



Exception to Attorney-Client Privilege in Shareholder Suits

Posted by William Savitt, Wachtell Lipton Rosen & Katz, on Wednesday, October 14, 2015

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The New York appellate court overseeing cases arising in Manhattan last week clarified and limited the circumstances in which corporations are obligated to produce confidential attorney-client communications to stockholder plaintiffs in the context of derivative litigation. [Nama Holdings, LLC v. Greenberg Traurig LLP, No. 14738-14739N, 2015 WL 5839311 \(N.Y. App. Div. 1st Dep't. Oct. 8, 2015\)](#). The decision endorsed a multi-factored approach to determining when shareholder plaintiffs have established "good cause" for production of privileged communications.

The case involved allegations that the managers of a New York limited liability company had breached their contractual and fiduciary obligations to the LLC's members. As is customary, defendants refused to produce confidential attorney-client communications in discovery. But the plaintiff invoked the "fiduciary exception," arguing that its dispute was not with the corporation but rather with corporate management, and that the equity holders, rather than management, should be the beneficiaries of any attorney-client relationship that existed between the managers and corporate counsel. The trial court agreed and, without further examination of the disputed documents, ordered defendants to produce all relevant attorney-client communications.

The First Department reversed. Adopting the rule of *Garner v. Wolfenbarger*, 430 F.2d 1093 (5th Cir. 1970), the appellate court held that the fiduciary exception exists under New York law but applies only when the complaining shareholders show "good cause" to pierce the privilege. "A blanket application of the exception whenever a fiduciary relationship is present," the court concluded, "would too easily abrogate the privilege, thereby discouraging candid discussion between corporate attorneys and management." Among other factors, the test for "good cause" includes consideration of the size of plaintiffs' stake, the seriousness and character of their claims, the specificity of the document request, the risk of disclosure to the defendants, and whether specific communications "contain advice on how corporate management might handle the shareholder." Conducting that analysis, the First Department ruled, ordinarily requires *in camera* review of at least some of the requested documents. The Court thus remanded the matter to the trial court for further review.

With the decision, New York joins Delaware (see our [August 18, 2014 memorandum](#)) and several other state and federal jurisdictions in applying the *Garner* framework. The rule highlights both the resilience and vulnerability of attorney-client privilege for corporate managers and the need for care in preserving privilege in the context of shareholder litigation.