The attorney-client privilege is among the oldest and most revered privileges for confidential communications. The privilege is necessary to ensure that a client receives competent legal advice by encouraging full disclosure to the lawyer without fear that the lawyer will be compelled to testify against him or her. In 1981, the U.S. Supreme Court held that the privilege was also available for corporations to assert against their shareholders. However, the privilege is not absolute.

In the seminal case of Garner v. Wolfinbarger, the U.S. Court of Appeals for the Fifth Circuit held that shareholders may overcome this privilege upon a showing of "good cause." Commonly referred to as the Garner exception, the doctrine has been applied to a variety of different fiduciary relationships. However, until the Delaware Supreme Court's ruling in Wal-Mart Stores, Inc. v. Indiana Electrical Workers Pension Trust Fund IBEW, the exception has never been expanded to allow for shareholders to obtain privileged documents in a pre-litigation Section 220 books and records demand.

While shareholders have the right to search records for a proper purpose, such as the investigation of fraud, Section 220 actions are often criticized as fishing expeditions. Although shareholder litigation serves an important corporate accountability function, there are many other measures that help meet the same end. This Comment analyzes the Delaware Supreme Court's unprecedented expansion of the Garner exception and argues that it is inconsistent with the spirit and purpose behind the doctrine. This Comment concludes by urging the General Assembly to overrule Wal-Mart or at least limit its holding solely to the most worthy of plenary suits.
TABLE OF CONTENTS

I. INTRODUCTION ................................................................. 678

II. BACKGROUND .................................................................. 680
    A. The Attorney-Client Privilege in the Corporate Setting ............. 680
       1. The Attorney-Client Privilege Generally ......................... 680
       2. The Garner Exception and the Attorney-Client Privilege
          in the Corporate Setting .................................................. 682
          a. Adoption of Garner .................................................. 683
          b. Treatment of Garner ............................................... 684
    B. Section 220 .................................................................... 685

III. ANALYSIS OF THE WAL-MART DECISION ..................... 687
    A. Factual and Procedural History .......................................... 687
    B. Parties' Contentions ......................................................... 690
    C. The En Banc Decision ....................................................... 691
       1. Wal-Mart's Challenge of the Scope .................................. 691
       2. Garner Exception Adopted ............................................. 693
       3. Garner Exception Applied ............................................. 695
       4. Work-Product Doctrine ................................................ 696
       5. Scope of Relief ................................................................ 696
    D. Reactions to Wal-Mart ....................................................... 697

IV. EVALUATION ................................................................. 699
    A. The Garner Exception Was Never Intended to Apply to
       Section 220 Actions ........................................................ 699
    B. Consequences and Call on the General Assembly ................. 702

V. CONCLUSION ................................................................. 703

I. INTRODUCTION

Dating back to ancient Rome, the attorney-client privilege is not only the oldest of the privileges, but it is also among the most revered. The privilege is necessary to ensure that a client is able to speak openly and candidly with her attorney, so that the attorney is able to accurately assess the client's situation and represent her both avidly and

---

1 See Jack P. Freidman, Is the Garner Qualification of the Corporate Attorney-Client Privilege Viable After Jaffee v. Redmond?, 55 BUS. LAW. 243, 244-45 (1999).
competently. However, this privilege is not absolute, particularly in the corporate context.

In 1970, the U.S. Court of Appeals for the Fifth Circuit established in *Garner v. Wolfinbarger* that otherwise privileged communications could be discovered by shareholders in a derivative suit upon a showing of good cause. The *Garner* exception is a balancing test composed of nine factors that weigh the need of the shareholders with the corporation's interest in confidentiality. While widely accepted, the scope of the exception has been incredibly controversial. Some jurisdictions have completely rejected *Garner* or have limited its holding to shareholder derivative suits. Some courts have expanded the *Garner* holding far beyond the corporate arena and into other fiduciary relationships such as public officials, partnerships, and pension plans.

In perhaps an unsurprising decision, the Delaware Supreme Court affirmatively adopted the *Garner* exception to attorney-client privilege in *Wal-Mart Stores, Inc. v. Indiana Electrical Workers Pension Trust Fund IBEW*. The ruling forced defendant Wal-Mart to hand over seven years of privileged documents to the shareholder plaintiff. However, what shocked many practitioners was that Wal-Mart was

---


3 See id. at 1219.

4 Garner v. Wolfinbarger, 430 F.2d 1093, 1103-04 (5th Cir. 1970).

5 This Comment refers to the rule set forth in *Garner v. Wolfinbarger* as the "*Garner* exception." See id. at 1104.

6 Id.

7 See Friedman, *supra* note 1, at 243.

8 E.g., Wells Fargo Bank, N.A. v. Superior Court, 990 P.2d 591, 594 (Cal. 2000) (holding that the attorney-client privilege is a legislative creation, and therefore the court has no power to recognize an implied exception to it).

9 E.g., Weil v. Inv./Indicators, Research & Mgmt., Inc., 647 F.2d 18, 23 (9th Cir. 1981) (declaring to extend *Garner* to allow a former shareholder intending to sue in an individual capacity to obtain privileged documents).

10 E.g., *In re Witness Before Special Grand Jury 2000-2*, 288 F.3d 289, 290 (7th Cir. 2002).


14 95 A.3d 1264, 1278 (Del. 2014).

15 See id. at 1270-71, 1278.
forced to turn over privileged documents not during discovery in a plenary suit, but in a pre-litigation Section 220 demand.\textsuperscript{16}

First, this Comment will review the background of the corporate attorney-client privilege and the \textit{Garner} exception.\textsuperscript{17} Second, it provides a background on demands made by shareholders to review corporate books and records under Section 220 of the Delaware General Corporation Law ("DGCL"),\textsuperscript{18} the portion of the Delaware Code that governs corporate law in the state of Delaware.\textsuperscript{19} Third, this Comment analyzes the Supreme Court's ruling in \textit{Wal-Mart Stores, Inc. v. Indiana Electrical Workers Pension Trust Fund IBEW}.\textsuperscript{20} Fourth, it provides a reactionary section, which discusses the post-\textit{Wal-Mart} thoughts of practitioners and academics across the country.\textsuperscript{21} Finally, this Comment concludes by arguing that the fiduciary exception to attorney-client privilege was never intended to apply to pre-litigation Section 220 demands,\textsuperscript{22} and will urge the General Assembly to overrule \textit{Wal-Mart} or at least limit its holding solely to plenary suits.\textsuperscript{23}

\section{II. Background}

\subsection{A. The Attorney-Client Privilege in the Corporate Setting}

1. The Attorney-Client Privilege Generally

The attorney-client privilege is among the oldest and most established evidentiary privileges known to Anglo-American jurisprudence.\textsuperscript{24} Every state recognizes the attorney-client privilege, and most states have codified the privilege through statute or evidentiary

\begin{flushright}
\footnotesize
16\textsuperscript{See, e.g.,} \textit{Delaware Supreme Court Extends Shareholder Books and Records Inspection Rights to Privileged Internal Investigation Documents, CLIENT ALERT} (King \& Spalding LLP, Atlanta, Ga.), Aug. 5, 2014, at 1-3, archived at http://perma.cc/3A6B-5MA2 [hereinafter Delaware Supreme Court Extends Inspection Rights].
17\textsuperscript{See infra Part II.A.}
18\textsuperscript{DEL. CODE ANN. tit. 8, § 220 (2006).}
19\textsuperscript{See infra Part II.B.}
20\textsuperscript{See infra Part III.A-C.}
21\textsuperscript{See infra Part III.D.}
22\textsuperscript{See infra Part IV.A.}
23\textsuperscript{See infra Part IV.B.}
\end{flushright}
rule. In Delaware, the privilege is codified in Delaware Rule of Evidence 502. This rule provides that, unless otherwise waived, a communication between a client and her attorney will be protected by the attorney-client privilege if that communication was made for the purpose of seeking legal advice where that communication is intended to be confidential.

The purpose of the privilege is "to encourage full and frank communication" between attorneys and their clients. The policy underlying such a privilege is to encourage clients to seek legal advice candidly so that lawyers are fully and completely informed in order to render the best possible legal services to that client. Theoretically,

---

26 Subsections (b) and (c) of Delaware Rule of Evidence 502 provide a brief definition of this privilege and who has standing to assert it:

(b) General rule of privilege. A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client (1) between the client or the client's representative and the client's lawyer or the lawyer's representative, (2) between the lawyer and the lawyer's representative, (3) by the client or the client's representative or the client's lawyer or a representative of the lawyer to a lawyer or a representative of a lawyer representing another in a matter of common interest, (4) between representatives of the client or between the client and a representative of the client, or (5) among lawyers and their representatives representing the same client.

(c) Who may claim the privilege. The privilege under this rule may be claimed by the client, the client's guardian or conservator, the personal representative of a deceased client or the successor, trustee or similar representative of a corporation, association or other organization, whether or not in existence. A person who was the lawyer or the lawyer's representative at the time of the communication is presumed to have authority to claim the privilege but only on behalf of the client.

Del. R. Evid. 502(b)-(c).
28 "A 'client' is a person, public officer or corporation, association or other organization or entity, either public or private, who is rendered professional legal services by a lawyer, or who consults a lawyer with a view to obtaining professional legal services from the lawyer." Del. R. Evid. 502(a)(1).
29 "A 'lawyer' is a person authorized, or reasonably believed by the client to be authorized, to engage in the practice of law in any state or nation." Del. R. Evid. 502(a)(3).
30 "A communication is 'confidential' if not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication." Del. R. Evid. 502(a)(2).
without the privilege, every communication with an attorney creates evidence that could potentially be used by others. Although the privilege is not absolute, the general purpose is to "promote broader public interests in the observance of law and administration of justice."35

2. The Garner Exception and the Attorney-Client Privilege in the Corporate Setting

In Upjohn Company v. United States, the U.S. Supreme Court held that although a corporation is not a natural person, it is entitled to assert the attorney-client privilege.36 Defining who the client is in a corporate setting, however, presents a unique difficulty because a corporation operates as a legal fiction: it lacks the ability to speak for itself.37 Courts have ruled that the power to assert this privilege lies with the directors and officers of the corporation where the party seeking

---

33 See Saltzburg, supra note 32, at 283:
If there were no privilege, conscientious lawyers, employed to provide assistance to clients, might well warn their clients to be careful about what they say. To avoid creating adverse evidence, clients and their lawyers might make an extensive effort to cast statements in a hypothetical form, in the hope that any person with an adverse interest would find the statements too nebulous to be useful.

34 For example, communications with an attorney cannot be used to conceal any information that would have been available to other persons if legal advice had never been sought. See Steven A. Saltzburg, Communications Falling Within the Attorney-Client Privilege, 66 IOWA L. REV. 811, 817-18 (1981).

35 Upjohn, 449 U.S. at 389.
36 Id. at 389-90.
37 See id. ("Admittedly complications in the application of the privilege arise when the client is a corporation, which in theory is an artificial creature of the law, and not an individual . . . ").

38 Corporations can, among other things, be sued, commit torts, and enter into contracts. But they can only operate through their agents such as directors, officers, shareholders, and employees. For a thorough examination of the legal fiction of corporations, see Sanford A. Schane, The Corporation is a Person: The Language of a Legal Fiction, 61 TUL. L. REV. 563 (1987).
corporate information is an outsider. The issue of who can assert this privilege becomes more complex when the corporation is involved in a lawsuit against its shareholders. This is because the shareholders are the owners of the company, and consequently, directors and officers (who ordinarily hold the privilege against corporate outsiders) owe fiduciary duties to the shareholders. Until 1970, the question of whether the privilege was applicable to a corporation in a shareholder derivative suit was undecided. 

a. Adoption of Garner

In the pivotal case of Garner v. Wolfinbarger, the Fifth Circuit held that a corporation, which acts through its directors and officers, could assert the privilege against its shareholders. The Garner court opined, however, that shareholders could overcome this privilege upon a showing of good cause.

The Garner case involved an Alabama-based company being sued by its shareholders in a derivative class action. The plaintiff-shareholders subpoenaed the corporation's lawyer in order to obtain various documents relating to the purported offense. In response, the lawyer asserted the attorney-client privilege. The district court, noting that counsel could cite only two English cases on the topic of corporate attorney-client privilege, stated that the attorney-client privilege was not available against a shareholder plaintiff.

On appeal, the Fifth Circuit delved much deeper into the issue presented. The court expressed a need to balance the interest of the corporation in upholding the privilege with the interest of the shareholders in obtaining evidence. With these competing interests in

40 See id.
41 See id.
43 Garner v. Wolfinbarger, 430 F.2d 1093, 1103-04 (5th Cir. 1970).
44 Id.
46 Id.
47 Id.
48 Id.
49 Id.
50 See Garner v. Wolfinbarger, 430 F.2d 1093, 1101 (5th Cir. 1970).
mind, the court ultimately reasoned that the corporation was not *per se* barred from asserting the attorney-client privilege against its shareholders.\(^{51}\) Where the corporation is facing "charges of acting inimically to stockholder interests," however, the shareholders may overcome this privilege by a showing of "good cause."\(^{52}\) The court did not define good cause, but it did list the following factors as indicia pertinent to the inquiry:

\[
[1] \text{The number of shareholders and the percentage of stock they represent;}
[2] \text{the bona fides of the shareholders;}
[3] \text{the nature of the shareholders' claim and whether it is obviously colorable;}
[4] \text{the apparent necessity or desirability of the shareholders having the information and the availability of it from other sources;}
[5] \text{whether, if the shareholders' claim is of wrongful action by the corporation, it is of action criminal, or illegal but not criminal, or of doubtful legality;}
[6] \text{whether the communication related to past or to prospective actions;}
[7] \text{whether the communication is of advice concerning the litigation itself;}
[8] \text{the extent to which the communication is identified versus the extent to which the shareholders are blindly fishing;}
[9] \text{the risk of revelation of trade secrets or other information in whose confidentiality the corporation has an interest for independent reasons.}\(^{53}\)
\]

The Fifth Circuit then vacated the judgment and remanded the case to the district court for further proceedings.\(^{54}\)

*b. Treatment of Garner*

*Garner* is often cited, but not as frequently applied.\(^{55}\) Out of the 373 opinions in which it has been cited, 41 have limited or explicitly

\(^{51}\)Id. at 1103.  
\(^{52}\)Id. at 1103-04.  
\(^{53}\)Garner, 430 F.2d at 1104.  
\(^{54}\)See id.  
\(^{55}\)See, e.g., *Delaware Supreme Court Permits Stockholders to Overcome Corporation's Attorney-Client Privilege for "Good Cause"*, CLIENT ALERT (Pillsbury Winthrop Shaw Pittman LLP, New York, N.Y.), Aug. 18, 2014, at 1, archived at http://perma.cc/K229-LCCV.
denied the *Garner* holding. For example, in Texas and California, the courts have explicitly declined to adopt the exception holding that the corporation is the real client, not the shareholder, and therefore the privilege cannot be breached. Conversely, in other jurisdictions, courts have expanded the exception to other fiduciary relationships such as insurance contracts, joint ventures, partnerships, and pension plans. In Delaware, *Wal-Mart* not only notes an affirmative adoption of *Garner* in plenary proceedings, but an unprecedented expansion to Section 220 proceedings.

**B. Section 220**

Under Delaware law, shareholders have the right, upon written demand, to inspect a corporation's ledger, a list of its stockholders, and other books and records for any proper purpose. The statute defines a proper purpose as a "purpose reasonably related to such person's interest as a shareholder," however, the scope is more limited than the statute might imply. Case law has limited this definition by establishing that a shareholder's desire to investigate mismanagement, wrongdoing, or waste is a proper purpose. To meet their burden in establishing a proper purpose, shareholders must "present some credible basis from
which the court can infer that waste or mismanagement may have occurred."\(^7\)

Presuming that this standard has been met, the shareholder still does not have carte blanche to inspect every document that may be related to the subject matter of inquiry.\(^8\) Demands made under Section 220 of the DGCL are targeted,\(^9\) and require the plaintiff to identify with "rifled precision" the documents being sought.\(^10\) These demands should not be confused with the wide variety of options available to a litigant during discovery.\(^11\) Rather, the shareholder is limited to those books and records that are necessary and essential to accomplish the shareholder's proper purpose.\(^12\) "A document is 'essential' for Section 220 purposes if, at a minimum, it addresses the crux of the shareholder's purpose, and if the essential information the document contains is unavailable from another source."\(^13\)

Section 220 demands play an integral part in shareholder litigation in Delaware.\(^14\) The use of Section 220 increased after *Rales v. Blasband*\(^15\) and *Grimes v. Donald*,\(^16\) where the Delaware Supreme Court urged shareholders to improve their pleadings by using the "tools at hand"\(^17\) and encouraged the use of Section 220 as a means of

\(^67\) *Id.* at 122 (emphasis in original) (quoting Thomas & Betts Corp. v. Leviton Mfg. Co., 681 A.2d 1026, 1031 (Del. 1996)).

\(^68\) *See* Kaufman v. CA, Inc., 905 A.2d 749, 753 (Del. Ch. 2006).


\(^70\) *See* Brehm v. Eisner, 746 A.2d 244, 266-67 (Del. 2000).

\(^71\) *See* Beam ex rel. Martha Stewart Living Omnimedia, Inc. v. Stewart, 845 A.2d 1040, 1056 n.51 (Del. 2004); *see also* La. Mun. Police Emps.’ Ret. Sys. v. Hershey Co., 2013 WL 612249, at *11 (Del. Ch. Nov. 8, 2013) (master's report) ("A Section 220 action is not a forum in which to seek the wide-ranging categories of documents that may be appropriate for discovery under Court of Chancery Rule 34.").

\(^72\) *See* Saito, 806 A.2d at 116.


\(^75\) *Rales v. Blasband*, 634 A.2d 927, 934 n.10 (Del. 1993).

\(^76\) *Grimes v. Donald*, 673 A.2d 1207, 1218 (Del. 1996) ("A stockholder . . . has the right to use the 'tools at hand' to obtain the relevant corporate records, such as reports or minutes, reflecting the corporate action and related information in order to determine whether or not there is a basis to assert that demand was wrongful refused.").

\(^77\) *Id.* at 1216 n.11 (citing *Rales*, 634 A.2d at 934-35 n.10) (stating that although derivative plaintiffs are not entitled to full discovery in order to meet their high pleading standards, the Court encourages the use of Section 220 as a tool for information gathering); *see also* Schoon v. Smith, 953 A.2d 196, 208 n.47 (Del. 2008) (recognizing that the books and records request is one of the primary "tools at hand" to obtain the necessary information before filing a derivative action).
investigating the claims they intended to bring. In fact, in 2013, Vice Chancellor Laster went so far as to opine that if a shareholder failed to seek corporate books and records before filing a derivative action, the court could assume that the shareholder was unable to "provide adequate representation for the corporation." Although the decision was overturned on appeal, the Delaware Supreme Court acknowledged the concerns that the Court of Chancery expressed about fast filers.

III. ANALYSIS: THE WAL-MART DECISION

A. Factual and Procedural History

In 2013, the Delaware Court of Chancery was asked to answer the question of whether a shareholder could obtain privileged documents through a Section 220 request. It began in April 2012, when The New York Times published a front-page article titled "Vast Mexico Bribery Case Hushed Up by Wal-Mart After Top-Level Struggle." This exposé described a scheme of illegal bribery payments that Wal-Mart de Mexico made to Mexican officials. Wal-Mart de Mexico ("WalMex") is a subsidiary of Wal-Mart in which Wal-Mart owns a controlling interest. The Times Article alleged that not only did the WalMex directors know about the scandal, but, at the direction of then WalMex CEO, Eduardo Castro-Wright, had taken steps to conceal it from the Wal-Mart headquarters. Additionally, the Times Article claimed that the Wal-Mart board became aware of the conduct in April 2005 when WalMex
executive, Sergio Cicero Zapata, informed Maritza Munich, the general counsel of Wal-Mart International, of the "irregularities' authorized 'by the highest levels" at WalMex.\footnote{Id.}

The Times Article also claimed that Munich began an investigation into Cicero's allegations and hired an outside law firm to develop an independent investigation plan.\footnote{See id.} However, senior leadership declined to implement a thorough investigation and instead chose a more limited, internal two two-week inquiry.\footnote{Id.} Control over the WalMex Investigation was transferred to WalMex's general counsel, José Luis Rodriguezmacedo ("Rodriguezmacedo"), who was one of the earliest targets of the bribery investigation.\footnote{See id.} According to the Times Article, Rodriguezmacedo, and consequently Wal-Mart, quickly ended the investigation by concluding that there was insufficient evidence of the alleged bribery and wrongdoing.\footnote{See Times Article, supra note 82.} In May 2012, counsel for Indiana Electrical Workers Pension Trust Fund IBEW ("IBEW")\footnote{Id.} received an anonymous package containing high-level Wal-Mart documents that were mentioned in the Times Article (the "Whistleblower Documents").\footnote{Wal-Mart Stores, Inc., 95 A.3d at 1269.} Upon notification, Wal-Mart's counsel stated that the documents were stolen by a former employee.\footnote{Id.}

On June 6, 2012, Wal-Mart received a demand from IBEW requesting inspection of broad categories of documents relating to the
bribery allegations described in the Times Article. On June 13, 2012, Wal-Mart agreed to make available to IBEW over 3,000 documents including meeting minutes, agendas, and presentations relating to the WalMex allegations, as well as relevant compliance policies. However, Wal-Mart refused to "provide documents that it determined were not necessary and essential to the stated purposes in the demand or that were protected by the attorney-client privilege and work-product doctrine." Unsatisfied, IBEW filed a complaint pursuant to Section 220 of the DGCL in the Delaware Court of Chancery.

IBEW noticed depositions of certain Wal-Mart records custodians to gain information about documents that it believed should have been disclosed. In response, Wal-Mart moved for a protective order, alleging that the deposition notices "encompassed virtually every document that might relate in any way to the Wal-Mex allegations," and additionally moved to strike the Whistleblower Documents. The Court of Chancery granted Wal-Mart's motion to strike and granted in part the protective order, restricting the scope of the information requested by IBEW. In order to comply with this ruling, Wal-Mart reviewed more than 160,000 documents, interviewed a number of current and former employees, officers, and directors, searched the data of eleven custodians, and subsequently provided IBEW with a further supplemental production and an updated privilege log.

Following a full trial, the Court of Chancery required that Wal-Mart produce more documents, including those protected by privilege

---

94 Id. at 1268. "The purpose of the Demand . . . was to investigate: (1) mismanagement in connection with the WalMex Allegations; (2) the possibility of breaches of fiduciary duty by Wal-Mart or WalMex executives in connection with the bribery allegations; and (3) whether a pre-suit demand on the board would be futile as part of a derivative suit." Id. at 1268-69.

95 See Wal-Mart Stores, Inc., 95 A.3d at 1269.

96 Id.


98 Wal-Mart Stores, Inc., 95 A.3d at 1269. "IBEW noticed depositions of a current senior officer, a former senior officer, and a Rule 30(b)(6) witness." Id.

99 Id.

100 Id. at 1269-70.

101 Wal-Mart Stores, Inc., 95 A.3d at 1269.

102 The Court of Chancery required Wal-Mart to produce:
(1) officer (and lower)-level documents regardless of whether they were ever provided to Wal-Mart's Board of Directors or any committee thereof; (2) documents spanning a seven-year period and extending well after the timeframe at issue; (3) documents from disaster recovery tapes; and (4) any additional responsive documents "known to exist" by the undefined "Office of
by adopting the Garner exception\textsuperscript{103} to attorney-client privilege.\textsuperscript{104} Additionally, the Chancery Court granted in part the motion to strike the Whistleblower Documents.\textsuperscript{105} Both parties appealed.\textsuperscript{106}

B. Parties' Contentions

Wal-Mart appealed on two main issues.\textsuperscript{107} In its primary argument, Wal-Mart claimed that the trial court improperly and incorrectly applied the Garner fiduciary exception to documents to which Wal-Mart asserted privilege\textsuperscript{108} as well as improperly applied the exception to work-product-protected documents.\textsuperscript{109} For its second argument, Wal-Mart asserted that the documents the trial court required it to produce "far exceeded"\textsuperscript{110} the proper scope of a Section 220 request, which requires "riffed precision."\textsuperscript{111} Wal-Mart's challenge of the scope of the ruling can be broken down into four components. First, it argued that the trial court erred by requiring Wal-Mart to produce officer-level documents.\textsuperscript{112} Here, Wal-Mart argues that the Court created a presumption that officer-level knowledge should be imputed to the Wal-Mart board of directors by requiring the corporation to produce

---

\textsuperscript{103}See Garner v. Wolfinbarger, 430 F.2d 1093 (5th Cir. 1970).

\textsuperscript{104}See Wal-Mart Stores, Inc., 95 A.3d at 1270.

\textsuperscript{105}See id. (holding that IBEW was limited to those documents that were posted on The New York Times website or to the congressional website, or referenced in Wal-Mart's public filings).

\textsuperscript{106}See id. at 1267. Wal-Mart appealed its requirement to provide the additional and privileged documents. IBEW filed a cross-appeal, arguing that Wal-Mart should be required to correct the deficiencies in its previous document productions and that IBEW should be permitted to use certain Whistleblower Documents that had been stricken by the Court of Chancery. \textit{id.}


\textsuperscript{108}See id.

\textsuperscript{109}See id. at 31.

\textsuperscript{110}See id. at 7.

\textsuperscript{111}See Appellant's Opening Brief at 8, Wal-Mart Stores, Inc., 95 A.3d 1264 (No. 7779-CS); see also Saito v. McKesson HBOC, Inc., 806 A.2d 113, 117 (Del. 2002) (citing Brehm v. Eisner, 746 A.2d 244, 266-67 (Del. 2000)).

\textsuperscript{112}Appellant's Opening Brief at 12, Wal-Mart Stores, Inc., 95 A.3d 1264 (No. 7779-CS); see also Wal-Mart Stores, Inc. v. Ind. Elec. Workers Pension Trust Fund IBEW, 95 A.3d 1264, 1270 (Del. 2014).
documents that were never even presented to the board of directors.\textsuperscript{113} Second, Wal-Mart alleged that the court erred by requiring it to produce documents that encompass dates beyond the period in which the wrongdoing is alleged to have occurred.\textsuperscript{114} Third, Wal-Mart argued that the court erroneously required it to search disaster recovery tapes for data from two custodians.\textsuperscript{115} Fourth, Wal-Mart argued that the court erred by requiring it to produce all documents "known to exist" by Wal-Mart's Office of the General Counsel.\textsuperscript{116}

Conversely, IBEW argued on cross-appeal that the Court of Chancery erred by not ordering Wal-Mart to correct deficiencies in its search for, and collection of, books and records.\textsuperscript{117} Additionally, IBEW argued that Wal-Mart did not present sufficient evidence for the trial court to have determined that the Whistleblower Documents were converted.\textsuperscript{118} Specifically, IBEW argued that Wal-Mart did not present any evidence besides the sender's anonymity to prove that the Whistleblower Documents were stolen.\textsuperscript{119}

C. The En Banc Decision

1. Wal-Mart's Challenge of the Scope

The Delaware Supreme Court, sitting \textit{en banc}, began its analysis by addressing the officer-level documents.\textsuperscript{120} The Court explained that these documents are both necessary and essential to the shareholder's claim for several reasons.\textsuperscript{121} First, the Court acknowledged that the shareholder's stated proper purpose was to examine whether demand would be futile; however, the other purpose of the request was to investigate the underlying bribery and how it was treated.\textsuperscript{122} First, the Court found that the documents may have unearthed why the alleged

\begin{footnotesize}
\begin{itemize}
\item[113] Appellant's Opening Brief at 14, \textit{Wal-Mart Stores, Inc.}, 95 A.3d 1264 (No. 7779-CS).
\item[114] \textit{Id.} at 16; see also \textit{Wal-Mart Stores, Inc.}, 95 A.3d at 1270-71.
\item[115] \textit{Wal-Mart Stores, Inc.}, 95 A.3d at 1271.
\item[116] \textit{Id.}
\item[117] \textit{Id.} "The Court of Chancery held that IBEW waived this argument. IBEW submits, however, that because there was no prejudice to Wal-Mart, the issue should be decided on the merits." \textit{Id.}
\item[118] \textit{Wal-Mart Stores, Inc.}, 95 A.3d at 1271.
\item[119] \textit{Id.} For the purposes of this Comment, IBEW's arguments on cross-appeal are of no consequence and will not be discussed any further.
\item[120] \textit{Id.} at 1272.
\item[121] \textit{Id.}
\item[122] \textit{Wal-Mart Stores, Inc.}, 95 A.3d at 1272.
\end{itemize}
\end{footnotesize}
wrong-doers were still executives or compliance personnel at Wal-Mart "when they knew material information about legal violations, which they apparently did not share with higher-ups, and deprived the board of its ability to take effective remedial action to protect the company's reputation and interests[."

Next, the Court found that this information was necessary and essential to the plaintiff's request, as it dealt with the crux of its claim. Such knowledge would have shed light on whether the board had effective controls to address such situations, and if so, whether it took appropriate remedial measures to cure the situation. Finally, the Court noted precedent in McKesson v. Saito that it had required production of officer-level documents before.

Next, the Court explained that the Court of Chancery had not created a presumption that officer-level documents should be imputed as communications with the board. Instead, it explained that the officer-level documents may establish director knowledge of the wrongdoing by establishing that certain officers in a "reporting relationship" to the Wal-Mart directors knew of key information relating to the scandal, and that those officers did in fact relay the information to specific directors. The Court held that this reasonable inference created from circumstantial evidence did not amount to the creation of a presumption.

The Court then found Wal-Mart's argument that the dates of the requested documents exceeded that of the alleged wrongdoing to be flawed. Noting that Wal-Mart had initially agreed to the date range, the Court explained that the range was appropriate given the need to investigate Wal-Mart's ongoing compliance efforts. Because the documents reflected changes in the wake of the WalMex investigation, they may also have shown director and officer knowledge, and thus liability. Additionally, Wal-Mart's privilege log confirmed that responsive documents existed from as early as September 2005 through at least May 2012.

---

123 Id.
124 Id. at 1272-73.
125 Id. at 1273.
126 818 A.2d 970, 2003 WL 897814 (Del. 2003) (Table) (affirming a Court of Chancery opinion that required the disclosure of officer-level documents).
127 Wal-Mart Stores, Inc., 95 A.3d at 1273.
129 Wal-Mart Stores, Inc., 95 A.3d at 1273.
130 Id.
131 Id. at 1273-74.
132 Id. at 1274.
133Wal-Mart Stores, Inc., 95 A.3d at 1274.
134 Id.
Then, the Court affirmed that Wal-Mart was required to collect and produce the disaster recovery data for the two custodians, or alternatively, to provide a detailed explanation as to why collection would not be possible. Without much further explanation, the Court excerpted a portion of IBEW's argument, which stated that "by collecting backup data for nine custodians, Wal-Mart implicitly recognizes that it may be a source of responsive documents." The Court then held that the Court of Chancery did not err by ordering the production of documents "known to exist by . . . the Office of the General Counsel . . . ." Wal-Mart argued that the trial court's requirement that the ambiguous "office" produce all documents "known to exist" is not only overly vague, but does not carry the requisite precision necessary for a Section 220 books and record request since such requests are narrow and only serve the plaintiff's proper stated purpose. Cit ing Saito, the Court held that such descriptive terms can suffice and that a motion for clarification is the proper forum for relief of this kind.

2. Garner Exception Adopted

Next on appeal, Wal-Mart argued that application of Garner was an open question and even if the Court chose to adopt Garner for plenary proceedings, the exception should not be available in the context of Section 220 litigation. In classic Delaware fashion, the Supreme Court agreed to address the waived issues anyway in the interest of justice. The Court began its analysis by reviewing the history of the corporate

---

135 Wal-Mart had voluntarily collected disaster tape recovery data for nine custodians, however it did not collect data from the two custodians at issue. Id. at 1274.
136 Id.
137 Wal-Mart Stores, Inc., 95 A.3d at 1275.
138 Id. at 1274-75. Wal-Mart had ample case law to support this contention. See supra Part II.B.
139 Saito v. McKesson HBOC, Inc., 806 A.2d 113 (Del. 2002).
140 Under Delaware law, a motion for clarification is treated as a motion for reargument under DEL. CH. R. 59(f). See, e.g., New Castle Cnty. v. Pike Creek Recreational Servs., LLC, 2013 WL 6904387, at *2 (Del. Ch. Dec. 30, 2013). On a motion for clarification, the court will not consider new arguments that are not in the record; they are reserved for cases where the meaning of what the court has written is unclear. Naughty Monkey LLC v. MarineMax Ne. LLC, 2011 WL 684626, at *1 (Del. Ch. Feb. 17, 2011).
141 Wal-Mart Stores, Inc., 95 A.3d at 1275.
142 Id.
143 At the trial court level, Wal-Mart had only argued that the Garner good cause factors had been met and did not challenge its application in general. See id.
144 Id.
attorney-client privilege in general and by reviewing *Garner*.\(^{145}\) The Court admitted that it had never explicitly adopted the exception, but reviewed two cases where it had tacitly endorsed *Garner* and one Court of Chancery case applying *Garner*.\(^{146}\)

In the early 1990s, the Court held in *Zirn v. VLI Corporation* that the attorney-client privilege had been waived through partial disclosure.\(^{147}\) Although the Court did not ultimately rely on *Garner*, the case stood for the proposition that the corporate attorney-client privilege is not absolute.\(^{148}\) In fact, when a shareholder sues its company, the privilege may be restricted or even denied upon a showing of good cause.\(^{149}\)

The Court next examined *Espinoza v. Hewlett-Packard Company*, a Section 220 action.\(^{150}\) In *Espinoza*, the Court held that the essentiality inquiry preceded any privilege or work product inquiry.\(^{151}\) The Court did not reach the applicability of the *Garner* doctrine because the plaintiff was unable to show that the documents requested were essential to his proper purpose.\(^{152}\)

Finally, the Court looked to *Grimes v. DSC Communications Corporation*\(^{153}\) as of particular importance.\(^{154}\) In *Grimes*, the plaintiff sought "books and records in order to determine whether the board wrongfully refused his demand, and if so to assist him in meeting the particularized pleading requirements of Rule 23.1."\(^{155}\) The Court of Chancery found the fact that suit had not yet been filed to be of no consequence to the *Garner* exception because the "posture of the case contemplate[d] the possible filing of a derivative suit sometime in the future."\(^{156}\) The Court of Chancery then analyzed the *Garner* good cause factors and determined that the plaintiff was entitled to receive some of the disputed documents.\(^{157}\) The Court of Chancery stated that "[o]f particular import is the fact that the documents sought are unavailable from any other source while at the same time their production is integral

\(^{145}\) *Wal-Mart Stores, Inc.*, 95 A.3d at 1275.
\(^{146}\) Id. at 1276-78.
\(^{147}\) 621 A.2d 773, 781 (Del. 1993).
\(^{148}\) See id.
\(^{149}\) See id.
\(^{150}\) 32 A.3d 365 (Del. 2011).
\(^{151}\) Id. at 374.
\(^{152}\) Id. at 372.
\(^{153}\) 724 A.2d 561 (Del. Ch. 1998).
\(^{155}\) *Grimes*, 724 A.2d at 568.
\(^{156}\) Id. at 568-69.
\(^{157}\) Id. at 569.
to the plaintiff's ability to assess whether the board wrongfully refused his demand—the stated purpose of his Section 220 demand.158 Noting the importance of the privilege, the Delaware Supreme Court in Wal-Mart officially adopted the Garner fiduciary exception as applicable in both plenary and Section 220 actions.159

3. Garner Exception Applied

After finding that the documents were necessary and essential to IBEW's claim, the Supreme Court went on to discuss the nine Garner factors160 and the application of five of those factors to this case.161

The first factor discussed was whether IBEW had demonstrated a colorable claim against Wal-Mart.162 The Court echoed the Court of Chancery's conclusion that a colorable claim existed based on the fact that Wal-Mart had made a public statement about the scandal which showed that there was actual concern about the legality of what may have occurred.163 Second, the Court addressed whether the information was available through other means at that point in the litigation.164 The Court discussed the Court of Chancery's opinion that because the alleged wrongdoing dealt with the investigation itself, it would be too difficult to obtain the documents by any other means.165 Third, the Court quoted the Court of Chancery's holding that the information requested was "particularized" and "not just a broad fishing expedition."166 Fourth, the communication was not advice concerning the litigation itself.167 As to the other factors, the Court gave no guidance on how it came to its decision, yet stated:

[T]he record reflects that disclosure of the material would not risk the revelation of trade secrets (at least it has not been argued by Wal-Mart); the allegations at issue implicate

---

158 Id.
160 Id. at 1276 n.32 (listing the nine Garner factors); see also supra Part II.A.2.a.
161 Wal-Mart Stores, Inc., 95 A.3d at 1278-80.
162 See id. at 1279.
163 Id.
164 See id. at 1279-80.
165 Wal-Mart Stores, Inc., 95 A.3d at 1279-80 (clarifying that by this, the Court of Chancery meant the documents were necessary and essential to the shareholder's proper purpose).
166 Id. at 1280.
167 Id.
criminal conduct under the FCPA; and IBEW is a legitimate stockholder as a pension fund. Accordingly, the record supports the Court of Chancery's conclusion that the documentary information sought in the Demand should be produced by Wal-Mart pursuant to the Garner fiduciary exception to the attorney-client privilege.¹⁶⁸

4. Work-Product Doctrine

The next issue the Court addressed was whether the trial court had erroneously applied the Garner exception to certain work-product-protected documents.¹⁶⁹ The Court acknowledged that Garner does not apply to work product.¹⁷⁰ Instead, under Delaware Court of Chancery Rule 26(b)(3), the plaintiff must show a substantial need for the information and that she is unable to obtain the information from other means without undue hardship.¹⁷¹ The Court held that although the ruling was based solely upon Rule 26(b)(3), the Garner factors tend to overlap with this standard.¹⁷² The Court then cited Zirn¹⁷³ and Grimes¹⁷⁴ as precedent for allowing this overlap in the Garner factors and Rule 26(b)(3) to aid in the decision regarding the work-product doctrine.¹⁷⁵

5. Scope of Relief

Finally, Wal-Mart argued that the scope of the records it was required to produce lacked the requisite "rifled precision"¹⁷⁶ of a proper Section 220 request.¹⁷⁷ However, the Court found that such rifled precision is a qualitative, not quantitative, fact-specific inquiry.¹⁷⁸ In fact, the Court noted that it had required the production of an even

¹⁶⁸ Id.
¹⁷⁰ Id. at 1280 n. 57 (quoting Saito v. McKesson HBOC, Inc., 2002 WL 31657622, at *11 (Del. Ch. Oct. 25, 2002) ("[T]his Court has held that there is no Garner exception to the work product privilege.").
¹⁷¹ Del. Ch. R. 26(b)(3).
¹⁷² Wal-Mart Stores, Inc., 95 A.3d at 1280-81.
¹⁷³ 621 A.2d 773, 782 (Del. 1993).
¹⁷⁴ 724 A.2d 561, 570 (Del. Ch. 1998).
¹⁷⁵ Wal-Mart Stores, Inc., 95 A.3d at 1281.
¹⁷⁶ Brehm v. Eisner, 746 A.2d 244, 266 (Del. 2000).
¹⁷⁷ Wal-Mart Stores, Inc., 95 A.3d at 1283.
¹⁷⁸ Id.
broader scope of documents in the past. Therefore, the necessary and essential standard had been met.

D. Reactions to Wal-Mart

There is ongoing debate about the significance of Wal-Mart, particularly if it does not settle. Immediately following the opinion, law firms from all over the country put their clients on notice of the potential consequences of the case, including the ability of shareholders to obtain sensitive information relating to internal investigations and the possibility of an expansion of compliance oversight duties. Bloggers and scholars alike speculated that this is the beginning of an expansion of a board's Caremark duties. However, some scholars have argued

179 Id. (citing McKesson Corp. v. Saito, 818 A.2d 970 (Del. 2003) (Table)).
180 See id.
181 See Thomas Fox, Delaware's Walmart Ruling Has Consequences Big and Small, COMPLIANCE WK. (Aug. 19, 2014), https://www.complianceweek.com ("If the Walmart case in Delaware is not settled, the Delaware Supreme Court could well put more and greater affirmative duties on a board of directors to exercise.").
182 See Client Memorandum, Paul, Weiss, Rifkind, Wharton & Garrison LLP, Delaware Supreme Court Recognizes Garner Doctrine, Affirms Order Requiring Production of Privileged Documents 2 (Aug. 8, 2014), archived at http://perma.cc/J3NC-6YDZ (warning of possibility of production of sensitive documents to shareholders in plenary or books and records actions); Delaware Supreme Court Extends Inspection Rights, supra note 16, at 2-3 (suggesting that Wal-Mart may lead to heightened obligation of boards in compliance efforts); Delaware Supreme Court Permits Stockholders to Overcome Corporation's Attorney-Client Privilege for "Good Cause", supra note 55, at 4 (warning that corporate counsel should give written legal advice on an as-needed basis only, mark written advice as privileged and/or as work product, and avoid situations where the only evidence of a fact is a privileged writing); Sarah S. Gold & Richard L. Spinogatti, Fiduciary Exception to Privilege in Books and Records Case, N.Y. L.J., Aug. 13, 2014, archived at http://perma.cc/T95U-98VB (noting that Wal-Mart is an important reminder as to the wide breadth of discovery available to plaintiffs through Section 220); Memorandum, Sullivan Cromwell LLP, Wal-Mart v. IBEW: Delaware Supreme Court Authorizes "Books and Records" Discovery of Internal Investigation Under Section 220 of the Delaware General Corporation Law and Adopts Garner Exception to Attorney-Client Privilege 4-5 (Aug. 6, 2014), archived at http://perma.cc/HZ96-72YA (noting the narrowness of the Wal-Mart holding and stressing the unique factual circumstances of the case).
183 "Caremark duties" is the colloquial term for a board's duties as described in the seminal case of In re Caremark International Inc. Derivative Litigation, 698 A.2d 959 (Del. Ch. 1996). A board's duty under Caremark is largely that of monitoring. Id. at 970-71. A board is liable when it knowingly causes the corporation to violate the law or fails to implement an information reporting and monitoring system. Id. This duty was narrowed further in Stone v. Ritter, where the court echoed Caremark, stating "only a sustained or systematic failure of the board to exercise oversight—such as an utter failure to attempt to assure a reasonable information and reporting system exists—will establish the lack of good faith that is a necessary condition to liability." 911 A.2d 362, 364 (Del. 2006) (quoting Caremark, 698 A.2d at 971).
that the case is of little importance. For example, on his blog Professor Bainbridge of UCLA School of Law stated, "[I]t just doesn't seem that big a deal."185

Michael Scher, contributing editor of the FCPA Blog and senior compliance officer, has written extensively on this issue.186 In April 2014, Scher began writing about Wal-Mart, forecasting that although newscasters and compliance professionals had not given the case much attention, big changes were coming to the compliance community.187 He believes that at the heart of the case lies the question of when a board is "obligated to support a compliance-related investigation[.]"188 He posed the following questions:

[W]hat misconduct by directors so taints them that shareholders are allowed to proceed with a civil complaint[?] When can directors be absolved from directing an internal FCPA investigation? And when can they ignore red flags of overseas misconduct and conduct business as usual?189

---

184 See Che Odom, Del. Supreme Court Eyes Section 220 Scope In Lawsuit About Wal-Mart Bribery, BLOOMBERG BNA (July 11, 2014), archived at http://perma.cc/C8SY-Z26X (expressing that Wal-Mart could present an opportunity to "freshen up Caremark"); Francis G.X. Pillegi, Delaware Supreme Court Requires Wal-Mart to Produce Privileged Documents, DEL. CORP. & COM. LITIG. BLOG (July 25, 2014), archived at http://perma.cc/R2JD-ELM8 ("This opinion will have lasting importance for corporate and commercial litigators regarding this topic."); Michael Scher, Walmart Decision in Delaware Could Reset Compliance Roles, FCPA BLOG (June 30, 2014, 8:08 AM), archived at http://perma.cc/G7E3-WU8Z (crediting Michael Volkov, former top ranking DOJ prosecutor, as suggesting that Caremark guidelines for board oversight of compliance are out of date and should be clarified to represent new compliance systems that include direct reporting to boards); Lucian E. Dervan, Privilege, Corporate Wrongdoing, and the Wal-Mart FCPA Investigation, WHITE COLLAR CRIME PROF BLOG (Aug. 31, 2014), archived at http://perma.cc/7GYU-N7Z2 (inquiring as to the effect that Wal-Mart will have on the future of internal investigations and internal counsel); Frank Reynolds, Citigroup Should Open Books on Banamex Troubles, Delaware Final Report Says, THOMSON REUTERS KNOWLEDGE EFFECT (Oct. 3, 2014), archived at http://perma.cc/DKX6-U6EN (citing Professor Lawrence A. Hamermesh) ("The Wal-Mart decision made it easier for shareholders to challenge their directors' supervision of regulatory compliance, but there could be an unintended consequence . . . .").


186 See Michael Scher, Mike Scher Has His Eyes on Delaware, FCPA BLOG (Apr. 21, 2014, 7:28 AM), archived at http://perma.cc/7XMX-4Q4F.

187 Scher, supra note 184.

In his opinion, the current board compliance standard does little to protect from disasters because "paper compliance programs" can consistently fail to detect corporate wrongdoing, yet directors are still absolved of liability.\textsuperscript{190} Although the Supreme Court did not address the issue in \textit{Wal-Mart}, Scher is hopeful because the issue was not discarded, either.\textsuperscript{191} He believes this critical issue will be decided during the plenary proceedings that are likely to ensue.\textsuperscript{192}

\textbf{IV. Evaluation}

\textit{A. The Garner Exception Was Never Intended to Apply to Section 220 Actions}

Before \textit{Garner} was adopted by the Fifth Circuit, it was unclear whether shareholders were even able to obtain privileged documents in plenary proceedings.\textsuperscript{193} In fact, the Fifth Circuit held that the privilege was presumed to protect such documents.\textsuperscript{194} Shareholders have the burden to rebut the presumption by a showing of good cause.\textsuperscript{195} The purpose of the exception adopted by the Fifth Circuit was to strike a balance between the shareholders' need for evidence with the corporation's legitimate interest in upholding the privilege.\textsuperscript{196}

However, under \textit{Wal-Mart}, this stringent threshold has become but a mere shadow of its former self.\textsuperscript{197} As it stands, shareholders are now able to obtain privileged documents any time they can plead a viable Section 220 claim.\textsuperscript{198} By meeting Section 220's far more lenient "proper purpose" inquiry, which "sets the lowest possible burden of proof,"\textsuperscript{199} shareholders may now abridge the revered privilege.\textsuperscript{200} The privilege is

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{190}Id.\textsuperscript{.}
\item \textsuperscript{192}Id.
\item \textsuperscript{193}See supra Part II.B.2.
\item \textsuperscript{194}See Garner v. Wolfinbarger, 430 F.2d 1093, 1103-04 (5th Cir. 1970) (holding that where a corporation is in suit against its stockholders on charges of acting inimically to stockholder interests, the privilege must be available unless stockholders are able to show good cause as to why it should not be invoked).
\item \textsuperscript{195}See \textit{id}.
\item \textsuperscript{196}See Cooper, supra note 2, at 1225 & n.68.
\item \textsuperscript{197}See infra text accompanying notes 201-05.
\item \textsuperscript{199}Seinfeld v. Verizon Commc'ns, Inc., 909 A.2d 117, 123 (Del. 2006).
\item \textsuperscript{200}There is no question that the attorney-client privilege is one of the sacred aspects of the American legal system. \textit{See, e.g.}, Mitchell v. Superior Court, 691 P.2d 642, 645 (Cal.}
\end{itemize}
\end{footnotesize}
one of the oldest and most established privileges in Anglo-American jurisprudence,\textsuperscript{201} and it was certainly not meant to be discarded simply because shareholders are able to present "some credible basis from which the court can infer that waste or mismanagement may have occurred."\textsuperscript{202}

The Garner factors themselves reveal that the exception was not intended at the pre-litigation stage.\textsuperscript{203} In particular, the Delaware courts misapplied four of the Garner factors: whether a claim is obviously colorable; the extent to which the communication is identified versus the extent to which the shareholders are blindly fishing; the necessity of the information and the availability of it from other sources; and whether disclosure of the material would risk the revelation of trade secrets.\textsuperscript{204} Additionally, the Court glossed over whether the communication was of advice concerning the litigation itself, providing little explanation as to how it came to this decision.\textsuperscript{205}

First, by the very nature of a Section 220 demand, a shareholder does not have a colorable claim.\textsuperscript{206} The shareholder seeks to inspect corporate books and records to help him or her plead sufficient facts that may—in the future—present a colorable claim.\textsuperscript{207} The Supreme Court found that the claim was colorable simply because Wal-Mart had made a public statement about the scandal.\textsuperscript{208} However, if IBEW had a colorable claim, it would already have had sufficient facts to file a complaint and would have been able to seek this information through discovery.

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{201} 1984) (citations omitted) ("The attorney-client privilege has been a hallmark of Anglo-American jurisprudence for almost 400 years."). That is why it is so unusual that the Wal-Mart Court was willing to set it aside once shareholders satisfy such a minimal burden. See, e.g., Casey Nix, Note, In re Sealed Case: The Attorney-Client Privilege—Till Death Do Us Part?, 43 VILL. L. REV. 285, 314-15 (1998) (discussing how longstanding common law traditions hold that a showing of need is not sufficient to abridge the attorney-client privilege).
\item \textsuperscript{202} See Friedman, supra note 1, at 244-45; see also Gold & Spinogatti, supra note 182.
\item \textsuperscript{203} See Garner v. Wolfinbarger, 430 F.2d 1093, 1104 (5th Cir. 1970).
\item \textsuperscript{204} See Wal-Mart Stores, Inc. v. Ind. Elec. Workers Pension Trust Fund IBEW, 95 A.3d 1264, 1278-80 (Del. 2014).
\item \textsuperscript{205} See id. at 1280. The only treatment of this factor is the Court's statement that, "[W]hen the communication is advice concerning the litigation itself, no, this is not after those litigations. So I don't think it's trying to get into anybody how to defend against what the plaintiffs are doing. This is during the real-time of Wal-Mart dealing with this thing." Id.
\item \textsuperscript{206} A colorable claim is generally defined as "[a] claim that is legitimate and that may reasonably be asserted, given the facts presented and the current law (or a reasonable and logical extension or modification of the current law)." BLACK'S LAW DICTIONARY 282 (9th ed. 2009). Those pursuing a Section 220 claim are seeking the facts necessary to form the basis of a colorable claim. See supra Part II.B.
\item \textsuperscript{207} See supra Part II.B.
\item \textsuperscript{208} Wal-Mart Stores, Inc., 95 A.3d at 1279.
\end{itemize}
\end{footnotesize}
pursuant to Delaware Court of Chancery Rule 34, not Section 220.\textsuperscript{209} If IBEW did not even have enough information to file a complaint, their claim could not possibly have been colorable.\textsuperscript{210}

Moreover, the Court held that IBEW was looking for specific documents and therefore was not blindly fishing.\textsuperscript{211} However, the sweeping amount of documents the Court subsequently ordered Wal-Mart to turn over contradicts that ruling.\textsuperscript{212} Seven years' worth of documents that were "known to exist" by the Wal-Mart General Counsel\textsuperscript{213} surely was not what Garner's limited holding portended, particularly before a suit was even filed. The Court's citation of \textit{Saito}\textsuperscript{214} for the proposition that more sweeping discovery had been ordered in the past\textsuperscript{215} is unpersuasive, for \textit{Saito} did not involve privileged or work-product-protected information.\textsuperscript{216}

Additionally, a plaintiff in a Section 220 suit has not had the benefit of discovery and therefore does not know if the information is available from other sources.\textsuperscript{217} The \textit{Wal-Mart} Court concluded that because the basis of the wrongdoing was in the way the investigation itself was conducted, it would be "very difficult to find those documents by other means."\textsuperscript{218} The Supreme Court clarified that it meant that the documents were necessary and essential to the shareholders proper purpose;\textsuperscript{219} in a Section 220 proceeding, however, this factor is not ripe to decide.\textsuperscript{220} Without the benefit of a full discovery, IBEW cannot possibly know if the information can be obtained from another source. In fact, the U.S. government has been able to conduct an investigation without the benefit of the privileged information.\textsuperscript{221} Certainly, the documents will be \textit{helpful} to the shareholders in order to plead a complaint, but that does not mean the documents are \textit{necessary and

\textsuperscript{210} See supra note 206.
\textsuperscript{211} See \textit{supra} note 206.
\textsuperscript{212} See \textit{Wal-Mart Stores, Inc.}, 95 A.3d at 1280.
\textsuperscript{213} See \textit{supra} note 206.
\textsuperscript{214} See \textit{Wal-Mart Stores, Inc.}, 95 A.3d at 1270.
\textsuperscript{215} Id. at 1275.
\textsuperscript{216} \textit{Saito v. McKesson HBOC, Inc.}, 806 A.2d 113 (Del. 2002).
\textsuperscript{218} \textit{Saito}, 806 A.2d at 114-16.
\textsuperscript{219} \textit{Id.} at 1279-80.
\textsuperscript{220} See supra Part II.B.
essential to the ultimate claim. Indeed, Upjohn, the seminal case that established the corporate attorney-client privilege, involved a shareholder seeking privileged information through inspection of corporate books and records that the U.S. Supreme Court denied. The Court stated that "[w]hile it would probably be more convenient for the Government to secure the results of petitioner's internal investigation by simply subpoenaing the questionnaires and notes taken by petitioner's attorney's such considerations of convenience do not overcome the policies served by the attorney-client privilege."

Finally, the Court erred by putting the burden of production on Wal-Mart to allege that the Garner good cause factors had not been met. The Court held that "the record reflects that disclosure of the material would not risk the revelation of trade secrets (at least it has not been argued by Wal-Mart). The test established by Garner, however, begins with a presumption that the corporation may assert the privilege against its shareholders unless the shareholders are able to show good cause as to why it should not be invoked in this particular instance. IBEW was obligated to show that trade secrets would not be revealed; Wal-Mart was not under such obligation. At the very least, the Court should have considered this apparent concern of the Garner court before it granted such a wide breadth of discovery.

B. Consequences and Call on the General Assembly

Now that it is easier for shareholders to obtain this sensitive information, Delaware is sure to see an increase in Section 220 actions. Although in its Wal-Mart opinion the Delaware Supreme Court stated that its holding was "narrow, exacting, and intended to be very difficult to satisfy," the doctrine has already been applied, and

---

222 See Robert C. Davis, Comment, Corporations and the Attorney-Client Privilege: Garner v. Wolfinbarger, 12 B.C. INDUS. & COM. L. REV. 1200, 1205 (1971) ("The attorney-client privilege . . . focuses upon the relationship of the client and his attorney, not upon the adversary's lack of information.").
223 Id. at 396.
224 See Garner v. Wolfinbarger, 430 F.2d 1093, 1103-1104 (5th Cir. 1970).
225 See supra Part II.A.2.a.
226 Upjohn Co. v. United States, 449 U.S. 383, 395 (1981) ("Consistent with the underlying purposes of the attorney-client privilege, these communications must be protected against compelled disclosure.").
229 Garner, 430 F.2d at 1103-04.
230 See supra Part II.A.2.a.
231 See Delaware Supreme Court Extends Inspection Rights, supra note 16, at 3.
232 Wal-Mart Stores, Inc., 95 A.3d at 1278.
won by shareholders, in three other cases, including an eerily similar Mexican fraud and bribery case involving a New York Times article.

While shareholders have the right to search records for a proper purpose such as the investigation of fraud, Section 220 actions are often criticized as fishing expeditions. Although stockholder litigation is an important component of corporate accountability, there are many other measures that help meet the same end. Directors commonly complain that these types of suits from dissident shareholders make it more difficult for directors to remedy the issue. With shareholders now able to seek privileged communications, boards may think twice before they seek legal advice. The General Assembly must beware of the possibility that Wal-Mart may now encourage plaintiffs to conduct strike suits that will incentivize corporations to settle suspect claims when faced with demands for privileged communication. The responsibility is now in the hands of the General Assembly to overrule Wal-Mart by statute, or at least properly limit its holding to what Garner intended—plenary suits only.

V. CONCLUSION

The Garner exception to the attorney-client privilege was never intended to apply to Section 220 suits. The reasoning behind Garner was to allow some redress for shareholders who seek information from a

---


233Reynolds, supra note 184.

234For example, corporations have audit committees and compliance officers, or they can hire outside auditors. See id.

235Id.

236See supra notes 32-33 and accompanying text.

237Ward v. Freeman, 854 F.2d 780, 786 (5th Cir. 1988).

238See Gold & Spinogatti, supra note 182 ("[P]erhaps future Delaware decisions will provide guidance and more certainty with respect to the contours of the Garner exception.").

239See Michael Greene, Attorneys Advise on §220 Actions, Say 'Wal-Mart' Likely a Rare Holding, BLOOMBERG BNA (Feb. 13, 2015) (citing Kathaleen S. McCormick, Partner at Young, Conaway, Stargatt & Taylor LLP), archived at http://perma.cc/FZ3V-GJTB ("[T]he Wal-Mart outcome will be [a] really difficult outcome for other stockholders to achieve.").
corporate defendant that is privileged during a plenary suit. The corporate defendant's presumption of confidentiality is supposed to be very difficult to overcome and is not in accord with the low burden of a Section 220. Extension of Garner to Section 220 suits will only encourage more nuisance suits and hinder a corporation's ability to fix its problems and seek legal advice. The General Assembly must overrule Wal-Mart, or at least limit its holding to only the most worthy of plenary suits.

240 See Olga Leier, Comment, Fiduciary Exception to the Attorney-Client Privilege: The Rationale Behind the Exception and the Need for Corporate Responsibility Suggest that the Exception Should Apply to Both Derivative and Non-Derivative Actions, 40 SW. L. REV. 199, 206-07 (2010).

241 See Disney v. Walt Disney Co., 857 A.2d 444, 447 (Del. Ch. 2004) (“The court begins its analysis with the presumption that the production of nonpublic corporate books and records to a stockholder making a demand pursuant to Section 220 should be conditioned upon a reasonable confidentiality order.”).