

Mixed Signals on the Future of Say on Pay Litigation

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The Oregon district court provided a ray of hope for companies fearing the possibility of shareholder say on pay litigation when it handed down its [January 11, 2012 decision](#) granting Umpqua's motion to dismiss a shareholder derivative suit alleging directors' breach of duty and officers' unjust enrichment after an increase in executive compensation. In the decision, Magistrate Judge Acosta rejected the shareholders' arguments that demand was futile because the directors were not independent or disinterested.

In *Umpqua*, plaintiff-shareholders argued that, where directors were likely to be subject to liability for the challenged actions, they could not be disinterested. The court rejected that reasoning in this context, saying that an adverse say on pay vote coupled with the award of increased compensation did not reach the necessary threshold of substantial likelihood of liability necessary to show that demand would be futile under Delaware law. (See our October 17, 2011 [blog post](#) on the success of companies in dismissing shareholder say on pay suits under Delaware and New York law). That reasoning had been successful in defeating dismissal under Ohio law in *Cincinnati Bell*, a case filed by the same firm representing the plaintiffs in *Umpqua*. The Oregon court disagreed, stating that accepting the reasoning "that presuit demand is itself suggestive of impending liability [and] is sufficient to create the type of self-interest that triggers the demand futility exception... would permit every derivative action plaintiff to argue that demand is futile... because no board would be able to act objectively in evaluating presuit demand." This would essentially negate the purpose of the demand requirement.

Despite the positive nature of the *Umpqua* decision for potential defendant-companies and the fact that, as the *Umpqua* decision points out, the holding in *Cincinnati Bell* has recently been called into question by jurisdictional defects, Cincinnati Bell Inc.'s [December 20, 2011 decision to settle](#) one of the say on pay shareholder suits may continue to fuel the plaintiffs' bar's desire to bring further suits. For example, [suit was filed against Navigant Consulting, Inc.](#) on January 19, 2012 in the Northern District of Illinois alleging breach of fiduciary duty on the part of the board and executive officers for increasing executive compensation during a period of decreasing shareholder value.

It remains to be seen if court decisions such as that in *Umpqua* will quell the lawsuits.

NOTE: *Umpqua* was dismissed without prejudice.

If you have any questions regarding the matters covered in this publication, please reach out to any of the lawyers listed below or your usual Davis Polk contact.

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