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1. Pick v. Alex & Baker

Derivative Suit

A derivative lawsuit is one brought on *behalf of the corporation*, by the shareholders, where there is a breach of fiduciary responsibility. The shareholders must first *exhaust all remedies internally*, and then may seek recovery on behalf of the corporation.

Here, A and B caused a decline in Pick's market share and stock, by focusing exclusively on wealthy investors. In addition, A and B failed to take an opportunity, that could have led to large profits per C's recommendation. The shareholders learned of these actions, issued a written demand and were denied.

Therefore, the shareholders may seek a derivative suit on behalf of the corporation.

Demand on Directors

The shareholders must make a demand on the board of directors *unless it is futile*.

Here, the shareholders made a written demand that the Board take remedial action, which was denied, and is thus futile.

Therefore, this requirement is met.

Demand on Shareholders

In some jurisdictions, there is also a requirement that the shareholders make a demand on the shareholders, *unless futile*.

Here, the shareholders plan to file suit on behalf of Pick. It appears the demand may have been made. However, since the board denied their request, the derivative suit can still be filed.

Therefore, this requirement is met.

Contemporaneous Ownership

The shareholders filing the suit must also own stock at the time of the breach, as well as hold stock during the lawsuit.

The shareholders filing suit on behalf of Pick, should have owned stock at the time of the breach, as well as hold stock during the lawsuit.

Therefore, this requirement is met.

Post a Bond

The shareholders must post a bond to *indemnify* the corporation in event of the lawsuit.

Since, the shareholders plan to file a suit on behalf of Pick, they must post a bond to *indemnify*

Pick in the event the lawsuit goes to trial.

Therefore, this requirement is met.

Management of Corporation

The board of directors manage the corporation. When it comes to *extraordinary business decision*, there must be *full disclosure*, a *majority vote* approving the decision, where there is *quorum*.

The board of directors are A, B, and C, they are the sole directors of the board, and therefore all members must be present in order for there to be a *quorum*. In order for the board to make *extraordinary business decisions*, such as focusing exclusively on wealthy investors, the A, B, C should be involved in the decision making process. In addition, when it comes to C's plan of forming E-Save, the board of directors must have *quorum* of directors, as this is a *extraordinary business decision*. Each decision, should be made *after full disclosure*, a *majority vote*, where quorum is present.

Therefore, the liability of A and B will be addressed below based on their management decisions.

Duty of Due Care - Directors

Each director of a corporation owes a duty to exercise *reasonable skill, care, and knowledge*, in carrying on the corporation business. Where the corporation breaches this duty that causes damages to the corporation, the shareholders in a derivative suit may seek recovery.

Here, A and B are members of the Board of Directors, and thus owe a duty to Pick. C believes that A and B caused a decline by focusing exclusively on wealthy investors, which may be a breach of A and B's duty to *exercise reasonable skill, care and knowledge*, in carrying out Pick's operations. Further, C believes that A and B caused the decline, or "*but for*" A and B's failure to exercise due care, Pick would not have declined. Further, the decline in Pick's valuation are lost profits or damages.

Therefore, the shareholders have a claim for breach of duty of due care.

Defense - Business Judgment Rule

The board of directors defense to their business decisions is the business judgment rule, which states their decisions are protected if based on well informed and good faith business decisions.

A and B believed that focusing exclusively on wealthy investors, was a well informed decision. In addition, they hired an analyst two months prior who may have been helping the board with these decisions. A, and B may rely on the information of a analyst, if that analyst is *competent* and the board of directors has reliable information they are assisting in an area they are educated to give advise. A and B, relying in good faith on the analyst, would absolve them from liability for their decision.

Remedies of Shareholders

Removal of Directors

If the board of directors were to lose in a lawsuit, it is possible that the shareholders vote to remove or replace board members

Therefore, the shareholders may bring a derivative suit, breach of duty of care. A and B will successfully defend under the business judgment rule.

2. Pick v. Cate

Derivative Suit

Defined and Discussed Supra.

Demand on Directors

Defined and Discussed Supra.

Demand on Shareholders

Defined and Discussed Supra.

Contemporaneous Ownership

Defined and Discussed Supra.

Post a Bond

Defined and Discussed Supra.

Management of Corporation

Defined Supra.

A, B and C were in a meeting to discuss C's venture opportunity, which was to form a subsidiary company called E-Save. All members were present, there was *quorum*. A and B voted against the decisions, thus, thus the *majority vote* failed to approve the decision.

Duty of Loyalty - Directors

The duty of loyalty owed by a director is that they will act in *good faith* to forego any *personal interest*, and instead act *solely for the benefit of the corporation*.

When C told A and B at the board meeting that she "planned to start a competing company called E-Save, Inc," this was proper, as she appeared to be starting the company for the benefit of Pick. C stated "Pick can capture the low-priced end of the market... and that was correct as E-Save soon began generating large profit, so it was a *good faith* disclosure.

However, C stated "unless" A and B agree that P will form subsidiary to focus on the low priced end of the stock market, C would start E-Save on her own, which may be for C's *personal interest*. Since C did in fact start E-Save, meanwhile P's stock price continued to decline, there

may be a **corporate opportunity doctrine** issue.

Therefore, C may have breached her duty of loyalty generally.

Corporate Opportunity Doctrine

A corporate officer may not *usurp* a corporate opportunity which is one *in line with the corporation's business take*, unless the director *gives full disclosure*, and *denial by the board*.

Here, C told A and B about starting E-Save, which was C *giving full disclosure*, as the entire board of directors was present. C believed the opportunity could generate large profits, and so offering the opportunity at the board meeting was C not *usurping* the opportunity that is *in line with* Pick's business.

However, C would also argue that P did not *usurp* an opportunity within Pick's *line of business* as Pick markets to wealthy investors who want to trade stocks online, and thus a subsidiary that focus on the low-priced end of the trading market would not be in line with the business.

Therefore, C did not breach her duty of loyalty under the corporate opportunity doctrine.

Duty of Due Care

Defined Supra.

When C formed E-Save on her own, this was done for the purpose of generating a large profit. C exercised due *care, skill, and knowledge* to create a valuable company.

The shareholder would argue that C should have taken measure to ensure the shareholders could vote on whether to explore E-Save, as it did in fact lead to generating large profits. However, the corporation's *purpose* is to market to wealthy investors who trade stocks online, and C had gone through the proper procedures.

Therefore, C did not breach her duty of due care.

Remedies of Shareholders

Disgorgement of Profits

Where a corporate director breaches their duty of loyalty or care in a derivative suit, the shareholders may seek to *disgorge the profits*.

As discussed, C did likely did not breach her duty of loyalty. Thus, the shareholders may not seek to disgorge C of profits generated.

Removal of Board of Director

Where a corporate director breaches their duty of loyalty or care in a derivative suit, the shareholders may seek to *remove the director* by shareholder vote.

As discussed, C did likely did not breach her duty of loyalty. Thus, the shareholders may not seek to *remove the director* by shareholder vote.

Therefore, the shareholders may bring claims of breach of duty of loyalty, due care, but fail. Thus they would not get the likely remedy of disgorgement of profits, or removal of board of director.

Question #1 Final Word Count = 1459

END OF EXAM