AN UNCERTAIN PRIVILEGE: REEXAMINING *GARNER V. WOLFINBARGER* AND ITS EFFECT ON ATTORNEY-CLIENT PRIVILEGE

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INTRODUCTION

The attorney-client privilege,[1] a sacrosanct principle of legal practice dating back to Roman times, is the oldest privilege recognized by Anglo-American jurisprudence.[2] It is firmly embedded in the consciousness of modern Americans,[3] depicted throughout popular culture,[4] and continues to feature prominently in high-profile cases like the Bernie Madoff scandal[5] and the ill-fated Bank of America/Merrill Lynch merger.[6] Without the privilege, clients would be unable to make "full and frank" disclosures to their attorneys, who in turn depend on candid communication with their clients in order to provide effective representation.[7] As a matter of public policy, the privilege enables attorneys to better fulfill their professional responsibilities, uphold their duties of good faith and loyalty to their clients, promote the observance of law, and contribute to the efficient administration of justice.[8]

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1 The attorney-client privilege preserves confidentiality of certain communications between an attorney and his client. For an explanation of the elements necessary to establish the privilege, see *infra* note 42.

2 *See* 8 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2290 (McNaughton rev. ed. 1961); *see also* Upjohn Co. v. United States, 449 U.S. 383, 389 (1981).

3 *See* DAVID W. NEUBAUER & HENRY F. FRADELLA, AMERICA'S COURTS AND THE CRIMINAL JUSTICE SYSTEM 180 (10th ed. 2011); Robert Pack, *Dilemmas in Attorney-Client Confidentiality*, DCBAR.ORG (Jan. 2004), http://www.dcbar.org/for_lawyers/resources/publications/washington_lawyer/january_2004/privilege.cfm. *See generally* Michael Asimow & Richard Weisberg, *When the Lawyer Knows the Client is Guilty: Client Confessions in Legal Ethics, Popular Culture, and Literature*, 18 S. CAL. INTERDISC. L.J. 229, 248–53 (2009).

4 The attorney-client privilege has featured prominently in popular books, such as JOHN GRISHAM, THE FIRM (1991), as well as television shows and movies, such as *Breaking Bad: Better Call Saul* (AMC television broadcast Apr. 26, 2009); *Law & Order: Bodies* (NBC television broadcast Sept. 24, 2003); *The Good Wife: Bitcoin for Dummies* (CBS television broadcast Jan. 15, 2012); . . . AND JUSTICE FOR ALL (Columbia Pictures 1979); PRIMAL FEAR (Paramount Pictures 1996); and THE LINCOLN LAWYER (Lionsgate 2011). Bear in mind that the accuracy of these depictions is another matter.

5 *See* Goldenson v. Steffens, No. 2:10-cv-00440-JAW, 2013 WL 145587 (D. Me. Jan. 14, 2013).

6 *See* Lead Plaintiffs' Response to Order to Show Cause and Petition to Intervene at 19, *In re* Bank of Am. Corp. Sec. Derivative & ERISA Litig., No. 09 MDL 2058 (PKC) (S.D.N.Y. Apr. 27, 2012), *available at* http://sdnyblog.com/wp-content/uploads/2012/04/09-Civ.-0258-2012.04.27-Opp-to-Motion-to-Intervene.pdf ("[Bank of America] waived the attorney-client privilege for many of the documents it produced, and produced documents under the *Garner* doctrine, allowing Lead Counsel to gain an unprecedented understanding of what transpired that is simply not available in other cases.").

7 *Upjohn*, 449 U.S. at 389.

8 *See generally* Mohawk Indus., Inc. v. Carpenter, 558 U.S. 100, 108 (2009); Commodity Futures Trading Comm'n v. Weintraub, 471 U.S. 343, 349 (1985); *Upjohn*, 449 U.S. at 389;

However, as the privilege has evolved, courts have delineated critical exceptions, recognizing certain circumstances in which public policy favors disclosure.[9]

In 1970, the U.S. Court of Appeals for the Fifth Circuit created a new exception to the attorney-client privilege. In the landmark decision *Garner v. Wolfinbarger*,[10] shareholders brought a derivative suit[11] against corporate management[12] based on alleged violations of federal and state securities law and on common law fraud regarding the sale of company stock.[13] During a deposition, the corporation's former counsel refused to answer several questions and produce documents regarding the advice he had provided the corporation.[14] In deciding whether to compel counsel to produce those documents and answer the oral examination, the Fifth Circuit recognized that while management must be able to freely obtain legal advice from counsel, management ultimately operates for the benefit of shareholders.[15] Balancing the competing needs of shareholders and management, the court held that the privilege of communication between management and counsel is qualified, not absolute.[16] Plaintiffs, upon showing the existence of a fiduciary relationship[17] and demonstrating good cause,[18] may discover specific communications between the corporation's management and counsel and compel certain testimony that ordinarily would be subject to that privilege.[19]

Garner is widely considered the authoritative source of the shareholder fiduciary exception[20] and has spawned a significant body of

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Trammel v. United States, 445 U.S. 40, 51 (1980); Fisher v. United States, 425 U.S. 391, 403 (1976).

9 *See Fisher*, 425 U.S. at 403 ("[S]ince the [attorney-client] privilege has the effect of withholding relevant information from the fact-finder, it applies only where necessary to achieve its purpose."). Some of the most common exceptions to the privilege include: waiver, crime or fraud, common interest, testators following the death of a client, and fiduciary duty.

10 430 F.2d 1093 (5th Cir. 1970).

11 For more on derivative suits, see *infra* note 36.

12 "Management" included directors, officers, and controlling persons. *Garner*, 430 F.2d at 1095. For the purposes of this Note, "management" refers to directors and officers interchangeably.

13 *Id.*

14 *Id.* at 1096.

15 *Id.* at 1101.

16 *Id.* at 1103–04.

17 See *infra* note 64 for a definition of "fiduciary relationship."

18 *Garner*, 430 F.2d at 1104.

19 *See id.*

20 *See* Robert R. Summerhays, *The Problematic Expansion of the* Garner v. Wolfinbarger *Exception to the Corporate Attorney-Client Privilege*, 31 TULSA L.J. 275, 278 (1995); *see also* 1 PAUL R. RICE, ATTORNEY-CLIENT PRIVILEGE IN THE UNITED STATES § 8:19 (2012); 25A MARC I. STEINBERG & RALPH C. FERRARA, SECURITIES PRACTICE: FEDERAL & STATE ENFORCEMENT § 11:8 (2013).

case law in both federal and state courts.[21] While many courts facing similar issues of privilege in fiduciary or other arguably analogous contexts have applied the *Garner* doctrine without variation,[22] some have adopted various mutations[23] or applied it to inappropriate circumstances.[24] Still others have attempted to limit its scope to derivative suits[25] or refused to apply the exception altogether.[26] Some circuits still have yet to address the issue.[27] But one theme is clear: *Garner* continues to arise as a point of contention in litigation.[28]

Many commentators are highly critical of *Garner*, noting that the inconsistencies in applying the exception have often made it difficult for parties to discern whether or not the attorney-client privilege will attach to communications between corporate management and counsel.[29] A direct consequence of this is twofold: (1) plaintiffs are often unable to assess the viability and costs of a claim, particularly where certain communications are deemed critical; and (2) corporate management is often unable to know ex ante whether their communications with

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21 See *infra* Part II–II.A for a discussion of *Garner*'s application among the lower courts. The scope of this Note is limited, with the exception of a few ancillary footnotes, to federal cases.

22 *See, e.g.*, Sandberg v. Va. Bankshares, Inc., 979 F.2d 332 (4th Cir. 1992), *vacated*, 1993 WL 524680 (4th Cir. Apr. 7, 1993); Fausek v. White, 965 F.2d 126 (6th Cir. 1992).

23 See *infra* Part II.A–C for a discussion of the different approaches that courts have taken in applying *Garner*.

24 See *infra* Part II.A for a discussion of the various circumstances in which courts apply *Garner*.

25 *See* Opus Corp. v. Int'l Bus. Machs. Corp., 956 F. Supp. 1503 (D. Minn. 1996); *see also* Wachtel v. Health Net, Inc., 482 F.3d 225 (3d Cir. 2007).

26 See *infra* Part II.C for a discussion of courts that have declined to adopt or extend *Garner*. While many district courts have refused to adopt *Garner*, no federal court of appeals has expressly rejected the principle. *See In re* United States, 590 F.3d 1305, 1311–12 (Fed. Cir. 2009) (discussing application of the *Garner* exception among its sister circuits).

27 *See* Milroy v. Hanson, 875 F. Supp. 646, 651 (D. Neb. 1995) (refusing to follow *Garner* as it "has not been adopted by the United States Court of Appeals for the Eighth Circuit").

28 *See infra* note 224.

29 *See* Jack P. Friedman, *Is the* Garner *Qualification of the Corporate Attorney-Client Privilege Viable After* Jaffee v. Redmond*?*, 55 BUS. LAW. 243, 259–63 (1999) (discussing a statistical study in which "a significant percentage of lawyers considers the *Garner* rule to adversely affect attorney-client communications"); Keith W. Johnson, *Evidence:* Fausek v. White*: The Sixth Circuit Garners Support for a Good Cause Exception to the Attorney-Client Privilege*, 18 U. DAYTON L. REV. 313, 331 (1993) ("The unpredictability that results from a less-than-absolute privilege hinders communications between management and corporate counsel."); Stephen A. Saltzburg, *Corporate Attorney-Client Privilege in Shareholder Litigation and Similar Cases:* Garner *Revisited*, 12 HOFSTRA L. REV. 817, 838–39 (1984) (discussing both the need generally for parties to believe that their communications with counsel will be shielded from discovery as well as the need specifically, in light of *Garner*, for corporate management to ascertain whether communications with counsel will remain privileged in the event of shareholder suits); Summerhays, *supra* note 20, at 317 ("[A]pplication of the *Garner* exception is often unpredictable."); Victoria A. Kummer, Note, *The* Garner *Exception to Attorney-Client Privilege: A New Approach to "Good Cause,"* 13 CARDOZO L. REV. 2141, 2142 (1992) ("The protection afforded shareholders in [the *Garner* line of decisions] . . . comes at the price of a weakened and unpredictable attorney-client privilege.").

counsel will later be disclosed in the event of a litigation.[30] The result is that plaintiffs may be dissuaded from bringing otherwise viable claims and clients and counsel may curtail their conversations in the face of such uncertainty.[31] Thus, there is a need for greater clarity in applying *Garner* in the discovery phase of a litigation.

The purpose of this Note is to examine the *Garner* exception and to propose a more narrow and predictable approach. This Note proposes that much of the ongoing disarray in contemporary *Garner*-related jurisprudence relates to areas of law far afield from the derivative context in which the *Garner* exception originally arose and that the logic of *Garner* collapses outside of that context.[32] Therefore, the exception should be limited solely to suits with a derivative claim and where the corporation's management is a named party. Additionally, where a claim is both derivative and non-derivative, courts should be required to determine, using a set of condensed *Garner*-like factors, the intended beneficiary of the litigation. Non-derivative shareholder claims generally benefit only the plaintiff shareholders individually and not all shareholders collectively.[33] Accordingly, where a claim is both derivative and non-derivative, only where the derivative claim is the predominant component[34] should a court allow the *Garner* exception to overcome the attorney-client privilege. Within this more circumscribed context, a presumption that favors discovery becomes more appropriate. That presumption should be subject to a defendant's ability to demonstrate "bad cause" based on another condensed set of *Garner* indicia.

Part I focuses on the *Garner* decision itself. Part II examines the disarray among the circuit and district courts in applying the exception. Part III considers the inconsistencies between *Garner* and its progeny and the Supreme Court's decision in *Upjohn Co. v. United States*[35] and subsequent jurisprudence. Part IV proposes a modification of the *Garner* exception, limiting its application to a more judicially manageable standard.

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30 According to one, albeit older, survey of practicing attorneys, 47.5% report that the *Garner* exception affects their ability to predict whether the privilege will attach to their communications with clients. Vincent C. Alexander, *The Corporate Attorney-Client Privilege: A Study of the Participants*, 63 ST. JOHN'S L. REV. 191, 356 (1989).

31 *See* FREDERICK A. BRODIE & KENNETH A. NEWBY, THE FIDUCIARY EXCEPTION TO THE ATTORNEY-CLIENT PRIVILEGE 9 (2009), *available at* http://www.pillsburylaw.com/sitefiles/publications/8549563d9fc83be742e2c8d622b85648.pdf; *see also* CHARLES ALAN WRIGHT ET AL., 24 FED. PRAC. & PROC. EVID. § 5476 (1st ed. 2013); Victoria A. Kummer, *Is that Conversation Really Privileged?*, 245 N.Y. L.J., June 9, 2011, at 5.

32 *See infra* Part II.A.

33 Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1, 8–10 (1991).

34 *See infra* Part IV.A–B.

35 449 U.S. 383 (1981).

I. Creation of the *Garner* Exception

A. *The Factual Background*

Prior to 1970, no federal appellate court had ever directly addressed whether a corporation's shareholders could overcome management's assertion of the attorney-client privilege in a derivative[36] litigation against a corporation.[37] At the time, only a small number of state and federal district courts had ever explored the issue.[38]

In *Garner v. Wolfinbarger*, stockholders brought a class action suit against First American Life Insurance Company of Alabama (FAL), its directors, officers, and controlling persons.[39] The suit alleged that the defendants had violated federal and state securities laws and regulations as well as committed common law fraud in connection with the issuance and sale of FAL stock and related matters.[40] Additionally, the plaintiffs

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36 Shareholders do not have standing to sue in their individual capacity concerning rights that belong to the corporation. See 12B WILLIAM MEADE FLETCHER, FLETCHER CYCLOPEDIA OF THE LAW OF CORPORATIONS § 5911 (2013) [hereinafter FLETCHER, CYCLOPEDIA], and *Tooley v. Donaldson, Lufkin, & Jenrette, Inc.*, 845 A.2d 1031 (Del. 2004), for a discussion of shareholder standing. See Carl J. Mayer, *Personalizing the Impersonal: Corporations and the Bill of Rights*, 41 HASTINGS L.J. 577, 664–67 (1990), for a comprehensive explanation of the constitutional rights enjoyed by corporations. Despite the absence of shareholder standing, the Federal Rules of Civil Procedure allow shareholders to bring suit in a derivative capacity. *See* FED. R. CIV. P. 23.1. A derivative action is one in which an action is "brought by a shareholder in the name or right of a corporation to redress an injury sustained by, or to enforce a duty owed to, the corporation." *See* 13 FLETCHER, CYCLOPEDIA § 5939; *see also* Kamen v. Kemper Fin. Servs., Inc., 500 U.S. 90, 95 (1991) ("[T]he purpose of the derivative action [is] to place in the hands of the individual shareholder a means to protect the interests of the corporation from the misfeasance and malfeasance of 'faithless directors and managers.'" (quoting Cohen v. Beneficial Loan Corp., 337 U.S. 541, 548 (1949))); Levine v. Smith, 591 A.2d 194, 200 (Del. 1991) ("A shareholder derivative suit is a uniquely equitable remedy in which a shareholder asserts on behalf of a corporation a claim belonging not to the shareholder, but to the corporation."), *overruled by* Brehm v. Eisner, 746 A.2d 244 (Del. 2000); Taormina v. Taormina Corp., 78 A.2d 473, 476 (Del. Ch. 1951) ("[T]he fundamental basis of a derivative stockholder's action . . . is to enforce a corporate right. . . . [where] a wrong has been done [to] the corporation . . . ."). Any recovery in a derivative proceeding does not accrue to any individual plaintiff but rather to the corporate treasury, thus benefiting the shareholders as a group. *See* 13 FLETCHER, CYCLOPEDIA, § 6028; *see also Tooley*, 845 A.2d at 1036 ("Because a derivative suit is being brought on behalf of the corporation, the recovery, if any, must go to the corporation."); Cantor v. Sachs, 162 A. 73, 76 (Del. Ch. 1932) ("[A]ny recovery granted by the decree necessarily is in favor of the corporation. The complaining stockholders secure nothing to themselves as individuals, beyond the mere right, which is inherent in the decree for relief to the corporation, of compelling their recalcitrant corporation to accept the relief which the decree affords."). Accordingly, the goal of a derivative suit is designed to vindicate the collective rights of shareholders as a singular class. ROBERT W. HAMILTON, CORPORATIONS 568 (3d ed. 1992).

37 Garner v. Wolfinbarger, 430 F.2d 1093, 1098 (5th Cir. 1970) ("[T]his is a case of first impression at the court of appeals level . . . .").

38 *See* Johnson, *supra* note 29, at 318.

39 *Garner*, 430 F.2d at 1095.

40 *Id.* at 1095–96.

also brought a derivative action on behalf of the corporation, claiming that FAL was itself damaged by an alleged fraud in the purchase and sale of securities.[41]

The dispute over the attorney-client privilege[42] arose during the deposition of FAL's president R. Richard Schweitzer.[43] During questioning, Schweitzer was asked about the advice he had provided the corporation regarding both the issuance and sale of company stock.[44] Both FAL counsel and Schweitzer himself objected, claiming that any communications between Schweitzer and FAL management occurred during his tenure as corporate counsel.[45] Under this theory, Schweitzer invoked the attorney-client privilege and refused to produce subpoenaed documents or respond to any deposition questions.[46] Plaintiff shareholders moved to compel discovery and, in a brief two-page opinion, the district court granted the plaintiffs' motion, holding that a corporation or its management could not invoke the attorney-client privilege against its shareholders.[47]

Without citing any federal or state case law, the district court instead relied entirely on two cases, both British, in which the issue had been directly decided.[48] Both decisions held that a corporation could not invoke the attorney-client privilege against its shareholders.[49] Analogizing the relationship between a trustee and its beneficiary to that of a corporation and its shareholders, the British decisions found that a corporation must categorically provide a complete disclosure of its dealings and as such is unable to wield the attorney-client privilege as a shield on its communications.[50]

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41 *Id.* at 1095.

42 The elements of the attorney-client privilege, as they appear in a commonly-cited decision of the District Court of Massachusetts, are as follows:

> The privilege applies only if (1) the asserted holder of the privilege is or sought to become [sic] a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.

United States v. United Shoe Mach. Corp., 89 F. Supp. 357, 358–59 (D. Mass. 1950).

43 Prior to his promotion to president, Schweitzer had previously served as attorney for the corporation in connection with issuance of FAL stock. *Garner*, 430 F.2d at 1095–96.

44 *Id.* at 1096.

45 *Id.*

46 *Id.*

47 Garner v. Wolfinbarger, 280 F. Supp. 1018 (N.D. Ala. 1968).

48 W. Dennis & Sons v. W. Norfolk Farmers' Manure & Chem. Co-Operative Co., [1943] 169 L.T. 74; Gouraud v. Edison Gower Bell Tel. Co. of Eur. Ltd., [1888] 57 L.T.Ch. 498.

49 *Garner*, 280 F. Supp. at 1018.

50 *W. Dennis*, 169 L.T. at 59; *Gouraud*, 57 L.T.Ch. at 498.

B. *The* Garner *Rationale*

At the outset on appeal,[51] the Fifth Circuit recited the four "fundamental conditions"[52] developed by John Henry Wigmore[53]—an American legal scholar whose work has heavily influenced evidence law in the United States[54]—for establishing a privilege against disclosure in the attorney-client context.[55] The court then noted that the fourth factor—whether the injury from disclosure would outweigh any benefit—was particularly instructive[56] as it provided a template for balancing the relevant interests at stake.[57] For this reason, the court then noted four traditional exceptions to an absolute privilege: (1) the trustee-beneficiary relationship;[58] (2) the crime-fraud exception;[59] (3) the joint-attorney exception;[60] and (4) the right of shareholders to inspect corporate books and records.[61] Recognizing that none was a perfect analogue for the corporate management-shareholder relationship,[62] the court utilized these exceptions simply to illustrate that a similarity existed sufficient to reexamine the attorney-client privilege within a corporate context.[63]

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51 The Fifth Circuit first determined that *Garner* was a federal question, rather than diversity, case and thus predicated on federal law and governed by federal, not state, evidentiary procedure. *Garner*, 430 F.2d at 1098.

52 The four fundamental conditions for establishing the privilege are:

> (1) The communications must originate in a *confidence* that they will not be disclosed[;] (2) [t]his element of *confidentiality must be essential* to the full and satisfactory maintenance of the relation between the parties[;] (3) [t]he *relation* must be one which in the opinion of the community ought to be sedulously *fostered*[;] (4) [t]he *injury* that would inure to the relation by the disclosure of the communications must be *greater than the benefit* thereby gained for the correct disposal of litigation.

8 WIGMORE, *supra* note 2, § 2285, at 527.

53 John Henry Wigmore's EVIDENCE IN TRIALS AT COMMON LAW is considered, at least by one commentator, to be "the most complete and exhaustive treatise on a single branch of our law that has ever been written" and is not only "by far the best treatise on the Law of Evidence . . . [but] also the best work ever produced on any comparable division of American Law." WILLIAM TWINING, THEORIES OF EVIDENCE: BENTHAM & WIGMORE 111 (1985) (quoting other sources) (internal quotation marks omitted).

54 EDWARD J. IMWINKELRIED & GLEN WEISSENBERGER, AN EVIDENCE ANTHOLOGY 7 (1996).

55 *Garner*, 430 F.2d at 1100.

56 *Id.* at 1101 ("The problem before us concerns Wigmore's fourth condition . . . .").

57 *Id.*

58 *Id.* at 1101–02.

59 *Id.* at 1102–03.

60 *Id.* at 1103.

61 *Id.* at 1104 n.21.

62 *Id.* at 1101 ("There may be reasonable differences over the manner of characterizing in legal terminology the duties of management, and over the extent to which corporate management is less of a fiduciary than the common law trustee.").

63 JOHN W. GERGACZ, ATTORNEY-CORPORATE CLIENT PRIVILEGE 3D § 6:8 (3d ed. 2013).

The court framed the relationship between management and shareholders in fiduciary terms,[64] reasoning that because management operates not for itself but shareholders, there is an alignment of interest such that management-counsel communications cannot be categorically withheld under the guise of the attorney-client privilege.[65] Accordingly, the court rejected the district court's wholesale abandonment of the attorney-client privilege within the context of shareholder suits[66] and found that where an entity functions on behalf or in the interests of others (as the management of a corporation does), any attempt by that entity to assert the attorney-client privilege against those whom it represents (shareholders) should be subject to a consideration of the needs of those beneficiaries when they seek disclosure.[67]

But rather than create a bright-line rule regarding disclosure, the court adopted a middle-of-the-road approach,[68] finding a qualified privilege.[69] According to the court's formulation, where communications relate to matters in which corporate management owes a fiduciary duty to its shareholders, management is entitled to a presumption that the attorney-client privilege applies, which

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64 *Garner*, 430 F.2d at 1101–04. Black's Law Dictionary defines a "fiduciary relationship" as one:

> [I]n which one person is under a duty to act for the benefit of another on matters within the scope of the relationship. . . . [and that] require[s] an unusually high degree of care. Fiduciary relationships usu[ally] arise in one of four situations: (1) when one person places trust in the faithful integrity of another, who as a result gains superiority or influence over the first, (2) when one person assumes control and responsibility over another, (3) when one person has a duty to act for or give advice to another on matters falling within the scope of the relationship, or (4) when there is a specific relationship that has traditionally been recognized as involving fiduciary duties, as with a lawyer and a client or a stockbroker and a customer.

BLACK'S LAW DICTIONARY 1402 (9th ed. 2009). While *Garner* analogized the shareholder-management relationship to that of trustee-beneficiary, it never explicitly described the former relationship as "fiduciary." Instead, the court noted that "[c]onceptualistic phrases describing the corporation as an entity separate from its stockholders are not useful tools of analysis." *Garner*, 430 F.2d at 1101.

65 *Garner*, 430 F.2d at 1101 ("[Because] management does not manage for itself . . . . [and] has duties which run to the benefit ultimately of the stockholders. . . . [t]he representative and the represented have a mutuality of interest . . . . [such that] management judgment must stand on its merits, not behind an ironclad veil of secrecy . . . ."). While the court spoke generally of the fiduciary relationship, it only used the term once, and in dicta, not in its analysis. *See id.* ("There may be reasonable differences over the manner of characterizing . . . the duties of management, and over the extent to which corporate management is less of a fiduciary than the common law trustee.").

66 *Id.* at 1103–04.

67 *Id.* at 1101.

68 *See generally* GERGACZ, *supra* note 63, § 6:3 (characterizing *Garner* as a compromise between the interests of management in preserving the attorney-client privilege while recognizing that management owes a fiduciary duty to shareholders whose derivative claims often would be unable to survive absent overcoming that privilege).

69 *Garner*, 430 F.2d at 1103–04.

shareholders may rebut by showing cause as to why it should not be invoked in the particular instance.[70]

The court outlined nine non-exclusive factors[71] that courts should consider in assessing whether shareholders have demonstrated good cause.[72] The court did not assign any particular factor a greater probative weight, nor did it detail a threshold requirement for any specific number of factors that must be satisfied.[73] Rather, it simply noted that in camera inspection was available to all courts and then remanded the case to the district court for a determination of whether the plaintiffs had shown good cause according to some or all of the nine indicia.[74] After a consideration of these factors on remand,[75] the district court found that shareholder plaintiffs had established good cause for disclosure of the communications at issue and overruled FAL's claim of attorney-client privilege.[76]

II. THE *GARNER* EXCEPTION AND ITS PROGENY

Since *Garner*, the exception has been cited in hundreds of federal district court decisions[77] and has become firmly entrenched in the rules relating to the admissibility of evidence in federal question cases.[78] Most

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70 *Id.*

71 The factors are:

> [(1)] [T]he number of shareholders and the percentage of stock they represent; [(2)] the bona fides of the shareholders; [(3)] the nature of the shareholders' claim and whether it is obviously colorable; [(4)] the apparent necessity or desirability of the shareholders having the information and the availability of it from other sources; [(5)] 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; [(6)] whether the communication related to past or to prospective actions; [(7)] whether the communication is of advice concerning the litigation itself; [(8)] the extent to which the communication is identified versus the extent to which the shareholders are blindly fishing; [(9)] the risk of revelation of trade secrets or other information in whose confidentiality the corporation has an interest for independent reasons.

Id. at 1104. For a critical examination of each factor, see Saltzburg, *supra* note 29, at 832–35.

72 *Garner*, 430 F.2d at 1104; *see supra* note 71.

73 Henry v. Champlain Enters., Inc., 212 F.R.D. 73, 84 (N.D.N.Y. 2003) (noting that "[n]one . . . of [the] factors are determinative").

74 *Garner*, 430 F.2d at 1104.

75 Garner v. Wolfinbarger, 56 F.R.D. 499, 502–04 (S.D. Ala. 1972).

76 *Id.* at 504.

77 WESTLAWNEXT, https://1.next.westlaw.com/Session/SignOn.html (sign into Westlaw Next; select "All Federal" from search box; use "430 F.2d 1093" as search term; select "Citing References" tab; under view, click "Cases"; under "NARROW," expand "Jurisdiction," and select "District Ct.").

78 Odmark v. Westside Bancorporation, Inc., 636 F. Supp. 552, 554 (W.D. Wash. 1986) ("Because the instant case is predicated on federal law, embodying federal policies, enforcement of those policies demands that the federal courts apply their own rule of privilege where substantial state interests are not infringed."); Paul R. Rice, The Evidence Project: Proposed

circuits recognize some form of the exception, including the First,[79] Second,[80] Fourth,[81] Fifth,[82] Sixth,[83] Seventh,[84] and D.C. Circuits.[85] While three federal appellate courts have declined to extend the exception to cases where the facts did not justify its application,[86] none have outright rejected the principle.[87]

Despite *Garner*'s broad acceptance, its application, while a necessary remedy to a recognized ill, has been inconsistent and its extension to different factual circumstances far too broad.[88] This has led to tremendous uncertainty for both shareholders and corporate

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Revisions to the Federal Rules of Evidence with Supporting Commentary, 171 F.R.D. 330, 350 (1997) ("[T]he *Garner* balancing has become an established exception in breach of fiduciary duty claims."); RESTATEMENT (THIRD) OF LAW GOVERNING LAW § 85 cmt. b (2000) (endorsing the *Garner* approach).

79 *See, e.g.*, *In re* Grand Jury Subpoena, 274 F.3d 563, 573 (1st Cir. 2001) (citing *Garner* as support for overcoming otherwise privileged communications between corporate management and counsel).

80 *See, e.g.*, *In re* Dow Corning Corp., 261 F.3d 280, 286 (2d Cir. 2001) ("[O]ther grounds may exist for disclosure of the communications, for instance, . . . the application of the shareholder 'good cause' exception to the attorney-client privilege announced in *Garner* . . . .").

81 *See, e.g.*, Sandberg v. Va. Bankshares, Inc., 979 F.2d 332, 352 (4th Cir. 1992) ("[W]e adopt [*Garner*'s] holding and rationale."), *vacated*, 1993 WL 524680 (4th Cir. Apr. 7, 1993).

82 *See, e.g.*, Ward v. Succession of Freeman, 854 F.2d 780, 786 (5th Cir. 1988) (rejecting the Ninth Circuit's narrow interpretation of *Garner* and extending the exception to non-derivative suits).

83 *See, e.g.*, Fausek v. White, 965 F.2d 126, 130 (6th Cir. 1992) ("[W]e agree with [*Garner*'s] rationale and adopt its holding.").

84 *See, e.g.*, *In re* Witness Before Special Grand Jury 2000-2, 288 F.3d 289, 294 (7th Cir. 2002) ("Just as a corporate attorney has no right or obligation to keep otherwise confidential information from shareholders, so a government attorney should have no privilege to shield relevant information from the public citizens to whom she owes ultimate allegiance . . . ." (citation omitted)). *But see In re* JP Morgan Chase & Co. Sec. Litig., No. 06 C 4674, 2007 WL 2363311, at *8 (N.D. Ill. Aug. 13, 2007) ("Although the Seventh Circuit itself has not discussed *Garner*, courts within this district have recognized the existence of the fiduciary exception.").

85 *See, e.g.*, *In re* Lindsey, 158 F.3d 1263, 1276 (D.C. Cir. 1998) (recognizing, although not explicitly adopting, *Garner*).

86 *See, e.g.*, Bland v. Fiatallis N. Am., Inc., 401 F.3d 779, 787–88 (7th Cir. 2005) (declining to apply the fiduciary exception to employers amending or terminating ERISA plans); Cox v. Adm'r U.S. Steel & Carnegie, 17 F.3d 1386, 1415 (11th Cir. 1994) (declining to extend *Garner*, based on the facts of the case, but not as a matter of law, to disputes between a union and its members), *modified on reh'g*, 30 F.3d 1347; Weil v. Inv./Indicators, Research & Mgmt., Inc., 647 F.2d 18 (9th Cir. 1981) (declining to extend *Garner* to non-derivative shareholders suits). Although many cases and commentators cite *Cox* as a prime example of a circuit court refusing to follow *Garner*, it is worth noting that due to the Fifth/Eleventh circuit court split, the Eleventh Circuit is still bound by *Garner*. Moore v. Metro. Life Ins. Co., 799 F. Supp. 2d 1290, 1293 (M.D. Ala. 2011) ("*Cox* . . . is sometimes cited as holding that the attorney-client privilege does not apply with respect to communications made to certain fiduciaries who obtain legal advice in the execution of their fiduciary obligations.").

87 *In re* United States, 590 F.3d 1305, 1312 (Fed. Cir. 2009) ("Though we are aware of some state courts that have expressly rejected the fiduciary exception, no federal court of appeals has rejected the principle, but have only declined to apply the exception in cases where the facts did not justify its application."), *rev'd and remanded*, United States v. Jicarilla Apache Nation, 131 S. Ct. 2313 (2011).

88 *See infra* Part II.A.

management as to whether and to what communications the privilege will attach[89] and a perception among some commentators that the attorney-client privilege has been eviscerated.[90] *Garner*'s erratic application, while manifesting itself in myriad fashions, can be distilled to three essential inconsistencies.

First, *Garner* has been discordantly applied to circumstances far afield from derivative suits,[91] thus threatening that the exception will swallow the rule of attorney-client privilege wholesale. Second, courts have disagreed regarding the scope and nature of the fiduciary relationship at issue.[92] Some courts interpret *Garner* as a two-tiered analysis in which the first tier—the existence of a fiduciary relationship—is a threshold[93] or dispositive requirement,[94] while others focus on whether a mutuality of interest existed between the parties at the time of the communication.[95] Other courts have used even more ambiguous terms, framing the relationship between management and shareholders as "quasi-fiduciary,"[96] while still others fail to define whether the fiduciary relationship is owed individually or collectively.[97] Third, some courts simply refuse to apply *Garner*, finding its logic inapposite to the specific circumstances of a case or generally in conflict with other jurisprudence, even in areas of the law where the exception has otherwise found overwhelming acceptance.[98]

The purpose of this Section is to develop a framework for understanding these discrepancies, both as a means of critiquing some of the differences that have arisen in the forty years since *Garner* was first decided and, ultimately, suggesting some solutions to these issues.

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89 *See* Kummer, *supra* note 31.

90 *See* ASS'N OF CORPORATE COUNSEL, THE DECLINE OF THE ATTORNEY-CLIENT PRIVILEGE IN THE CORPORATE CONTEXT (Nov. 2005), *available at* http://www.acc.com/vl/public/Surveys/loader.cfm? csModule=security/getfile&pageid=16306&page=/legalresources/resource.cfm&qstring=show=16306&title=The%20Decline%20Of%20the%20Attorney-Client%20Privilege%20in%20the%20Corporate%20Context; Ronald C. Minkoff, *A Leak in the Dike: Expanding the Doctrine of Waiver of the Attorney-Client Privilege*, *in* ETHICS AFTER ENRON: PROTECTING YOUR FIRM OR CORPORATE LAW DEPARTMENT: A SATELLITE PROGRAM 195, 199 (2002) ("[T]he [corporate] attorney-client privilege is under attack today as never before."); see also Fred C. Zacharias, *The Fallacy that Attorney-Client Privilege Has Been Eroded: Ramifications and Lessons for the Bar*, 1999 PROF. LAW. 39, 39 & n.2, for a compilation of contemporary scholarly discussions about the "perception in the practicing bar that modern courts have eviscerated the doctrine of attorney-client privilege."

91 *See infra* Part II.A.

92 *See infra* Part II.B.

93 *See infra* Part II.B.1.

94 *See id.*

95 *See infra* Part II.B.2.

96 *See id.*

97 *See infra* Part II.B.3.

98 *See infra* Part II.C.

A. *Extension Beyond Derivative Suits*

Garner was both a shareholder class action and a derivative suit.[99] Plaintiffs sought damages both for themselves individually and for the corporation.[100] However, the court was unconcerned with the fact that a damages award might inure in part to the individuals, rather than in full to the corporation, making it clear in a footnote that its "decision [did] not turn on whether [the derivative] claim [was] in the case or out."[101] Instead, the consideration most animating the court was the "particularized context" of *Garner*—namely, that the party asserting the privilege acted wholly or partly on behalf of those seeking to access the subject matter of the communications.[102]

That "particularized context," however, has proven to be anything but. Since the *Garner* decision, courts have applied the exception in class actions[103] and individual suits[104] in a wide array of circumstances, including: general and limited partnerships,[105] beneficiaries of corporate pension plans,[106] ERISA[107] claims,[108] union members and union

[99] Garner v. Wolfinbarger, 430 F.2d 1093, 1095 (5th Cir. 1970).

[100] *Id.*

[101] *Id.* at 1097 & n.11.

[102] *Id.* at 1101.

[103] *See, e.g.*, *In re* Int'l Sys. & Controls Corp. Sec. Litig., 693 F.2d 1235 (5th Cir. 1982); RMED Int'l, Inc. v. Sloan's Supermarkets, Inc., 94 Civ. 5587PKLRLE, 2003 WL 41996 (S.D.N.Y. Jan. 6, 2003); *In re* Pfizer Inc. Sec. Litig., No. 90 Civ. 1260, 1993 WL 561125 (S.D.N.Y. Dec. 23, 1993); Panter v. Marshall Field & Co., 80 F.R.D. 718 (N.D. Ill. 1978); Cohen v. Uniroyal, 80 F.R.D. 480 (E.D. Pa. 1978).

[104] *See, e.g.*, Quintel Corp., N.V. v. Citibank, N.A., 567 F. Supp. 1357 (S.D.N.Y. 1983); Labaton v. Universal Leaf Tobacco Co., No. 77 Civ. 119 (CMM), 1980 U.S. Dist. LEXIS 10823 (S.D.N.Y. Mar. 14, 1980); Bailey v. Meister Brau, Inc., 55 F.R.D. 211 (N.D. Ill. 1972).

[105] *See, e.g.*, Fortson v. Winstead, McGuire, Sechrest & Minick, 961 F.2d 469, 475 n.5 (4th Cir. 1992); Lugosch v. Congel, 219 F.R.D. 220, 229, 242–43 (N.D.N.Y. 2003); Ferguson v. Lurie, 139 F.R.D. 362 (N.D. Ill. 1991).

[106] *See, e.g.*, Helt v. Metro. Dist. Comm'n, 113 F.R.D. 7, 9–10 (D. Conn. 1986).

[107] The Employee Retirement Income Security Act (ERISA) is "a federal law that sets minimum standards for pension plans in private industry" and "also guarantees payment of certain benefits . . . if a defined plan is terminated." *The Employee Retirement Income Security Act (ERISA)*, U.S. DEPARTMENT LAB., http://www.dol.gov/compliance/laws/comp-erisa.htm (last visited Sept. 21, 2013).

[108] ERISA claims have been a particularly fertile extension of *Garner*. *See, e.g.*, Solis v. Food Emp'rs Labor Relations Ass'n, 644 F.3d 221, 227–28 (4th Cir. 2011); Bland v. Fiatallais N. Am., Inc., 401 F.3d 779 (7th Cir. 2005); *In re* Occidental Petrol. Corp., 217 F.3d 293 (5th Cir. 2000); Allen v. Honeywell Ret. Earnings Plan, 698 F. Supp. 2d 1197, 1201–02 (D. Ariz. 2010) (discussing fiduciary exception similar to *Garner*); Tatum v. R.J. Reynolds Tobacco Co., 247 F.R.D. 488 (M.D.N.C. 2008); Smith v. Jefferson Pilot Fin. Ins. Co., 245 F.R.D. 45 (D. Mass. 2007) (discussing fiduciary exception similar to *Garner*); Henry v. Champlain Enters., Inc., 212 F.R.D. 73 (N.D.N.Y. 2003); Wash.-Balt. Newspaper Guild, Local 35 v. Wash. Star Co., 543 F. Supp. 906, 909–10 (D.D.C. 1982); Donovan v. Fitzsimmons, 90 F.R.D. 583 (N.D. Ill. 1981). *But see* Wachtel v. Health Net, Inc., 482 F.3d 225 (3d Cir. 2007); *In re* Long Island Lighting Co., 129 F.3d 268 (2d Cir. 1997) (discussing fiduciary exception similar to *Garner*).

officers,[109] insurance subrogees and subrogors,[110] executors and beneficiaries of an estate,[111] joint ventures,[112] bankruptcy creditors' committees,[113] corporate bondholders,[114] purchasers of stock,[115] prosecutors and public officials,[116] real estate transactions,[117] and attorneys and their clients.[118]

Extending the exception beyond shareholder suits to circumstances in which there is not a well-established fiduciary relationship between the parties is inherently problematic and inconsistent with the logic of the *Garner* decision.[119] Moreover, the considerable variability in application of the exception by different courts[120] and the absence of any

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109 *See, e.g.*, Nellis v. Air Line Pilots Ass'n, 144 F.R.D. 68 (E.D. Va. 1992); *see also* Mallick v. Int'l Bhd. of Elec. Workers, 749 F.2d 771 (D.C. Cir. 1984); Aguinaga v. John Morrell & Co., 112 F.R.D. 671 (D. Kan. 1986).

110 *See, e.g.*, Dome Petrol. Ltd. v. Emp'rs Mut. Liab. Ins. Co. of Wisc., 131 F.R.D. 63 (D.N.J. 1990); *see also In re* MetLife Demutualization Litig., 495 F. Supp. 2d 310 (E.D.N.Y. 2007), *rev'd on other grounds*, 583 F.3d 173 (2d Cir. 2009); A. Kush & Assocs. (Can.) Ltd. v. Wein Geroff Enters., Inc., No. 85 C 493, 1986 WL 15120 (N.D. Ill. Dec. 31, 1986).

111 Lawrence v. Cohn, No. 90 Civ. 2396, 2002 WL 109530 (S.D.N.Y. Jan. 25, 2002).

112 *See, e.g.*, W. Gas Processors, Ltd. v. Enron Gas Processing Co., No. CIV.A. 87-A-1472, 1989 WL 20529 (D. Colo. Mar. 6, 1989).

113 *See, e.g.*, Official Comm. of Asbestos Claimants of G-I Holding, Inc. v. Heyman, 342 B.R. 416 (S.D.N.Y. 2006); *In re* Baldwin-United Corp., 38 B.R 802, 805 (Bankr. S.D. Ohio 1984).

114 *See, e.g.*, Broad v. Rockwell Int'l Corp., No. CIV-3-73-437-D, 1977 WL 928 (N.D. Tex. Feb. 18, 1977).

115 *See, e.g.*, *In re* Bairnco Corp. Sec. Litig., 148 F.R.D. 91 (S.D.N.Y. 1993); Cohen v. Uniroyal, Inc., 80 F.R.D. 480 (E.D. Pa. 1978). *But see In re* Atl. Fin. Mgmt. Sec. Litig., 121 F.R.D. 141 (D. Mass. 1988); Shirvani v. Capital Investing Corp., 112 F.R.D. 389 (D. Conn. 1986).

116 *See, e.g.*, *In re* A Witness Before the Special Grand Jury 2000-2, 288 F.3d 289, 293–94 (7th Cir. 2002) ("Just as a corporate attorney has no right or obligation to keep otherwise confidential information from shareholders, so a government attorney should have no privilege to shield relevant information from the public citizens to whom she owes ultimate allegiance, as represented by the grand jury." (citation omitted)).

117 *See, e.g.*, Quintel Corp., N.V. v. Citibank, N.A., 567 F. Supp. 1357 (S.D.N.Y. 1983) (bank acting as fiduciary in real estate transaction).

118 *See, e.g.*, *In re* Sunrise Sec. Litig., 130 F.R.D. 560, 596–97 & n.9 (E.D. Pa. 1989).

119 For a detailed discussion of *Garner*'s extension beyond shareholder suits, particularly derivative suits, see *infra* Part IV. For a discussion of issues surrounding the extension of *Garner* to these "quasi-fiduciary" contexts, see *infra* Part II.B.2. While this Note argues that the *Garner* exception should be cabined to derivative suits, where there is a clear, legally recognized fiduciary duty—e.g. general and limited partnerships and ERISA claims—utilizing the exception is still arguably appropriate, albeit under slightly different premises. *See infra* note 234.

120 *See, e.g.*, Sandberg v. Va. Bankshares, Inc., 979 F.2d 332, 351–54 (4th Cir. 1992) (adopting *Garner* exception within context of minority shareholder suit), *vacated*, 1993 WL 524680 (4th Cir. Apr. 7, 1993); Fausek v. White, 965 F.2d 126, 130–31 (6th Cir. 1992) ("[The defendant] maintains that *Garner* applies only in shareholder derivative actions and that all policy considerations favor applying the privilege in cases where the plaintiffs act only for their own benefit rather than on behalf of the corporation. . . . Nothing in the language or the reasoning of *Garner* . . . so limits its holding. . . . The fact that shareholder-plaintiffs seek recovery for themselves only may render their motives more suspect than if they bring a derivative action. Nevertheless, this is just one factor to be considered in determining whether good cause exists to deny the application of the privilege in a particular case."); Ward v. Succession of Freeman, 854 F.2d 780, 786 (5th Cir. 1988) (noting in dicta that the *Garner* exception applies to non-

clear outer perimeter to the exception[121] has led to settings likely not conceived of by the Fifth Circuit, breeding tremendous uncertainty among actual and potential litigants.[122]

B. *Scope and Nature of the Fiduciary Relationship*

A major shortcoming of *Garner* was its purposefully ambiguous description of the fiduciary relationship at issue.[123] Whether management owed the fiduciary duty to shareholders or to the corporate entity itself remains unclear.[124] While the *Garner* court did speak generally of the fiduciary relationship between shareholders and management, it never fully delineated the contours of that rationale.[125]

derivative shareholder suits); Lawrence E. Jaffe Pension Plan v. Household Int'l., Inc., 244 F.R.D. 412, 423 (N.D. Ill. 2006) ("[Even though] Plaintiffs have not filed a derivative action and their interests are clearly personal in that they seek to recover financially for [defendant's] alleged fraud. . . . the court finds that the fiduciary exception applies to the communications . . . ."); RMED Int'l, Inc. v. Sloan's Supermarkets, Inc., 94 CIV. 5587PKLRLE, 2003 WL 41996, at *4 (S.D.N.Y. Jan. 6, 2003) ("[Although] the Second Circuit has never expressly adopted or applied *Garner* . . . . the *Garner* rationale is alive and well in this Circuit."); Burghart v. Landau, 82 CIV. 2181 (MJL), 1985 WL 209, at *5–6 (S.D.N.Y. Jan. 23, 1985) ("Although the facts in *Garner* involved a derivative action, its rationale is not limited to that particular setting. . . . [W]e find that the Magistrate did not err in applying *Garner* to an individual or direct action."); Cohen v. Uniroyal, Inc., 80 F.R.D. 480, 484 n.4 (E.D. Pa. 1978) ("*Garner* does not require unanimity of stockholder action or even, as the defendant suggests, that the class inquiring into privileged communications comprise a majority of the corporation's stockholders."); Bailey v. Meister Brau, Inc., 55 F.R.D. 211, 213–14 (N.D. Ill. 1972) ("[T]he [*Garner*] court specifically noted that it did not consider it determinative whether the attorney consulted was retained by the corporation or by management on its own account. The important consideration was that management's duties gave the shareholders a sufficient interest in knowing its legal communications to outweigh the interests served by confidentiality." (citation omitted)). *But see, e.g.*, Weil v. Inv./Indicators, Research & Mgmt., Inc., 647 F.2d 18, 23 (9th Cir. 1981) ("Without passing on the merits of *Garner*, we find it inapposite to the case before us. [Plaintiff] is not currently a shareholder of the Fund, and her action is not a derivative suit."); Herrmann v. Rain Link, Inc., No. 11-1123-RDR, 2012 WL 1207232, at *6–7 (D. Kan. Apr. 11, 2012) ("[T]he Tenth Circuit . . . has [not] addressed the fiduciary exception and the manner in which courts should apply it."); Milroy v. Hanson, 875 F. Supp. 646, 651 (D. Neb. 1995) ("I will not follow *Garner* . . . . [because] whatever the utility of the *Garner* rationale, it has no applicability where the plaintiff stockholder asserts claims primarily to benefit himself, particularly where such claims will undoubtedly harm *all* other stockholders if successful."); Gerrits v. Brannen Banks of Fla., Inc., 138 F.R.D. 574, 579 (D. Colo. 1991) ("I am not prepared at this juncture, however, to apply the *Garner* . . . exception to cases in which . . . non-derivative claims are presented . . . .").

121 *See* GERGACZ, *supra* note 63, at 746 ("[T]he *Garner* exception continues to grow. Its core may well be moving beyond formal fiduciary relationships . . . .").

122 *See* Johnson, *supra* note 29, at 342–43.

123 Garner v. Wolfinbarger, 430 F.2d 1093, 1101 (5th Cir. 1970) ("Conceptualistic phrases describing the corporation as an entity separate from its stockholders are not useful tools of analysis. . . . There may be reasonable differences over the manner of characterizing in legal terminology the duties of management, and over the extent to which corporate management is less of a fiduciary than the common law trustee.").

124 *See infra* note 172.

125 *See infra* notes 168–72.

The Fifth Circuit itself, upon revisiting the issue, appears to have taken an even broader approach than its initial *Garner* decision, expanding the exception to "quasi fiduciary"[126] relationships[127] and non-derivative shareholder suits.[128] Consequently, it is still unresolved whether the *Garner* rationale was premised solely on the unique relationship between shareholders, management, and the corporation or whether it was also founded on the existence of an additional common law or statutory fiduciary duty.[129] A direct result is that decisions applying *Garner* have failed—or been unable—to define the scope and nature of that relationship in an adequate or consistent fashion, thus creating an uncertain and unpredictable privilege.

1. Fiduciary Relationship as a Threshold or Dispositive Requirement

The most popular reading of *Garner* employs a stratified analysis.[130] Only after finding the existence of a common law or statutory fiduciary relationship between the party seeking discovery and the party attempting to invoke the attorney-client privilege do most courts then weigh the good cause requirements.[131] Viewing the fiduciary duty as a threshold requirement is the most true to the *Garner* analysis, which premised its least ambiguous passages upon the fiduciary relationship between shareholders and management.[132]

However, some courts have viewed finding a fiduciary relationship as dispositive, dispensing with the good cause analysis altogether. These

126 One court has defined a "quasi fiduciary" duty as one in which the relationship of management to the stockholder is not "in the strict sense [that of a] trustee[]" but one where management is "required to act in the utmost good faith, and in accepting the office they impliedly undertake to give to the enterprise the benefit of their best care and judgment, and to exercise the powers conferred solely in the interest of the corporation." Orlando Orange Groves Co. v. Hale, 144 So. 674, 677 (Fla. 1932).

127 *In re* Int'l Sys. & Controls Corp. Sec. Litig., 693 F.2d 1235, 1239 (5th Cir. 1982) (noting the "quasi-fiduciary relationship analogized to in *Garner*").

128 Ward v. Succession of Freeman, 854 F.2d 780 (5th Cir. 1988).

129 *See* Summerhays, *supra* note 20, at 289–91.

130 GERGACZ, *supra* note 63, at 721–22.

131 *See, e.g.*, Fausek v. White, 965 F.2d 126, 132 (6th Cir. 1992) ("*Garner* only applies to cases in which the corporation stands in a fiduciary relationship to those seeking to abrogate the attorney-client privilege."); J.H. Chapman Group, Ltd. v. Chapman, No. 95 C 7716, 1996 WL 238863, at *2 (N.D. Ill. May 2, 1996) ("[T]he prerequisites of the fiduciary duty exception are a fiduciary relationships and good cause for overcoming the attorney-client privilege[.]"); Helt v. Metro. Dist. Comm'n, 113 F.R.D. 7, 9–11 (D. Conn. 1986) (turning to an examination of "good cause" factors only after establishing that a fiduciary relationship existed between the fund administrator and its beneficiaries); Aguinaga v. John Morrell & Co., 112 F.R.D. 671, 678 (D. Kan. 1986) ("The trigger for application of the *Garner* principles is a fiduciary relationship between the person or entity asserting the attorney-client privilege and the person or entity attempting to obtain the information.").

132 *See* GERGACZ, *supra* note 63, at 726 ("The only requisite for the application of the good cause exception is the existence of a fiduciary relationship between the parties in dispute.").

decisions can be divided into two categories. The first is a line of decisions that draw upon the principles of *Garner* and trust law[133] to extend the exception to ERISA fiduciaries.[134] These decisions, now generally accepted among most courts,[135] jettison the "good cause" analysis altogether, finding that the fiduciary duty a pension plan trustee or corporate sponsor owes to an ERISA beneficiary[136] is sufficient to warrant an exception to the attorney-client privilege.[137]

The second category is a single, aberrational[138] district court decision: *Valente v. PepsiCo, Inc.*[139] In *Valente*, minority shareholders brought a class action against the majority shareholders, claiming that the majority shareholders made various misrepresentations with regard to an ongoing merger, as well as violated federal securities law.[140] The majority shareholders sought to withhold production in discovery of certain documents under the guise of the attorney-client privilege.[141] The District of Delaware first distinguished *Garner* based on the facts[142] but then utilized its reasoning to find that a fiduciary must execute his duties without obfuscating his reasons from the legitimate inquiries of the beneficiaries.[143] Upon finding a duty between the minority and majority shareholders, the court then permitted discovery of the privileged corporate communications without any showing or discussion of "good cause."[144]

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133 *See, e.g.*, Riggs Nat'l Bank v. Zimmer, 355 A.2d 709, 713 (Del. Ch. 1976).

134 *See* Petz v. Ethan Allen, Inc., 113 F.R.D. 494 (D. Conn. 1985); Wash.-Balt. Newspaper Guild, Local 35 v. Wash. Star Co., 543 F. Supp. 906 (D.D.C. 1982). For a discussion of the fiduciary exception in the context of the ERISA beneficiary-trustee relationship, see GERGACZ, *supra* note 63, § 6:28.

135 See Patricia C. Kussmann, *Construction and Application of Fiduciary Duty Exception to Attorney-Client Privilege*, 47 A.L.R. 6th 255, §12 (2009) for a survey of federal circuits in which courts apply the exception within the ERISA context.

136 The duties owed, inter alia, by fiduciaries to their beneficiary include: "[(1)] [a]cting solely in the interest of plan participants and their beneficiaries and with the exclusive purpose of providing benefits to them; [(2)] [c]arrying out their duties prudently; . . . [(3)] [and] [p]aying only reasonable plan expenses." *See* Emp. Benefits Sec. Admin., *Meeting Your Fiduciary Duties*, U.S. DEPARTMENT LAB., http://www.dol.gov/ebsa/publications/fiduciaryresponsibility.html (last visited Feb. 8, 2013).

137 *See infra* note 234 (noting the need to separate the ERISA fiduciary exception from the *Garner* corporate exception); *see also* Kummer, *supra* note 29, at 2149–50; Kussmann, *supra* note 135.

138 Tom Kirby, *New Life for the Corporate Attorney-Client Privilege in Shareholder Litigation*, 69 A.B.A. J. 174, 175–76 (1983).

139 68 F.R.D. 361 (D. Del. 1975).

140 *Id.* at 363.

141 *Id.* at 364.

142 *Id.* at 366 ("The Court finds [the attorney-client privilege] issue [in the instance case] to be more complex than . . . the situation presented in *Garner*.").

143 *Id.* at 370.

144 *Id.* at 366–69. *But see* Goldenson v. Steffens, No. 2:10–cv–00440–JAW, 2013 WL 145587, at *11 (D. Me. Jan. 14, 2013); Lawrence v. Cohn, No. 90 CIV. 2396 (CSHMHD), 2002 WL 109530, at *3 (S.D.N.Y. Jan. 25, 2002).

As a general rule, dispensing with the "good cause" requirement[145] is difficult to reconcile with *Garner*'s reasoning. The *Garner* exception is a balancing test, in which courts must weigh the legitimate interests of corporate management and shareholders to determine whether it is appropriate, based on the circumstances, to pierce the corporate privilege.[146] While this Note does not pass upon the wisdom of such a categorical exception, it does propose that to justify an invasion of corporate communications based on *Garner* without a showing of "good cause" is a distortion of its holding.[147]

2. "Quasi-Fiduciary" Relationships and Mutuality of Interest

As detailed above, most courts premise the application of the *Garner* exception upon the existence of a common law or statutory fiduciary relationship.[148] However, much of the criticism surrounding *Garner* derives from its extension to settings in which that relationship is absent.[149] In these situations—e.g., insurance subrogors and subrogees—courts sometimes refer to obligations which have not quite risen to the level of a fiduciary duty but which nonetheless carry some of the same characteristics.[150] As a consequence, courts' characterization of these duties as "quasi fiduciary"[151] appears to telegraph their discomfort

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145 However, this Note argues that eliminating the "good cause" requirement is appropriate in the trustee-beneficiary context. For a more detailed explanation, see *infra* note 234.

146 *See* Johnson, *supra* note 29, at 344.

147 The Delaware District Court is, of course, not bound by Fifth Circuit decisions. District courts in the Third Circuit have, however, applied the *Garner* exception. *See, e.g.*, Arcuri v. Trump Taj Mahal Assocs., 154 F.R.D. 97, 109 (D.N.J. 1994) ("*Garner* has been held by the district courts in this circuit to apply to unions in this circuit . . . ."). Yet, the Third Circuit has never expressly adopted *Garner* and, in fact, has declined to extend it in several instances. *See, e.g.*, *In re* Teleglobe Commc'ns Corp., 493 F.3d 345, 385 (3d Cir. 2007) ("*Garner* has . . . never [been] adopted by our Court. . . . [and] we have not always applied *Garner* [to new circumstances].").

148 *See* Summerhays, *supra* note 20, at 292.

149 Paul J. Sigwarth, *It's MY Privilege and I'll Assert It If I Want To: The Attorney-Client Privilege in Closely-Held Corporations*, 23 J. CORP. L. 345, 354 (1998). At least one court applying *Garner* debated whether there is a meaningful distinction between the duty of a "fiduciary" and that of "good faith and fair dealing." A. Kush & Assocs. v. Wein Geroff Enters., Inc., No. 85 C 493, 1986 WL 15120, at *2 (N.D. Ill. Dec. 31, 1986) ("Regardless of whether the duty of the insurer in Illinois is technically 'fiduciary' or 'good faith and fair dealing,' we believe the magistrate correctly held that the *Garner* approach is applicable and the right to the privilege may be limited . . . .").

150 *See, e.g.*, Dome Petrol. Ltd. v. Emp'rs Mut. Liab. Ins. Co. of Wisc., 131 F.R.D. 63, 69 (D.N.J. 1990) ("[The subrogor] does not owe a fiduciary duty to [the subrogee] . . . . Yet that relationship does provide the commonality of interest, at least as to the rights subrogated, of which the *Garner* court was concerned."). *But see* Arcuri v. Trump Taj Mahal Assocs., 154 F.R.D. 97, 109 (D.N.J. 1994) ("Unlike shareholders in a derivative suit, there is no mutuality of interest between different factions of a union. . . . [U]nion members frequently have radically different and conflicting interests on the job." (internal quotation marks omitted)).

151 *See supra* note 126.

with applying the term "fiduciary" to areas of the law that do not fit within the existing parameters.[152]

To compensate, courts employ *Garner* verbiage, describing the relationship between the parties as one in which there is a "mutuality of interest."[153] "Mutuality of interest" is used to signify that while the parties may not have a true fiduciary relationship,[154] sufficiently analogous characteristics exist such that there may be grounds for abrogation of the attorney-client privilege.[155]

Most notable in this regard was a decision by the U.S. Court of Appeals for the Fifth Circuit, *In re International Systems & Controls Corp. Securities Litigation*,[156] in which the court refused to extend the

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152 RAFAEL CHODOS, THE LAW OF FIDUCIARY DUTIES § 1:24, at 63 (1st ed. 2000).

153 Craig C. Martin & Matthew H. Metcalf, *The Fiduciary Exception to the Attorney-Client Privilege*, 34 TORT & INS. L.J. 827, 853–56 (1999).

154 A "true fiduciary" has been characterized as one in which:

> A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the "disintegrating erosion" of particular exceptions.

Meinhard v. Salmon, 249 N.Y. 458, 464 (1928).

155 *See* Johnson, *supra* note 29, at 327 ("Without a mutuality of interests between the parties, the rationale behind allowing plaintiffs to discover otherwise privileged information is destroyed."); *see also* Martin & Metcalf, *supra* note 153, at 855. The majority of courts find that a mutuality of interest must exist at the time the communication is made. *See, e.g.*, *In re* Omnicom Group Inc. Sec. Litig., 233 F.R.D. 400, 412 (S.D.N.Y. 2006) (*Garner* "good cause" analysis inapplicable because plaintiffs were not shareholders at time of attorney-client communications); *In re* Kidder Peabody Sec. Litig., 168 F.R.D. 459, 475 (S.D.N.Y. 1996) ("[T]he logic of the *Garner* approach may limit its application to parties who were shareholders at the time of the assertedly privileged communication . . . ."); Moskowitz v. Lopp, 128 F.R.D. 624, 637 (E.D. Pa. 1989) ("[T]here must be some fiduciary relationship and a mutuality of interest at the time the privileged communications were made for the *Garner* rationale to apply."); *In re* Atlantic Fin. Mgmt. Sec. Litig., 121 F.R.D. 141, 146 (D. Mass. 1988) ("Plaintiffs in this case have not made a sufficient showing that a fiduciary relationship existed between plaintiffs and defendants . . . at the time the discussions with counsel took place.); Quintel Corp., N.V. v. Citibank, N.A., 567 F. Supp. 1357, 1364 (S.D.N.Y. 1983) (finding *Garner* inapplicable to communications made prior to formation of fiduciary relationship). However, a sizeable minority have taken a more expansive reading of *Garner* and applied the exception to communications that occurred prior to any mutuality of interest. *See, e.g.*, *In re* Pfizer Inc. Sec. Litig., No. 90 Civ 1260 (SS), 1993 WL 561125, at *12 (S.D.N.Y. Dec. 23, 1993) (extending *Garner* exception to plaintiff class that included investors who were not fiduciaries at the time of the allegedly misleading statement, but later purchased stock in reliance on that statement); *In re* Int'l Bus. Machs. Corp. Sec. Litig., No. 92 Civ. 9076 (GLG), 1993 WL 760214, at *3 (S.D.N.Y. Nov. 30, 1993) (applying the *Garner* exception in shareholder class action where certain shareholders were not shareholders at time of communications); *In re* Bairnco Corp. Sec. Litig., 148 F.R.D. 91, 98 (S.D.N.Y. 1993) (members of plaintiff class were "purchasers" rather than "shareholders" at time of allegedly misleading statements); Cohen v. Uniroyal, Inc., 80 F.R.D. 480, 484 (E.D. Pa. 1978) (extending same protection of *Garner* exception to class members who had not yet purchased stock at time of allegedly misleading communications).

156 693 F.2d 1235 (5th Cir. 1982).

Garner exception to attorney work product.[157] Plaintiffs in *International Systems* brought a derivative and class action suit against the board of directors of International Systems and Control Corporation (ISC), alleging the board either knowingly or negligently allowed ISC to pay commissions and bribe foreign nationals in order to secure contracts, which in turn led to a Securities and Exchange Commission (SEC) investigation and complaint.[158] Plaintiffs moved to compel production of documents prepared by ISC in response to the SEC investigation and defendants refused, claiming the attorney-client privilege and work product immunity.[159]

Reaffirming *Garner*, the court stressed *Garner*'s emphasis on the "mutuality of interest" between shareholders and management.[160] In contrast, the court found that because attorney work product protection is triggered by a party's anticipation of litigation, any mutuality of interest between shareholders and management is destroyed and replaced by an adversarial relationship.[161] Consequently, the court found that this adversarial relationship is incongruous with the "quasi-fiduciary relationship analogized to in *Garner*" and that attorney work product should not be discoverable.[162]

Although the Fifth Circuit declined to extend *Garner* to attorney work product, its broad interpretation of the management-shareholder relationship in *Garner* as "quasi-fiduciary" provides the doctrinal basis for an extension of the *Garner* exception to areas beyond any common law or statutory fiduciary relationship.[163] However, without the anchor of an existing common law or statutory fiduciary duty, there is no conceivable limit to the types of relationship to which *Garner* might

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157 *Id.* at 1239. Black's Legal Dictionary defines "work product" as "[t]angible material or its intangible equivalent—in unwritten or oral form—that was either prepared by or for a lawyer or prepared for litigation, either planned or in progress. . . . [that is] generally exempt from discovery or other compelled disclosure." BLACK'S LAW DICTIONARY 1947 (9th ed. 2009). The term is generally utilized "to describe the products of a party's investigation or communications concerning the subject matter of a lawsuit if made (1) to assist in the prosecution or defense of a pending suit, or (2) in reasonable anticipation of litigation." *Id.* For the relevant Federal Rule of Civil Procedure, see FED. R. CIV. P. 26(b)(3). For the leading Supreme Court decision on the work product doctrine, see Hickman v. Taylor, 329 U.S. 495 (1947).

158 *In re Int'l Sys. & Controls Corp. Sec. Litig.*, 693 F.2d at 1237–38.

159 *Id.* at 1238.

160 *Id.* at 1239.

161 *Id.*

162 *Id.* For additional discussion of the contours of "mutuality of interest" where there is a clear fiduciary-beneficiary relationship at stake, see a Delaware state court decision, *In re* Fuqua Indus., S'holder Litig., No. 11974, 2002 Del. Ch. LEXIS 52, at *12 (Del. Ch. May 2, 2002) ("At the point in time when the interests of the fiduciary and the beneficiary diverge, however, there is no longer a mutuality of interest and a *Garner* analysis is not appropriate. Although there is . . . no bright-line rule that identifies the point in time when mutuality of interest diverges in each case, that divergence must necessarily occur at the point in time when the parties can reasonably anticipate litigation over a particular action.").

163 *See* Summerhays, *supra* note 20, at 292.

apply.[164] Consequently, a well-established fiduciary duty, known and understood to the parties at the time of the occurrence, is critical to maintaining even a semblance of predictability and an outer perimeter as to when the attorney-client privilege will apply.

3. Collective vs. Individual Duty

The absence of a clear outer perimeter to the scope of the "quasi-fiduciary" relationship is particularly acute in light of the fact that courts sometimes fail to articulate whether the fiduciary duty owed by management applies to shareholders individually or collectively.[165] Consequently, it is often difficult to identify who is the fiduciary (the party who is prevented from claiming privilege of communication) and who is the beneficiary (the party who can overcome the fiduciary's assertion of the privilege).[166]

The principal concern with this ambiguity is twofold. First, assume that management owes a duty to shareholders collectively.[167] In such an instance, because shareholders, when viewed as a singular body, are in a sense a component of the corporation,[168] management's duty runs only to the corporation as an entity.[169] Thus, where shareholders bring suit in a non-derivative capacity under federal securities laws or in a class action that fails to represent the entire class of shareholders, management's duty would be divided. The natural consequence of this divide is that the mutuality of interest so critical to *Garner* breaks down. Conversely, imagine that the duty is owed to shareholders individually.[170] There, the fiduciary duty remains between management

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164 Even where "mutuality of interest" serves as a reasonable proxy for a fiduciary relationship, it is difficult to ascertain any fixed outer boundary, as even tenuous relationships often have a brief mutuality of interest.

165 *See, e.g.*, Valente v. PepsiCo, Inc., 68 F.R.D. 361, 368 (D. Del. 1975) ("[A] corporation is, at least in part, the association of its shareholders, and it owes to them a fiduciary obligation . . . .").

166 *See* Summerhays, *supra* note 20, at 293.

167 This view comports with Delaware corporate law. *See, e.g.*, Cede & Co. v. Technicolor, Inc., 634 A.2d 345, 361 (Del. 1993) ("[T]he duty of loyalty mandates that the best interest of the corporation and its shareholders takes precedence over any interest possessed by a director, officer or controlling shareholder and not shared by the stockholders generally.").

168 This mirrors *Garner*'s emphasis on shareholders, not the corporation, being the real client. Garner v. Wolfinbarger, 430 F.2d 1093, 1101 (5th Cir. 1970) ("[M]anagement does not manage for itself and . . . the beneficiaries of its action are the stockholders.").

169 *See* Paula J. Dalley, *The Misguided Doctrine of Stockholder Fiduciary Duties*, 33 HOFSTRA L. REV. 175, 191 (2004) ("[C]orporate duties are generally owed to the corporation and its stockholders as a whole rather than to the stockholders individually.").

170 While, and as noted above, a director's duty is generally owed to the corporate entity as a whole, there are some "special circumstances [where] a corporate [manager] may owe a duty to individual shareholders . . . ." Chanoff v. U.S. Surgical Corp., 857 F. Supp. 1011, 1020 (D. Conn. 1994).

and the particular shareholder bringing suit, even though respect for that duty within the context of an exception to the attorney-client privilege might be adverse to the interests of the other remaining shareholders.

This tension gives rise to the second problem. Because only the party to whom a fiduciary duty is owed may overcome the privilege,[171] where it remains ambiguous if that duty includes shareholders in an individual or collective sense, it is impossible to determine whether a party would even satisfy a basic prerequisite of the *Garner* reasoning. If *Garner* stands for the proposition that shareholders may overcome the privilege in an individual capacity in, for instance, a federal securities suit, that dispenses with the need for any derivative portion of the claim or a class action that represents the entire class or subclass of shareholders. Conversely, if *Garner* is interpreted to require shareholders in the collective, then either a derivative claim or a class action that represents the entire class of existing shareholders becomes vital.

Garner contains conflicting language on this point.[172] Moreover, *Garner*'s progeny fail to articulate any meaningful distinction.[173] The result is various interpretations based upon inconsistent reasoning. Consequently, it is difficult for parties to determine, even well beyond the nascent stages of a claim, whether they will have satisfied even some of the basic conditions necessary for overcoming the privilege.

C. *Refusal to Adopt* Garner

While a minority, some courts have refused to adopt *Garner* regardless of form or circumstance. The most notable is a series of decisions in which courts have refused to adopt the *Garner* exception in shareholder suits—the original context in which *Garner* was decided.[174]

In *Weil v. Investment/Indicators, Research & Management, Inc.*,[175] the Ninth Circuit declined to evaluate the merits of *Garner* but found the *Garner* reasoning inapposite to the case before it. Animating the

171 GERGACZ, *supra* note 63, at 726–27.

172 In one passage, the court notes that "management has duties which run to the benefit ultimately of the stockholders." *Garner*, 430 F.2d at 1101. In another, somewhat vague passage, the *Garner* court provided that "there are obligations . . . that run from corporation to shareholder . . . ." *Id.* at 1102.

173 *See* Summerhays, *supra* note 20, at 293 ("[M]any of these decisions [applying *Garner*] . . . fail to distinguish between individual shareholders and shareholders collectively.").

174 *See, e.g.*, Weil v. Inv./Indicators, Research & Mgmt., Inc., 647 F.2d 18, 23 (9th Cir. 1981); Milroy v. Hanson, 875 F. Supp. 646, 651–52 (D. Neb. 1995); Lefkowitz v. Duquesne Light Co., CIV. A. No. 86-1046, 1988 WL 169273, at *6 (W.D. Pa. June 14, 1988); Shirvani v. Capital Investing Corp., 112 F.R.D. 389, 391 (D. Conn. 1986).

175 647 F.2d 18 (9th Cir. 1981).

court's decision was that the plaintiff in *Weil* was only a former shareholder—thus no longer a fiduciary of corporate management—and her action was not a derivative suit.[176] Instrumental to the Ninth Circuit's finding that *Garner*'s holding and policy rationale simply did not apply was the fact that the plaintiff in *Garner* sought damages from other defendants on behalf of the corporation, whereas the plaintiff in *Weil* sought damages from the corporation for her own pecuniary benefit and the members of her proposed class.[177]

Another short line of district court decisions[178] considered the *Garner* policy rationale within the context of the then-recent Supreme Court decision, *Upjohn Co. v. United States*.[179] Recognizing that the *Garner* exception injected an element of uncertainty into the scope of the attorney-client privilege—once a relatively static area of the law—these decisions found that a restriction or confusion of traditional privilege concepts could eventually result instead in a curtailment of frank and forthright attorney-client communication altogether.[180] Believing that this public policy consequence conflicted with the general rule announced by the Supreme Court in *Upjohn*, these lower courts refused to follow *Garner*.[181]

III. THE SUPREME COURT AND THE ATTORNEY-CLIENT PRIVILEGE

A. Upjohn Co. v. United States

Eleven years after denying certiorari to *Garner*,[182] the United States Supreme Court clarified the scope of the attorney-client privilege in the corporate context in the landmark case of *Upjohn Co. v. United States*.[183] Accountants for the petitioner, Upjohn Co. (Upjohn), a pharmaceutical manufacturing corporation, had discovered that one of Upjohn's foreign subsidiaries had made illegal payments to secure government business abroad.[184] The accountants informed Upjohn's General Counsel, who, upon consulting with outside counsel, decided that the company would conduct an internal investigation of the payments.[185]

176 *Id.* at 23.

177 *Id.*

178 *See Milroy*, 875 F. Supp. at 651–52; *Lefkowitz*, 1988 WL 169273, at *6; *Shrivani*, 112 F.R.D. at 391.

179 449 U.S. 383 (1981).

180 *Lefkowitz*, 1988 WL 169273, at *6 (quoting *Shrivani*, 112 F.R.D. at 391).

181 *Milroy*, 875 F. Supp. at 651; *Lefkowitz*, 1988 WL 169273, at *7; *Shrivani*, 112 F.R.D. at 391.

182 401 U.S. 974 (1971).

183 449 U.S. 383 (1981).

184 *Id.* at 386.

185 *Id.*

After voluntarily notifying the Internal Revenue Service (IRS) of the investigation, the IRS issued a summons for information collected by Upjohn.[186] Upjohn refused, citing the attorney-client privilege and attorney work product in anticipation of trial.[187]

Overturning the Sixth Circuit, the Supreme Court denied the IRS request and decided in favor of Upjohn.[188] The unanimous Court reaffirmed the existence of the corporate attorney-client privilege and formulated a broad application within the internal corporate structure.[189] While emphasizing that it was only deciding the case before it and declining to issue a bright-line rule,[190] the Court made several policy judgments about the scope of the attorney-client privilege.[191] The most critical public policy issue animating the Court was a need for greater predictability in determining the application of the attorney-client privilege in the corporate context.[192] The Court recognized that an absence of predictability would have a chilling effect on corporate clients seeking full and frank legal advice,[193] thereby curtailing an attorney's ability to gather facts and disincentivizing corporations from seeking the advice of counsel in self-policing.[194] Accordingly, the Court held that while the scope of the attorney-client privilege must be decided on a case-by-case basis, communications between counsel and

186 *Id.* at 387–88.

187 *Id.* at 388.

188 The Court of Appeals had decided in favor of the IRS, finding no attorney-client privilege for Upjohn's communications based on the "control group" test. United States v. Upjohn Co., 600 F.2d 1223, 1227–28 (6th Cir. 1979), *judgment reversed Upjohn*, 449 U.S. 383. Premised on the fact that because a corporation is a fictitious entity and "only the [corporation's] senior management, guiding and integrating the several operations, . . . can be said to possess an identity analogous to the corporation as a whole," *id.* at 1226, the control group test limits the attorney-client privilege to those corporate officers who are "in a position to control or even to take a substantial part in a decision about any action which the corporation may take upon the advice of the attorney," City of Phila. v. Westinghouse Elec. Corp., 210 F. Supp. 483, 485 (E.D. Pa. 1962).

189 *Upjohn*, 449 U.S. at 395–97.

190 *Id.* at 396 ("[W]e decide only the case before us, and do not undertake to draft a set of rules which should govern challenges to investigatory subpoenas. . . . [as it] would violate the spirit of Federal Rule of Evidence 501." (citing S. REP. NO. 93-1277, at 13 (1974) ("[T]he recognition of a privilege based on a confidential relationship . . . should be determined on a case-by-case basis.") (alteration in original))).

191 *See* Katherine M. Weiss, Note, Upjohn Co. v. United States *as Support for Selective Waiver of the Attorney-Client Privilege in Corporate Criminal Investigations*, 48 B.C. L. REV. 501, 504 (2007) ("Specifically, the Court sought to increase predictability, protect the attorney's fact-gathering role, and eliminate a significant disincentive for corporate self-policing.").

192 *Upjohn*, 449 U.S. at 393 ("[I]f the purpose of the attorney-client privilege is to be served, the attorney and client must be able to predict with some degree of certainty whether particular discussions will be protected. An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all.").

193 *Id.* at 392.

194 *Id.* at 393.

corporate employees would be given a wider protection than under previous judicial formulations.[195]

Some courts argue that *Upjohn* did not undermine the holding in *Garner*.[196] *Upjohn* concerned a third party—the IRS—seeking disclosure of privileged communications.[197] In contrast, the entire crux of *Garner* was to recognize that shareholders are not really a third party, but rather that they assume the role of a client—i.e., the client of corporate counsel—when management seeks counsel on matters that ultimately affect shareholder interests.[198]

However, while *Upjohn* can be distinguished from *Garner* based on the above factual disparity, *Upjohn*'s emphasis on predictability is difficult to reconcile with *Garner*'s balancing test approach.[199] Under *Garner*, management can never know at the time of their communication with counsel whether "the conversation may become discoverable in an as-yet unfiled lawsuit by as-yet unknown plaintiffs at some [indeterminable] point in the future."[200] Such uncertainty belies a fundamental conflict with the Court's policy judgments in *Upjohn*.

B. *Subsequent Supreme Court Decisions*

Without directly addressing this inherent conflict, the Court subsequently examined the use of balancing tests in *Jaffee v. Redmond*[201] and *Swidler & Berlin v. United States*.[202] In *Jaffee*, the Court confronted for the first time whether notes prepared by a licensed clinical social worker in the course of counseling a patient, i.e., the defendant, were discoverable.[203] Noting that, much like the attorney-client relationship, effective psychotherapy depends on an environment of trust in which the patient and therapist can openly communicate without fear of

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195 *Id.* at 395–97. According to one commentator, "*Upjohn* struck the balance strongly in favor of an unqualified corporate attorney-client privilege." Summerhays, *supra* note 20, at 308.

196 *Upjohn* did not expressly overrule or even address *Garner* or any of its progeny. Additionally, *Upjohn* was concerned with the scope of the attorney-client privilege *within* the corporate entity itself, not the ability of parties outside of, but still related to, the corporate structure. *See, e.g.*, Ward v. Succession of Freeman, 854 F.2d 780, 785 (5th Cir. 1988) ("[*Upjohn*] focused upon the traditional circumstance of an outside party seeking disclosure of privileged communications. The entire thrust of *Garner* was, however, to recognize that shareholders stand in the shoes of a client when management seeks counsel on matters that ultimately should benefit shareholder interests.").

197 *Upjohn*, 449 U.S. at 387–88.

198 *Ward*, 854 F.2d at 785.

199 *See* Friedman, *supra* note 29, at 266 ("The broad language used by the U.S. Supreme Court in *Upjohn* implies that an evidentiary privilege may not be shrouded in uncertainty.").

200 Kummer, *supra* note 31, at 6.

201 518 U.S. 1 (1996).

202 524 U.S. 399 (1998).

203 *Jaffee*, 518 U.S. at 4.

conversations later becoming available to undetermined and undeterminable adverse parties, the Court extended the protection of the attorney-client privilege to the narrow context of psychotherapist-patient communications.[204]

Two years later, the Court addressed a possible restriction rather than extension of the attorney-client privilege in *Swidler*. There, the Court examined whether the death of an attorney's client terminates the privilege with respect to notes of confidential communications that occurred between the attorney and the client while the client was still alive.[205] Holding that the privilege survives the death of the client, the Court declined to fashion a new posthumous disclosure rule.[206]

While neither decision discussed the *Garner* balancing exception and its extensive use among the circuit courts, both decisions emphatically rejected the use of balancing tests and instead explicitly adopted a categorical approach to determining exceptions to the attorney-client privilege.[207] However, *Jaffee* and *Swidler* are distinguishable on a number of bases.[208] In particular, both decisions concerned the scope of the attorney-client privilege for individuals; thus their logic has little relevance to *Garner*'s application to entities, like a corporation, where statutory and common law duties presumably exist between the relevant parties.[209]

Further complicating the application of the attorney-client privilege is *Commodity Futures Trading Commission v. Weintraub*.[210] The dispute in *Weintraub* centered on the control of the attorney-client privilege of a corporation in bankruptcy. After the corporation had passed into receivorship, management no longer had any discernable role in the company's operations, which were under the control of the trustee.[211] The Court found that as a successor in interest of all assets, rights, and privileges, the trustee, acting in the capacity of corporate

204 *Id.* at 10.

205 *Swidler*, 524 U.S. at 401–03.

206 *Id.* at 410.

207 *Swidler*, 524 U.S. at 409 ("Balancing *ex post* the importance of the information against client interests . . . introduces substantial uncertainty into the privilege's application. For just that reason, *we have rejected use of a balancing test in defining the contours of the privilege*." (emphasis added) (citing *Jaffee*, 518 U.S. at 17–18; Upjohn Co. v. United States, 449 U.S. 383, 393 (1981))); *Jaffee*, 518 U.S. at 17–18 ("We *reject the balancing component of the [attorney-client] privilege* implemented by [the] court [of appeals] and a small number of States. Making the promise of confidentiality contingent upon a trial judge's later evaluation of the relative importance of the [party's] interest in privacy and the evidentiary need for disclosure would eviscerate the effectiveness of the privilege." (emphasis added) (footnote omitted)).

208 *See* Paul R. Rice, *The Corporate Attorney-Client Privilege: Loss of Predictability Does Not Justify Crying* Wolfinbarger, 55 BUS. LAW. 735, 738 (2000).

209 *Id.*

210 471 U.S. 343 (1985).

211 *See id.* at 345–47.

management, has the exclusive power to exercise or waive the attorney-client privilege while a litigation is in progress.[212]

Because shareholders act in the role of management during the course of a derivative litigation on the merits,[213] at least one commentator has interpreted *Weintraub* as requiring an unconditional right of plaintiff shareholders in a derivative action to discover corporate attorney-client communications.[214] This commentator further suggests that this right of derivative shareholder plaintiffs to overcome the corporate attorney-client privilege is not available to shareholders in non-derivative suits—and, by extension, any party bringing suit in a non-derivative capacity—because non-derivative suits fall under the ambit of the attorney-client privilege as delineated in *Upjohn* and *Jaffee*, and do not assume a management-like role as required by *Weintraub*.[215]

According to another commentator, *Weintraub* provides an additional conceptual premise for *Garner*.[216] This commentator suggests that because *Weintraub* emphasized that a critical goal of bankruptcy proceedings is to enable the trustee to uncover insider fraud, allowing corporate management to wield the privilege as a defense against the trustee's efforts might impede an investigation into their own conduct.[217] Specifically, because corporate management were charged as acting inimically to the trustee's interest, the Supreme Court's reasoning in *Weintraub* supports the view that when individual management are charged with their own wrongdoing, these persons may be motivated to exercise the privilege afforded to the corporate entity as a whole to protect their own self-interest rather than the corporation's.[218] Thus, a party other than management should decide the exercise or waiver of the privilege.[219]

C. *Recent Developments*

Despite the obvious inconsistency between the Supreme Court's line of decisions and *Garner*, the Supreme Court has never reconciled the disparate philosophies. In fact, the Court has only once explicitly

212 *Id.* at 348–49.

213 *See* Macey & Miller, *supra* note 33, at 10 ("The derivative action allows a representative shareholder in such circumstances to take over the litigation from . . . managers and prosecute it on behalf of the corporation.").

214 *See* Friedman, *supra* note 29, at 281.

215 *Id.*

216 Alexander, *supra* note 30, at 361.

217 *Id.*

218 *Id.* at 362.

219 *Id.*

discussed *Garner*.[220] In a 2011 decision, *United States v. Jicarilla Apache Nation*,[221] the Court considered whether the fiduciary exception to the attorney-client privilege shielded the United States, in its capacity as a trustee for the Apache Nation, from producing documents in a breach-of-trust action.[222] While finding that the fiduciary exception did not apply in this instance, the majority opinion acknowledged and seemingly endorsed *Garner*[223]—and thus, the use of balancing tests in determining the application of the attorney-client privilege—noting that "[c]ourts apply the fiduciary exception on the ground that 'management does not manage for itself.'"[224] Consequently, the issue is still a fighting point in litigation,[225] and the lower courts have been left to their own

220 *See supra* notes 221–26 and accompanying text. The Court did in fact cite to *Garner* in *Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343 (1986). However, that citation strictly pertained to *Garner*'s general discussion of the crime-fraud exception to the attorney-client privilege, *not* its application of the *Garner* balancing test exception. *Id.* at 354 ("[Respondents] point out that the privilege does not shield the disclosure of communications relating to the planning or commission of ongoing fraud, crimes, and ordinary torts . . . ." (citing Garner v. Wolfinbarger, 430 F.2d 1093, 1102–03 (1971))).

221 131 S. Ct. 2313 (2011).

222 *Id.* at 2318.

223 The Court recognized *Garner* in dicta throughout the opinion. *See id.* at 2321 ("By the 1970's, however, American courts began to adopt the English common-law rule." (citing *Garner*, 430 F.2d at 1103–04, for the proposition that "shareholders, upon a showing of 'good cause,' [may] discover legal advice given to corporate management"); *id.* at 2327 ("'[O]f central importance in . . . *Garner* . . . was the fiduciary's lack of a legitimate personal interest in the legal advice obtained[.]'" (quoting Wachtel v. Health Net, Inc., 482 F.3d 225, 232 (3d Cir. 2007))). Justice Sotomayor, in her lone dissent, also recognized *Garner*'s application among the lower courts. *Id.* at 2332 (Sotomayor, J., dissenting) ("The fiduciary exception is now well recognized in the jurisprudence of both federal and state courts, and has been applied in a wide variety of contexts, including . . . disputes between corporations and shareholders . . . ." (footnote omitted) (citing *Garner*, 430 F.2d 1093)).

224 *Id.* at 2327 (majority opinion) (quoting *Garner*, 430 F.2d at 1101).

225 *See* BCR Safeguard Holding, L.L.C. v. Morgan Stanley Real Estate Advisor, Inc., CIV.A. 13-0066, 2013 WL 4434361 (E.D. La. Aug. 15, 2013); Records v. Geils Unlimited Research, LLC, No. 12-11419-FDS, 2013 WL 3967970 (D. Mass. July 30, 2013); MapleWood Partners, L.P. v. Indian Harbor Ins. Co., No. 08-23343-CIV, 2013 WL 3853388 (S.D. Fla. July 16, 2013); Solis v. Bruister, No. 4:10-cv-77-DPJ-FKB, 2013 WL 493374 (S.D. Miss. Jan. 22, 2013); Goldenson v. Steffens, No. 2:10-cv-00440-JAW, 2013 WL 145587 (D. Me. Jan. 14, 2013); Penn, LLC v. Prosper Bus. Dev. Corp., No. 2:10-cv-993, 2012 WL 3583258 (S.D. Ohio Aug. 20, 2012). For recent memorandums and motions in recent litigations, see Defendants' Memorandum of Law in Opposition to Plaintiffs' Motion to Compel the Production of Documents Pertaining to Household's Consultations with Ernst & Young LLP, No. 02-C-5893 (N.D. Ill. Nov. 7, 2006), and Class' Response to Household Defendants' Objections to Magistrate Judge Nolan's December 6, 2006 Order, No. 02-C-5893 (N.D. Ill. Jan. 11, 2007); *see also* Lead Plaintiff's Reply Memorandum of Law in Support of Renewed Motion to Compel the Raytheon Defendants to Produce Documents Withheld on the Grounds of Privilege and Work-Product, No. 199CV12142 (D. Mass. July 21, 2003); Raytheon Defendants' Opposition to Lead Plaintiffs' Renewed Motion to Compel the Raytheon Defendants to Produce Withheld Documents, No. 199CV12142 (D. Mass. July 14, 2003).

devices in integrating the disparate philosophies of *Garner* and the Supreme Court cases.[226]

IV. Proposal

Garner was rightly decided but has since been wrongly applied. The tremendous disorder amongst the lower courts, taken together with *Garner*'s inherent conflict with the Supreme Court's attorney-client jurisprudence—not to mention the internal inconsistency of the Supreme Court's recent endorsement of *Garner*—requires a significant reevaluation of the *Garner* approach. The proposal that follows is designed to have a similar effect as *Garner*, recognizing the legitimate need for certain parties to disclose otherwise privileged communications, while enhancing uniformity and thus increasing predictability.

A. *Limiting* Garner *to Derivative Suits*

Limiting *Garner*'s application solely to suits against management or majority shareholders in which there is a derivative[227] claim is the first step in remedying uncertainty among the courts and potential litigants. This guarantees that a fiduciary relationship—the foundation of the *Garner* exception—exists between the parties.[228] The second step is limiting any disclosure strictly to communications[229] made during the time when the parties' interests were aligned, which further confirms that the communications were at least ostensibly made for plaintiff shareholders' benefit. This limitation reinforces the first, ensuring that a

[226] *See* Julia B. Meister, *The Fiduciary Exception: What the United States Supreme Court is Saying About the Attorney-Client Privilege Between Trustees and Their Counsel and What it Means in Ohio*, 22 OHIO PROB. L. J. 1 (2011) ("Though *Jicarilla* found the fiduciary exception inapplicable to the case before it, it invites renewed attention to the various . . . treatment[s] of the exception.").

[227] As both a matter of the existing law of derivative actions and for this proposal, the plaintiff must be a shareholder at the time the action is commenced, FED. R. CIV. P. 23.1(a)–(b), and must remain a shareholder during the pendency of the action, *see, e.g.*, Schilling v. Belcher, 582 F.2d 995, 999 (5th Cir. 1978).

[228] Majority or controlling shareholders owe a fiduciary duty to the minority shareholders. *See, e.g.*, Superintendent of Ins. of N.Y. v. Bankers Life & Cas. Co., 404 U.S. 6, 12 (1971) ("[C]ontrolling stockholder owes the corporation a fiduciary obligation—one 'designed for the protection of the entire community of interests in the corporation—creditors as well as stockholders.'" (quoting Pepper v. Litton, 308 U.S. 295, 307 (1939))).

[229] For the purposes of this section, "communications" shall refer to both answering interrogatories, providing testimony, and producing documents related to the issue being litigated.

mutuality of interest existed at the time of the communications in question.[230]

While the *Garner* court did not limit its reasoning strictly to shareholder, let alone derivative, suits the court's fiduciary relationship analogue[231] and emphasis on a mutuality of interest between shareholders and corporate management, who both act as a proxy for the corporation itself, is consistent with derivative actions in a manner unlike non-derivative suits.[232]

There are still a number of concerns with limiting *Garner* to strictly derivative suits. First, shareholders in a derivative action "are not without personal motives."[233] Second, mutuality of interest frequently exists outside of the shareholder context where one party owes a fiduciary duty to another.[234] Finally, derivative suits are rife with their own problems;[235] particularly that it is often unclear whether the corporate interest will be furthered until after an issue has been fully litigated.[236]

However, the unique nature of derivative actions ensures that the primary beneficiary of the suit is in fact not the individual plaintiffs but a greater collective.[237] Because shareholders bring suit in a representative capacity on behalf of the corporation and any recovery inures not to the individual plaintiffs, but instead to the corporation

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230 *See, e.g.*, Quintel Corp, N.V. v. Citibank, N.A., 567 F. Supp. 1357, 1363–64 (S.D.N.Y. 1983) (refusing to apply *Garner* to communications made after fiduciary relationship had terminated).

231 *See supra* note 123 and accompanying text.

232 *See* Garner v. Wolfinbarger, 430 F.2d 1093, 1101 (5th Cir. 1970).

233 GERGACZ, *supra* note 63, at 724.

234 In this author's opinion, an exception to the attorney-client privilege should be allowed in any trustee-beneficiary or "quasi-trustee" (e.g., ERISA claim) relationship. However, such an exception should rest on the common law of trusts, for example, *Riggs Nat'l Bank v. Zimmer*, 355 A.2d 709, 713 (Del. Ch. 1976), rather than *Garner*, a discussion of which is beyond the scope of this Note.

235 An often-cited issue with derivative suits is that they create serious incentive problems for plaintiffs' attorneys. *See, e.g.*, Robert F. Booth Trust v. Crowley, 687 F.3d 314, 320 (7th Cir. 2012) ("The suit serves no goal other than to move money from the corporate treasury to the attorneys' coffers . . . ."); A.F. Conard, *Winnowing Derivative Suits Through Attorneys Fees*, 47 LAW & CONTEMP. PROBS. 269, 281 (1984) ("[H]igh [attorney's] awards motivate the filing of suits that lack merit."). *But see* John C. Coffee, Jr., *New Myths and Old Realities: The American Law Institute Faces the Derivative Action*, 48 BUS. LAW. 1407, 1436–37 (1993) (refuting arguments that derivative actions produce only limited financial benefits in relation to their costs). For a more general discussion of the differences in an attorney's role in class action and derivative suits and recommendations for reform, see Macey & Miller, *supra* note 33, at 12–27. An additional criticism of shareholder litigation is that it is "a weak, if not ineffective, instrument of corporate governance." Roberta Romano, *The Shareholder Suit: Litigation Without Foundation?*, 7 J.L. ECON. & ORG. 55, 84 (1991).

236 GERGACZ, *supra* note 63, at 724.

237 Under the Federal Rules of Civil Procedure, a "derivative action may not be maintained if it appears that the plaintiff does not fairly and adequately represent the interests of shareholders or members who are similarly situated in enforcing the right of the corporation or association." FED. R. CIV. P. 23.1(a).

itself, there is a collective symmetry between shareholders and the corporation.[238] This is not to suggest that individual shareholders suing in a non-derivative capacity are inherently motivated by greed—they are suing, at least in a sense, to protect their investment. Yet because of the more individualistic nature of the pecuniary gain in non-derivative suits—even class actions—they are more deserving of "careful scrutiny."[239]

The *Garner* court recognized this tension between a shareholder's legitimate interest in protecting his investment in a non-derivative securities lawsuit and the potential harm that any recovery might cause to other non-party shareholders.[240] Thus, evaluating who is the intended beneficiary of the litigation becomes critical to invoking the *Garner* policy rationale.[241] A finding that the suit is intended primarily to benefit the plaintiff personally, to the potential detriment of all remaining shareholders, should caution against applying the exception. Conversely, where the suit is intended to benefit the plaintiff and all remaining shareholders collectively, the *Garner* exception should be allowed.[242] Such a limitation is consistent with the *Garner* opinion, which, according to one commentator "appears to presuppose that a shareholder suit is brought on behalf of *all* shareholders."[243]

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238 *See* Ward v. Succession of Freeman, 854 F.2d 780, 786 (5th Cir. 1988) ("Where shareholders bring a successful derivative action on behalf of the corporation, they benefit all shareholders. Where, however, shareholders seek to recover damages from the corporation for themselves, they do not even seek a gain for all others. In the latter circumstance, the motivations behind the suit are more suspect, and thus more subject to careful scrutiny, in determining if good cause for suspending the privilege exists.").

239 *Id.*

240 Garner v. Wolfinbarger, 430 F.2d 1093, 1101 n.17 (1970) ("Due regard must be paid to the interests of nonparty stockholders, which may be affected by impinging on the privilege, sometimes injuriously . . . . The corporation is vulnerable to suit by shareholders whose interests or intention may be inconsistent with those of other shareholders, even others constituting a majority.").

241 In *Ward v. Succession of Freeman*, the Fifth Circuit explained that in *Garner* they "elected not to open all communications to the casually interested shareholders for policy reasons that merit restatement here: stockholders may wish to use the communications to 'second-guess or even harass [management] in matters purely of judgment,' resulting in a deterioration of candid attorney communication." 854 F.2d at 785 (quoting *Garner*, 430 F.2d at 1101).

242 Some argue that because a class action suit has the potential to represent all shareholders collectively, even in the absence of a derivative claim, the *Garner* exception should be allowed. *See* GERGACZ, *supra* note 63, at 724. However, there are difficulties that surround ensuring an adequate class representation. *See, e.g.*, Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541 (2011) (holding that proof of commonality among a plaintiff class necessarily overlaps with plaintiffs' merits claim(s) regarding a defendant's alleged crime such that a court must undertake a Rule 23(b) analysis in tandem with, rather than subsequent to, its Rule 23(a) analysis). While those difficulties are beyond the scope of this Note, this author believes that requiring a derivative claim better ensures that any award will benefit all shareholders collectively.

243 Sigwarth, *supra* note 149, at 354.

B. *The Revised* Garner *Indicia*

Limiting *Garner* strictly to the derivative context, while allowing shareholders to bring a non-derivative claim only where a derivative claim is also present, maintains the spirit of *Garner* while ensuring a more circumscribed, and thus, predictable application among the courts. To ensure that plaintiffs adequately represent the entire shareholder class and are not simply including a derivative claim as a mechanism towards overcoming the privilege, courts should look to three factors: (1) "the number of [plaintiff] shareholders and the percentage of stock they represent";[244] (2) the number of personal claims in relation to the derivative claim;[245] and (3) whether those claims are directed at corporate management/directors or other shareholders.[246]

In evaluating the first factor, courts should continue to examine existing applications of *Garner* to determine its parameters. Previous decisions have employed both qualitative and quantitative criteria.[247] For the percentage of shareholders represented, courts have found that 4%[248] was inadequate while 40%[249] was sufficient. In less precise terms, courts look to the "substantiality" of the shareholders represented.[250] Likewise, for the percentage of stock represented, courts have found that extreme minority stakes—i.e., less than 1%[251]—in corporate stock was a

244 This factor derives from *Garner*, 430 F.2d at 1104.

245 To a certain extent, this step mirrors the second *Garner* factor, "the bona fides of the shareholders," as this step generally entails determining whether the claim: (1) is a derivative action and (2) seeks monetary compensation for the plaintiffs. *See, e.g.*, *Ward*, 854 F.2d at 786; RMED Int'l, Inc. v. Sloan's Supermarkets, Inc., No. 94 Civ. 5587PKLRLE, 2003 WL 41996, at *5 (S.D.N.Y. Jan. 6, 2003) ("The bona fides of the shareholders point towards upholding the privilege claim because this is a class action seeking monetary compensation for the plaintiffs and is not a derivative action."); *In re* Int'l Bus. Machs. Corp. Sec. Litig., No. 92 Civ. 9076 (GLG), 1993 WL 760214, at *3 (S.D.N.Y. Nov. 30, 1993).

246 This factor mirrors a critical element in the *Garner* reasoning—that where "[a] corporation is in suit against its stockholders on charges of acting inimically to stockholder interests," *Garner*, 430 F.2d at 1103, management cannot necessarily be trusted to assure adequate representation of shareholder interests in the suit. Macey & Miller, *supra* note 33, at 10.

247 *See infra* notes 251–54.

248 *See Ward*, 854 F.2d at 786 ("Turning to [the] pertinent factors listed in *Garner*, we see even less reason for finding good cause. . . . [because] Plaintiffs cumulatively owned less than four (4%) of the stock in [the company during the relevant period] . . . .").

249 Fausek v. White, 965 F.2d 126, 133 (6th Cir. 1992) (finding plaintiffs established good cause because they "owned approximately forty percent of [the company's] stock before [the defendant] began his allegedly fraudulent activities").

250 *See* Lawrence E. Jaffe Pension Plan v. Household Int'l, Inc., 244 F.R.D. 412, 423 (N.D. Ill. 2006) ("[T]he Class represents a *substantial* majority of shareholders . . . ." (emphasis added)); Cohen v. Uniroyal, Inc., 80 F.R.D. 480, 484 (E.D. Pa. 1978) ("The plaintiff class is *substantial* in number . . . ." (emphasis added)).

251 Ryskamp *ex rel.* Boulder Growth & Income Fund v. Looney, No. 10-cv-00842-WJM-KLM, 2011 WL 3861437, at *11 (D. Colo. Sept. 1, 2011) ("Applying the *Garner* factors to this case, a significant factor, and for this Court, the dispositive one [in finding that the Plaintiff has

significant factor in finding that good cause did not support disclosure. Conversely, 15% has been found sufficient.[252]

With regard to the second factor, the primary determinant should be whether the derivative claim adds any real substance[253] to the non-derivative claim. Substance should be primarily evaluated by scrutinizing the type and amount of relief sought by plaintiffs. Where the causes of action and personal claims for relief predominate to the point of making the derivative portion but a token claim, the scale should tilt towards preserving the attorney-client privilege. But where the derivative claim predominates or adds substance to the suit, that should favor applying the exception. As an additional measure, courts should examine whether plaintiffs have exhausted intracorporate remedies,[254] satisfied the requisite procedural steps,[255] and sought to vindicate the kind of corporate rights particular to a derivative suit.[256]

The third factor, like the first, incorporates a key element of the *Garner* reasoning: the identity of the parties. Critical to this assessment is the degree of control and involvement that the defendant party exercises within the corporation. *Garner* recognized that where "[a] corporation is in suit against its stockholders on charges of acting inimically to stockholder interests"[257] management cannot always be expected to represent the interests of shareholders in that particular litigation.[258] Thus, where management is the defendant in the dispute, this should favor disclosure to the plaintiff shareholders. Conversely, where other shareholders uninvolved in business operations are named as defendants, the collective representation of plaintiff's shareholder

not made a sufficient showing to warrant application of the *Garner* exception], is that Plaintiff owns . . . less than one percent of . . . stock.").

252 *See* Sandberg v. Va. Bankshares, Inc., 979 F.2d 332, 352–53 (4th Cir. 1992) ("Because the class of shareholders controlled fifteen percent of the stock, we find that this factor weighs in favor of finding good cause as well."), *vacated*, 1993 WL 524680 (4th Cir. Apr. 7, 1993).

253 "Substance" can be understood with reference to whether the derivative and non-derivative claims are "mirror images" of one another. St. Clair Shores Gen. Emps. Ret. Sys. v. Eibeler, No. 06 Civ. 688(SWK), 2006 WL 2849783, at *7 (S.D.N.Y. Oct. 4, 2006). In such an instance, there is a significant reason to doubt that a plaintiff could adequately "vindicate its own interest" by pursuing the non-derivative claim, "while also attempting to represent the interests of [the corporation] by requesting damages for the corporation in connection with the same alleged wrongdoing." *Id.*

254 *See generally* Patrick T. Clendenen & A.W. Phinney, *Derivative Litigation: Fundamental Concepts and Recent Developments*, *in* 1 ANNUAL REVIEW OF DEVELOPMENTS IN BUSINESS AND CORPORATE LITIGATION (2008).

255 *See* FED. R. CIV. P. 23.1.

256 Derivative claims and non-derivative claims vindicate different kinds of rights. For instance, if a corporation has been mismanaged or its assets taken by management for personal gain, the shareholders claim is a derivative one. Conversely, if management has simply lied to the shareholders, the claim is an individual one for breach of federal securities law.

257 Garner v. Wolfinbarger, 430 F.2d 1093, 1103 (5th Cir. 1970).

258 *See* Macey & Miller, *supra* note 33, at 10 ("[I]f the suit would potentially harm the managers' personal interests, the managers may be unwilling to prosecute the claim, even when doing so would serve the best interests of the corporation.").

class is compromised. Such a finding should tilt generally, but not categorically, towards upholding the privilege.[259]

C. *"Bad Cause"—Shifting the Burden to the Defendants*

If these three factors are satisfied,[260] thus demonstrating the bona fides of the derivative claim and the collective benefit of the overall suit, there should be a presumption that favors discovery of the communications at issue. Within this narrow context, the aim of shifting the burden to the defendants is to enhance predictability but limit the scope of the new default rule in favor of disclosure of legal advice, rather than protection of the privilege.

That presumption, however, should be subject to a defendant's demonstrating "bad cause" based on a condensed set of *Garner* indicia.[261] "Bad cause" may be demonstrated by showing: (1) no apparent necessity or desirability of the shareholders having the information and/or its availability from other sources;[262] (2) that the communication related to past and not prospective actions;[263] (3) that the communication is of advice concerning the litigation itself;[264] and

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259 There are, of course, instances in which a shareholder versus shareholder litigation would still support applying the *Garner* exception. For instance, if a majority of shareholders holding a majority of stock brought suit against other shareholders who also served in a corporate director or managerial capacity, finding that the *Garner* exception applied might be appropriate. Moreover, because majority shareholders owe a fiduciary duty to minority shareholders, the foundational principles of *Garner* would still apply.

260 Plaintiffs must also satisfy the requisite procedural requirements of a derivative action, which has two stages. *See* Cantor v. Sachs, 162 A. 73, 76 (Del. Ch. 1932). In the first, or demand stage, "a stockholder must, before instituting suit, demand that the board of directors bring suit on behalf of the corporation for the alleged wrong, unless the making of such a demand would be futile." Gregory P. Williams & Megan R. Wischmeier, *Derivative Litigation: Fundamental Concepts and Recent Developments*, *in* ANNUAL REVIEW OF DEVELOPMENTS IN BUSINESS AND CORPORATE LITIGATION 502 (2007) (citing Kamen v. Kemper Fin. Servs., 500 U.S. 90, 95 (1991)). In the second, or litigation, stage, where the board of director refuses to initiate suit, the shareholder "pursues the litigation on its merits against the named defendant on behalf of the corporation." *See* Friedman, *supra* note 29, at 275.

261 This approach mirrors *Valente v. PepsiCo, Inc.*, *see supra* Part II.B.1, in which the court found that "where a corporation seeks advice from legal counsel, and the information relates to the subject of a later suit by a minority shareholder in the corporation, the corporation is not entitled to claim the [attorney-client] privilege as against its own shareholder, absent some special cause." 68 F.R.D. 361, 367 (D. Del. 1975). *Valente* delineates a series of factors including: (1) whether the claim was made in bad faith; (2) whether the interests of the great majority of the beneficiaries would be better served by the privilege; and (3) if the information sought were a trade secret or other public policy implications gave added weight to the need for secrecy. *Id.* at 370. However, *Valente* has not been "widely accepted and at least one commentator has described it as an 'aberrant' decision." Deutsch v. Cogan, 580 A.2d 100, 106 (Del. Ch. 1990).

262 *Garner*, 430 F.2d at 1104.

263 *Id.*; *see also* Herrmann v. Rain Link, Inc., No. 11-1123-RDR, 2012 BL 90177, at *6–7 (D. Kan. Apr. 11, 2012).

264 *Garner*, 430 F.2d at 1104.

(4) that there is a significant risk of revelation of trade secrets or other information in whose confidentiality the corporation has an interest for independent reasons.[265]

For the first factor, while the privilege clearly should not encompass facts,[266] if the information is available from non-privileged sources, such as employee interviews and business files, then the party seeking discovery should be unable to pierce the privilege. To overcome the privilege, the party seeking disclosure must establish the unavailability of the information by making a good faith effort to obtain the information from other sources.[267] That good faith effort should be evaluated not by the relevance of the information but simply by whether it is obtainable.[268] The policy animating such a rule is obvious: information available from non-privileged sources is just that—available—and thus does not warrant the use of the exception.

For the second factor, there is a clear divide between communications that relate to past versus prospective actions. Where corporate management seeks advice from counsel related to past actions or after the filing of the suit, such communications deserve special solicitude.[269] Without a privilege, corporate management would be unable to obtain any remedial advice.[270] An inability to obtain such advice would do violence to a corporation's interest in "self-investigation and preparation for litigation."[271] Conversely, where the communications concern future actions, such a finding should militate towards finding good cause. Critical to this determination is that the communication is closely correlated to the duty running from management to shareholders.[272]

For the third factor, where the communication concerns matters related to the litigation itself, that should weigh heavily against disclosure. Given the significance of a mutuality of interest between the parties, that the parties are in litigation demonstrates that their interests have become adverse. While, as a general matter, it is often difficult to ascertain at what point parties' mutuality of interest breaks down, the initiation of litigation is a clear demarcation. Such a rule is consistent

265 *Id.*

266 Upjohn Co. v. United States, 449 U.S. 383, 395–96 (1981) ("The privilege only protects disclosure of communications; it does not protect disclosure of the underlying facts by those who communicated with the attorney . . . .").

267 *See In re* LTV Sec. Litig., 89 F.R.D. 595, 608 (N.D. Tex. 1981).

268 *See In re* Kidder Peabody Sec. Litig., 168 F.R.D. 459, 474 (S.D.N.Y. 1996).

269 *See* Cohen v. Uniroyal, Inc., 80 F.R.D. 480, 485 (E.D. Pa. 1978); *see also* Sandberg v. Va. Bankshares, Inc., 979 F.2d 332, 350 (4th Cir. 1992), *vacated*, 1993 WL 524680 (4th Cir. Apr. 7, 1993); Ohio-Sealy Mattress Mfg. Co. v. Kaplan, 90 F.R.D. 21, 31 (N.D. Ill. 1980).

270 *See Upjohn*, 449 U.S. 383.

271 *See LTV Sec. Litig.*, 89 F.R.D. at 608.

272 Where the communication relates to matters in which the fiduciary duty does not run between the parties, the privilege should be upheld.

with the existing application of *Garner*, in which the exception does not apply to management requests for legal counsel where management seeks to insulate themselves from an existing shareholder action.[273] As with the second factor, management's ability to obtain confidential counsel would be effectively neutralized, thereby leaving them forever unable to successfully defend themselves in litigation.[274]

Like the preceding factors, the fourth is also borrowed from *Garner*. Where disclosure would expose trade secrets or other information in whose confidentiality the corporation has an interest for reasons independent of the litigation, that should militate heavily towards upholding the privilege. Management frequently discusses matters that require secrecy, and exposure might damage a corporation's viability, both as a matter of profit and public perception.[275] However, if the secretive material is inextricably intertwined with the heart of the litigation such that an inability to discover the material would be fatal to plaintiff's action, a court must consider piercing the privilege. Such a determination requires a careful examination of the nature of the information at stake, its preexisting access to the public, its risk of harm to the corporation, and its importance to the lawsuit.

Like *Garner*, these factors are non-exclusive and should command equal weight.[276] None is dispositive and none should apply bright-line metrics. In evaluating these factors, courts should continue to examine existing precedent for guidance. Courts should also continue to employ in camera inspection, oral examinations, and protective orders to guard against unnecessary disclosure.[277]

Although the Supreme Court has technically prohibited the use of balancing tests in the application of the attorney-client privilege, those decisions are distinguishable on a number of bases.[278] Moreover, and perhaps more importantly, because the Court seemingly endorsed the *Garner* exception in *United States v. Jicarilla Apache Nation*, balancing tests appear to have a new vitality. While the continued use of a balancing test runs the obvious risk of unpredictability, condensing the

273 *See* Garner v. Wolfinbarger, 430 F.2d 1093, 1104 (5th Cir. 1970).

274 *Sandberg*, 979 F.2d 332.

275 *See, e.g.*, Rockwell Graphic Sys., Inc. v. DEV Indus., Inc., 925 F.2d 174, 177 (7th Cir. 1991) ("[D]isclosure . . . is often necessary to the efficient exploitation of a trade secret . . . .").

276 *Garner*, 430 F.2d at 1104 ("There are many indicia that may contribute to a decision of presence or absence of good cause . . . .").

277 *See id.* ("The court can freely use in camera inspection or oral examination and freely avail itself of protective orders, a familiar device to preserve confidentiality in trade secret and other cases where the impact of revelation may be as great as in revealing a communication with counsel.").

278 See *supra* note 196 for a discussion of the distinctions between *Upjohn* and *Garner*. See *supra* notes 208–09 and accompanying text for a discussion of the differences between the Supreme Court's decisions in *Jaffe*, *Swidler*, and *Garner*.

Garner factors from nine to a modified two-tiered analysis has the potential to significantly reduce uneven application while still recognizing the legitimate policy justifications underpinning *Garner*. Thus, where the constituents of the corporation become embroiled in an internecine dispute and bring suit in a derivative capacity, the judicial use of a narrowed *Garner*-like balancing test should be employed to weigh the competing needs of the parties and better assure some degree of predictability when deciding whether to allow plaintiffs to overcome defendants' assertion of the attorney-client privilege.

CONCLUSION

The *Garner* rule is a vital exception to the attorney-client privilege. However, there is a real danger that without proper limits, the exception will swallow the rule, thereby destroying a basic understanding between corporate clients and their attorneys that their communications will remain privileged.[279] Given the fractured state of the law among the lower courts and the inherent inconsistencies in the Supreme Court's line of decisions, there is considerable reason for reevaluating the *Garner* standard.

Any assessment must balance two competing needs: the ability of counsel and their clients to have some predictable assurance that their communications will remain privileged against the needs of shareholder litigants to discover those communications which were undertaken for their benefit and are critical to their lawsuit. To do so, the *Garner* exception must be circumscribed and restructured. Such a reconfiguration must require a truly collective benefit for all shareholders. Moreover, it must be subject to a defendant's ability to rebut any presumption towards discovery. The ultimate goal though must be one of predictability because, ultimately, an uncertain privilege is little better than no privilege at all.

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[279] Kenneth A. Hindman & M. Colston Jones, *Preserving Candor Between Lawyers and Clients: The Hidden Danger from Exceptions to the Attorney-Client Privilege*, *in* THE ATTORNEY-CLIENT PRIVILEGE IN CIVIL LITIGATION: PRACTICING AND DEFENDING CONFIDENTIALITY 177, 178 (Vincent S. Walkowiak et al. eds., 5th ed. 2012).