

EXAMINERS' ANALYSIS OF QUESTION NO. 14

1. Whether Davy could properly file a shareholder derivative suit.

A "derivative proceeding" is "a civil suit in the right of a domestic corporation or a foreign corporation that is authorized to or does transact business in this state." MCL 450.1491a(a). "Any recovery runs in favor of the corporation, for the shareholders do not sue in their own right. They derive only an incidental benefit. If the defendants account, it must be to the corporation and not to the shareholders." *Futernick v Statler Builders, Inc*, 365 Mich 378, 386 (1961), quoting *Dean v Kellogg*, 294 Mich 200, 207 (1940) (citations omitted).

MCL 450.1492a states in relevant part that a shareholder may not commence or maintain a derivative suit unless the shareholder (1) was a shareholder of the corporation at the time of the act or omission complained of, (2) fairly and adequately represents the interests of the corporation in enforcing the right of the corporation, and (3) continues to be a shareholder until the time of judgment. Here, the facts indicate that Davy was a "long time" shareholder when he filed suit in 2016. Therefore, factor (1) appears to be satisfied.

Regarding factor (2), whether Davy "fairly and adequately represents the interests of the corporation in enforcing the right of the corporation" depends on the facts of the case. Davy must have the capacity to vigorously and conscientiously prosecute a derivative proceeding free from personal interests, which are antagonistic to the interests of similarly situated shareholders or the corporation. Other factors considered include the remedy sought; indications that the plaintiff is not the true party in interest; the plaintiff's unfamiliarity with the litigation; pending litigation between the plaintiff and defendants; plaintiff's vindictiveness toward the defendants; and the degree of support from other shareholders. 13 Fletcher Cyclopedic of the Law of Private Corporations § 5981.41. Here, there is no indication that Davy's interests are antagonistic to the interests of shareholders or to the corporation. Furthermore, there is no indication that Davy is not the true party in interest, that he is unfamiliar with the litigation,

that there is any pending litigation between Davy and AWC, or that Davy harbors any vindictiveness toward AWC. All in all, factor (2) appears to be satisfied.

Regarding factor (3), nothing in the facts indicates that Davy ever ceased to be a shareholder or would cease to be a shareholder prior to the time of judgment. Thus, factor (3) appears to be satisfied.

In addition, MCL 450.1493a imposes procedural requirements on a shareholder's derivative action. It provides that a derivative action may not be initiated until: (1) a written demand has been made upon the corporation to take suitable action, and (2) 90 days have passed "from the date the demand was made unless the shareholder has earlier been notified that the demand has been rejected by the corporation or unless irreparable injury to the corporation would result by waiting for the expiration of the 90-day period." *Id.* at (b). Here, the facts clearly indicate that Davy made a written demand upon the corporation to require Bernie to reimburse the corporation for the costs of his "frivolous freebie vacations." The facts also indicate that more than 90 days had passed before Davy filed the derivative lawsuit. Therefore, the procedural requirements for a derivative suit have been met.

2. Whether the court may order AMC to pay Davy's expenses

Under the "American rule," attorney fees generally are not recoverable from the losing party absent an exception set forth in a statute or court rule expressly authorizing such an award. *Pirgu v United Services Auto Assn*, 499 Mich 269, 274-275 (2016); *Haliw v City of Sterling Heights*, 471 Mich 700, 707 (2005).

However, MCL 450.1497 provides for such an exception. Section 1497(b) provides that, at the conclusion of the derivative proceeding, the court may order "[t]he corporation to pay the plaintiff's reasonable expenses, including reasonable attorney fees, incurred in the proceeding if it finds that the proceeding has resulted in a substantial benefit to the corporation." Thus assuming Davy prevails, and assuming the court finds that Davy's derivative suit "resulted in a substantial benefit to the corporation," the court has the

discretion to award reasonable expenses, including reasonable attorney fees.

Section 1497(b) goes on to require that Davy "account to the corporation for any proceeds received in excess of expenses awarded by the court, except that this shall not apply to a judgment rendered for the benefit of an injured shareholder only and limited to a recovery of the loss or damage sustained by him or her." Thus, assuming Bernie is required to reimburse the corporation for the costs of his "frivolous freebie vacations," the amount that is awarded in excess of Davy's reasonable expenses and attorney's fees must be returned to AWC.