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Delaware Supreme Court Recognizes *Garner* Doctrine, Affirms Order Requiring Production of Privileged Documents

In *Wal-Mart Stores, Inc. v. Indiana Electrical Workers Pension Trust Fund IBEW*, the Delaware Supreme Court formally recognized the “*Garner* doctrine,” an exception to the attorney-client privilege, in connection with a stockholder’s demand for records under Section 220 of the Delaware General Corporation Law, and confirmed that the exception also applies to other stockholder claims. The decision may allow derivative plaintiffs to obtain certain sensitive privileged communications and attorney work-product in cases involving substantial allegations of serious fiduciary misconduct.

BACKGROUND

In June 2012, a Wal-Mart stockholder made a demand under Section 220 to inspect Wal-Mart’s books and records relating to an alleged bribery scheme involving Wal-Mart’s Mexican subsidiary, as well as alleged efforts to cover-up that misconduct. Wal-Mart produced more than 3,000 documents but withheld or redacted certain materials as privileged or attorney work-product. The Delaware Court of Chancery ordered Wal-Mart to produce the withheld privileged materials under the *Garner* doctrine – recognized in *Garner v. Wolfinbarger*, 430 F.2d 1093 (5th Cir. 1970) – which permits stockholders to obtain otherwise privileged materials upon a showing of good cause in order to pursue claims of fiduciary misconduct. The Court of Chancery also required Wal-Mart to produce attorney work-product. Wal-Mart’s obligation to produce privileged documents was conditioned upon the stockholder taking “appropriate steps” to protect their confidentiality.

AFFIRMANCE AND RECOGNITION OF *GARNER*

Affirming the Court of Chancery’s “appropriate exercise of discretion,” the Delaware Supreme Court held that the documents at issue were “necessary and essential” to the stockholder’s proper purposes under Section 220. Given the serious nature of the alleged misconduct and the allegation that Wal-Mart’s internal investigation was seriously deficient, the stockholder was entitled to documents relating to Wal-Mart’s alleged bribery scheme as well as the internal investigation of that scheme. In so ruling, the Delaware Supreme Court for the first time expressly recognized the *Garner* doctrine (which it had “tacitly endorsed” in prior opinions) and held that the doctrine applies in both plenary litigation and books-and-records actions under Section 220. The Delaware Supreme Court endorsed the following factors recognized in *Garner* that should inform the trial court’s consideration of whether a stockholder has shown good cause to order the production of privileged materials:

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- the number of stockholders asserting the claim and the percentage of stock they represent;
 - the *bona fides* of the stockholders;
 - the nature of the stockholders' claim and whether it is colorable;
 - the necessity or desirability of the stockholders having the information and its availability from other sources;
 - whether the alleged corporate wrongdoing is illegal or criminal in nature;
 - whether the privileged communications concern the litigation itself;
 - whether the privileged communications are identified with particularity or the stockholders are "blindly fishing"; and
 - the risks associated with revealing trade secrets or other sensitive, confidential information.

The Delaware Supreme Court also upheld the requirement that Wal-Mart produce attorney work-product, holding that the applicable standard – that the party seeking production have “substantial need” of the work-product and is unable to obtain equivalent information without “undue hardship” – overlapped with the stockholder’s required showing under the *Garner* doctrine.

Practitioners should note the following takeaways:

- As noted by the Delaware Supreme Court, the scope of a corporation’s required production under Section 220 turns on a “fact specific inquiry” and will therefore differ from case to case. In *Wal-Mart*, the stockholder was able to point to an extensive and detailed public record of alleged bribery and other misconduct, and evidence that Wal-Mart’s internal investigation of those issues had been seriously compromised. The ruling may not apply in cases lacking such an extraordinary record.
- While the *Wal-Mart* opinion removes any doubt that Delaware applies the *Garner* doctrine, the Delaware Supreme Court stressed that this limited exception to the attorney-client privilege is “narrow,” “exacting,” and “very difficult to satisfy.”
- Corporate counsel and outside counsel retained to perform an investigation should be cognizant of the possibility that privileged communications may be produced to stockholders, either in plenary litigation or in more limited books-and-records proceedings.

For a copy of the opinion, click [here](#).

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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