The Problematic Expansion of the Garner v. Wolfinbarger Exception to the Corporate Attorney-Client Privilege

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THE PROBLEMATIC EXPANSION OF THE GARNER v. WOLFINBARGER EXCEPTION TO THE CORPORATE ATTORNEY-CLIENT PRIVILEGE

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I. INTRODUCTION

Defining the scope of the corporate attorney-client privilege requires a unique fusion of corporate law and the law of evidence. The first federal cases venturing to define the corporate attorney-client privilege focused little on the unique structure of the modern corporation as a litigant. In the seminal case of Radiant Burners, Inc. v.
American Gas Ass’n,¹ the Seventh Circuit squarely held that the attorney-client privilege extends to communications between corporate management and corporate counsel. This decision failed, however, to address the interaction between the corporate privilege and the numerous corporate subgroups — such as management, employees, and stockholders — that compose the modern corporation. Rather, the decision seemed to treat the modern corporation as a monolithic structure capable of wielding the attorney-client privilege without regard to the corporation’s internal structure.²

In Upjohn Co. v. United States,³ the Supreme Court refined the corporate attorney-client privilege under federal law with a closer eye to the internal structure of the corporation. Specifically, the Upjohn Court reaffirmed the existence of the corporate attorney-client privilege and strengthened the privilege by rejecting the narrow “control group” formulation of the privilege.⁴ In rejecting the control group test, the court recognized that internal corporate communications critical to a corporation’s legal defense are not restricted to the corporation’s upper echelons. The Court thus concluded that the corporate attorney-client privilege should also extend to communications between counsel and lower level employees in some circumstances.⁵

While these decisions are crucial steps in the evolution of the corporate attorney-client privilege, they do not address a troubling question: Can a corporation assert the attorney-client privilege against the corporation’s own shareholders? Indeed, both decisions discussed above involved attempts by litigants outside a corporation to obtain

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¹ 320 F.2d 314 (7th Cir. 1963).
² To be fair, the Seventh Circuit did not confront a conflict between corporate subgroups, such as a suit by shareholders or employees against management. The court did not, therefore, have to decide whether — and on what basis — one subgroup could wield the corporation’s privilege against another. Rather, the suit in Radiant Burners involved a claim that the defendant violated Section 1 of the Sherman Act, 15 U.S.C. § 1 (1994). 320 F.2d at 316. The suit thus involved an attempt by an “outsider” to pierce a corporation’s attorney-client privilege and obtain communications between corporate management and the corporation’s counsel.
⁴ Under the “control group” approach to the corporate attorney-client privilege, the scope of the privilege is limited to communications between corporate counsel and those corporate employees whose position in the corporate hierarchy allows them to act on any legal advice given by counsel. See City of Philadelphia v. Westinghouse Elec. Corp., 210 F. Supp. 483, 484-85 (E.D. Pa.), mandamus denied, General Electric Co. v. Kirkpatrick, 312 F.2d 742 (3d Cir. 1962). Thus, communications between corporate counsel and lower level employees — even if necessary in order for counsel to render legal advice to management — would not be protected by the privilege. Id.
⁵ Upjohn, 449 U.S. at 394-95. According to the Court, the communications must (1) concern matters within the scope of the employees’ corporate duties, and (2) the employees must be sufficiently aware that they are being questioned in order for the corporation to obtain legal advice. Id. at 394.
the corporation's privileged communications. Courts have generally held that the power to assert a corporation's attorney-client privilege lies with the corporation's officers and board of directors. This model, however, reflects the typical case where the party attempting to obtain corporate secrets is a corporate outsider. Invoking the privilege in this case benefits not only management, but also shareholders and other "constituents" of the corporate entity that have a stake in the corporation's well-being.

Where the parties seeking allegedly privileged information are the shareholders of the corporation, however, this model breaks down. After all, the shareholders are essentially the "owners" of the corporation and its assets, and the role of the Board and corporate officers is arguably to serve the interests of the corporation's owners as a whole.

Until 1970, no federal court had squarely addressed the issue of the availability of the corporate attorney-client privilege in suits brought by a corporation's shareholders. In the seminal case of Garner v. Wolfinbarger, the Fifth Circuit held that corporate management could invoke the attorney-client privilege against its own shareholders in the context of a shareholder derivative suit. However, the court qualified this privilege by holding that shareholders could overcome the privilege by presenting evidence showing "good cause." While Garner involved the specific case of a shareholder derivative suit, most courts have declined to limit its holding to derivative claims. Rather, courts have applied the Garner exception not only to a wide range of non-derivative shareholder litigation, but also to litigation involving other types of fiduciary relationships, such as insurance contracts, joint ventures, partnerships, and pension plans.

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6. See, e.g., Commodity Futures Trading Comm'n v. Weintraub, 471 U.S. 343, 349 (1985) (observing that a corporation asserts the attorney-client privilege through its officers and board of directors); see also MODEL BUSINESS CORPORATION ACT § 8.01(b) (1984) ("All corporate powers shall be exercised by or under the authority of, and the business and affairs of the corporation managed under the direction of, the board of directors.").

7. In Upjohn, the Court noted that the corporate attorney-client privilege benefits the public by encouraging corporations to be law abiding. See Upjohn, 449 U.S. at 392-93.

8. See Robert W. Hamilton, Corporations 281 (3d ed. 1992) ("The shareholders are viewed as the ultimate owners of the corporation.").


10. Id. at 1103-04.

11. The Garner plaintiffs also alleged violations of federal securities laws. Id. at 1095.

12. See infra Part V.
This article re-examines the doctrinal foundations of the *Garner* exception, and evaluates the extension of the exception beyond shareholder derivative suits. Specifically, this article questions the wisdom of expanding the *Garner* exception without considering the policies underlying the attorney-client privilege or the structure of the modern corporation. A careful consideration of these policies in the context of shareholder and non-shareholder litigation suggests a more limited role for the exception. However, the most pressing problem with the current formulation of the *Garner* exception is that its application is unpredictable and uncertain for both courts and management.\(^\text{13}\) This unpredictability significantly undermines the value of the privilege.\(^\text{14}\)

Part II of this article examines the policy arguments underlying the corporate attorney-client privilege and the justification for creating an exception for shareholder discovery requests. Parts III and IV discuss the development of the *Garner* exception to the attorney-client privilege, and assess the doctrinal foundations of the exception. Part V then explores the extension of the *Garner* exception beyond shareholder derivative actions. Finally, Part VI examines the practical problems of applying *Garner's* "good cause" requirement.

## II. Justifying an Exception to the Corporate Attorney-Client Privilege in Shareholder Litigation

In contrast to discovery requests by corporate outsiders, discovery requests by a corporation's own shareholders confound the policies traditionally used to support the corporate attorney-client privilege. Traditionally, courts and commentators have relied on Wigmore's balancing approach to evidentiary privileges to justify the corporate privilege.\(^\text{15}\) This part of the paper examines two related approaches to the plaintiff shareholder problem: (1) Wigmore's traditional balancing approach to evidentiary privileges, and (2) a "corporate governance" approach to the corporate privilege.

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13. *See infra* Part IV, section D.

14. *See* Upjohn Co. *v.* United States, 449 U.S. 383, 393 (1981) ("[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 . . . is little better than no privilege at all.*") (emphasis added).

A. Wigmore’s Balancing Approach to Evidentiary Privileges

One approach to the plaintiff shareholder problem is to adopt Wigmore’s balancing approach to the attorney-client privilege and reassess the balance struck in favor of the corporate privilege. According to Wigmore, evidentiary privileges result in costs to the legal system by withholding relevant information from the trier-of-fact.\(^{16}\) Because of these costs, Wigmore believed that evidentiary privileges should only be recognized if the benefits produced by the privileges outweigh the associated costs from the loss of relevant evidence.\(^{17}\) One of the principal benefits of the attorney-client privilege identified by Wigmore is that the privilege creates incentives for the client to consult with its attorney and fully reveal information necessary for the attorney to provide sound legal advice.\(^{18}\)

Similarly, in the context of the corporate client, many argue that the attorney-client privilege encourages corporate management to freely seek legal advice and to fully investigate any wrongdoing by corporate employees or officers.\(^{19}\) Because of the complex regulatory environment confronting modern businesses, creating incentives for management to consult with counsel and learn its legal obligations might prove socially beneficial, as well as beneficial for the corporation.\(^{20}\) Counterbalancing these benefits, however, are the costs of losing relevant evidence. These costs are likely to be more accentuated

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17. Id. § 2285, at 527. Some commentators have questioned whether the costs identified by Wigmore should be given much weight. See, e.g., Developments in the Law, supra note 15, at 1507-08; 24 C. A. Wright & K. Graham, Federal Practice and Procedure § 5472, at 85. These commentators argue that the evidence lost through the attorney-client privilege might not exist without the privilege. This follows because the privilege encourages communications between the client and its attorney. Without the privilege, some of these communications might never take place. See Upjohn, 449 U.S. at 395 ("Application of the attorney-client privilege . . . puts the adversary in no worse position than if the communications had never taken place.").
18. 8 J. Wigmore, supra note 16, § 2291, at 545; see also 23 Wright & Graham, supra note 17, § 5422, at 672 n. 35 (describing the view of modern supporters of the privilege that it contributes to the accuracy of the adversarial system by ensuring that trial attorneys are better prepared).
19. See, e.g., Stephen A. Saltzburg, Corporate Attorney-Client Privilege in Shareholder Litigation and Similar Cases: Garner Revisited, 12 Hofstra L. Rev. 817, 823-24 (1984) (arguing that the corporate privilege creates incentives for officers and other corporate employees to communicate with counsel); see also Upjohn, 449 U.S. at 392 (arguing that a restricted corporate privilege "threatens to limit the valuable efforts of corporate counsel to ensure their client's compliance with the law.").
20. In fact, because of the regulatory environment confronting corporate management, one might argue that a strong corporate attorney-client privilege is more important than the privilege for individuals. See Upjohn, 449 U.S. at 392 ("In light of the vast and complicated array of regulatory legislation confronting the modern corporation, corporations, unlike most individuals,
in the corporate context, because management can often funnel critical information through corporate counsel or otherwise structure the "flow of information" within the corporation so as to maximize the amount of material protected by the privilege.\(^\text{21}\)

Where management seeks to assert the corporation’s privilege against its own shareholders, however, the balance of costs and benefits of the privilege tend to shift in favor of restricting the corporation’s privilege. First, in contrast to an outsider, shareholders are the ultimate owners of the corporation.\(^\text{22}\) Second, corporate management is generally deemed to owe a fiduciary duty to the corporation.\(^\text{23}\) Since shareholders, collectively, are the ultimate owners of the corporation, they are essentially the ultimate beneficiaries of this fiduciary duty.\(^\text{24}\) Finally, corporate shareholders possess a strong interest in protecting their financial stake in the corporation by monitoring and controlling management’s activities. When taken together, therefore, the unique policy concerns arising in shareholder litigation might be sufficient to tip the balance in favor of disclosure.\(^\text{25}\)

The strength of the policies favoring disclosure to shareholders varies depending on whether the shareholders requesting privileged material are representing their own individual interests, or whether they are representing the collective interests of shareholders as a

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\(^{21}\)See 24 WRIGHT & GRAHAM, supra note 17, § 5471, at 156.

\(^{22}\)See, e.g., HAMILTON, supra note 8.

\(^{23}\)See infra note 86 and accompanying text.

\(^{24}\)Since shareholders, in their entirety, are the ultimate owners of the corporation, a strong argument can be made that they possess almost a complete identity with the corporate entity. As a result, any duties or obligations owed to the corporate entity are also owed to shareholders as a group.

\(^{25}\)These interests might be even more likely to tip the balances if one takes the view that the purported benefits of the corporate privilege are uncertain. Some commentators have argued that the attorney-client privilege does not create any additional incentives for corporations to consult with counsel because corporations would consult with counsel even without the privilege. See, e.g., Elizabeth G. Thornburg, SANCTIFYING SECRECY: THE MYTHOLOGY OF THE CORPORATE ATTORNEY-CLIENT PRIVILEGE, 69 NOTRE DAME L. REV. 157, 159 (1993) ("This examination will show that none of the purpose myths [of the corporate privilege] are valid when considered in light of the realities of modern corporate life and modern litigation."); see also Vincent C. Alexander, THE CORPORATE ATTORNEY-CLIENT PRIVILEGE: A STUDY OF THE PARTICIPANTS, 63 ST. JOHN’S L. REV. 191, 225 (1989) ("The argument that the privilege is necessary to induce the corporation’s agents to confide in counsel rings somewhat hollow. Because a vast array of laws and regulations must be taken into account . . . corporate managers would appear to have no practical choice but to consult lawyers.").
group. The policies discussed above are strongest when the requesting party represents shareholders in their entirety.\textsuperscript{26} Where the requesting party is a small group of shareholders suing on their own individual claims, however, these policies are much weaker. In such a case, the party requesting privileged material is more similar to the third party outsider against whom \textit{Upjohn} and \textit{Radiant Burners} favored a strong corporate privilege.\textsuperscript{27} In contrast to parties seeking to vindicate the collective rights of shareholders, the interests of shareholders litigating their individual claims are adverse not only to corporate management, but also to other shareholders who are not involved in the litigation.\textsuperscript{28} The distinction between the claims of individual shareholders and the claims of shareholders as a group is, therefore, important in assessing whether the corporate attorney-client privilege should apply against shareholder discovery requests.

B. The Corporate Governance Model

The application of the corporate attorney-client privilege in this context can also be viewed as a problem of corporate governance and the appropriate allocation of power between management and shareholders. The issue of whether corporate management can invoke the attorney-client privilege against the corporation's own shareholders is ultimately based on the pluralistic nature of the modern corporation.\textsuperscript{29}

\textsuperscript{26} The principle example of such a suit is the shareholder derivative suit. In a derivative suit, the plaintiff shareholders sue corporate management on behalf of the corporation. \textit{See Hamilton}, supra note 8, at 567-68. Any recovery accrues solely to the corporate treasury and, by extension, the corporation's shareholders as a group. Thus, the derivative suit seeks to vindicate the \textit{collective} rights of shareholders — as the ultimate owners of the corporation — rather than the individual rights of the plaintiff shareholders. \textit{Id.} at 568 ("A derivative action, however, usually has some aspects of a class action since the shareholder, when suing to right a wrong done to the corporation, is also suing to protect the interests of all the other shareholders."); \textit{see also}, David A. Skeel, Jr., \textit{Rethinking the Line Between Corporate Law and Corporate Bankruptcy}, 72 TEx. L. REV. 471, 498 (1994) (discussing the shareholder derivative suit as a mechanism for monitoring corporate management); \textit{Robert C. Clark, Corporate Law} 639 (1986).

\textsuperscript{27} \textit{See supra} notes 1-3 and accompanying text. \textit{See also} 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.").

\textsuperscript{28} If the plaintiff shareholder successfully recovers on a purely individual claim, then the resulting judgment ultimately comes out of the pocket of the other shareholders in the form of lower corporate earnings or a decrease in corporate assets.

\textsuperscript{29} \textit{See, e.g.,} John Leubsdorf, \textit{Pluralizing the Client-Lawyer Relationship}, 77 CORNELL L. REV. 825, 826-30 (1992) (discussing the problems of representing clients that consist of groups of individuals); \textit{see also} 23 \textit{Wright & Graham}, supra note 17, at 171-72 (comparing the corporation to a representative government and a bureaucracy).
Under the present state of the law, the attorney-client privilege is possessed by the corporation as an entity. However, the corporate entity is not monolithic, but consists of several constituent groups: shareholders, the board of directors, corporate management, lower level employees, and suppliers.

As an entity apart from its managers, employees, and stockholders, the corporation is intangible. The corporate attorney-client privilege can only be invoked on behalf of a corporation by one of the corporation's constituent groups. This fact raises a critical question: Which constituent group should wield the power to assert or waive the corporation's privilege? Under current corporate statutes and case law, management possesses the power to assert or waive the privilege. This reflects the classical paradigm of corporate governance: Corporate management tends to the daily operations of the corporation under the oversight of the corporation's board of directors, while shareholders have little actual control over the corporation's day-to-day activities.

Where the plaintiffs are shareholders alleging management misconduct against the corporation, however, a strong argument can be

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31. See, e.g., 24 Wright & Graham, supra note 17, §5476, at 171 (“Some commentators have portrayed the corporation as a kind of representative government, whose officers are surrogates for its employees, customers, suppliers and investors.”).
32. See Weintraub, 471 U.S. at 348 (“[A] corporation must act through its agents. A corporation cannot speak directly to its lawyers. Similarly, it cannot directly waive the privilege when disclosure is in its best interests. Each of these actions must necessarily be undertaken by individuals empowered to act on behalf of the corporation.”) (emphasis added).
33. See, e.g., Leubsdorf, supra note 29, at 827 (“Who can speak for the group? The usual response is to treat the group as an entity, thus restoring the traditional single client theory. Who speaks for the entity is determined by whatever law governs its internal structure . . . .”).
34. See supra note 6.
35. See Henn & Alexander, Laws of Corporations 490-91 (3d ed. 1983) (“In a strict sense, management of the business and affairs of a corporation is under the direction of its board of directors, and shareholders have no functions of management as such.”) (emphasis added); see also John H. Matheson & Brent A. Olson, Shareholder Rights and Legislative Wrongs: Toward Balanced Takeover Legislation, 59 Geo. Wash. L. Rev. 1425, 1470-71 (1991) (discussing the separation of management and control in large publicly held corporations).

The principal argument advanced to support the traditional paradigm is economic. Each constituent group benefits from having the corporation managed by professional managers who possess the specialized expertise necessary to operate a complex corporation. See, e.g., Richard A. Posner, Economic Analysis of the Law 300-03 (2d ed. 1977) (“The separation of ownership and control is a false issue. Separation is efficient, and indeed inescapable, given that for most shareholders the opportunity costs of active participation in the management of the firm would be prohibitively high.”).
made that management is no longer the appropriate corporate constituent to exercise the privilege on behalf of the corporation.\textsuperscript{36} Allowing management to assert the corporation’s privilege in this context would primarily benefit management at the expense of the corporation and shareholders collectively. Yet, the privilege is not management’s privilege to use for its own private benefit. By forcing disclosure to shareholders, a court is essentially redistributing the power to assert or waive the privilege to the corporation’s shareholders who, as the ultimate owners of the corporation, most closely approximate the interests of the corporate entity.\textsuperscript{37}

As we observed in our discussion of Wigmore’s balancing approach, support for this shifting of power among corporate constituent groups appears weaker when the litigants seeking privileged material represent only a sub-group of the corporation’s shareholders. As such, these litigants cannot claim that they represent the entirety of the corporation’s ownership. Nor can they claim to be representing the interests of the corporation. While it is true that these litigants might possess a fractional interest in the corporation, their interests are opposed to the interests of non-litigant shareholders.\textsuperscript{38}

III. CREATION OF THE \textit{GARNER} EXCEPTION

A. The Factual Background

Until \textit{Garner v. Wolfinbarger} was decided in 1970, no federal court had squarely addressed the question of whether corporate management could invoke the corporation’s attorney-client privilege to prevent shareholders engaged in litigation against the corporation from obtaining allegedly privileged communications. \textit{Garner} originated as a suit by the stockholders of First American Life Insurance Co. of Alabama against the company, its directors, and several of its key officers.\textsuperscript{39} The suit consisted of a derivative claim on behalf of the corporation, along with alleged violations of federal securities laws

\textsuperscript{36} See, e.g., Leubsdorf, \textit{supra} note 29, at 828 ("[P]roblems arise even with corporations, when the officers and directors, who normally speak for the corporation, arguably violate their fiduciary duties.").

\textsuperscript{37} As discussed previously, shareholders, in their entirety, are the ultimate owners of the corporation. See \textit{supra} note 24 and accompanying text. Accordingly, shareholders, collectively, can be deemed the corporate constituent group with the strongest identity to the corporate entity. In other words, all the shareholders, considered as a group, might be deemed the equivalent of the corporation for purposes of reallocating the power to waive or assert the corporation’s privilege.

\textsuperscript{38} See \textit{supra} notes 26-28 and accompanying text.

\textsuperscript{39} Garner v. Wolfinbarger, 430 F.2d 1093, 1095 (5th Cir. 1970).
and regulations. The corporation itself filed cross-claims against all the other defendants; the corporation’s cross-claims mirrored the allegations in the derivative part of the plaintiffs’ complaint.\(^{40}\)

The dispute over the corporate defendant’s access to the attorney-client privilege arose when the plaintiffs deposed the corporation’s inside counsel and asked specific questions concerning the content of legal advice given corporate management concerning a sale of its stock.\(^{41}\) The corporation’s counsel responded by invoking the attorney-client privilege on behalf of the corporation, and the plaintiffs responded with a motion to compel. In a brief two-page opinion, the district court granted the plaintiffs’ motion, holding that a corporation could not invoke the attorney-client privilege against its shareholders.\(^{42}\)

The court cited no federal or state case law to support its holding. Instead, the court rested its holding on two old British cases: *Gouraud v. Edison Gower Bell Telephone Co. of Europe Ltd.*\(^{43}\) and *W. Dennis & Sons, Ltd. v. West Norfolk Farmers’ Manure & Chemical Co., Ltd.*\(^{44}\) Both cases hold that the corporate attorney-client privilege cannot be invoked against a corporation’s own shareholders. The courts reasoned that the relationship between a corporation and its shareholders is analogous to the relationship between a trustee and its beneficiary. Because of these obligations, a corporation must fully disclose its dealings to its shareholders and, as a result, cannot invoke the attorney-client privilege to shield its activities.\(^{45}\)

The district court did not expressly analyze the applicability of these decisions to the modern American corporation, nor did it discuss the policies underlying the attorney-client privilege. However, the court certified its decision for interlocutory appeal to the Fifth Circuit.
B. *The Fifth Circuit’s Creation of the Garner Exception*

The Fifth Circuit rejected the district court’s absolute renunciation of the attorney-client privilege in the context of shareholder derivative suits, and instead adopted a qualified formulation of the privilege. Under the court’s approach, corporate management may assert the attorney-client privilege against the corporation’s shareholders. However, plaintiff shareholders can overcome management’s assertion of the privilege by producing evidence sufficient to show “good cause.”

The court did not create a formula for determining when plaintiffs have shown good cause, but instead detailed nine factors that courts should consider:

1. the number of shareholders [requesting allegedly privileged communications] 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 [the information] from other sources,
5. whether, if the shareholders’ claim is of wrongful action by the corporation, [such] action [is] 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 the revelation of trade secrets or other information in whose confidentiality the corporation has an interest for independent reasons.

The court then remanded the case to the district court for determination of whether the plaintiffs had shown good cause according to the nine “indicia.”

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46. According to the court, “The corporation is not barred from asserting [the attorney-client privilege] merely because those demanding information enjoy the status of stockholders.” Id. at 1103.
47. Id. at 1103-04 (“[W]here the corporation is in suit against its stockholders . . . the availability of the privilege [should] be subject to the right of the stockholders to show cause why it should not be invoked . . . .”).
48. Id. at 1104.
C. Courts’ Acceptance of Garner v. Wolfinbarger

The exception created in Garner has gained overwhelming acceptance in federal courts. Only one court has expressly declined to adopt the exception.\textsuperscript{49} Other courts have attempted to limit the types of cases in which the exception is available.\textsuperscript{50} Overall, however, most courts have applied the Garner exception broadly. In fact, the exception has even been adopted by some state courts.\textsuperscript{51} As a result of Garner's wide acceptance, the decision has been extraordinarily influential in defining the extent of the corporate attorney-client privilege, especially in private suits brought under federal securities laws and regulations.\textsuperscript{52}

IV. Evaluating the Underpinnings of the Garner Exception

One of the paramount problems of the Garner exception is that neither the Garner opinion nor its progeny clearly details or analyzes the policy and doctrinal foundations of the exception. The Garner opinion begins its analysis with Wigmore’s traditional balancing test. The court weighed the benefits of management’s power to assert the attorney-client privilege to shield communications with corporate counsel against the interests of shareholders in obtaining information vital to proving their claims of management wrongdoing.\textsuperscript{53} In conducting the balancing process, the court recognized the value of promoting communications between management and corporate counsel: “Corporate management must manage. . . . Part of the managerial task is to seek legal counsel when desirable, and, obviously, management prefers that it confer with counsel without the risk of having the communications revealed at the instance of one or more dissatisfied stockholders.”\textsuperscript{54} The court held, however, that the benefits of the corporate attorney-client privilege were outweighed by the interests of the shareholders in ensuring that management’s judgment is not


\textsuperscript{50} See, e.g., Weil v. Investment/Indicators Research & Management, Inc., 647 F.2d 18, 23 (9th Cir. 1981) (limiting the Garner exception to derivative suits).


\textsuperscript{52} See infra Part V, Section A.

\textsuperscript{53} 430 F.2d at 1100-01.

\textsuperscript{54} Id. at 1101.
cloaked "behind an ironclad veil of secrecy." 55 Central to the court's decision to create an exception in the context of shareholder suits, therefore, is the fact that "management does not manage for itself and that the beneficiaries of its action are the stockholders." 56

This brief discussion of the court's reasoning suggests that the Garner exception is based primarily on the high degree of trust and care owed by corporate management to the corporation's shareholders. In this vein, the Garner exception might be viewed as a wholly corporate doctrine limited to suits between corporate shareholders and their corporations. Yet, the fiduciary language employed in Garner is sufficiently broad and universal that the exception can also be interpreted as a general exception to the attorney-client privilege which is applicable beyond the corporate context. Unfortunately, Garner's doctrinal framework can support either interpretation.

This ambiguity is further compounded by the fact that Garner also relies on problematic analogies to both (1) the joint-client exception and (2) the crime-fraud exception. The present section explores the ambiguities and weaknesses inherent in Garner's doctrinal framework with an eye toward understanding some of the problems that have arisen with the extension of Garner beyond shareholder derivative suits. This discussion will set the stage for Section V, which explores the steady expansion of Garner beyond derivative suits.

A. The Existence of a Fiduciary or Quasi-Fiduciary Duty

The Garner opinion focuses on the unique nature of the relationship and duties between a corporation and its shareholders as the primary justification for creating an exception to the corporate attorney-client privilege. Yet, neither Garner nor its progeny clearly characterizes the nature of the relationship and duties upon which they rely. This lack of clarity raises two key questions. First, is the Garner exception based on the existence of a common-law or statutory fiduciary relationship, or is it based on a broader and more malleable "quasi-fiduciary" relationship? If the exception is based on the broader standard, then the range of relationships subject to the Garner exception is much broader than if the exception requires a common-law or statutory fiduciary relationship. 57

55. Id.
56. Id.
57. A strict fiduciary relationship requirement limits the range of relationships subject to the Garner exception because of the common law or statutory conditions necessary for creating a fiduciary relationship. Not every relationship rises to the level of a fiduciary relationship. See
The second question raised by the ambiguities in the case law applying Garner involves identification: Which corporate constituents owe a fiduciary or quasi-fiduciary duty for purposes of applying Garner, and to whom is the duty owed? One passage in the Garner opinion suggests that the corporation, as well as its management, owes a duty to shareholders. This passage, however, does not reveal whether this duty is owed to each shareholder individually, or whether the duty is owed to shareholders collectively. Furthermore, another passage in the opinion indicates that there is an independent fiduciary duty running from management to the corporation. Thus, Garner fails to clearly articulate the pattern of fiduciary or quasi-fiduciary duties upon which it bases its exception. This ambiguity is important in assessing whether courts should apply the Garner exception beyond the context of derivative suits.

1. Is Garner Based on a Fiduciary or “Quasi-Fiduciary” Duty?

When characterizing the relationships among management, the corporation, and shareholders, the Garner opinion never expressly uses the term “fiduciary.” Instead, the court merely recognizes that “there are obligations, however characterized, that run from corporation to shareholder.” The court goes no further in characterizing these obligations than simply asserting that “management does not manage for itself and that the beneficiaries of its action are the stockholders.” While this passage might be interpreted as describing the bare essentials of a fiduciary obligation, it might also encompass a multitude of other relationships where one party acts for another. In

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58. 430 F.2d at 1102 ("[T]here are obligations, however characterized, that run from corporation to shareholder and must be given recognition in determining the applicability of the privilege.").

59. Id. at 1103. ("[P]rotection of [stockholder] interests as well as those of the corporation ... require that the availability of the privilege be subject to the right of the stockholders to show cause why it should not be invoked.") (emphasis added).

60. See infra Section V.

61. 430 F.2d at 1102 (emphasis added).

62. Id. at 1101.
fact, at one point the court appears to acknowledge that these corporate relationships might not rise to the level of a common-law or statutory fiduciary relationship.\textsuperscript{63}

How these corporate relationships are characterized is important because it strongly controls how easily the rationale of the Garner decision can be applied outside the context of the shareholder suit, and defines the range of relationships potentially subject to the Garner exception. If the rationale for the Garner exception is founded on the unique relationships among management, the corporation, and shareholders, a strong argument might be made that the Garner exception should not be applicable outside the corporate context.\textsuperscript{64} If the exception is founded on the existence of a common-law or statutory fiduciary duty, the exception might be logically applied to fiduciary relationships outside the corporate context. However, the term “fiduciary” has a relatively specific legal meaning depending on the jurisdiction.\textsuperscript{65} Thus, application of the exception under this approach would be limited to relationships deemed “fiduciary” in nature according to the common-law or statute. Finally, if the exception is based merely on the fact that one party owes some general duty of care or other generalized obligation, then the boundaries of the exception are potentially broad.

Despite this ambiguity in the Garner opinion, most courts appear to have accepted the “fiduciary relationship” rationale for the Garner exception.\textsuperscript{66} The clearest expression of this approach appears in Nellis v. Airline Pilots’ Ass’n.\textsuperscript{67} In Nellis, the court applied the Garner exception in the context of a suit brought by union members against their national union charging breach of contract and breach of fiduciary duty. The court held that the Garner exception to the attorney-client privilege is applicable whenever a beneficiary sues a fiduciary for breaching its fiduciary duty.\textsuperscript{68} In fact, at one point the court refers

\begin{flushleft}
\textsuperscript{63} Id. ("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.").

\textsuperscript{64} Or, at a minimum, it should caution courts to refrain from automatically applying the exception outside the corporate arena.

\textsuperscript{66} See infra Part V, Section B, for cases interpreting Garner as creating a general “fiduciary-beneficiary” exception to the attorney-client privilege.

\textsuperscript{65} 144 F.R.D. 68 (E.D. Va. 1992).

\textsuperscript{67} Id. at 70-71. According to the court, “The Garner court determined that when beneficiaries sue a fiduciary for behavior allegedly inimical to their interests, the availability of the attorney-client privilege should ‘be subject to the right of the [beneficiary] to show cause why it should not be invoked in the particular instance.’” Id. (quoting Garner, 430 F.2d at 1103-04) (emphasis added). This statement is a generous reading of the court’s holding in Garner.
\end{flushleft}
to the *Garner* exception as the "fiduciary-beneficiary" exception to the attorney-client privilege. This characterization of the exception also appears in *Donovan v. Fitzsimmons*. In *Donovan*, the court held that the *Garner* exception is not limited to corporate relationships, but extends to any case involving a fiduciary-beneficiary relationship.

For the courts that have adopted the approach illustrated by these cases, the existence of a common-law or statutory fiduciary relationship is a threshold requirement for applying the *Garner* exception. For example, in *Fausek v. White*, the court held that the *Garner* exception only applies in cases where a corporation owes a fiduciary duty to the parties attempting to obtain allegedly privileged communications. The plaintiffs in *Fausek* were minority shareholders who brought suit against a controlling shareholder and the corporation for wrongful conduct connected with the buy-out of the plaintiff's stock. As a prerequisite to applying the *Garner* exception, the court first examined whether the controlling shareholder and the corporation owed a fiduciary duty to the minority shareholders according to the law of the jurisdiction. The court concluded that the defendants owed the plaintiffs a fiduciary duty under the law of the jurisdiction, and preceded to apply the *Garner* "good cause" balancing test. In contrast,

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As mentioned above, the *Garner* court did not expressly base their exception to the attorney-client privilege on the existence of a fiduciary duty. Yet, through the "miracle" of brackets, the court in *Nellis* appears to have substantially broadened the applicability of the exception to any suit by a beneficiary against a fiduciary. The original language from the *Garner* opinion expressly states that the privilege is subject to the right of shareholders to show good cause. See *Garner*, 430 F.2d at 1103-04.

69. 90 F.R.D. 583 (N.D. Ill. 1981). The facts of *Donovan* are complex and will be discussed more thoroughly in Part V. Briefly, the case involved a suit by the Secretary of Labor on behalf of pension plan beneficiaries against the trustee of the plan.

70. According to the court, "The *Garner* approach is not premised on concepts peculiar to corporate law, but rather has its underpinning in the common law of trust relationships." *Id.* at 586. For an overview of cases that have applied the *Garner* exception to non-corporate fiduciary relationships, see Part V Section B below.

71. 965 F.2d 126 (6th Cir. 1992).

72. *Id.* at 127-28.

73. *Id.* at 131.

74. *Id.* at 133. Similarly, in *Quintel Corp., v. Citibank*, 567 F. Supp. 1357 (S.D.N.Y. 1983), the court closely scrutinized the relationship between the defendant bank and the plaintiff to determine whether the defendant owed the plaintiff a fiduciary duty. The litigation concerned a transaction in which the defendant assisted the plaintiff in obtaining certain real estate properties. The defendant also managed the properties for the plaintiff. The court carefully considered the defendant's role in the transaction and the extent of the power it exercised on behalf of the plaintiff. Only after determining that the defendant owed the plaintiff a fiduciary duty did the court apply the *Garner* exception. *Id.* at 1363-64.
other courts have expressly declined to apply the *Garner* exception in the absence of a fiduciary relationship.\textsuperscript{75}

While most courts appear to tightly fuse the *Garner* exception to the existence of a common-law or statutory fiduciary duty, some decisions do not appear to limit the exception to this well-defined category of relationships. The most important of these decisions is a Fifth Circuit decision, *In re International Systems and Controls Corp. Securities Litigation*.\textsuperscript{76} In this decision, the court characterized the corporate obligations and duties at issue in *Garner* as "quasi-fiduciary" in nature.\textsuperscript{77} Thus, the Fifth Circuit's interpretation of its own earlier decision in *Garner* appears to reject the requirement that the party attempting to invoke the attorney-client privilege must owe a common-law or statutory fiduciary duty to the party attempting to overcome the privilege.\textsuperscript{78} This broad interpretation of the doctrinal basis of the *Garner* exception would justify extending the reach of the exception much farther beyond the context of the traditional common-law fiduciary relationship. Such a broad basis for the *Garner* exception would inject considerably more uncertainty into predicting the extent of the protection afforded by the attorney-client privilege in transactions that have most of the earmarks of arms-length relationships, yet contain additional obligations not present in ordinary market transactions.\textsuperscript{79}

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\textsuperscript{75} See *In re Colocronis Tanker Sec. Litig.*, 449 F. Supp. 828 (S.D.N.Y. 1978). In Colocronis, the court held that *Garner* was inapplicable in a suit brought by banks participating in a loan syndication against the bank originating the loan. The court based its decision squarely on the absence of a fiduciary relationship: "[T]hese agreements are arms-length contracts between relatively sophisticated financial institutions and do not establish fiduciary relationships such as exist between the management of a corporation and the corporation's shareholders . . . ." Id. at 833.

\textsuperscript{76} 693 F.2d 1235 (5th Cir. 1982).

\textsuperscript{77} Id. at 1239.

\textsuperscript{78} See also *In re Pfizer Sec. Litig.*, No. 90 Civ. 1260 (SS), 1993 WL 561125, at *11 (S.D.N.Y. Dec. 23, 1993) (noting that the *Garner* exception has been extended to cover other "fiduciary-type" relationships) (emphasis added); Kush & Assoc., Ltd. v. Wein Geroff Ent., 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 . . . . that the *Garner* approach is applicable . . . .").

\textsuperscript{79} For example, in some contexts mineral lessees owe their lessors obligations and duties beyond those present in arms-length contracts. See, e.g., Amoco Prod. Co. v. First Baptist Church of Poyote, 579 S.W.2d 280 (Tex. Civ. App. 1979) (fashioning a requirement of "utmost good faith" when the lessee negotiates gas sales contracts that include gas allocable to the lessor under the lease agreement). However, despite these heightened duties, few courts would characterize the lessee/lessor relationship as true fiduciary relationship. Yet, under the broader view of *Garner* discussed here, the *Garner* exception might well be applicable to these cases.

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2. Who Owes a Fiduciary Duty and to Whom is it Owed?

Even if a majority of courts are correct in concluding that the \textit{Garner} exception arises only in the presence of a common-law or statutory fiduciary duty, the \textit{Garner} opinion raises another troubling question in the corporate context: Who owes a fiduciary duty for purposes of the exception, and to whom is the duty owed? The answer to this question is important for two reasons. First, the party identified as the fiduciary is the party prevented from asserting the attorney-client privilege. Yet, the decisions applying \textit{Garner} have not clearly articulated whether the exception is concerned with a duty owed solely by management, or whether the exception also recognizes a duty on the part of the corporation as a whole.\(^{80}\) Second, under this "fiduciary-beneficiary" approach, only the beneficiary of the fiduciary duty can overcome the fiduciary's assertion of the privilege. Thus, whether a fiduciary duty is owed to shareholders individually or collectively strongly influences whether the \textit{Garner} exception is appropriate in a particular context.\(^{81}\)

One passage in the \textit{Garner} opinion suggests that heightened obligations and duties are owed by the management of a corporation to that corporation's shareholders.\(^{82}\) However, the opinion contains additional language suggesting that the corporate entity itself owes a fiduciary duty to shareholders.\(^{83}\) The opinion also fails to distinguish whether the fiduciary duties at the heart of the \textit{Garner} exception are owed to shareholders collectively or individually. Other courts applying \textit{Garner} have similarly held that the corporation itself, as well as management, owes a fiduciary duty to its shareholders.\(^{84}\) Yet many of these decisions, like the \textit{Garner} opinion, fail to distinguish between individual shareholders and shareholders collectively. Outside the

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\(^{80}\) A duty solely on the part of management seems to fall more into line with the shareholder derivative model. Under this model, management owes a duty to the corporation and, derivatively, to the shareholders collectively.

\(^{81}\) If the relevant beneficiary in the corporate context is the individual shareholder, then the \textit{Garner} exception is logically applicable to any case in which a shareholder claims that her individual rights as a shareholder have been infringed, such as the case of a claim alleging that a corporation has violated federal securities laws. \textit{See infra Part V, § A.} If management and the corporation owe a fiduciary duty to shareholders \textit{collectively}, however, the \textit{Garner} exception cannot be logically extended to shareholder suits which do not seek to vindicate the collective rights of shareholders, such as is accomplished in a shareholder derivative action. \textit{See id.}

\(^{82}\) According to the \textit{Garner} court, "[M]anagement has duties which run to the benefit ultimately of the stockholders." Garner v. Wolfinbarger, 430 F.2d 1095, 1101 (5th Cir. 1970).

\(^{83}\) \textit{Id.} at 1102 ("[T]here are obligations . . . that run from corporation to shareholder . . .").

\(^{84}\) \textit{See, e.g.,} Valente v. PepsiCo, Inc., 68 F.R.D. 361, 368 ("[A] corporation is, at least in part, the association of its shareholders, and it owes to them a fiduciary obligation . . . ")
context of derivative suits, some courts applying the Garner exception to suits by minority shareholders against majority shareholders have characterized the obligations of the majority shareholder as a fiduciary duty. 85

These formulations of duties owed in the corporate context do not coincide with principles developed in corporate case law and codified in many state statutes. According to these principles, corporate managers and directors owe a fiduciary duty to the corporation as a whole. Most courts and commentators agree on this point. 86 In contrast, a few courts have held that management similarly owes a fiduciary duty to individual shareholders. 87 The majority of cases where courts have found such a duty involve transactions in which management has directly dealt with individual shareholders, 88 or where a director is also a majority shareholder accused of oppressing minority shareholders. 89

The apparent conflict between Garner and its progeny, on the one hand, and corporate case law and statutes on the other, might be resolved by interpreting the language in Garner to mean that management owes a fiduciary duty to shareholders collectively. 90 Since a corporation’s shareholders are collectively the “owners” of the corporation, extending management’s fiduciary duty to include shareholders as a group would be consistent with both Garner and corporate case law and statutes. 91 However, while many of the courts applying Garner fail to distinguish between a duty owed to individual

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86 See, e.g., Henn & Alexander, supra note 35, at 627; Hamilton, supra note 8, at 465-66.
87 See, e.g., Hamilton, supra note 8, at 465 (“In most instances, directors owe duties to the corporation as a whole rather than to individual shareholders or to individual classes of shareholders.”).
88 Id.
89 See Henn & Alexander, supra note 35, at 651; see also 18B Am. Jur. 2d Corporations § 1692 (1985) (demonstrating that a party’s mere status as a shareholder is not, in most cases, sufficient to give rise to an individualized fiduciary duty. Rather, courts require the presence of additional elements beyond a bare shareholder-management relationship). See Kaspar v. Thorne, 755 S.W.2d 151, 155 (Tex. Ct. App. 1988) (holding that, in the absence of a contractual or other “special” relationship, corporate managers owe no duty to individual shareholders).
90 In fact, the language in the Garner opinion consistently refers to shareholders collectively. See, e.g., Garner v. Wofford, 430 F.2d 1093 1101 (5th Cir. 1970) (“[I]t is difficult to rationally defend the assertion of the privilege if all, or substantially all, stockholders desire to inquire into the attorney’s communications with [management] . . . .”) (emphasis added).
91 This follows because management owes a fiduciary duty to the corporation. Since shareholders are the owners of the corporation, there is an essential identity between the corporate entity and the corporation’s shareholders considered as a group.
shareholders and a duty to shareholders collectively, some courts apparently extend the duty to individual shareholders. This interpretation creates a serious dilemma. When shareholders sue management and the corporation in their individual capacity, their interests are adverse not only to management, but also to the corporation and other shareholders.

This problem is further compounded by the unusual reference in Garner, and other cases, to a fiduciary duty owed by the corporation — not management — to its shareholders. This reference is unusual for two reasons. First, a corporation is an intangible entity that can only act through its agents, specifically the management. Second, the reference seems to suggest that a corporation, independent of management, possesses a self-interest independent of its shareholders. This reference is even more troublesome if it is construed so as to create a fiduciary duty running from the corporation to individual shareholders. Conversely, this reference might just be a short-hand statement that corporate management — as opposed to the corporation itself — owes a fiduciary duty to shareholders. The fact that the Garner exception lends itself to such various interpretations is one of its most significant problems.

B. Common Interests and The Joint Client Exception

The Garner court did not base its exception to the attorney-client privilege solely upon the presence of a special relationship of trust between management and shareholders. As further support for its exception, the Garner court also noted that corporate management and corporate shareholders possess a "mutuality of interest" in corporate

92. This interpretation occurs most frequently in suits brought under federal securities laws. In these suits, shareholders sue the corporation as individuals.
93. See supra notes 26-28 and accompanying text.
94. See, e.g., Commodity Futures Trading Comm’n v. Weintraub, 471 U.S. 343, 349 (1985) (observing that a corporation can only assert the attorney-client privilege through its agents); see also Hamilton, supra note 8, at 129 ("A corporation is a type of legal institution or concept that defines relationships among people. It is 'more nearly a method than a thing.'") (quoting Farmers’ Loan & Trust Co. v. Pierson, 222 N.Y.S. 532, 543 (N.Y. Sup. Ct. 1927)).
95. See Deborah A. DeMott, Beyond Metaphor: An Analysis of Fiduciary Obligation, 1988 Duke L. J. 879, 917 (1988) ("[T]he concept of fiduciary obligation implicitly presumes that persons bound by the obligation are capable of possessing a self-interest that may diverge from the interests of the beneficiaries of the obligation. This concept is not readily applicable to a corporation, the interests of which are generally treated as identical to those of its shareholders as a group.").
96. Id. at 918 ("[I]f the corporation owes a fiduciary obligation to each shareholder individually, does the majoritarian norm for shareholder decision making apply to transactions that would otherwise breach the corporation's fiduciary obligation?").
management freely seeking the advice of counsel. 97 The court's reference to the "common interests" or "mutuality of interest" between management and shareholders is closely connected with its attempt to create an analogy between the management-shareholder relationship confronted in Garner and the "joint client" doctrine. 98 The court's analogy to the joint client exception raises two related questions. First, does the joint client exception provide an appropriate paradigm for the relationships among the various constituent groups of the corporation? Second, would evidence of adverse interests be sufficient to defeat application of the Garner exception?

1. Garner and the Joint Client Exception

Under the joint client doctrine, two parties with common interests may jointly retain and consult an attorney concerning legal matters in which they possess a common interest without losing the protection of the attorney-client privilege as to third parties. 99 As such, the joint client exception - unlike the crime-fraud exception - is not truly an exception to the attorney-client privilege, but an exception to the general rule that disclosure of confidential information in the presence of third parties waives the privilege. 100

The joint clients may not, however, invoke the privilege against each other if they become involved in a subsequent suit against each other over the subject matter of the allegedly privileged communications. 101 The rationale for this limitation is that a client making these disclosures cannot reasonably expect that the communications will be kept secret from a co-client. 102 In this guise, therefore, the joint client exception acts as a limitation on the ability of a client to assert his or her attorney-client privilege.

The Garner opinion builds on the "joint client" doctrine by creating an analogy between the management-shareholder relationship and

98. See id. at 1101, 1103.
99. See, e.g., Simpson v. Motorists Mut. Ins. Co., 494 F.2d 850, 855 (7th Cir. 1974) ("[W]here the same attorney represents two parties having a common interest, and each party communicates with the attorney, the communications are privileged . . . ."); see also Grand Trunk Western R. Co. v. H.W. Nelson Co., 116 F.2d 823, 835 (6th Cir. 1941) (discussing the attorney-client privilege in relation to multiple representation by one attorney).
101. See Simpson, 494 F.2d at 855; see also Jack Weinstein & Margaret Berger, Weinstein's Evidence, § 503(b)[7] (1986) (discussing the attorney-client privilege in relation to an attorney representing an insured at the cost of the insurer).
102. See Wolfram, supra note 100, at 275.
the relationship between joint clients. While the court does not fully reveal its reasoning in drawing this analogy, the court appears to rely on two factors. First, according to the court, when corporate management consults with counsel, the consultation is ultimately for the benefit of the shareholders. Second, corporate management and the shareholders of the corporation share a common or mutual interest in the subject matter of any consultations with corporate counsel regarding the affairs of the corporation.

These two points are more clearly expressed in Ward v. Succession of Freeman. In Ward, the court concluded that "[t]he entire thrust of Garner was . . . to recognize that shareholders stand in the shoes of a client when management seeks counsel on matters that ultimately should benefit shareholder interests." This passage suggests that when management consults corporate counsel, shareholders are deemed the equivalent of joint clients for the purposes of the consultation. This follows even though shareholders never actually engage or consult with corporate counsel.

2. Is the Joint Client Analogy Appropriate?

While neither Garner nor Ward attempt to argue that the shareholder-management relationship and the joint client situation are identical, the analogy is sufficiently inaccurate to call into question whether courts should rely upon it. First, management and shareholders do not jointly engage and consult with corporate counsel. In the typical joint client scenario, the joint clients cannot justifiably expect that their communications with counsel will not be disclosed to the other client because they jointly retain and communicate with their attorney. In the corporate context, however, only management and the corporate board possess the power to engage and consult with corporate counsel. Thus, in contrast with the joint client scenario, management may justifiably expect their consultations with corporate counsel to be kept secret.

104. Id. at 1101.
105. See id. at 1103 ("In many situations in which the same attorney acts for two or more parties having a common interest, neither party may exercise the privilege in a subsequent controversy with the other.").
106. 854 F.2d 780 (5th Cir. 1988).
107. Id. at 785 (emphasis added).
108. See supra note 102 and accompanying text.
109. See supra text accompanying notes 34-35.
110. In addition, treating management and shareholders as joint clients may confront corporate counsel with conflicting duties under the Model Rules of Professional Conduct.
The Garner court's joint client analogy also misconceives the duties of a corporation's inside and outside counsel. Under the Model Rules of Professional Conduct, corporate counsels owe a duty of loyalty and confidentiality to the corporate entity. While corporate counsel must inevitably act through management and other corporate constituents, it owes no duty of loyalty or confidentiality to these constituents independent of its duty to the corporate entity. In fact, when a conflict between the interests of the corporation and one of its constituent groups arises, the Model Rules require a corporate counsel to disclose that the counsel's duties run solely to the corporation, not to the constituent.

Garner's joint client analogy, however, conflicts with the established paradigm of the corporate counsel's roles and duties by essentially elevating the corporate shareholder to the status of a client. For corporate counsel, this transformation creates potentially conflicting duties to both the corporate entity and shareholders with no guide as to how to resolve the conflict. In the corporate takeover context, for example, corporate counsel must advise the target corporation's management on whether to accept a merger proposal. Under the approach of the Model Rules and governing case law, the counsel must ensure that the proposal is in the interests of the corporation, regardless of its impact on individual shareholders. Garner's joint client analogy, however, would also create a conflicting duty to safeguard

111. See Model Rules of Professional Conduct Rule 1.13(a) (1994) ("A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents."); see also Wolfram, supra note 100, at 421 (discussing a lawyer's duty to represent the interest of the corporation rather than the interest of the corporation's constituents).

112. See ABA Comm. on Professional Ethics and Grievances, Formal Op. 86 (1932) ("As a corporation speaks and acts only through its officers and directors, its counsel is their legal advisor in respect to [the corporation's] affairs, but in performing that duty he is acting as the corporation's attorney only and not as the attorney of any of its stockholders, directors or officers as individuals, or any group or faction thereof."); see also, Roberta S. Karmel, Duty to the Target: Is an Attorney's Duty to the Corporation a Paradigm for Directors?, 39 Hastings L.J. 677, 687 (1988) (observing that the attorney for the target corporation in a merger setting owes a duty directly to the target corporation, not the target corporation's shareholders).

113. See Model Rules of Professional Conduct Rule 1.13(d) (1994) ("In dealing with an organization's directors, officers, employees, members, shareholders, or other constituents, a lawyer shall explain the identity of the client when it is apparent that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing."); see also Model Rules of Professional Conduct Rule 1.13 cmt. 8 (1994) (discussing the lawyer's duty to advise constituents of the corporation of the lawyer's primary duty).

114. See Egan v. McNamara, 467 A.2d 733, 739 (D.C. Cir. 1983) (holding that corporate counsel represents the corporation's interests, not the individual shareholders' interests, during merger negotiations); see also ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1056 (1968).
shareholder interests. Such a fundamental conflict might require that corporate counsel be disqualified from representing either party.\textsuperscript{115}

If we distinguish between individual shareholder claims and shareholder derivative claims, we might be better able to reconcile Garner's joint client analogy with the Model Rules and the case law defining corporate counsel's duties to the corporation. Where the interests of individual shareholders or a group of minority shareholders diverge from the interests of the corporate entity, both the Model Rules and courts hold that a corporate counsel's duty runs solely to the corporate entity.\textsuperscript{116} Where management is accused of wrongdoing against the corporation and its shareholders collectively, however, courts have been willing to hold that a corporate counsel owes a duty to both the corporation and shareholders collectively.\textsuperscript{117} This approach makes sense because, as stated previously, there is a strong identity between the corporate entity and shareholders considered collectively,\textsuperscript{118} and derivative suits seek to advance the collective interests of shareholders. Unfortunately neither Garner nor its progeny have drawn an adequate distinction between the claims of individual shareholders and claims that advance the rights of all shareholders.\textsuperscript{119}

In addition to misconceiving the role of corporate counsel, Garner's joint client analogy also overstates the extent to which the interests of management and the shareholders attempting to pierce the corporation's attorney-client privilege coincide. These interests might be more closely aligned when the suit is derivative in nature.\textsuperscript{120} However, management's interests at the time of the consultation are likely to diverge radically from the interests of individual shareholders. This divergence occurs because when management consults with counsel and acts on counsel's advice, it must also consider the interests of (1) the shareholders as a whole, (2) corporate creditors, (3) regulatory authorities, and (4) the corporation's own employees.\textsuperscript{121} Management

\begin{footnotes}
\textsuperscript{115} See Wolfram, supra note 100, at 465-67 (1986).
\textsuperscript{116} See supra notes 111-113 and accompanying text.
\textsuperscript{117} See Rowen v. Le Mars Mut. Ins. Co. of Iowa, 282 N.W.2d 639, 654 (Iowa 1979) (holding that in a derivative action the attorney's duty "is to the entire body of shareholders") (emphasis added); see also Karmel, supra note 112, at 687-88 (discussing the possibility of a duty to shareholders in certain circumstances).
\textsuperscript{118} See supra text accompanying notes 36-37.
\textsuperscript{119} See supra text accompanying notes 84-85.
\textsuperscript{120} In the case of a derivative suit, the plaintiff shareholders are literally standing in the shoes of the corporation. Presumably, management's interests are more closely aligned with the corporation's interests than with the interests of individual shareholders.
\textsuperscript{121} See, e.g., Peter J. Henning, Corporate Law After the Eighties: Reflections on the Relationship between Management, Shareholders and Stakeholders, 36 St. Louis U. L.J. 519, 594
\end{footnotes}
must, therefore, consider a broader range of interests than merely
those individual shareholders that might be adversely affected or feel
aggrieved by its actions.

3. Application of Garner When Interests are Adverse

Garner’s references to “common interests” and a “mutuality of
interest,” in isolation, might support the argument that the Garner
exception can be defeated if the party opposing disclosure can show
that the party seeking to overcome the attorney-client privilege pos-
sesses interests adverse to its own.122 In fact, in In re International
Systems,123 the Fifth Circuit declined to extend the holding of Garner
to attorney work product because, according to the court, manage-
ment and shareholders no longer possess a “mutuality of interest”
once a sufficient threat of litigation exists to trigger the work-product
immunity.

Evidence of adverse interests is unlikely, however, to automati-
cally sway a court away from invoking the Garner exception. In fact,
the Garner opinion itself states that the presence of an adverse inter-
est — by itself — should not defeat the Garner exception.124 Further-
more, the Fifth Circuit’s decision in Ward v. Succession of Freeman
further limits the extent to which the presence of adverse interests
should prevent the application of the Garner exception.125 In Ward,
corporate management assailed the lower court’s application of the
Garner exception by arguing that its interests were adverse to the
plaintiff shareholders who had brought federal securities claims
against management and the corporation.126 The court rejected man-
agement’s argument. Instead, the court emphasized that management

(1992) (arguing that “[t]he corporate entity exists to serve a number of interests and represents
an investment by more than just the equity owners”).
122. This interpretation would place an important limitation on Garner. Presumably, a fidu-
ciary relationship could exist even if the fiduciary and beneficiary possess some adverse interests.
This limitation would prevent the application of Garner where there are adverse interests even
though a fiduciary relationship still exists.
123. 693 F.2d 1235 (5th Cir. 1982).
124. Garner v. Wolfinbarger, 430 F.2d 1093, 1101 (5th Cir. 1970) (“There may be many situa-
tions in which the corporate entity or its management, or both, have interests adverse to those of
some or all stockholders. But when all is said and done management is not managing for
itself.”).
125. 854 F.2d 780 (5th Cir. 1988).
126. The plaintiff shareholders alleged that the corporation and its management violated fed-
eral securities laws during the course of a tender offer in which the corporation repurchased a
large block of its own stock from its shareholders. Id. at 782. The corporate defendants argued
that, in the context of a tender offer, management must seek to conserve corporate assets by not
over-paying for redeemed stock. Id. at 784. On the other hand, shareholders redeeming their
and shareholders need not share a total unity of interest for the rationale of *Garner* to be applicable.\(^\text{127}\)

C. *The Crime-Fraud Exception*

In addition to the “joint client” doctrine, the *Garner* court also relied on an analogy to the traditional “crime-fraud” exception to the attorney-client privilege. The crime-fraud exception prevents a party from invoking the attorney-client privilege to shield communications made to further contemplated or ongoing criminal or fraudulent conduct.\(^\text{128}\) While it is not clear whether the alleged wrongdoing on the part of management in *Garner* actually rose to the level of criminal or fraudulent conduct, the court declined to limit the reach of the *Garner* exception to communications that would fall under the crime-fraud exception.\(^\text{129}\) Instead, the court apparently viewed the management’s alleged breach of its duty to shareholders sufficiently wrongful to invoke the policies underlying the crime-fraud exception.\(^\text{130}\)

Some commentators and at least one court have questioned the need for the *Garner* exception in addition to the crime-fraud exception.\(^\text{131}\) This criticism is invalid to the extent that it suggests that the *Garner* exception is redundant. As noted earlier, the *Garner* exception encompasses conduct that clearly falls short of fraud or criminal

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\(^\text{127}\) *Id.* at 785 (“In *Garner*, we specifically elected, however, to open up to shareholders (who demonstrate good cause) communications between management and counsel where some pecuniary interests are necessarily adverse.”).

\(^\text{128}\) See, e.g., *In re* Grand Jury Subpoena Duces Tecum, 731 F.2d 1032, 1038 (2nd Cir. 1984) (“It is well-established that communications that otherwise would be protected by the attorney-client privilege or the attorney work-product privilege are not protected if they relate to client communications in furtherance of contemplated or ongoing criminal or fraudulent conduct.”).

\(^\text{129}\) See *Garner* v. *Wolfinbarger*, 430 F.2d 1093, 1103 (5th Cir. 1970) (“[W]e do not consider [the] unavailability of the privilege to be confined to the narrow ground of prospective criminal transactions.”).

\(^\text{130}\) *Id.* (“The differences between prospective crime and prospective action of questionable legality, or prospective fraud, are differences of degree, not of principle.”).


> Without sacrificing important public interests in maintaining open communication between lawyer and client generally, shareholders do possess adequate disclosure rights under long-established limits to the attorney-client privilege in cases of demonstrable wrongdoing—i.e., the privilege exception recognized when there are “communications in furtherance of contemplated or ongoing criminal or fraudulent conduct.”

*Id.* (quoting *In re* Grand Jury Subpoena Duces Tecum, 731 F.2d at 1038).
conduct. More importantly, the requirement of good cause necessary to invoke the Garner exception is significantly less strict than the predicate for the crime-fraud exception. In order to invoke the crime-fraud exception, the party seeking to overcome the privilege must show that the opposing party obtained legal advice for the purpose of furthering a criminal or fraudulent act. Thus, the exception requires a showing that the client knew that consultations with counsel would be used to advance criminal or fraudulent activity. In contrast, the Garner exception lacks a scienter requirement.

D. Lack of a Firm Doctrinal Basis for Garner

The principal theme of this section is that the doctrinal underpinnings of the Garner exception are frustratingly ambiguous. Much of Garner's doctrinal foundation, if accepted at face value, is at odds with statutory and case law conceptions of the powers, relationships, and duties comprising the modern corporation. Given the ambiguities in Garner's foundation, however, many of these doctrinal conflicts could be resolved through careful interpretation and formulation. Unfortunately, few of the courts applying Garner have accepted this task.

Furthermore, Garner's ambiguities also create significant uncertainty for courts and corporate management. For courts, the uncertainty over whether the Garner exception is limited to (1) the corporate context, (2) common-law or statutory fiduciary relationships, or (3) a broad range of quasi-fiduciary relationships has led to inconsistent results when courts apply the exception outside the context of derivative suits. For corporate management and non-corporate fiduciaries, the lack of clear standards creates significant uncertainty as to when these parties can or cannot rely on the protections of the attorney-client privilege.

132. Derivative claims, for example, might be based on a claim that management breached its duty of due care. See, e.g., HENN & ALEXANDER, supra note 35, at 621.
133. See, e.g., Clark v. United States, 289 U.S. 1, 15 (1933) ("There are early cases apparently to the effect that a mere charge of illegality, not supported by any evidence, will set the confidences free. But this conception of the privilege is without support in later rulings.") (citations omitted).
134. Id.
135. See supra text accompanying notes 86-88.
136. See infra Part V, Section A.
V. JUDICIAL EXTENSION OF THE GARNER EXCEPTION

While the rationale for the Garner exception appears strongest in the case of shareholder derivative suits, courts have freely extended Garner to a wide range of non-derivative suits. Indeed, the Garner opinion itself supports the conclusion that the exception extends beyond shareholder derivative suits. The applicability of the Garner exception in non-derivative suits was put on a surer footing in Ward. In Ward, the Fifth Circuit expressly held that the Garner exception was not limited to shareholder derivative suits. In so holding, the Fifth Circuit rejected the Ninth Circuit's limitation of Garner to shareholder derivative suits in Weil v. Investment/Indicators, Research & Management. Courts' extension of Garner has not, however, been limited to non-derivative shareholder litigation. The Garner exception has been widely applied outside the corporate context to litigation involving a broad spectrum of fiduciary and quasi-fiduciary relationships.

This extension of the Garner exception assumes that the rationale for the exception, when applied in a derivative suit, is equally present in any suit brought by a shareholder or the beneficiary of a fiduciary duty. Although the validity of this assumption is not self-evident, many of the courts that have applied Garner outside the context of derivative suits do not fully assess whether the Garner exception's underlying rationale supports applying the exception in these different contexts. The following discussion will examine the cases that have

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137. In Garner, the shareholders joined their derivative claims with individual claims under federal securities regulations. See Garner v. Wolfinbarger, 430 F.2d 1093, 1095 (5th Cir. 1970). In a footnote, the court appears to indicate that the derivative nature of the claim is not a requirement for applying the Garner exception: "The District Court has not ruled on motions to dismiss the derivative claim. But our decision does not turn on whether that claim is in the case or out." Id. at 1097 n.11 (emphasis added).

138. 854 F.2d 780.

139. Id. at 786.

140. 647 F.2d 18, 23 (9th Cir. 1981). According to the court, "The Garner plaintiffs sought damages from other defendants in behalf of the corporation, whereas Weil seeks to recover from the corporation for herself ... Garner's holding and policy rationale simply do not apply here." In Ward, the Fifth Circuit rejected this narrow reading of Garner, stating that, "[u]nder Weil, the factors in the Garner good cause index are not even considered unless the suit is derivative in nature. We have rejected the Ninth Circuit's narrow interpretation of the types of suits covered by Garner." 854 F.2d at 786.

141. See infra Part V, Section B.

142. This lack of analysis likely results from most courts' interpretation of Garner as a "fiduciary-beneficiary" exception to the attorney client-privilege. See supra Part IV, Section A. Courts' broad reading of Garner allows them to apply the exception to any fiduciary-beneficiary relationship with little further analysis of whether the exception is appropriate for a particular type of suit.
extended Garner beyond derivative actions. Section A analyzes the extension of Garner to non-derivative shareholder suits, while Section B analyzes Garner's extension to suits between fiduciaries and their beneficiaries. The concluding section proposes a narrow reading of Garner that limits application of the exception to shareholder derivative actions.

A. Non-Derivative Shareholder Suits

Courts have applied the Garner exception in shareholder suits brought under federal securities laws, and suits by minority shareholders alleging wrongdoing by the corporation and its majority shareholders. Both of these types of cases are similar to derivative claims in that they involve conflicts between corporate management and shareholders. They differ significantly, however, in that the plaintiffs in these types of suits do not purport to represent the interests of the corporate entity or the collective interests of shareholders as a group.\(^\text{143}\) In contrast, plaintiffs in derivative suits sue on behalf of the corporation and, by extension, shareholders collectively.\(^\text{144}\)

1. Shareholder Suits Brought under Federal Securities Laws

Courts have reached differing conclusions as to whether the Garner exception is applicable in shareholder suits brought under federal securities laws.\(^\text{145}\) A possible explanation for this lack of unanimity is the differing nature of these claims and shareholder derivative suits. Claims brought under SEC Rule 10b-5 differ from derivative claims in two ways. First, Rule 10b-5 claims are the plaintiffs' individual claims. They are not brought on behalf of the corporate entity.\(^\text{146}\) Second, the cause of action created under 10b-5 is available only to purchasers or sellers of a corporation's securities.\(^\text{147}\) Thus, 10b-5 plaintiffs might

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143. See, e.g., Hamilton, supra note 8, at 507-10, 567-68.

144. Id. at 567-68. See supra text accompanying note 26.

145. These types of suits typically arise under Securities and Exchange Commission Rule 10b-5, which was promulgated under the authority of section 10(b) of the Securities Exchange Act of 1934. The text of the rule states:

- It shall be unlawful for any person, directly or indirectly, by use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,
- (1) to employ any device, scheme, or artifice to defraud;
- (2) to make any untrue statement of a material fact . . .
- in connection with the purchase or sale of any security.

See generally Hamilton, supra note 8, at 507.

146. See Hamilton, supra note 8, at 508.

147. See Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723 (1975) (holding that only purchasers or sellers of securities possess standing to sue under 10b-5).
represent only a small sub-class of the corporation’s shareholders: purchasers and sellers of the corporation’s securities during the time period covered by the suit.\textsuperscript{148} As a result, the plaintiff class in a 10b-5 action does not fully coincide with the corporation’s current shareholders as a group.\textsuperscript{149} Because of this lack of identity between the plaintiff class and current shareholders, interests of the two groups are likely to be adverse.\textsuperscript{150}

Despite the fact that the plaintiffs in 10b-5 suits might possess interests adverse to other shareholders and the corporate entity, many courts have held that the rationale of \textit{Garner} is applicable in 10b-5 suits.\textsuperscript{151} These courts appear to base their application of the \textit{Garner} exception on the presence of a fiduciary relationship between the corporation and corporate management on one hand, and \textit{individual} shareholders on the other.\textsuperscript{152} This rationale for applying \textit{Garner}, however, fails to resolve the conflict between the fiduciary duties owed to plaintiff shareholders and the fiduciary duties owed to non-plaintiff shareholders who have no claim under Rule 10b-5. Instead, these courts appear to hold that the duties owed to plaintiff shareholders in 10b-5 suits automatically prevail over the duties owed to non-plaintiff shareholders.

\textsuperscript{148} In fact, the plaintiffs in a 10b-5 suit need not be shareholders at the time the suit is brought. This reflects the fact that their cause of action arises not from their status as shareholders, but from their status as purchasers or sellers of the corporation’s securities.

\textsuperscript{149} For example, some of the plaintiffs might have sold their shares before the suit, in which case they are not current shareholders. Furthermore, the plaintiff class would not include current shareholders who purchased their shares prior to events alleged to violate 10b-5.

\textsuperscript{150} This follows because any recovery by the plaintiff class will cause losses to the corporation and diminish the value of the ownership of those shareholders that are not part of the plaintiff class.


\textsuperscript{152} \textit{See, e.g., Ward}, 854 F.2d at 785. The court in \textit{Ward} cites the “trustee-beneficiary” language in \textit{Garner} to support application of the good cause test in a 10b-5 action. The court, however, later cautions that the \textit{Garner} good cause test should be more strictly applied in 10b-5 actions: “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 circumstances, the motivations behind the suit are more suspect, and thus more subject to careful scrutiny.” \textit{Id.} at 786; \textit{see also In re LTV}, 89 F.R.D. at 606-07 (holding that the \textit{Garner} exception is applicable in a 10b-5 action because “[u]nlike an individual client, corporate management has duties which ultimately run to the benefit of stockholders”).

As discussed in Part IV, \S A \textit{supra}, the presence of a fiduciary duty between individual shareholders and the corporation and its management does not have a firm foundation in either the statutes or case law governing modern corporations. \textit{See supra} text accompanying notes 94-96.
The fiduciary-beneficiary rationale of these courts also suffers from an inherent contradiction. In a typical 10b-5 suit, the plaintiffs seek communications relating to proxy statements and other representations made before they purchased the defendant corporation's stock. At the time these communications were made, however, no fiduciary duty existed. The fiduciary duty did not arise until the plaintiffs actually purchased the corporation's stock.

Several courts have seized on this aspect of 10b-5 suits to support their conclusion that the Garner exception does not apply in individual suits brought under federal securities laws and regulations. According to these courts, the Garner exception is inapplicable in the absence of a fiduciary relationship. Since the crux of a private action under Rule 10b-5 involves conduct occurring prior to the point when the plaintiffs became shareholders — and, therefore, beneficiaries to a fiduciary duty — these courts conclude that Garner is inapplicable to 10b-5 claims.

These courts' rejection of Garner in the context of private securities litigation is not, however, tantamount to a rejection of the broad "fiduciary-beneficiary" interpretation of Garner. Presumably, these courts would apply the Garner exception in other cases where the interests of the plaintiff shareholders clash with the interests of other shareholders as long as the plaintiff shareholders can demonstrate that

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153. See, e.g., Cohen, 80 F.R.D. at 484 ("It is true that at the time of the allegedly fraudulent conduct the class members had not yet purchased stock and had therefore not yet entered the favored 'mutuality of interest' relationship with management.").

154. Of the courts applying the Garner exception to 10b-5 actions, only the court in Cohen, 80 F.R.D. at 480, attempted to address this contradiction. The court in Cohen attempted to overcome this contradiction by arguing that the plaintiffs' cause of action under 10b-5 did not accrue until they actually purchased the stock. 80 F.R.D. at 484. Since the cause of action accrued when the plaintiffs became beneficiaries of the fiduciary duty, the court argued that Garner was applicable. Id. The court's reasoning is unpersuasive because it confounds (1) the accrual of a cause of action with (2) the making of the allegedly privileged communications. For most courts, the fiduciary-beneficiary rationale of Garner requires that the fiduciary relationship exist at the time the communications were made. See supra text accompanying notes 69-73. The point when the cause of action accrues is therefore irrelevant.


156. See, e.g., Moskowitz, 128 F.R.D. at 637 ("[T]his court finds the existence of a fiduciary duty or mutuality of interest dispositive to the application of the Garner doctrine.").

157. See In re Atlantic Fin., 121 F.R.D. at 146 ("If the stock had not yet been purchased, a fiduciary relationship did not yet exist. Without a showing of a fiduciary relationship, the Garner rationale does not apply."). See also Moskowitz, 128 F.R.D. at 637 ("Since it appears from the record before the court that the plaintiff was not a shareholder at the time of the communications in question, the motion for wholesale production will be denied.").

158. See supra Part IV, Section A for a discussion of the "fiduciary" underpinnings of Garner.
the corporation owed them a fiduciary duty at the time of the allegedly wrongful conduct that is the subject of their suit.159

2. Suits Brought against Majority Shareholders

This reliance on the "fiduciary-beneficiary" interpretation is evidenced by other courts' application of the Garner exception in suits brought by minority shareholders alleging wrongdoing by a majority, or controlling shareholder.160 In contrast to Rule 10b-5 actions, the plaintiff shareholder can usually show that a fiduciary duty existed at the time of the events in question.161 As a result, courts have generally held that the Garner exception is applicable in these types of suits.162 This extension of Garner, however, fails to reflect the fact that the interests of the plaintiff shareholders in these cases — in contrast to the plaintiffs in a derivative action — do not necessarily coincide with the interests of other shareholders or the corporation.163

3. Reassessing the Extension of Garner to Non-Derivative Shareholder Suits

As discussed previously, the clash between the interests of the plaintiff shareholders and non-plaintiff shareholders in wholly private, non-derivative suits strongly supports the argument that courts should not apply Garner.164 In a derivative suit, the plaintiffs seek to vindicate wrongdoing against the corporation.165 The suit is on behalf of the corporation, and the proceeds of the suit revert directly to the

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159. These courts would apply the Garner exception in cases where a fiduciary duty exists at the time that the communications were made.


161. See, e.g., Hamilton, supra note 8, at 466 (“A number of states hold that controlling shareholders in a closely held corporation owe a duty to other shareholders that is akin to that owed by partners to each other.”); see also Heny & Alexander, supra note 35, at 651 (“Controlling shareholders . . . are usually subjected to fiduciary duties.”).

162. For example, in Fausek, the plaintiffs were former minority shareholders of the corporate defendant who were alleging that a majority shareholder and former corporate officer abused his position by attempting to “squeeze out all minority shareholders.” 965 F.2d at 128. The court held that Garner was applicable in this case because Tennessee law creates a fiduciary duty on the part of controlling shareholders for the benefit of minority shareholders. See also Valente, 68 F.R.D. at 369-70 (holding that Garner was applicable in a suit by a minority shareholder against the corporation's controlling shareholder because a fiduciary relationship existed at the time of the events in question). "It is no longer open to question that a majority shareholder who controls a corporation must not use his position to the undue disadvantage of the minority." Id. at 369.

163. See supra notes 26-28 and accompanying text.

164. See supra notes 26-28 and accompanying text.

corporation. Viewed in this manner, derivative suits benefit all shareholders as a group.\textsuperscript{166}

However, where the plaintiff shareholders seek to recover individually, as in 10b-5 actions, there appears to be little justification for elevating their interests above those of non-plaintiff shareholders.\textsuperscript{167} Even if one accepts the argument that management and the corporation owe special duties to individual shareholders,\textsuperscript{168} duties are also owed to non-plaintiff shareholders, who might be harmed by a large recovery. As a result, a strong argument can be made that the plaintiff shareholders in these types of cases are more similar to the third-party outsiders against whom \textit{Radiant Burners} and \textit{Upjohn} struck the balance strongly in favor of an unqualified corporate attorney-client privilege.\textsuperscript{169}

B. \textit{Extension of Garner to Non-Shareholder Litigation}

One of the most important results of courts relying on the general "fiduciary-beneficiary" interpretation of \textit{Garner} is the extension of the \textit{Garner} exception to non-shareholder suits. This extension exploits the fact that fiduciary relationships are not confined to intra-corporate relationships.\textsuperscript{170} Once \textit{Garner} is freed from the moorings of shareholder suits, it becomes a significant limitation on the attorney-client privilege across a potentially limitless range of fiduciary, and possibly quasi-fiduciary, relationships.\textsuperscript{171} This section examines the different types of non-shareholder cases in which the \textit{Garner} exception has been applied, and evaluates the development of a general "fiduciary-beneficiary" exception to the attorney-client privilege.

1. General and Limited Partnerships

Several courts have applied the \textit{Garner} exception in suits between partners and in suits by limited partners against the general
partner of the limited partnership. These courts have based their decision to apply Garner on the presence of fiduciary duties. However, the courts that have applied the Garner exception in the partnership context appear to distinguish between suits by limited partners and suits by partners in a general partnership.

At least one court has held that, in a suit involving partners in a general partnership, the Garner exception automatically forces disclosure regardless of whether the plaintiffs show good cause. This court based its abrogation of the good-cause requirement on its conclusion that the fiduciary duties owed by partners to one another are significantly stronger than the duties owed to corporate shareholders.

Another court, however, has held that the good-cause requirement exists in suits brought by limited partners against their limited partnership and the general partner. In Ferguson v. Lurie, the court distinguished Abbott by observing that the relationship between limited partners and a limited partnership more closely resembles the relationship between shareholders and a corporation than the relationship among partners in a general partnership. Because the strength of the duties in the limited partnership do not rise to the level of those in a general partnership, the court concluded that the plaintiff must make the usual showing of good cause in order to overcome the defendants' assertion of the attorney-client privilege.

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172. See, e.g., Fortson v. Winstead, McGuire, Sechrest & Minick, 961 F.2d 469, 475 n.5 (4th Cir. 1992) (holding that the Garner rationale is applicable to suits by a limited partner because of the fiduciary duty owed by the limited partnership's general partners). In Ferguson v. Lurie, 139 F.R.D. 362, 365 (N.D. Ill. 1991), the court held that the Garner exception was applicable to a suit by limited partners against the partnership's general partner: "In limited partnerships ... general partners do have a fiduciary obligation to the limited partners. Given that the plaintiffs have established the requisite fiduciary relationship ... the court must consider whether this relationship warrants the disclosure of communications otherwise protected by the attorney-client privilege." The court proceeded to analyze each of the Garner "good cause" indicia.

173. Abbott v. Equity Group, Nos. 86-4186, 86-3271, 86-3592, 1988 WL 86826, at *1 (E.D. La. Aug. 10, 1988) ("Because of the relationship existing between partners in the creation of a partnership, which we view as stronger than that existing between stockholder and corporation, we conclude that the bar preventing disclosure of attorney communications, as between partners, is not simply relaxed, but non-existent."). (emphasis added).

174. Ferguson, 139 F.R.D. at 366. For the court, the principle factor distinguishing limited partnerships from general partnerships is that limited partners — like corporate shareholders — enjoy limited liability, while the partners in a general partnership are jointly and severally liable for all partnership obligations. Id.

175. The court concluded that "given the important difference between general and limited partners, the court finds that limited partners should not be excepted from Garner's requirement of showing good cause before otherwise privileged documents are released to them." Id. at 365; see also Fortson, 961 F.2d at 475 n.3 (holding that the limited partnership could not assert the attorney-client privilege against limited partners upon a showing of good cause by the limited partners).
2. Suits By Beneficiaries of Corporate Pension Plans

The broad "fiduciary-beneficiary" formulation of the Garner exception has also prompted courts to apply the exception in suits brought by pension plan beneficiaries against pension plan trustees and the corporate sponsors of the plans. These courts base their extension of Garner to pension plan litigation on the fiduciary duties placed on the plan trustees by the Employee Retirement Income Security Act of 1974 (ERISA). One court, however, has held that Garner is inapplicable in a suit against a corporation that cancelled a benefits plan because the corporation did not operate the plan itself.

However, these courts have come to differing conclusions as to whether the plaintiff beneficiaries must show good cause. Several courts expressly reject the good cause requirement and allow automatic disclosure in suits by plan beneficiaries. These courts apparently base their rejection of the good cause requirement on a combination of the strength of the fiduciary relationship created by ERISA and on an assumption that the plan trustee — in contrast to corporate management — can claim little interest in obtaining legal advice free from the interference of plan beneficiaries. One court, however, applied Garner's good-cause requirement with no attempt to


177. 29 U.S.C. § 1001 et seq. See, e.g., Washington-Baltimore Newspaper Guild, 543 F. Supp. at 909 ("Under ERISA, the trustees of an employee benefit plan are fiduciaries who owe an undivided duty of loyalty to the participants in the benefit plan."); see also Jackson, 1991 WL 148756, at *2 ("[W]hen an attorney advises a fiduciary regarding the administration of an employee benefit plan, the client is not the fiduciary, but the beneficiaries of the plan. As a result, the courts did not allow the fiduciaries to assert the attorney-client privilege against the plan participants."). Furthermore, Garner might be applicable in ERISA suits even in cases where the plan beneficiaries are not the named plaintiffs. In Donovan v. Fitzsimmons, the court held that Garner was applicable in a suit where the Secretary of Labor was suing on behalf of plan beneficiaries. 90 F.R.D. at 586-87.

178. See In re Unisys Corp. Retiree Medical Benefits ERISA Litig., No. MDL 969, 1994 WL 6883 (E.D. Pa. Jan. 6, 1994). In this case, the plaintiff retirees brought suit claiming that their employer violated ERISA when it terminated its medical benefits plan. The court rejected application of the Garner exception because, it held, there was no fiduciary duty on the part of the employer: "It is well established that an employer does not owe its employees a fiduciary duty when it makes a decision to amend or terminate an employee benefit plan." Id. at *3.

179. See Jackson, 1991 WL 148751, at *3; Washington-Baltimore Newspaper Guild, 543 F. Supp. at 909 n.5. In Petz, 113 F.R.D. at 497, the court allowed disclosure of privileged communications even though it never expressly rejected the good cause requirement.

180. In Washington-Baltimore Newspaper Guild, the court observed that the relationship between the plan’s trustee and its beneficiaries is more direct than that between corporate managers and shareholders:
distinguish the fiduciary duties under ERISA from corporate fiduciary duties.\(^{181}\)

3. Suits by Union’s Membership against the Union

Courts have also applied the *Garner* exception in suits brought by union members against their national union.\(^{182}\) As with the other types of suits in which courts have applied *Garner*, these courts rely on the presence of fiduciary duties on the part of the union.\(^{183}\) Whether or not plaintiff union members must show good cause, however, is uncertain. In one case, the court suggests that the good cause requirement exists in the union context.\(^ {184}\) Another court, however, applied the exception without any mention of the good cause requirement.\(^ {185}\)

4. Litigation Between Insurers and Insureds

Courts have also applied the *Garner* exception in litigation between insurance companies and their insureds.\(^ {186}\) Unlike the other cases, however, at least one court appears to apply the *Garner* exception in this context even though it questions whether insurers owe their insureds a fiduciary duty.\(^ {187}\) Other courts base their application of *Garner* in this context on the presence of a fiduciary duty.

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Such a requirement is properly limited to a corporate setting, in which the management of a sizable corporation clearly cannot "please all of its stockholders all of the time," and management requires "protection from those who might second-guess or even harass ...." In a trustee relationship, on the other hand, there exists *no legitimate need for* a trustee to shield his actions . . . .

543 F. Supp. at 909 n.5 (emphasis added). The court also adds that: "[W]hile corporate managers perform duties which ‘run to the benefit ultimately of the stockholders,’ a pension plan trustee directly serves the fund beneficiaries." *Id.*


183. See, e.g., Boswell, 106 L.R.R.M. at *1 ([B]ecause the officers of [the union] stand in a fiduciary relationship to the [union] and its members, under the rationale of *Garner* v. Wolfinbarger, the [union’s] officers cannot assert the attorney-client privilege against [the plaintiff].); see also *Aguinaga*, 112 F.R.D. at 680 (‘Cases have uniformly held that a union’s duty of fair representation is a fiduciary duty.’).

184. See *Aguinaga*, 112 F.R.D. at 681 (‘The court has examined the nine factors enumerated in *Garner* that bear upon whether ‘good cause’ has been shown.’).

185. See *Boswell*, 1981 WL 27188, at *1 (suggesting that the presence of a fiduciary duty on the part of the union is sufficient to apply the *Garner* exception regardless of good cause).


187. *Id.* at *2 (‘Regardless of whether the duty of the insurer in Illinois is technically fiduciary or good faith and fair dealing, we believe . . . that the *Garner* approach is applicable.’). This interpretation of *Garner* seems to imply that the exception is available outside the context of a statutory or common law fiduciary relationship. *See supra* notes 76-79 and accompanying text.
5. Other Fiduciary Relationships

In addition to the relationships discussed above, courts have applied Garner to other fiduciary relationships. One court applied Garner to a suit between joint venturers.188 Another court applied Garner to a suit between a bankruptcy creditors' committee and the parties it represented.189 Still another court has applied Garner to force a corporation to disclose privileged material to the corporation's bondholders.190 Finally, courts have applied Garner in cases involving contractual relations in which the court has determined that the nature of the contractual relationship gives rise to a fiduciary duty.191

C. Assessing the Emerging “Fiduciary-Beneficiary” Exception to the Attorney-Client Privilege

The cases discussed in this section extend the Garner exception to non-shareholder fiduciary litigation with little discussion of whether the policies underlying the exception favor extending the exception outside the corporate context. This section assesses the emergence of a general fiduciary-beneficiary exception to the attorney-client privilege. The central focus is whether any justification for an independent fiduciary-beneficiary exception exists apart from the rationale underlying the Garner exception. Absent any independent justification for a fiduciary-beneficiary exception, Garner provides little support for this rapidly expanding exception to the attorney-client privilege.

188. See Western Gas Processors, Ltd. v. Enron Gas Processing Co., No. 87-A-1472, 1989 WL 20529, at *7 (D. Colo. Mar. 6, 1989) ("In light of the close relationship of trust and confidence created by a joint venture . . . I hold that the fiduciary relationship between joint venturers outweighs the interests protected by the attorney-client privilege.").

189. See In re Baldwin-United Corp., 38 B.R. 802, 804 (Bankr. S.D. Ohio 1984) (holding that a "narrower construction of the [attorney-client] privilege is required where disclosure is sought by those who are so represented" by the committee); see also In re Braniff, Inc., 153 B.R. 941 (Bankr. M.D. Fla. 1993). But cf. In re Subpoenas Duces Tecum Dated March 16, 1992, 978 F.2d 1159 (9th Cir. 1992) (holding that a creditors' committee could assert the attorney-client privilege against a former officer of the debtor because there was no fiduciary duty).

190. See Broad v. Rockwell International Corp., Fed. Sec. L. Rep. (CCH) ¶ 95,894 (N.D. Tex. Feb. 18, 1977). As with the other cases discussed in this section, the court in Broad relied on the presence of a fiduciary duty running from the corporation to its bondholders.

1. Is there a Rationale for a Fiduciary-Beneficiary Exception to the Attorney-Client Privilege?

Falling back to Wigmore's balancing test, the benefits of an unqualified attorney-client privilege for fiduciaries seems to strongly outweigh the costs of the privilege. As discussed earlier, one of the primary benefits of the attorney-client privilege is the promotion of communications between an attorney and her client.192 Promoting attorney-client communications seems most valuable when the client is subject to complex duties and obligations imposed by statute or common law, such as in the case of fiduciaries.193 In contrast to many contractual relationships, fiduciaries are subject to strict obligations with respect to their beneficiaries.194 Yet, the exact scope and nature of a fiduciary's obligations in a given context are often far from clear.195 It stands to reason, therefore, that the public as a whole might benefit from an unqualified attorney-client privilege that encourages fiduciaries to consult with legal experts and learn their legal obligations.196

On the other hand, the arguments that might be advanced in favor of limiting fiduciaries' attorney-client privilege are not sufficiently convincing to counterbalance the benefits of the privilege.

192. See supra note 18 and accompanying text. Another benefit cited by commentators is that the privilege increases the accuracy of the judicial system by increasing the preparedness of attorneys. See Developments in the Law, supra note 15, at 1505.

193. See In re Grand Jury Subpoena Duces Tecum Dated Nov. 16, 1974, 406 F. Supp. 381, 388 (S.D.N.Y. 1975) ("The [attorney-client] privilege is, after all, born of the law's own complexity. The layman's course through litigation must at least be evened by the assurance that he may, without penalty, invest his confidence and confidences in a professional counsellor."). Similarly, as discussed in Part II, the Supreme Court, in Upjohn, emphasized the public benefits that might accrue by encouraging corporations to learn their obligations under complex regulatory schemes. See supra note 20.

194. See, e.g., RESTATEMENT [SECOND] OF AGENCY §§ 387-96 (1957) (detailing a fiduciary's strict obligations of loyalty and confidentiality). Under the Restatement, fiduciaries are prohibited from entering into transactions that conflict with the interests of their beneficiaries, and must disgorge any profits received from a transaction executed on behalf of his beneficiary. Id; see also Meinhard v. Salmon, 164 N.E. 545, 546 (N.Y. 1928) ("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.").


196. See Saltzburg, supra note 19, at 847 ("Fiduciary relationships may create special duties that require professionals to exercise unusual or special care. That is more, not less, reason to give fiduciaries full opportunity to consult openly with counsel.").
While it is true that fiduciaries owe heightened obligations of loyalty and confidentiality to their beneficiaries, it is not clear why the presence of these duties should support abrogating the fiduciary's privilege in subsequent litigation with the beneficiary.\textsuperscript{197} As noted by one commentator, the term fiduciary "has no talismanic quality that dictates abdication of the usual approach to attorney-client privilege whenever the word is invoked."\textsuperscript{198} This statement simply reflects the fact that the existence of a fiduciary relationship, in itself, says nothing about the policies underlying the attorney-client privilege.

In fact, the adoption of a qualified privilege based on the presence of a fiduciary duty is likely to suffer from such uncertainty of application and unpredictability as to render the privilege virtually useless.\textsuperscript{199} Since the fiduciary-beneficiary exception only applies in the presence of a fiduciary duty, a party to a relationship must predict whether a court would find that the relationship gives rise to such a duty. The attributes of a fiduciary relationship are not, however, clearly etched in stone. The presence of a fiduciary duty is often a question of fact,\textsuperscript{200} and the rules governing when a duty arises are often unclear.\textsuperscript{201} Moreover, courts' reference to Garner's "good cause" indicia give rise to an additional level of uncertainty.\textsuperscript{202}

2. The Relevance of Garner

Given the relative advantages of maintaining an unqualified attorney-client privilege for fiduciaries, the Garner decision itself provides little support for reaching an alternative conclusion. The Garner decision is strongly rooted in the unique problems of intra-corporate

\textsuperscript{197} In fact, in many cases a fiduciary's duties to his beneficiary might actually be curtailed in subsequent litigation with his beneficiary. For example, under the Model Rules of Professional Conduct, attorneys owe their client strict duties of loyalty and confidentiality. In fact, these obligations extend beyond the termination of the representation. See Model Rules of Professional Conduct Rules 1.6, 1.8 (1983). When an attorney becomes involved in litigation with a former client, however, she is no longer required to maintain her former client's confidences. See Model Rule of Professional Conduct Rule 1.6(b)(2) ("A lawyer may reveal such information to the extent the lawyer reasonably believes necessary . . . . to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client . . . . ").

\textsuperscript{198} See, e.g., Saltzburg, supra note 19, at 846.

\textsuperscript{199} In Upjohn, the Supreme Court emphasized the importance of predictability in defining and applying the attorney-client privilege. See supra note 14 and accompanying text.

\textsuperscript{200} See, e.g., Quintel Corp. v. Citibank, 567 F. Supp. 1353, 1362-63 (S.D.N.Y. 1983). The court in Quintel used almost a page in the opinion examining the relationship between the plaintiff and the defendant to determine whether the defendant was bound by a fiduciary duty.

\textsuperscript{201} See Cooter & Freedman, supra note 170, at 1045-46 ("Legal theorists and practitioners have failed to define precisely when such a relationship exists, exactly what constitutes a violation of this relationship, and the legal consequences generated by such a violation.").

\textsuperscript{202} See infra Part VI.
relationships. In contrast, the nature of the attorney-client privilege in the fiduciary context is sufficiently different from the corporate setting of Garner to call into question whether Garner is adequate precedent for a broad fiduciary-beneficiary exception.

One key criticism of the corporate attorney-client privilege is that corporate management will consult attorneys even in the absence of the privilege. Fiduciaries, on the other hand, are not always corporations. In many cases, a fiduciary is an individual. Although fiduciaries, like corporations, are governed by complex obligations, individual fiduciaries are not likely to possess the daily institutional reliance on attorneys that exists in corporations. Furthermore, individual fiduciaries can claim privacy interests that do not exist in the corporate context. As a result, the benefits of an unqualified attorney-client privilege are arguably stronger in the case of a fiduciary than with a corporation.

D. Limiting Garner’s Reach

As demonstrated above, the extension of Garner outside the context of derivative litigation poses significant practical and theoretical problems. These problems suggest that courts may have been too hasty in extending Garner, especially to the extent that the exception has been extended beyond corporate litigation. This section proposes a more confined version of the Garner exception that is limited to shareholder suits seeking to vindicate either (1) rights common to all shareholders, or (2) rights of the corporation. This approach is similar to the approach of the Ninth Circuit in Weil.

1. Striking a Better Balance of Interests

Placing a limitation on the reach of the Garner exception produces a better balance among the interests of corporate constituents.

203. See supra text accompanying notes 39-46.
204. See supra note 25 and accompanying text.
205. For example, an attorney is often deemed to owe a fiduciary obligation to his or her clients. See Wolfram, supra note 100, at 145-48.
206. Corporations employ attorneys that are usually key participants in the corporation’s daily activities.
207. See Alexander, supra note 25, at 223 (“But the concerns about human dignity and autonomy that have prompted most writings about privacy are minimal in the corporate context.”).
208. See Weil v. Investment/Indicators, Research and Management, Inc., 647 F.2d 18, 23 (9th Cir. 1981) (“Weil is currently a shareholder . . . and her action is not a derivative suit . . . Garner’s holding and policy rationale simply do not apply here.”).
As observed in Section II of this article, limiting the corporate privilege to shareholder derivative suits reflects the notion that shareholders, as a collective whole, share an almost complete identity with the corporate entity.209 Thus, when shareholders’ collective interests are contrasted against management’s much less significant interests, the balance between the two strongly favors protecting shareholders’ collective rights by limiting management’s ability to invoke the corporation’s privilege against shareholders.210 Consequently, when limited to the two types of cases set out above, Garner presents a defensible framework for allocating powers among corporate constituent groups.

In contrast, as noted earlier, the “expanded version” of Garner may fail to strike an adequate balance among the various interests when the Garner exception is applied outside the context of derivative suits. Outside the context of derivative suits, the interests of the plaintiff shareholders, non-plaintiff shareholders, and management each diverge.211 Thus, shareholders, as a collective whole, no longer possess a united interest. Given this divergence in the shareholders’ interests, Garner and its progeny provide no doctrinally defensible basis for favoring one shareholder group over another.

Finally, limiting Garner to the corporate arena prevents its use as a general “fiduciary-beneficiary” exception to the attorney-client privilege. As noted earlier, there is no independent rationale for creating an exception to the attorney-client privilege in litigation between fiduciaries and their beneficiaries.212

2. Easing Unpredictability

Limiting the reach of Garner also eases the intractable problem of unpredictability. Since both courts and corporations will be on notice that the exception is only available in particular contexts, both can

209. This follows from the fact that shareholders collectively are the ultimate owners of the corporation. See supra text accompanying note 22. In this context, shareholders’ collective interests clearly exceed the interests of the “outsider” plaintiffs whose access to privileged material was sharply curtailed in Upjohn and Radiant Burners. See supra Part II.

210. Shareholders’ collective rights likely would outweigh management’s rights because of management’s small financial stake in the corporation. See Garner v. Wolfinbarger, 430 F.2d 1093, 1101 (5th Cir. 1970) (“It is difficult to rationally defend the assertion of the privilege if all, or substantially all, stockholders desire to inquire into attorney’s communications with corporate representatives who have only nominal ownership interests, or even none at all.”) (emphasis added).

211. See supra notes 22-25 and accompanying text.

212. See supra Part V, Section C.
adequately predict how the exception will apply in a given case. Corporation's, fiduciaries, and "quasi-fiduciaries" would no longer face the specter of uncertainty over whether communications with counsel might later be discoverable under Garner.

VI. Garner's "Good Cause" Test

Up to this point, the primary focus has been on Garner's scope and doctrinal underpinnings. The present section shifts the focus more to the practical aspects of applying Garner's "good cause" requirement. Application of the Garner exception requires that the parties seeking the privileged material show "good cause" for the disclosure. The nine "indicia" proposed by Garner as a guide for determining whether a party seeking allegedly privileged communications has shown "good cause" to pierce the attorney-client privilege have not received consistent treatment by courts. As a result, application of the Garner exception is often unpredictable. This section examines (1) variations in how courts apply the Garner indicia, (2) treatment of communications relating to the instant litigation, and (3) critiques of Garner's nine indicia by courts and commentators.

A. Courts' Application of the Garner Indicia

In isolation, the term "good cause" contains little analytic content. Based on this term alone, neither courts nor corporate management have adequate guidance as to when a party has shown sufficient good cause to overcome management's assertion of the corporation's attorney-client privilege. The nine indicia listed by the Garner court provide some assistance in deciding the issue. However, since courts vary in how they apply these indicia, much of the guidance provided by Garner is lost.

213. As discussed earlier, Garner's many ambiguities create a significant amount of uncertainty over when and how the exception is to be applied. See supra Part IV.
214. Garner, 430 F.2d at 1104.
215. One reason for the inconsistent treatment can be traced to the qualifications that the Garner court attaches to its list of indicia. In setting out its nine indicia, the court emphasizes that "[t]here are many indicia that may contribute to a decision of presence or absence of good cause." Id. at 1104 (emphasis added). The court's language clearly suggests that the nine indicia listed in the opinion are neither exclusive nor mandatory. Id.
216. See, e.g., Shirvani v. Capital Investing Corp. 112 F.R.D. 389, 390 (D. Conn. 1986) ("That rather vague 'good cause' exception, however, was ill-defined in origin and has been troublesome in application.").
217. See Garner, 430 F.2d at 1104 (listing nine indicia that courts may consider in determining whether shareholders have shown good cause to overcome the corporation's attorney-client privilege).
The most significant variance among courts is the degree to which they consider each of the nine indicia listed in Garner. Some courts carefully consider and weigh all nine indicia. Other courts, however, highlight only one or two indicia that they deem important. Finally, several courts have purported to find good cause without any evidence that they considered the Garner indicia, or any other indicia.

This inconsistency is compounded by the holdings of some courts that the party seeking privileged communications is not required to show good cause outside the corporate context. For these courts, the mere presence of a fiduciary relationship appears to be sufficient to prevent the fiduciary from asserting the attorney-client privilege against its beneficiary. While the holdings of these courts represent a more extensive qualification of the corporate attorney-client privilege, the holdings do possess the benefit of predictability.

B. After-the-Fact Communications

Two of the indicia listed in the Garner opinion are (1) "whether the communication is of advice concerning the litigation itself," and (2) "whether the communication related to past or to prospective actions." These two indicia focus on the extent to which the communications sought involve either "after-the-fact" investigations of the incidents in question or "after-the-fact" consultations in preparation for litigation. These specific factors are examined separately here.

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219. See, e.g., Fausek v. White, 963 F.2d 126, 133 (6th Cir. 1992) (finding "good cause" based on the plaintiffs' 40% interest in the corporation and the fact that the information sought was not readily available from other sources); Bailey v. Meisterbrau, Inc., 55 F.R.D. 211, 214 (N.D. Ill. 1972) (holding that good cause was present because plaintiff's claim was colorable and because the information sought was not available from other sources).


221. See, e.g., Washington-Baltimore Newspaper Guild, Local 35 v. Washington Star Co., 543 F. Supp. 905, 909 n.5 (D.D.C. 1982) ("Such a [good cause] requirement, in this Court's view, is properly limited to a corporate setting. . . .")

222. Id. ("[N]o such showing of 'good cause' has ever, to our knowledge, been required under the common law of trusts.").

223. 430 F.2d at 1104.

224. See, e.g., In re LTV Sec. Litig., 89 F.R.D. 595, 607 (N.D. Tex. 1981) ("The class here seeks after-the-fact communications concerning offenses already completed; that is, communications exchanged between the party alleged to have committed the offenses and an attorney acting in his professional capacity to represent the party in proceedings involving the alleged offenses.").
because the distinction they draw appears to have significant influence on courts.\textsuperscript{225}

Most courts decline to allow disclosure of after-the-fact communications.\textsuperscript{226} One court argued that allowing such disclosures could create a strong disincentive for corporations to investigate wrongdoing by its officers and employees.\textsuperscript{227} The same court also noted that, at the time that after-the-fact communications occur, "the interests of the corporation . . . are not necessarily coincidental with shareholder plaintiffs."\textsuperscript{228} The rationale for restricting access to after-the-fact communications, therefore, corresponds with Wigmore's balancing approach. Because of the nature of after-the-fact communications and the potential for the use of such communications in incipient litigation, corporations might decline to freely consult with counsel absent some assurance of confidentiality.\textsuperscript{229} None of the cases surveyed for this paper expressly applied the Garner exception to after-the-fact communications.

C. Critiques of the Garner Indicia

Some courts and commentators have strongly criticized the "good cause" indicia set out in Garner.\textsuperscript{230} Much of this criticism, however, appears to stem from the inconsistencies in courts' application of the

\textsuperscript{225} The Garner decision does not explain its rationale for selecting these two factors. These two factors, however, seem closely related to the policies underlying the crime-fraud exception and the attorney work-product immunity. See, e.g., Fed. R. Civ. P. 26(b)(3) (codification of work-product immunity); Hickman v. Taylor, 329 U.S. 495 (1947) (holding that attorney work product is subject to a qualified immunity from discovery). In Hickman the Court stated that "[w]ere [work-product] open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten. . . . Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial." Id. at 511.

\textsuperscript{226} See, e.g., In re LTV, 89 F.R.D. at 608; In re International Systems and Controls Corp. Sec. Litig., 693 F.2d 1235 (5th Cir. 1982) (holding that once litigation is sufficiently foreseeable so as to invoke work-product protections, the Garner exception is not applicable); Sandberg v. Virginia Bankshares, Inc., 979 F.2d 332, 350 (4th Cir. 1992) (finding the privilege non-assertible because the communication occurred while the entities remained business adversaries before their merger). Other courts considered these two indicia, but concluded that the communications sought where not after-the-fact consultations or investigations. See, e.g., Quintel Corp. v. Citibank, 567 F. Supp. 1357, 1364 (S.D.N.Y. 1983) ("Within the boundaries enumerated above, there is no danger of revealing advice concerning this litigation.").

\textsuperscript{227} In re LTV, 89 F.R.D. at 608 ("Forced disclosure of counsel’s remedial advice would do great injury to the corporation’s interest in self-investigation and preparation for litigation.").

\textsuperscript{228} See supra notes 10-14 and accompanying text.

\textsuperscript{229} See supra note 19, at 832 ("[I]t is not self-evident why these criteria were chosen at all."). Shirvani, 112 F.R.D. at 390 (describing the good cause test as “ill-defined in origin” and “troublesome in application”).
The criticism also stems, in part, from the fact that these indicia were formulated in the context of a shareholder derivative suit. With the extension of the Garner exception beyond shareholder derivative suits, courts must apply the good cause requirement in suits involving relationships and fact patterns quite different from the facts and relationships at issue in Garner. In these cases, many of the individual indicia might not be relevant.

When the Garner indicia are closely examined, it is apparent that they were designed to thwart the “strike suit” problem. The Garner court seemed to be keenly aware that the Garner exception might be used to facilitate strike suits. When faced with the prospect of divulging privileged communications, corporate management might be more inclined to settle with the plaintiff shareholders, even if the plaintiffs hold a relatively insignificant amount of stock and their claims have little merit. By focussing courts’ attention on the percentage of share ownership represented by the plaintiffs, the colorability of the claims, and the bona fides of the plaintiffs, the Garner court clearly appears to be addressing the strike suit problem. Consequently, assessing the Garner indicia without considering this fact leads many critics of the indicia astray.

Instead, a more useful alternative might be to reformulate the nine individual Garner criteria based on the general policies or rationale they reflect. Courts could then generate a more generalized and flexible set of criteria. A good example is the court’s restatement of the Garner indicia in In re Pfizer Securities Litigation. In Pfizer, the court relied on a four-part inquiry to determine whether the plaintiff had shown “good cause”: “(1) the discovering party’s stake in the fiduciary relationship; (2) the apparent merit of the claim; (3) the need of the discovering party for the information; and (4) the nature of the communication itself.” This formulation of the “good cause” test is more advantageous than the nine-factor test because it more easily

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231. See, Saltzburg, supra note 19, at 832 ("[T]he court’s indicia are so vague as to make it almost impossible for management to know when the statements they make to counsel might be revealed.").

232. Strike suits are suits that have little merit or support, and which are brought purely for their settlement, or nuisance value. See Robert C. Clark, Corporate Law § 15.2 (1986).

233. See generally Note, Extortionate Corporate Litigation: The Strike Suit, 34 Colum. L. Rev. 1308 (1934) (one of the first descriptions of the strike suit problem).


235. Id. at *13. Based on these four factors, the court held that good cause had not been shown because the information was available from other sources. Id.
translates to non-derivative shareholder suits and suits between beneficiaries and fiduciaries. This version is more generally applicable because it focuses on the core ideas that the nine factor *Garner* test expresses in more specific, concrete factors.\(^{236}\) This greater generality is also, however, the principal disadvantage of the “short” version of the good cause test. The short version of the good cause test — while more flexible — provides courts and corporate management with little guidance or predictability as to how the *Garner* good cause test should be applied.\(^{237}\)

VII. Conclusion

The *Garner* exception to the attorney-client privilege emerged from the Fifth Circuit’s effort to forge a compromise between corporate management’s obvious need to manage the affairs of the corporation free from unnecessary harassment and the need of corporate shareholders to oversee and control the agents who administer their investment. Given the uncertainty over the corporate attorney-client privilege’s effectiveness in increasing management’s consumption of legal services, *Garner*’s qualification of the privilege is defensible when it is applied to shareholder derivative suits. In contrast to *Upjohn* and *Radiant Burners*, the plaintiffs in a derivative action are not third party “outsiders” attempting to recover from the corporation for their own gain.

\(^{236}\) For example:

1. the number of shareholders requesting allegedly privileged communications and the percentage of stock they own
   
   This factor is closely tied with the plaintiffs’ stake in the fiduciary relationship.

2. the bona fides of the shareholders, and

3. the nature of the shareholders’ claim and whether it is obviously colorable, and

4. whether, if the shareholders’ claim is of wrongful action by the corporation, such action is criminal, or illegal but not criminal, or of doubtful legality.

These three factors, on the other hand, focus the court’s attention on the apparent merit of the plaintiffs’ claims.

5. the apparent necessity or desirability of the shareholders having the information and the availability of the information from other sources.

This factor prompts the court to gauge the plaintiffs’ need for the communications they seek.

6. whether the communications relate to past or 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, and

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

These last four factors address the nature of the communications.

\(^{237}\) This unpredictability strongly supports the argument that the *Garner* exception to the attorney-client privilege should be limited to shareholder derivative suits. See infra Part V, Section C.
The *Garner* exception went astray, however, when courts aggressively expanded the reach of the exception beyond derivative suits to claims involving the purely personal interests of the plaintiffs. The extension of *Garner* has also undermined the attorney-client privilege by decreasing the predictability of the privilege's protections. In contrast to plaintiffs in derivative actions, these plaintiffs are more closely related to the "outsider" of *Upjohn* and *Radiant Burners*. As a result, the problems accompanying the recent expansion of *Garner* strongly support a limitation of the exception to derivative suits.