

ANSWER TO QUESTION NO. 12

This question raises the ability of Smith to successfully maintain a suit against the individual directors and BLAU. The successful applicant should first acknowledge that Smith may bring this in both an individual and derivative basis, and then proceed to discuss (1) whether the statutory requirements for bringing a derivative suit have been met, and (2) whether there are grounds for Smith to maintain these claims on an individual basis. The proper conclusions are that plaintiff does not meet all the statutory requirements for bringing a derivative claim and that he is alleging an injury that is also an injury to the corporation, and so he cannot maintain this case in his individual capacity. His case should be dismissed.

General Principles: Initially, the applicant should receive points for noting that the motion challenges Smith's standing to sue and who is the real party in interest. *Michigan National Bank v Mudgett*, 178 Mich App 677, 679 (1989). See also *Leite v Dow Chemical Co*, 439 Mich 920 (1992). Credit should also be given if the applicant recognizes that the shareholder and corporation are separate entities, *Belle Isle Grill Corp v Detroit*, 256 Mich App 463, 473-474 (2003).

Derivative Claims: In general, "a suit to enforce corporate rights or to redress or prevent injury to the corporation, whether arising out of contract or tort, must be brought in the name of the corporation and not that of a stockholder, officer or employee." *Belle Isle, supra* at 473-474. The normal practice is for a derivative suit to be brought by one or more shareholders suing in a representative capacity. In particular, a shareholder can maintain a suit for injuries to a corporation by meeting the statutory requirements set forth in MCL 450.1492a, which states:

"A shareholder may not commence or maintain a derivative proceeding unless the shareholder meets all of the following criteria:

"(a) The shareholder was a shareholder of the corporation at the time of the act or omission complained of or became a shareholder through transfer by operation of law from one who was a shareholder at the time.

"(b) The shareholder fairly and adequately represents the interests of the corporation in enforcing the right of the corporation.

"(c) The shareholder continues to be a shareholder until the

time of judgment, unless the failure to continue to be a shareholder is the result of corporate action in which the former shareholder did not acquiesce and the derivative proceeding was commenced prior to the termination of the former shareholder's status as a shareholder."

A shareholder also may not commence a derivative suit unless he has made a written demand upon the corporation to take suitable action and either 90 days have elapsed since the demand, a rejection is received from the corporation, or irreparable injury would result to the corporation by waiting the 90 days. NICL 450.1493a. A plaintiff who does not satisfy all of these criteria cannot maintain a derivative claim on behalf of the company.

Additionally, because the suit is brought for the benefit of the corporation, "[a]ny recovery runs in favor of the corporation", *Futernick v Statler Builders, Inc.*, 365 Mich 378, 386 (1961), quoting *Dean v Kellogg*, 294 Mich 200, 207-208 (1940), and the corporation is usually brought into the case as a defendant. Also, generally a shareholder who acquiesces or participates in a decision cannot later challenge it in court.

Here, Smith made a written demand on the corporation, and waited 90 days to file suit, satisfying MCL 450.1493a. He also was a shareholder at the time he filed suit, and there is nothing to suggest that he could not fairly and adequately represent the interest of the corporation in the lawsuit. In fact, given his business experience and training, an argument could be made that he does. Smith also properly sued BLAU as a defendant to make it a party. There is also no suggestion that Smith or any other shareholders had any input in this decision. However, Smith fails to satisfy the requirement that he remains a shareholder through the time of judgment, as he sold his 500 shares of stock during the pendency of the litigation. His divesting of the shares also did not result from corporate activity, but from his own voluntary sale of the publicly traded stock. Thus, he cannot maintain this derivative suit.

Individual Claims: A claim can be brought in the name of the individual if the shareholder "can show a violation of a duty owed directly to the individual that is independent of the corporation." *Belle Isle Grill, supra* at 474. Thus, Smith may be able to pursue these claims in his own right if he can show "a violation of a duty owed directly to him" *Michigan National Bank, supra*. However, this "exception does not arise merely because the alleged violation resulted in injury to both the corporation and the individual; rather, it is limited to cases in which there is a breach of duty that is owed to the individual personally." *Belle Isle Grill*,