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RECENT DEVELOPMENT

BAA, PLC V. ACACIA MUT. LIFE INS. CO.: MARYLAND DOES NOT RECOGNIZE A FRAUD EXCEPTION TO THE STATUTORY ACCOUNTANT-CLIENT PRIVILEGE IN PURELY CIVIL ACTIONS.

By: Sarah Jacobs

The Court of Appeals of Maryland held that a fraud exception to the accountant-client privilege is not recognized in civil actions. *BAA, PLC v. Acacia Mut. Life Ins. Co.*, 400 Md. 136, 929 A.2d 1 (2007). The Court refused to recognize a judicially-created exception that is not enumerated in the statute, since the accountant-client privilege is purely statutory in Maryland. *Id.* at 158-59, 929 A.2d at 14.

In 1997, BAA, PLC (“BAA”), successor of British Airport Authority, purchased Duty Free International (“Duty Free”), a publicly traded corporation that sells duty-free goods at airports. In 2000, BAA decided to sell Duty Free to the Falics, three businessmen. In preparation for the sale, both parties hired independent auditing firms to complete a valuation of Duty Free. While evaluating the assets of Duty Free, Arthur Andersen, LLC (“Arthur Andersen”), hired by the Falics, contacted Deloitte & Touche LLP (“Deloitte”), hired by BAA, requesting certain documents from BAA and Duty Free. BAA agreed to make those documents available provided that the Falics and Arthur Andersen signed a confidentiality agreement. Both parties agreed and BAA furnished the information.

In 2001, the Falics and BAA reached an agreement for the sale of Duty Free, after a significant decrease in the sale price. The Falics purchased Duty Free, but all of Duty Free’s debt obligations remained its responsibility, including notes assumed by Duty Free prior to its acquisition by BAA. After the sale in 2002, noteholders of Duty Free (“the Noteholders”), including Acacia Mutual Life Insurance, filed suit against BAA, Duty Free, and the Falics for breach of fiduciary duty under the Maryland Uniform Fraudulent Conveyance Act (“MUFCA”). The Noteholders alleged conspiracy and common law fraud against BAA.

Prior to trial, the claims against Duty Free and the Falics were settled, while the causes of action against BAA were limited to breach of fiduciary duty and violations of MUFCA. The Noteholders alleged that the reduced sale price left Duty Free insolvent. During discovery, the Noteholders sought to discover documents from Deloitte's audit of Duty Free. Deloitte produced a number of documents, but invoked the accountant-client privilege provided by section 9-110 of the Courts and Judicial Proceeding Article ("section 9-110") for others.

The Noteholders filed a motion to compel disclosure in the Circuit Court for Anne Arundel County, arguing that there exists an applicable fraud exception to the accountant-client privilege. The circuit court denied the motion. At the close of the trial, the Noteholders requested that the jury be instructed that goodwill should be considered an intangible asset with no liquidity value when assessing insolvency. The circuit court instructed the jury as to the assessment of insolvency, but refused to instruct about goodwill.

The Noteholders appealed to the Court of Special Appeals of Maryland on three separate issues. In an unreported opinion, the Court of Special Appeals, applying the law of *Dixon v. Bennett*, remanded the case to the trial court, holding that there is a fraud exception to the accountant-client privilege. *BAA*, 400 Md. at 147, 929 A.2d at 7 (citing *Dixon v. Bennett*, 72 Md. App. 620, 531 A.2d 1318 (1987)).

BAA petitioned for writ of certiorari to the Court of Appeals of Maryland to determine the following issues: first, whether Maryland recognizes a fraud exception in civil actions; second, whether the exception can be satisfied by allegations rather than evidence; and, third, whether goodwill is considered an intangible asset under Maryland Code section 15-202(a). *BAA*, 400 Md. at 149, 929 A.2d at 8. Similarly, the Noteholders filed a cross-petition. *Id.* at 149, 929 A.2d at 8. The Court of Appeals of Maryland granted certiorari for both BAA's petition and the Noteholders' cross petition. *Id.* at 149, 929 A.2d at 8.

The Court began with an examination of the plain language of section 9-110(d). *BAA*, 400 Md. at 150-51, 929 A.2d at 9-10. Because the accountant-client privilege is created by statute, the Court held that exceptions are limited to those enumerated in section 9-110(d). *BAA*, 400 Md. at 150, 929 A.2d at 9. Those exceptions include actions governed by the criminal or bankruptcy laws or proceedings by the State Board of Public Accountancy. *Id.* at 150, 929 A.2d at 9.

The Court of Appeals of Maryland then addressed the degree to which judges may interpret common law and statutory privileges. *Id.* at 158, 929 A.2d at 14. The substantive law relating to common law privileges (such as the attorney-client privilege), which are merely codified, is a matter for the courts to determine. *Id.* at 158, 929 A.2d at 14. In contrast, the Court refused to review the legislative intent behind section 9-110(d) to infer any unenumerated exceptions. *Id.* at 159, 929 A.2d at 14. The Court held that where the Legislature expressly enumerated exceptions, the Court will not read in additional exceptions. *Id.* at 152, 929 A.2d at 10.

For all of the above reasons, the Court overruled the portion of *Dixon* relating to the accountant-client privilege. Accordingly, the Court found that the privilege had no applicable fraud exception under the circumstances in the instant case. *Id.* at 159, 929 A.2d at 15.

The Court, relying on precedent, held that unless the allegation is for criminal fraud, the “exception to the accountant-client privilege is inapplicable” *Id.* at 155, 929 A.2d at 12. The Court determined that the instant case did not fall within one of the exceptions because it was a civil action governed by MUFCA. *BAA*, 400 Md. at 151, 159, 929 A.2d at 9, 15.

The Court rejected the Noteholders’ argument that BAA waived the privilege by providing the confidential materials to the Falics and Arthur Andersen, finding that the Falics and Arthur Andersen were not third parties and that BAA only released the information under a confidentiality agreement. *Id.* at 163, 929 A.2d at 16-17. The Court also held that BAA did not waive the privilege in referring to the documents at trial because “a party does not waive the accountant-client privilege by denying the opposing accusations” *Id.* at 161, 929 A.2d at 16 (citation omitted).

Additionally, the Court upheld the circuit court’s jury instruction on the issue of goodwill as an asset for determining insolvency. *Id.* at 164, 929 A.2d at 17-18. The Court found nothing in MUFCA that excludes goodwill as an asset for the calculation. *BAA*, 400 Md. at 166, 929 A.2d at 18-19. While it is not an independently liquid asset, goodwill falls within the statutory definition of “asset,” and therefore can appropriately be used in the jury’s determination of insolvency. *Id.* at 166, 929 A.2d at 18-19.

The Court’s decision demonstrates the significance given to privileges, and specifically the Court’s reluctance to circumvent the Legislature’s language regarding privileges. The Court plainly stated the difference between common law and statutory privileges. As a

result, it is a signal to practitioners that, when preparing for discovery, one should consider the origin of privileges and take heed of any express exceptions prior to issuing subpoenas.