

## Articles

March 28, 2012

### Failure to Make Pre-Suit Demand for Litigation in an Executive Compensation Case Leads to Dismissal of Shareholder Derivative Action against Maryland Corporation

In a recent opinion by the United States District Court for the District of Maryland, the Court dismissed a shareholder derivative action against a Maryland corporation and certain of its officers and directors because the plaintiff failed to make a pre-suit demand for litigation on the corporation's Board of Directors, and failed to allege facts showing that such a demand would be futile. *Weinberg v. Gold*, 2012 WL 812348, Civil No. 1:11-cv-3116-JKB (D. Md. Mar. 12, 2012). The plaintiff alleged that the company's compensation committee and Board of Directors had breached their fiduciary duties to the company and its shareholders by approving an executive compensation plan.

The Court rejected all of the plaintiff's arguments in favor of excusing pre-suit demand as futile under Maryland law, and held as follows:

- In considering whether a shareholder derivative complaint adequately alleges demand futility, a court's focus is limited to whether a majority of the directors "are so personally and directly conflicted" that they cannot be expected to respond to a pre-suit demand in good faith; the court must refrain from analyzing the substance of the claims.
- A shareholder advisory vote disapproving an executive compensation plan -- a so-called say on pay vote -- is not a substitute for a formal pre-suit shareholder demand. Although a say on pay vote "may be reasonably considered as a factor in the demand futility analysis," it does not constitute a pre-suit demand and does not by itself demonstrate that demand would be futile.
- An officer's or director's participation in the underlying transaction, or status as a defendant in the derivative lawsuit, does not disqualify that officer or director from considering a pre-suit demand and, thus, does not make demand futile.

The U.S. District Court of Maryland, in the *Weinberg* opinion, provides a thorough analysis of Maryland law in this area of shareholder derivative litigation and appears to be the first court to consider the impact of a say on pay vote in alleging demand futility under Maryland law. *Weinberg* reaffirms the strong Maryland policy of requiring a shareholder to make a pre-suit demand prior to initiating derivative litigation.

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