

*Sekuk Global Enterprises Profit Sharing Plan v. Herve A. Kevenides, et al.*

In *Sekuk Global Enters. Profit Sharing Plan v. Kevenides, et al.*, 2004 WL 1982508 (Md. Cir. Ct.), the Court granted the defendants' motion to dismiss a shareholder derivative action which challenged the independence of directors of the corporation in connection with the demand requirement.

Plaintiffs Sekuk and others owned stock in Reckson Associates Realty Corp. (Reckson), a Maryland corporation founded by members of the Rechler family. Reckson operated as a real estate investment trust that owned, developed and managed offices and industrial properties in the New York area. Reckson had eleven voting directors, five of whom were members of the Rechler family and seven of whom were independent directors. At issue in the case was Plaintiffs' opposition to a transaction in which certain properties owned by Reckson were to be sold to the Rechler family.

In deciding on the motion, the Court noted the well-established concept that courts will not usually consider a derivative action by a shareholder on behalf of a corporation until the complaining stockholder has first made a demand on the corporation, and demonstrated that this demand was refused, or, alternatively, that making a demand would have been futile. The Court adhered to the strict pre-suit demand requirement adopted by the Court of Appeals of Maryland in *Werbowsky v. Collumb*, 766 A.2d 123, 144 (Md. 2001). According to the Court in *Werbowsky*, a pre-suit demand made by a shareholder is futile only when allegations demonstrate with particularity either that: (1) making a demand, or the delay in waiting for a response to a demand, would cause irreparable harm to the corporation; or (2) a majority of the directors are so personally and directly conflicted or committed to the disputed decision that they cannot reasonably be expected to respond to a demand in good faith and within the ambit of the business judgment rule.

Applying the requirements of *Werbowsky*, the Court determined that the Plaintiffs clearly had not shown that making a demand or waiting for the board of directors' response would have caused irreparable harm. According to the Court, the disputed transaction was announced early in September 2003 and the Plaintiffs easily could have made a demand on the board of directors immediately or shortly thereafter. Instead, they waited more than five weeks. The Court also determined that while irreparable injury is suffered whenever monetary damages cannot be easily calculated, the Plaintiffs in this case had not demonstrated that they could not have been adequately compensated for any potential breach by an award of money.

The Court further determined that the Plaintiffs had failed to demonstrate that a majority of Reckson's directors were so personally and directly conflicted that they could not have reasonably been expected to respond to the Plaintiffs' demands in good faith and within the ambit of the business judgment rule. The Plaintiffs alleged that because the board of directors had been hand-picked by the Rechler family, and because individual board members had long-standing relationships with the Rechlers, the directors were not independent with respect to the disputed transaction. But, using *Werbowsky*, the Court refused to excuse the demand requirement based on those allegations. Instead, the court cited to several Maryland and Delaware cases where the courts required Plaintiffs to plead facts that called director

independence into doubt with particularity, and stated that evidence of familial, personal and/or business relationships was not sufficient to excuse a demand. See *Danielewicz v. Arnold*, 769 A.2d 274, 291 (Md. 2001) and *Kohls v. Duthie*, 765 A.2d 1274, 1284 (Del. Ch. 2000). See also *Beam v. Stewart*, 845 A.2d 1040 (Del. 2004).

In determining whether the independent directors acted in bad faith or outside the scope of the business judgment rule, the Court again made reference to *Werbowisky*, where it was held that in deciding if a demand was futile, a court should not address issues going to the merits of a complaint, that is: whether there was, in fact, self dealing or lack of business judgment with respect to a disputed decision or transaction. The Plaintiffs had made a series of allegations outside of the complaint which they sought to have the Court consider regarding the futility of making a demand: namely, the directors' level of commitment to the disputed transaction at the time it was announced and the lack of any fiduciary out clause. The Court concluded that neither the facts in the complaint, nor the other facts which the Plaintiffs asked the Court to consider, sufficiently supported the assertion that the directors could not have responded to a demand in good faith and within the ambit of the business judgment rule. Finally, the Court noted that several additional factors that supported its conclusions were: (1) it would have been far less onerous to make a demand than to file a shareholder derivative action; and (2) based on *Werbowisky*, the Court of Appeals, if it were to address the issue, would be likely to hold that the presence or absence of a fiduciary out clause does not excuse a pre-suit demand.

This case provides a good example of the application of the demand-futility doctrine recently articulated by the Court of Appeals in *Werbowisky*.