

Another Win for Goldman

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On October 4, 2011, we [blogged](#) about the dismissal of a series of lawsuits filed in New York by Goldman Sachs shareholders. We noted that a similar shareholder suit against Goldman Sachs was pending in the Delaware Chancery Court. Last week, that suit was [dismissed](#).

With respect to executive compensation issues, the shareholders in the Delaware case claimed that Goldman's directors breached their fiduciary duties by (1) failing to properly analyze and rationally set compensation levels for Goldman's employees and (2) committing waste by "approving a compensation ratio to Goldman employees in an amount so disproportionately large to the contribution of management, as opposed to capital as to be unconscionable."

Ruling on Goldman's motion to dismiss for failure to make a pre-suit demand upon the board and for failure to state a claim, the Delaware Chancery Court found that a pre-suit demand was not excused because the plaintiffs failed to plead demand futility with sufficient particularity. In other words, the plaintiffs failed to plead particularized factual allegations that raised a reasonable doubt as to whether (1) Goldman's board lacked independence because of its financial ties to Goldman, (2) the board's compensation structure was the product of a valid exercise of business judgment and (3) the board of directors could have properly exercised its independent and disinterested business judgment in responding to a demand.

Taking the New York and Delaware results together, it is clear that for these types of compensation lawsuits, at least based on Delaware law, it is not easy to plead demand futility with sufficient particularity to survive at the motion to dismiss stage. It will be interesting to see for how much longer the plaintiffs' bar will continue trying. Note that the one say-on-pay-based derivative suit (against Cincinnati Bell) so far that has [survived a motion to dismiss](#), and excused pre-suit demand, applied Ohio substantive law.

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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