

Pennsylvania Supreme Court Issues Landmark Decision Preserving the Corporate Attorney-Client Privilege

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On Wednesday, January 23, 2019, the Supreme Court of Pennsylvania rejected a “qualified” attorney-client privilege that would have changed the law in Pennsylvania governing the scope of the privilege. The qualified privilege had been adopted in a ruling by the Pennsylvania Commonwealth Court. The qualified privilege, often referred to as the *Garner* analysis, could have compelled a corporation to disclose its privileged communications to the person suing it upon a showing of good cause. While the Court’s opinion focused on the derivative litigation context (where dissenting shareholders or members attempt to assert claims on behalf of the corporation itself), its reasoning carries broader implications for Pennsylvania’s attorney-client privilege in the corporate setting.

Tucker Arensberg litigators Gary Hunt and Jeremy Farrell represent the nonprofit organizations and their current management team in the litigation and argued against the adoption of the qualified privilege before the Supreme Court, pointing out that such a privilege would make it impossible for corporate counsel and clients to predict with any certainty whether their privileged communications would later be divulged in derivative litigation discovery. The Supreme Court agreed, finding a qualified privilege with an uncertain application to be inconsistent with its prior decisions emphasizing predictability in the application of the attorney-client privilege.

The Court also confirmed that an operating business’s current management team controls the corporation’s privilege and that the mere assertion of a derivative claim does not permit a dissenting shareholder or manager to overcome the privilege. Finally, the Court concluded that the fiduciary and co-client/common interest exceptions to the attorney-client privilege did not apply because the dissenting former board members who initiated the derivative action were not owed fiduciary duties by and were not were co-clients with the corporations they sued.

You can read the Court’s 42-page opinion [here](#). Please feel free to contact Gary Hunt or Jeremy Farrell if you have questions.