Delaware Recognizes the Garner Doctrine

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In his September 17, 2014 “Privilege Points” release, Tom Spahn discusses the Garner doctrine – fiduciary exception to the attorney-client privilege:

As difficult as it can be to properly identify the "client" inside a corporation, within a corporate family, and when corporate lawyers deal with employees, there is another counterintuitive possibility — that the corporation's shareholders may be the real "client."

In Garner v. Wolfinbarger, 430 F.2d 1093 (5th Cir. 1970), the Fifth Circuit recognized that in certain circumstances shareholders pursuing a derivative case could access communications between corporate executives and the corporation's lawyers. That doctrine eventually developed into what is called "the fiduciary exception," when combined with an old English trust principle recognizing trusts' beneficiaries as the real "clients" (and thus entitled to communications between the trustee and her lawyer). Since Garner, some courts have applied the same principle to shareholders' non-derivative claims against corporations, while other courts have questioned that expansion. In Wal-Mart Stores, Inc. v. Indiana Electrical Workers Pension Trust Fund IBEW, 95 A.3d 1264, 1278 (Del. 2014), the Delaware Supreme Court extended the Garner doctrine to "plenary stockholder/corporation proceedings" and Delaware Code Section 220 actions (Del. Code, tit. 8, § 220). Id. Although the court described the Garner doctrine as "narrow, exacting, and intended to be very difficult to satisfy," the court easily found that IBEW shareholders met the standard. Id.

Corporations' lawyers and executives should remember that hostile shareholders may essentially be looking over their shoulders as they communicate with each other.