

**EXAMINERS' ANALYSIS OF QUESTION NO. 13**

**(1) Whether Paul Ping could properly file a shareholder derivative suit.**

**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 Paul was a shareholder in 2012, and there is nothing in the facts to indicate that Paul ceased to be a shareholder or would cease to be a shareholder prior to the time of judgment. Thus, factors (1) and (3) are satisfied.

Regarding factor (2), the determination of whether a plaintiff fairly and adequately represents the interests of the corporation, necessarily depends on the facts of the case. Generally speaking, a plaintiff must have the capacity to vigorously and conscientiously prosecute a derivative proceeding and be free from personal interests, especially economic interests, which are antagonistic to the interests of similarly situated shareholders or the corporation. Other factors to be considered include the remedy sought by the plaintiff; 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 received by the plaintiff from other shareholders. 13 Fletcher Cyclopedia of the Law of Private Corporations § 5981.41. Here, there is no indication that Paul's interests are antagonistic to the interests of similarly situated shareholders or to the corporation. Furthermore, there is no indication that Paul is not the true party in interest, that he is unfamiliar with the litigation, that there is any pending litigation between Paul and Callen Corp, or that Paul harbors any vindictiveness toward the corporation. While the facts do not indicate the degree of support received by Paul from the other shareholders, that factor alone is not dispositive. On the whole, this factor seems to be satisfied.

**MCL 450.1493a** imposes additional requirements on a shareholder's derivative action. It provides that a derivative action may not be initiated until both of the following occur: (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. Here, the facts clearly indicate that Paul made a written demand upon the corporation to reduce the director's salary to a reasonable level. While 90 days had not lapsed before Paul filed the derivative lawsuit, a judge could reasonably conclude that Paul's conversation with Sam Smith, a director of Callen Corp, served as notification that Paul's demand for reduced director compensation had been rejected. In the event that Paul's conversation with Sam is not deemed to be adequate notification of rejection, Paul's derivative suit would not be permitted to proceed.

**(2) Whether the trial court properly dismissed Paul Ping's lawsuit**

**MCL 450.1495** provides that the court "shall dismiss" a derivative proceeding if, on motion by the corporation, the court finds that one of four statutorily delineated groups has made a determination in good faith and after conducting a reasonable investigation upon which its conclusions are based that the maintenance of a derivative proceeding is not in the best interests of the corporation.

Under this statutory provision, such a determination may be made by either (1) a majority vote of disinterested directors, if disinterested directors constitute a quorum at a board meeting; (2) a majority vote of a committee consisting of 2 or more disinterested directors appointed by a majority vote of disinterested directors present at a meeting of the board, whether or not the disinterested directors constitute a quorum at the meeting; (3) a panel of 1 or more disinterested persons appointed by the court upon motion by the corporation; or (4) all disinterested independent directors.

Here, the facts indicate that, pursuant to Callen Corp's motion, the court appointed a panel of three disinterested persons to make the requisite determination. The burden of proof rested with Paul to prove that the determination made by the disinterested panel was not made in good faith or that the panel's investigation was not reasonable. MCL 450.1495(1). Because the court found the court-appointed disinterested panel made a determination in good faith after conducting a reasonable investigation that the maintenance of the derivative proceeding was not in the best interests of the corporation, the court was required to dismiss Paul's suit upon Callen Corp's motion.