

Minority Business Owners and Trust Beneficiaries May Be Able to Obtain Otherwise Privileged Documents

Article By:

David C. Blickenstaff

Adam Diederich

Kirstie Brenson

In certain circumstances, shareholders of corporations and members of limited liability companies can obtain confidential communications between corporate management and the company's attorney that would otherwise be protected by the attorney-client privilege.

Similarly, in a few jurisdictions trust beneficiaries may be able to obtain privileged communications between trustees and their counsel relating to routine trust administration.

A decision recently issued by the New York Supreme Court (County of Saratoga) illustrates one of these exceptions — the “fiduciary exception.”^[1] The court ruled that the fiduciary exception to the attorney-client privilege enabled the minority owner of a multi-company family business to obtain information about communications between corporate management and the companies' attorney. Under the fiduciary exception, a shareholder or member can obtain the company's otherwise-privileged information by satisfying a fact-intensive, multi-factor analysis to establish that “good cause” exists to disregard the attorney-client privilege. The fiduciary exception may apply when a minority owner alleges breach of fiduciary duty or similar wrongdoing against corporate management.

The court in the New York case considered several factors in concluding that the minority owner could obtain communications between management and the companies' attorney and between the companies' attorney and their accountant:

- The business did not have any disinterested owners or managers to investigate the alleged wrongdoing because one of the owners was the plaintiff and the only other two owners were defendants.
- The information sought concerned the key transactions at issue in the lawsuit, including management's refusal to provide books and records to the plaintiff, management's decision to remove the plaintiff as a director, and management's elimination of the plaintiff's ownership of one of the companies. The companies' attorney advised management throughout these transactions, and management may have relied upon that advice in

undermining the plaintiff's interests.

- The information sought may have been the only available evidence of whether management acted in the interests of the plaintiff and the companies or in their own personal interests.
- The plaintiff's claims of self-dealing and conflict of interest were at least "colorable."
- The information sought was specific; the plaintiff was not "blindly fishing."
- None of the information sought related to advice concerning the lawsuit.

Because the court found that the fiduciary exception applied, the minority owner had the right to obtain information that corporate management expected was protected from disclosure by the attorney-client privilege.

A similar doctrine that is recognized in a handful of jurisdictions (and is also known as the fiduciary exception) may enable trust beneficiaries to obtain information about communications between trustees and their lawyers. This exception applies only to advice about the routine administration of the trust, not advice about adversity between the trustee and the beneficiaries (such as a claim for breach of fiduciary duty).[2] Notably, in the trust context the fiduciary exception does not involve the same multi-factor test that applies in the corporate context. Instead, in jurisdictions that recognize the exception, beneficiaries may obtain privileged information relating to trust administration without making a further showing.

Corporations and LLCs

As we previously have discussed, not all jurisdictions recognize the fiduciary exception in the corporate context, and not all jurisdictions that recognize it apply the same test. Moreover, members of Illinois limited liability companies generally have a better chance of obtaining privileged communications between management and the company than members of LLCs in most other jurisdictions and shareholders of corporations organized in any jurisdiction. In prior posts, we have also discussed steps that companies and their management can take to prevent minority owners from obtaining privileged communications.

To avoid application of the fiduciary exception, majority owners should consider engaging their own attorneys — and not seeking advice from company attorneys — when considering actions that a minority owner could challenge as self-dealing or a breach of fiduciary duty.

Trusts

In the trust context, only a few jurisdictions recognize the fiduciary exception; more do not and many are undecided.[3] Trustees and their lawyers should know what privilege law applies to their relationship. They should also be aware of the possibility that future litigation will occur in a state that recognizes the exception even if the trust is currently being administered in a state that has rejected it. If counsel is being engaged because of adversity with the beneficiaries, the trustee should consider paying the fees itself to blunt an argument that the lawyer was really serving the trust and its beneficiaries, and as always fiduciaries and their lawyers should be careful to avoid intemperate comments in their written communications in case they do end up being discoverable in litigation.

[1] *Celia v. Celia*, No. EF20202282, 2023 WL 2777945, 2023 NY Slip Op 30995(U) (Sup. Ct. Mar. 31, 2023).

[2] See, e.g., *J.P. Morgan Tr. Co. of Delaware v. Fisher*, No. CV 12894-VCL, 2019 WL 6605863, at *5 (Del. Ch. Dec. 5, 2019) (citing *Riggs Nat'l Bank of Washington, D.C. v. Zimmer*, 355 A.2d 709,

711-12 (Del. Ch. 1976)).

[3] See, e.g., *Riggs, supra* (adopting fiduciary exception in trust context); *Wells Fargo Bank, N.A. v. Superior Court*, 22 Cal. 4th 201 (2000) (rejecting fiduciary exception in trust context); *Huie v. DeShazo*, 922 S.W. 2d 920 (Tex. 1996) (same) ; *In re Estate of McAleer*, 248 A.3d 416 (Pa. 2021) (summarizing the state of the law nationwide); David L.J.M. Skidmore & Laura E. Morris, *Whose Privilege Is It, Anyway? The Fiduciary Exception to the Attorney-Client Privilege*, Prob. & Prop., September/October 2013, at 20, 25-28 (2013) (collecting authorities).

© 2025 ArentFox Schiff LLP

National Law Review, Volume XIII, Number 199

Source URL:<https://natlawreview.com/article/minority-business-owners-and-trust-beneficiaries-may-be-able-to-obtain-otherwise>