰ and thus, it is not just a good cause test which makes absolute predictability an unrealistic goal. Uncertainty cannot be fully eliminated as long as the two-rationale framework exists as is and as long as the Court continues to sacrifice a degree of predictability in exchange for a case-by-case approach to privilege determinations.²²¹

²¹⁴ See *Wachtel v. Health Net, Inc.*, 482 F.3d 225, 234 (3d Cir. 2007); 29 U.S.C. § 1103(a)–(b)(2) (2018).

²¹⁵ See *Wash. Star*, 543 F. Supp. at 909 n.5 (criticizing *Donovan's* good cause prong).

²¹⁶ See *Wachtel*, 482 F.3d at 233; see also *supra* p. 423 (discussing *Washington Star* in more detail).

²¹⁷ See Benjamin Cooper, Note, *An Uncertain Privilege: Reexamining Garner v. Wolfenbarger and Its Effect on Attorney-Client Privilege*, 35 CARDOZO L. REV. 1217, 1220 n.29 (2014) (listing various articles which argue that a non-categorical good cause test makes the fiduciary exception more uncertain).

²¹⁸ *Id.* at 1241–43, 1226 n.29.

²¹⁹ See *id.* at 1252 (“[B]ecause the Court seemingly endorsed the Garner exception in *United States v. Jicarilla Apache Nation*, balancing tests appear to have a new vitality.”).

²²⁰ See Summerhays, *supra* note 39, at 314 (“[A] qualified privilege based on the presence of a fiduciary duty is likely to suffer from such uncertainty Since the fiduciary-beneficiary exception only applies in the presence of a fiduciary duty, a party to a relationship must predict whether a court would find that the relationship gives rise to such a duty. The attributes of a fiduciary relationship are not, however, clearly etched in stone. The presence of a fiduciary duty is often a question of fact, and the rules governing when a duty arises are often unclear.”).

²²¹ See *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 200 (2011) (Sotomayor, J., dissenting) (quoting *Upjohn Co. v. United States*, 449 U.S. 383, 396 (1981) (“[P]rivilege determinations are . . . made on a . . . document-by-document—basis. . . . ‘While such a ‘case-by-case’ basis may to some slight extent undermine desirable certainty . . . it obeys the spirit of” of Rule 501.”).

In the atypical fiduciary context of *Wachtel* and *Stephan*, however, a good cause test does not detrimentally magnify the doctrine's unpredictability, but rather, resolves the circuit split through a compromise. Currently, *Wachtel* and *Stephan* offer narrow certainty in geographically-limited areas, while causing nationwide asymmetry and frequent challenges to each holding. Good cause provides a middle-of-the-road alternative to *Wachtel* and *Stephan*'s incompatible categorical rules as a test that can hold the fiduciary exception applicable and inapplicable when the circumstances properly warrant each result. It does this by striking a balance between a fiduciary's interest in privacy and circumstances where beneficiaries really ought to have access to the information.²²² It also is a way to account for unique fiduciaries whose interests diverge from their beneficiaries.²²³ The defining characteristic of the *Wachtel/Stephan* fiduciary is that it pays beneficiaries' claims from its own pocket, resulting in an inescapable divergence of interests, nonexistent in the trustee archetype.²²⁴ This divergence of interests, like that between shareholders and corporate management, puts the ERISA insurer in the same group of unique fiduciaries worthy of a modified test. Accordingly, the framework for fiduciary exception in ERISA insurer-fiduciary cases should incorporate a good cause requirement.

1. Defining the Good Cause Test: Shifting the Burden and Generalizing the Factors

The *Garner* good cause variant offers limited help in defining the proper good cause test for ERISA insurer cases. *Garner* places the burden to show cause on those seeking to compel production.²²⁵ This added obstacle was designed with an eye towards preventing "strike suits"—frivolous claims that are brought simply to extract a settlement or harass corporate management.²²⁶ *Garner*'s concern for shareholder

²²² Russell Hirschhorn, *View from Proskauer: ERISA Plan Fiduciaries—Are Your Conversations with Counsel Privileged?*, PROSKAUER ROSE LLP (Mar. 10, 2014), <https://www.ERISAPRACTICECENTER.COM/2014/03/view-from-proskauer-erisa-plan-fiduciaries-are-your-conversations-with-counsel-privileged/>.

²²³ *Lawrence v. Cohn*, No. 90CIV.2396 (CSHMHD), 2002 WL 109530, at *5 (S.D.N.Y. Jan. 25, 2002).

²²⁴ *See supra* pp. 435–36, 446.

²²⁵ *Garner v. Wolfenbarger*, 430 F.2d 1093, 1103–04 (5th Cir. 1970). This burden standard is the majority rule. *See Kussmann, supra* note 82, § 9. A minority of cases hold that the party asserting the attorney-client privilege has the burden of showing good cause for nondisclosure. *Id.* at § 10.

²²⁶ *See Summerhays, supra* note 39, at 320 & n.232; *see supra* note pp. 447–48 (discussing this prevention of harassment claims justification for the good cause test in more detail).

strike suits, a frequently-occurring problem in the corporate space,²²⁷ does not easily extend to the ERISA insurer context. Rather, if anything, misconduct and abuse have been shown to be highly prevalent among insurers²²⁸ in light of the inherent conflicts they face in paying benefits through their own funds.²²⁹

This pattern of insurer misconduct distinguishes the *Wachtel/Stephan* context from that of *Garner*, as the prevention-of-abuse justification for the good cause prong is directed towards the insurer's wrongdoing, not the beneficiary's. Just as *Garner* placed an added burden on shareholders given the regularity of harassment suits, so too should the good cause burden be on the party most prone to misconduct here. Not only does history indicate this to be the insurer, but ERISA's scheme for insurers and its susceptibility to exploitation also supports that the burden should be on insurers. ERISA allows an insurer to pay benefits from its own purse without an impartiality safeguard that assets be held in trust.²³⁰ Magnifying this effect, plan documents can be drafted or amended so as to provide for a deferential standard of review over claims decisions.²³¹ Placing an added burden on ERISA insurers to

²²⁷ Robert L. Hickok, Jay A. Dubow & Gay Parks Rainville, *Confronting the New Shareholder Strike Suit*, THE LEGAL INTELLIGENCER (Dec. 6, 2012, 12:00 AM), <https://www.law.com/thelegalintelligencer/almID/1202580460417/>.

²²⁸ See *Stephan v. Unum Life Ins. Co. of Am.*, 697 F.3d 917, 933–34 (9th Cir. 2012) (detailing a historical pattern of abuse by insurer Unum, including erroneous and arbitrary benefits denials, bad faith contract misinterpretations, purposeful denial of valid claims knowing that ERISA's deferential standard of review could shield it from liability, and other unscrupulous tactics); *Zanny v. Kellogg Co.*, No. 4:05CV-74, 2006 WL 1851236, at *9 (W.D. Mich. June 30, 2006) (stating that the “record is an open indictment of MetLife's practices and treatment of the mentally-ill and long-term disability benefits” as the insurer “regularly reviewed the client's file with an open intention to deny benefits despite the profound and compelling evidence of serious and prolonged mental illness.”); *Radford Tr. v. First Unum Life Ins. Co. of Am.*, 321 F. Supp. 2d 226, 247 n.20 (D. Mass. 2004) (listing three dozen cases in which courts have openly criticized Unum's bad faith denials and other misconduct); *Loucks v. Liberty Life Assurance Co.*, 337 F. Supp. 2d 990, 995 (W.D. Mich. 2004) (“[C]laim administrators not only failed to appreciate the significance of the medical findings of Plaintiff's treating specialists, they defamed Plaintiff by inaccurately labeling her an HIV patient The claim administration was both grossly negligent and driven by financial motives irrespective of the binding contract/benefit language.”); John H. Langbein, *Trust Law as Regulatory Law: The Unum/Provident Scandal and Judicial Review of Benefit Denials Under ERISA*, 101 NW. U. L. REV. 1315, 1317–21 (2007); see also *Metro. Life Ins. Co. v. Glenn*, 554 U.S. 105, 117 (2008) (“[C]onflic[t]s of interest . . . should prove more important (perhaps of great importance) . . . where an insurance company administrator has a history of biased claims administration.”).

²²⁹ See *supra* pp. 425–26 (discussing the various conflicts of interests faced by insurers).

²³⁰ 29 U.S.C. § 1103(a)–(b)(2) (2018).

²³¹ See *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 114–15 (1989) (holding that the standard of review over a denial of benefits is de novo, unless the plan grants a fiduciary the discretionary authority

account for this proneness to misconduct is a common doctrinal response by courts.²³² Thus, in order to account for insurers' history of abuse, susceptibility to misconduct due to ERISA's minimal safeguards, and the rule that the attorney-client privilege applies only where necessary,²³³ this Note proposes that ERISA insurer-fiduciaries should bear the burden to show good cause for nondisclosure.

In evaluating whether a good cause burden has been met, courts evaluate a series of factors deriving from those listed in *Garner*.²³⁴ However, these *Garner* indicia offer only limited help in defining the appropriate factors for ERISA insurer cases, because they are specific to the shareholder context and do not easily translate beyond.²³⁵ The U.S. District Court for the Southern District of New York in *In re Pfizer*, however, extracted the general principles embodied in the *Garner* indicia to broaden their use.²³⁶ Transposing the *Pfizer* court's generalized factors to the *Wachtel/Stephan* context, courts determining if insurers have shown cause for nondisclosure should consider the following: (1) the beneficiary's stake in the fiduciary relationship; (2) the apparent merit of the beneficiary's claim; (3) the beneficiary's need for the privileged information; and (4) the nature of the privileged communication itself.

The first generalized factor stems from *Garner*'s first factor: the number of shareholders in the derivative suit and the percentage of stock they own.²³⁷ While this inquiry is specific to the corporate context, the underlying purpose, here, is to weed out strike suits, as a sizeable number of shareholder-plaintiffs suggests a nonfrivolous claim.²³⁸ Extracting the ultimate purpose of this inquiry, the factor is

to make benefit determinations. If that is the case, claims decisions are subject to only an arbitrary and capricious, or abuse of discretion-type, standard.)

²³² See *Pinto v. Reliance Standard Life Ins. Co.*, 214 F.3d 377, 379 (3d Cir. 2000) (adopting a heightened standard of review when an insurer exercises discretionary authority over benefits).

²³³ *Fisher v. United States*, 425 U.S. 391, 403 (1976).

²³⁴ See *Garner v. Wolfenbarger*, 430 F.2d 1093, 1104 (5th Cir. 1970).

²³⁵ See Summerhays, *supra* note 39, at 320.

²³⁶ See *In re Pfizer Inc. Sec. Litig.*, 90 Civ. 1260 (SS), 1993 U.S. Dist. LEXIS 18215, at *44 (S.D.N.Y. Dec. 23, 1993) (redefining the *Garner* indicia into four broader factors: "(1) the discovering party's stake in the fiduciary relationship; (2) the apparent merit of the claim; (3) the need of the discovering party for the information; and (4) the nature of the communication itself"); see Summerhays, *supra* note 39, at 321 n.236 (describing how the four *Pfizer* factors correspond to the original nine *Garner* indicia).

²³⁷ See Summerhays, *supra* note 39, at 321 n.236.

²³⁸ See *supra* pp. 450–51.

really a call to study objective measures, such as the number of claimants, in order to see if a claim is meritorious. In the ERISA insurer context, that same idea can be achieved by asking whether a pattern of claim administration misconduct exists for the particular insurer. A history of abuse can be evidenced by many plan participants having sued an insurer, whether in the same litigation²³⁹ or in a series of suits.²⁴⁰ Insurers bear the burden of showing cause for nondisclosure, but beneficiaries may present evidence to show a pattern of wrongdoing. Insurers, conversely, can “demonstrate that, before making the decision on [a] claim, it implemented procedures to mitigate possible bias” or took other proactive safeguards.²⁴¹ A policy gain thus ensues, as this factor has the benefit of incentivizing ethical business practices by insurers, who have a greater chance of having their attorney-client privilege upheld when they take preventative steps to address conflicts and mitigate their potential for abuse.

Next, the second generalized factor—the merit of the beneficiary’s claim—should be evaluated based on the apparent legitimacy of the beneficiary’s allegations and the evidence available to support such allegations. Per *Donovan*, this inquiry should elicit whether the suit is colorable and brought in good faith, as opposed to a mere “fishing expedition.”²⁴²

The third factor—the beneficiary’s need to discover the privileged information—allows an insurer to push back on the presumptively applicable fiduciary exception by showing that the information sought can be obtained by a means not at odds with the attorney-client privilege.²⁴³

²³⁹ See *Donovan v. Fitzsimmons*, 90 F.R.D. 583, 587 (N.D. Ill. 1981) (finding good cause, in part, because “[t]he Secretary [of Labor] seeks restitution on behalf of all of the approximately 500,000 potential beneficiaries of the [pension] Fund. There can be no contention that this is a lawsuit involving only a handful of disgruntled pensioners or a small minority of the Fund’s participants.”).

²⁴⁰ See *supra* note 228 for examples of such abuse across multiple cases.

²⁴¹ *Stephan v. Unum Life Ins. Co. of Am.*, 697 F.3d 917, 934 (9th Cir. 2012).

²⁴² See *Donovan*, 90 F.R.D. at 584.

²⁴³ See *Cooper*, *supra* note 217, at 1251 (proposing a shifted burden scheme for derivative suits) (“[I]f the information is available from non-privileged sources, such as employee interviews and business files, then the party seeking discovery should be unable to pierce the privilege. To overcome the privilege, the party seeking disclosure must establish the unavailability of the information by making a good faith effort to obtain the information from other sources . . . information available from non-privileged sources is just that—available—and thus does not warrant the use of the exception.”).

The fourth and likely most important factor, given courts' emphasis on communication-based analyses,²⁴⁴ is the nature of the privileged communication itself. Under this factor, insurers may rebut the beneficiary's initial showing by proving the materials requested by the beneficiary to be overly broad in scope or not directly relevant to the beneficiary's suit.²⁴⁵ *Donovan* suggests that the relative importance of the information should be considered here.²⁴⁶

CONCLUSION

The *Wachtel/Stephan* circuit split reveals a core problem in the two-rationale framework for evaluating the fiduciary exception's applicability. The framework's all-or-nothing approach outputs only categorical rules, making the exception *per se* applicable or *per se* not to a particular class of fiduciaries. Such rules have limited viability, proving only workable on the extreme ends of the spectrum of possible fiduciaries. They prove especially unworkable for the hard-to-categorize *Wachtel/Stephan* fiduciary: a limited-purpose ERISA claims fiduciary with a profit interest that diverges from those of the beneficiaries whom they serve.

This Note offers a two-part solution for resolving these problems. First, it scrutinizes the incongruent analytic methods used by *Wachtel* and *Stephan* in applying the two-rationale test and compares them to the Supreme Court's *Jicarilla* decision in order to establish uniform standards for each rationale. Next, it proposes the adoption of a new prong in the framework—a good cause requirement—but one in which the burden to show cause is on the insurer-fiduciary.

Thus, the proposed fiduciary exception framework for ERISA insurer cases is a stratified analysis. An ERISA plan beneficiary moving to compel production of privileged materials bears the initial burden of showing that the two rationales for the exception—the real client rationale and the duty to disclose versus attorney-client privilege weighing rationale—are both satisfied. A successful showing creates a rebuttable presumption that the exception will apply and shifts the burden onto the insurer to show cause as to why its attorney-client privilege should remain. Four nonexclusive factors derived from *Garner* and generalized in *Pfizer* guide the evaluation of whether good cause has been shown. This modified fiduciary exception

²⁴⁴ See *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 200 (2011) (Sotomayor, J., dissenting); *United States v. Mett*, 178 F.3d 1058, 1065 (9th Cir. 1999); *Becher v. Long Island Lighting Co. (In re Long Is. Lighting Co.)*, 129 F.3d 268, 271 (2d Cir. 1997).

²⁴⁵ See *Donovan*, 90 F.R.D. at 584 (where “the materials . . . are limited in scope and directly relevant to discrete issues in this action,” the factor weighs in favor of discovery).

²⁴⁶ See *id.* (finding good cause, in part, as the “information is necessary to meet the potential defense of the former trustees of reliance upon counsel in entering the prior transactions subject to current dispute”).

framework, together with the uniform tests for the two rationales established in Part III-A, addresses the unique peculiarities of the ERISA insurer-fiduciary and provides a model by which future courts taking up the *Wachtel/Stephan* question can analyze the issues under a uniform and balanced standard.

