



**Are Communications Between An Indenture Trustee And Its Attorneys Privileged?
Pre-Default Communications Held To Be Privileged**

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At least before default, indenture trustees are not traditional, common-law trustees and, therefore, need not disclose attorney-client communications to noteholder-beneficiaries.

The attorney-client privilege of a trustee at common law is limited. Because the trustee as a fiduciary acts in the interests of beneficiaries, the beneficiaries are sometimes treated as clients of the trustee’s attorney and, therefore, become entitled to access to the attorney’s communications with the trustee. This rule is called the “fiduciary exception” to the attorney-client privilege. (The details of this rule vary from state to state.)

A magistrate judge in the Southern District of New York recently held the fiduciary exception inapplicable to indenture trustees, *at least before default*. In *Blackrock Allocation Target Shares: Series S Portfolio v. Wells Fargo Bank, N.A.*, Magistrate Judge Netburn stated:

Plaintiffs finally contend that the trusts are the parties-in-interest and that the fiduciary exception to the attorney-client privilege therefore waives Wells Fargo’s privilege. The Court disagrees.

First, the fiduciary exception generally applies in the context of a traditional, common law fiduciary trustee. [cit. om.] Both sides agree that Wells Fargo is not a traditional fiduciary trustee. In its capacity as an indenture trustee, Wells Fargo does not serve as a fiduciary to trust beneficiaries before an Event of Default. Instead, Wells Fargo’s obligations are strictly circumscribed by the governing agreements and its obligations prior to an Event of Default are ministerial in nature. [cit. om.]

The Court went on to note that Wells Fargo received the legal advice in question “to better inform its *own* obligations as trustee under the governing agreements and not to advance the interests of the certificateholders,” further distinguishing the case from the situation where the advice is for the benefit of the trust beneficiaries. Finally, since Wells Fargo was entitled to indemnification for legal fees under the indenture, the fact that the attorneys were paid by trust assets did not entitle the noteholders to access to the communications.

The decision leaves open the question of whether the fiduciary exception will apply after a default under an indenture, when the indenture trustee becomes subject to traditional common law trust duties to noteholders. This raises the important question of how an indenture trustee, post-default, can best protect itself against application of the fiduciary exception, which may entitle the beneficiaries to disclosure of attorney-client communications between the trustee and its counsel.

Blackrock Allocation Target Shares: Series S Portfolio v. Wells Fargo Bank, N.A., No. 14-CV-09371, 2017 BL 75025 (S.D.N.Y. Mar. 09, 2017)

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