

# What Does Delaware's Wal-Mart Decision Mean for the Attorney-Client Privilege and Internal Investigations?

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The Delaware Supreme Court's decision in ***Wal-Mart Stores, Inc. v. Indiana Electrical Workers Pension Trust Fund IBEW***, No. 614, 2014 Del. LEXIS 336, 2014 WL 3638848 (July 23, 2014), a Section 220 "books and records" case concerning allegations that Wal-Mart's Mexican subsidiary engaged in an illegal bribery scheme, is significant because it formally adopted the *Garner* doctrine, "which allows stockholders of a corporation to invade the corporation's attorney-client privilege in order to prove fiduciary breaches by those in control of the corporation upon showing good cause." *Wal-Mart*, 2014 Del. LEXIS 336, at \*25. The court upheld the Delaware Court of Chancery's order requiring Wal-Mart to provide the shareholder plaintiff with documents relating to the company's own internal investigation of the allegations, including documents protected by the attorney-client privilege as well as the work product doctrine.

In some respects the *Wal-Mart* decision is disconcerting for corporate counsel. It suggests that counsel conducting internal investigations of allegations of corporate wrongdoing should bear in mind the possibility that someday their privileged communications, which they assume to be confidential, may be subject to review by a shareholder plaintiff's counsel seeking grounds to sue the corporation's directors and officers. But the *Walmart* case involved unusual circumstances and should not be read as opening privileged communications by corporate counsel to widespread discovery in most shareholder litigation.

## Section 220 of the Delaware General Corporation Law

[Section 220 of the Delaware General Corporation Law](#) gives stockholders the right, upon written demand under oath, to inspect the corporation's stock ledger, a list of its stockholders, and its other books and records for any proper purpose. The law defines a "proper purpose" as "a purpose reasonably related to such person's interest as a stockholder." The Delaware Supreme Court has previously held that a stockholder's desire to investigate wrongdoing or mismanagement may constitute a "proper purpose," but the shareholder must show by a preponderance of the evidence that there is a credible basis from which the court can infer that there is possible mismanagement that would warrant further investigation. *Seinfeld v. Verizon Communications, Inc.*, 909 A.2d 117, 121-24 (Del. 2006). The scope of a stockholder's inspection is limited to those books and records that are "necessary and essential" to accomplish the shareholder's stated, proper purpose. *Saito v. McKesson HBOC, Inc.*, 806 A.2d 113, 116 (Del. 2002), *overruled on other grounds*, *Lambrecht v.*

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*O'Neal*, 3 A.3d 277, 292 (Del. 2010); see also *Espinoza v. Hewlett-Packard Co.*, 32 A.3d 365, 371 (Del. 2011). "A document is 'essential' for Section 220 purposes if, at a minimum, it addresses the crux of the shareholder's purpose, and if the essential information the document contains is unavailable from another source." *Id.* at 371-72 (footnotes omitted).

## Background of the *Wal-Mart* Case

In *Wal-Mart*, the plaintiff shareholder IBEW brought a books and records action in the Delaware Court of Chancery in the wake of a *New York Times* article suggesting that Wal-Mart had not adequately investigated allegations of bribery at its Mexican subsidiary, WalMex. According to the article, as summarized in the Delaware Supreme Court's opinion, Wal-Mart rejected the investigation plan recommended by outside counsel, did not pursue preliminary internal findings that there was reasonable suspicion to believe that Mexican and U.S. laws had been violated, and transferred control over the investigation to WalMex's general counsel, even though he himself was a target.

The Court of Chancery ordered Wal-Mart to turn over to IBEW any responsive documents known to exist by the office of the general counsel, including documents protected by the attorney-client privilege and the attorney work product doctrine, subject to the condition that IBEW take appropriate steps to protect their confidentiality. In making this order, the court invoked the exception to the attorney-client privilege articulated in *Garner v. Wolfinbarger*, 430 F.2d 1093 (5th Cir. 1970).

## The *Garner* Doctrine

In *Garner v. Wolfinbarger*, the U.S. Court of Appeals for the Fifth Circuit established a test for determining whether company shareholders should be allowed access to privileged communications between the company and its counsel. Under the *Garner* doctrine, a corporation may assert the attorney-client privilege to justify withholding documents from its stockholders, "[b]ut where the corporation is in suit against its stockholders on charges of acting inimically to stockholder interests," stockholders may obtain privileged documents on a showing of "good cause." 430 F.2d at 1103. In determining whether stockholders have shown good cause, the court should consider factors such as:

- the number of shareholders and the percentage of stock they represent;
- the bona fides of the shareholders; the nature of the shareholders' claim and whether it is obviously colorable;
- the apparent necessity or desirability of the shareholders having the information and the availability of it from other sources;
- whether, if the shareholders' claim is of wrongful action by the corporation, it is of action criminal, or illegal but not criminal, or of doubtful legality;
- whether the communication related to past or to prospective actions;
- whether the communication is of advice concerning the litigation itself;
- the extent to which the communication is identified versus the extent to which the shareholders are blindly fishing; and

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- the risk of revelation of trade secrets or other information in whose confidentiality the corporation has an interest for independent reasons.

*Id.*

## The Delaware Supreme Court's *Wal-Mart* Decision

The Delaware Supreme Court held in *Wal-Mart* that the *Garner* doctrine should be applied in both “plenary” stockholder/corporation proceedings and in a Section 220 books and records action. *Wal-Mart*, 2014 Del. LEXIS 336, at \*31. The court ruled that the Court of Chancery had properly concluded that the privileged documents sought by the shareholder plaintiff from Wal-Mart were “necessary and essential” to the shareholder’s purpose because the shareholder was questioning not only WalMart’s actions in Mexico, but the propriety of the company’s internal investigation itself and whether there was a cover-up. The Supreme Court also held that the shareholder plaintiff had demonstrated good cause for applying the fiduciary exception to the attorney-client privilege under the *Garner* doctrine, noting the Court of Chancery’s findings that the IBEW was not simply blindly fishing and that the communications sought did not concern the litigation itself, and also pointing out, among other factors, that the underlying allegations implicated potential criminal conduct. *Id.* at \*32-35.

In a separate analysis, the Delaware Supreme Court also concluded that the Court of Chancery had properly ordered Wal-Mart to turn over documents protected by the work product doctrine. While the *Garner* doctrine does not apply to work product documents, the Supreme Court held that the lower court’s order requiring disclosure of work product documents was proper under the standards of Court of Chancery Rule 26(b)(3). *Id.* at \*36-38.

## What Does *Wal-Mart* Mean?

Does *Wal-Mart* portend a major change in the degree of protection the Delaware courts give to corporate internal investigations under the attorney-client privilege and work product doctrines? Most likely not. Significantly, the Delaware Supreme Court pointed out that “the *Garner* doctrine fiduciary exception to the attorney-client privilege is narrow, exacting, and intended to be very difficult to satisfy.” *Id.* at \*31. And while the *Wal-Mart* decision marks the first time that the Delaware Supreme Court has adopted the *Garner* doctrine, this is not a sudden shift in Delaware law.

The *Garner* doctrine was previously cited with approval by the Delaware Supreme Court in *Zirn v. VLI Corp.*, 621 A.2d 773, 781-83 (Del. 1993). And it has been applied by the Delaware Court of Chancery in ordering production of privileged communications relating to special committee investigations in both plenary and Section 220 cases. See *Grimes v. DSC Communications Corp.*, 724 A.2d 561, 568-69 (Del. Ch. 1998) (Section 220 case); *Ryan v. Gifford*, C.A. No. 2213-CC, 2007 Del. Ch. LEXIS 168, at \*9-11, 2007 WL 4259557 (Nov. 30, 2007) (shareholder derivative action).

Application of the *Garner* doctrine in a books and records action is also limited by additional requirements. In particular, a shareholder plaintiff must first show that the requested records are essential before the *Garner* test is considered. See *Wal-Mart*, 2014 Del. LEXIS 336, at \*31. For example, in *Espinoza v. Hewlett-Packard Co.*, 32 A.3d 365 (Del. 2011), the Delaware Supreme Court held that the shareholder plaintiff in a Section 220 action was not entitled to obtain an investigative report prepared by the company’s outside counsel concerning sexual harassment allegations against HP’s former CEO. The court never reached the privilege issue because it concluded that, while the shareholder plaintiff had demonstrated a proper purpose and a credible basis for inferring possible

mismanagement, he had not shown that the document was essential to his purpose. His primary purpose was to investigate why the Board had agreed to pay tens of millions of dollars in severance to the departing CEO, instead of terminating him for cause. The court reasoned that the report was not essential to this purpose because it did not discuss the “for cause” issue and was not central to the board’s decision, and because much of the relevant information in it had been provided to the plaintiff through other means. It is also noteworthy that, in contrast with *Wal-Mart*, the investigation in the *Hewlett-Packard* case was not being directly challenged.

The *Wal-Mart* case tells an important cautionary tale. Corporate counsel undertaking investigations need to be conscious of the possibility that a court may order production of their confidential privileged communications to shareholders’ counsel under the *Garner* doctrine – at least where there is a credible basis for challenging the adequacy of the investigation itself. And even apart from the *Garner* doctrine, the attorney-client privilege for corporate investigations may be lost for other reasons. For example, in the *Ryan* case cited above, the Delaware Court of Chancery held that the attorney-client privilege for special committee investigation documents had also been waived through disclosure. But in the majority of cases, internal investigation documents protected by the attorney-client privilege and/or work product doctrine should continue to be shielded from shareholder review.

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