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## Appeals Court Upholds Fiduciary Exception to Attorney-Client Privilege in Wake of Pa. High Court Split

The frontline appeals court opinion examined PNC Bank's appeal of an Orphans' Court decision granting a motion to compel discovery, in which the bank argued that a fiduciary exception ran contrary to Pennsylvania law.

By Aleeza Furman | May 24, 2022



***PNC Bank office. Photo by Ken Wolter/Shutterstock***

The Pennsylvania Superior Court ruled that legal documents requested by a trusts' beneficiaries in a dispute with trustees were not protected from discovery in a decision that comes a year after an evenly split high court (<https://www.law.com/thelegalintelligencer/2021/04/08/pa-justices-fail-to-reach-consensus-on-attorney-client-privilege-application-to-trustees/>) left open a question of whether there is a fiduciary exception to attorney-client privilege.

The frontline appeals court opinion (<https://www.pacourts.us/assets/opinions/Superior/out/J-A06008-22o%20-%20105152508186390264.pdf?cb=1>) examined PNC Bank's appeal of an Orphans' Court decision granting a motion to compel discovery, in which the bank argued that a fiduciary exception ran contrary to Pennsylvania law.

The court upheld the motion Monday, finding that state law created no such contradiction. "Although the attorney-client privilege is codified, so too is a trustee's duty to inform beneficiaries regarding a trust's administration," Judge Mary Murray wrote in the opinion.

Jay Freiberg of Elman Freiberg represented the personal representative of the Estate of Jennie Scaife, David Zywiec, in his suit alleging that the corporate and individual trustees of a family trust started by Sarah Mellon Scaife breached their fiduciary duty by not creating a separate trust for Jennie Scaife. Zywiec had sought documentation surrounding the decision not to create the separate trust.

Freiberg said the Superior Court's determination clears up ambiguity left by the state Supreme Court's lack of consensus on what he said can be a hotly contested issue.

"PNC has been trying to overrule this ... for 20 years, but the law in Pennsylvania is what the court said today," Freiberg said.

Attorneys with Ballard Spahr represented PNC in the case and did not respond to requests for comment.

Freiberg said that, while the immediate effects of the decision appear to primarily weigh in the favor of beneficiaries, both sides of trust and estates disputes stand to gain. "I think it's a win for trustees and beneficiaries because it's going to lead to better trust administration," he said, adding that ultimately trustees shield themselves from liability when they share their documentation.

PNC argued that there is no statute or Pennsylvania law establishing that attorney-client privilege does not protect fiduciary matters and that most jurisdictions reject such an exception.

Zywiec and the estate of Jennie Scaife, conversely, said that Pennsylvania law does acknowledge the exception, an assertion that the state of Pennsylvania supported in its *parens patriae* argument in the case.

The Superior Court relied in part on its own interpretation of the earlier case that led to the justices' split opinions, in which the Superior Court held that the importance of transparency in a fiduciary relationship creates a basis for an exception to attorney-client privilege and the work product doctrine.

In the high court opinion supporting that decision, Justice David Wecht wrote, "where legal counsel is procured by a trustee utilizing funds originating from a trust corpus, the beneficiaries of that trust are entitled to examine the contents of communications between the trustee and counsel."

In support of reversal, Justice Christine Donohue argued that the case law supporting the exception had been wrongly decided and that Wecht's interpretation created an unreasonable requirement that trustees pay their own legal expenses if they wanted any privilege to apply.

Because the high court was evenly split, the Superior Court's decision was affirmed, supporting the exception used Monday to uphold the motion to compel discovery.

The case is captioned *In re Trust Established Under Agreement of Sarah Mellon Scaife*.

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