



**TERESA E. NEATHERY, Plaintiff, v. CHEVRON TEXACO CORPORATION  
GROUP ACCIDENT POLICY NO. OK 826458 AND ACCIDENT POLICY NO.  
SLG-000784; and DOES 1 through 10, inclusive, Defendants.**

**Civil No. 05cv1883-JM (CAB)**

**UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF  
CALIFORNIA**

*2006 U.S. Dist. LEXIS 96586*

**July 7, 2006, Decided**

**SUBSEQUENT HISTORY:** Summary judgment denied by *Neathery v. Chevron Texaco Corp. Group Accident Policy No. Ok 826458, 2006 U.S. Dist. LEXIS 96624 (S.D. Cal., July 31, 2006)*

**PRIOR HISTORY:** *Neathery v. Chevron Texaco Corp. Group Accident Policy No. Ok 826458, 2006 U.S. Dist. LEXIS 96585 (S.D. Cal., Feb. 13, 2006)*

**COUNSEL:** [\*1] For Teresa E Neathery, an individual, Plaintiff: Thomas M Monson, LEAD ATTORNEY, Susan Lee Horner, Miller Monson Peshel Polacek and Hoshaw, San Diego, CA.

For Chevron Texaco Corporation Group Accident Policy No. OK 826458 and Accident Policy No. SLG-000784, -group welfare benefits plans under ERISA, Defendant: Michael Bernacchi, LEAD ATTORNEY, Burke, Williams & Sorensen, LLP, Los Angeles, CA.

**JUDGES:** CATHY ANN BENCIVENGO, United States Magistrate Judge.

**OPINION BY:** CATHY ANN BENCIVENGO

**OPINION**

**ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFF'S MOTION TO COMPEL**

**PRODUCTION OF DOCUMENTS**

**I. Introduction**

Before the Court is Plaintiff Teresa A. Neathery's motion to compel production of documents withheld by Defendants Chevron Texaco Corporation Group Accident Plans as privileged, submitted on June 15, 2006. Defendants submitted an opposition to the motion on June 23, 2006. On June 27, 2006, the Court held a telephonic conference. Susan Horner, Esq., appeared for Plaintiff. Michael Bernacchi, Esq., appeared for Defendants. The Court ordered an *in camera* review of the documents at issue to determine if the fiduciary exception applied to Defendants' privilege claim. Defendants submitted their privilege log and the withheld [\*2] documents on June 28, 2006. Having considered the submissions of the parties and the arguments of counsel, and having reviewed the withheld documents, Plaintiff's motion is GRANTED IN PART and DENIED IN PART.

**II. Discussion**

This is an ERISA case concerning claims made under accident insurance plans. The documents at issue are communications between CIGNA Group Insurance claims managers and the CIGNA in-house litigation counsel made between January 18, 2005 and December 1, 2005. Litigation was filed on September 30, 2005, consequently some of the communications were made

before the final determination of Plaintiff's claim and some after. Defendants withheld the documents as attorney-client privileged communications and in some instances on the basis of attorney work product protection. It is not disputed that the documents are communications with counsel; however, Plaintiff contends that the "fiduciary exception" applies.

The Ninth Circuit recognizes the fiduciary exception to the attorney-client privilege. *U.S. v. Mett*, 178 F.3d 1058, 1062 (9th Cir. 1999). "As applied in the ERISA context, the fiduciary exception provides that 'an employer acting in the capacity of ERISA fiduciary is [\*3] disabled from asserting the attorney-client privilege against plan beneficiaries on matters of plan administration.'" *Id.* at 1063 (citation omitted). Plaintiff, therefore, contends that as the claim beneficiary, she is entitled to review all documents relevant to her claim for benefits that were generated in the course of making the benefit determination. (Pl.'s Mot. 5-6.) This includes documents to and from counsel that were generated in the course of reviewing and making a determination or her appeal.

Defendants argue that the fiduciary exemption does not apply in cases where the fiduciary seeks legal advice on an issue of liability to a plan beneficiary. (Def.'s Opp. 1.) "The attorney-client privilege reasserts itself as to any advice that the fiduciary obtains in an effort to protect [itself] from civil or criminal liability." *Mett*, 178 F.3d at 1066. In this case, prior counsel for Plaintiff, Timothy Lemucchi, took a very aggressive posture in his correspondence with the plan administrators, asserting that they may be violating ERISA regulations in their handling of Plaintiff's claim appeal. (Def.'s Opp., Ex. 10.) Defendants contend that certain of the communications with counsel [\*4] were with regard to the assertions made by Plaintiff's counsel that the administrators were violating ERISA regulations and, therefore, were not matters of claim administration. (Def. Opp. at 10.)

Defendants also argue that the fiduciary exemption does not apply in cases where the interests of the plan beneficiary and the plan administrator diverge. (Def.'s Opp. 1.) "When an administrator is required to justify or to defend against a beneficiary's claims made because of an act of plan administration, the administrator does not act directly in the interests of the disappointed beneficiary but in his own interests or in the interests of the rest of the beneficiaries." *Geissal v. Moore Med. Corp.*, 192

*F.R.D. 620, 624 (E.D. Mo. 2000).*

Defendants argue that, although litigation had not yet been filed, the interests of Plaintiff and Defendants had already diverged at the time certain of the privileged communications with counsel were made. The communications, Defendants argue, were to secure legal advice for the purpose of defending against Plaintiff's claims and anticipated litigation and, therefore, not subject to the exemption.

The court in *Geissal* considered the same argument and rejected [\*5] the contention that pre-decisional legal advice of counsel is subject to the attorney-client privilege and not available for review:

This contradicts the principle that the plan's administrator or trustee administers the plan in the beneficiaries' best interests. The prospect of post-decisional litigation against the plan by the disappointed beneficiary can exist whenever the plan denies a claim. Because the denial of claims is as much a part of the administration of a plan as the decision-making which results in no unhappy beneficiary, the prospect of post-decisional litigation against the plan is an insufficient basis for gainsaying the fiduciary exception to the attorney-client privilege.

*Id.* at 625.

The Court agrees. Communications with counsel made concerning the investigation and consideration of Plaintiff's appeal, before the litigation commenced, constituted pre-decisional legal advice about the administration of the plan. The beneficiary is entitled to know what legal opinions were given concerning the investigation and determination of Plaintiff's appeal. *Id.* (with regard to pre-decisional legal advice about benefits under the plan the beneficiary is the client not the administrator). [\*6] "The attorney-client privilege is inapplicable to bar the production of counsel's communications with the plan administrator upon which [the benefits] decision of the plan depended." *Id.* Additionally, the pre-decisional legal advice and opinions are not protected from discovery by the attorney work product doctrine as they were not made in anticipation of

litigation.

Applying the principles set forth above to the documents provided by Defendants, and listed on the privilege log, the Court finds four categories of communications:

1) communications that do not contain confidential information or advice but are merely transmittals to or from counsel and are not privileged;

2) pre-decisional communications about the investigation and determination of Plaintiff's appeal that are subject to the fiduciary exception;

3) communications made to obtain advice about allegations of potential ERISA violations that are privileged; and

4) post-litigation communications that are privileged.

The Court finds that the following documents on the May 2, 2006 privilege log do not contain confidential information or legal advice and are not subject to the attorney-client privilege:

# 3 6/23/05 Claim Referral Form [\*7] (marked as item 2 in the *in camera* package)

# 4 7/07/05 Email (marked as item 3A in the *in camera* package)

# 5 7/11/05 Email (marked as item 3B in the *in camera* package)

# 7 7/19/05 Telephone log (marked as item 5 in the *in camera* package)

# 14 8/01/05 Fax Transmission Cover Sheet/Report (marked as item 10 in the *in camera* package)

# 15B 6/29/05 and 7/27/05 Redactions from Log Sheet (marked as item 11B in the *in camera* package)

The Court finds that the following documents on the May 2, 2006 privilege log are pre-decisional communications with counsel regarding the determination of Plaintiff's appeal and subject to the fiduciary exception:

# 1 1/18/05 Email (marked as item 1A in the *in camera* package)

# 2 1/18/05 Email (marked as item 1B in the *in camera* package)

# 9 7/27/05 Memo (marked as item 7 in the *in camera* package)

The Plaintiff's motion to compel is GRANTED as to the following documents from the May 2, 2006 privilege log: Nos. 1, 2, 3, 4, 5, 7, 9, 14 and 15B. Defendants are ordered to produce these documents no later than **August 4, 2006**.

The Court finds that the following documents on the May 2, 2006 privilege log are confidential communications requesting or receiving legal advice not [\*8] regarding the administration of the plan and are privileged:<sup>1</sup>

# 6 7/11/05 Fax Transmission (marked as item 4 in the *in camera* package)

# 8 7/21/05 Email (marked as item 6 in the *in camera* package)

# 10 7/21/05 Email (marked as item 8A in the *in camera* package)

# 11 7/21/05 Email (marked as item 8B in the *in camera* package)

# 12 7/28/05 Email (marked as item 8C in the *in camera* package)

# 13 7/28/05 Fax Transmission (marked as item 9 in the *in camera* package)

<sup>1</sup> # 15A (item 11A in the *in camera* package) the Social Security number of another insured, not part of this litigation, was redacted on the basis of

third party privacy. The motion to compel as to this redaction is DENIED.

The Court finds that the following documents on the May 2, 2006 privilege log are confidential communications requesting or receiving legal advice made after the litigation was filed and the interests of the parties had diverged and are privileged:

# 15C 11/17/05 and 12/01/05 Redactions  
from Log Sheet (marked as item 12 in the  
*in camera* package)

Plaintiff's motion to compel is DENIED as to the following documents from the May 2, 2006 privilege log: Nos. 6, 8, 10, 11, 12, 13, 15A and 15C.

### **III. Conclusion**

Based on the above [\*9] discussion, Plaintiff's motion to compel is GRANTED as to the following documents from the May 2, 2006 privilege log: Nos. 1, 2, 3, 4, 5, 7, 9, 14 and 15B. Defendants are ordered to produce these documents no later than **August 4, 2006**. Plaintiff's motion to compel is DENIED as to the following documents from the May 2, 2006 privilege log: Nos. 6, 8, 10, 11, 12, 13, 15A and 15C.

### **IT IS SO ORDERED.**

DATE: 7/7/06

CATHY ANN BENCIVENGO

United States Magistrate Judge