

Chancery Clarifies Scope of ‘Equitable Standing’ in Derivative Actions

By **Aric H. Wu** and **Jefferson E. Bell**

In *In re AbbVie Stockholder Derivative Litigation*, 2015 Del. Ch. LEXIS 192 (Del. Ch. July 21, 2015), Vice Chancellor Sam Glasscock III rejected the plaintiffs’ request that they be accorded “equitable standing” to pursue derivative claims and clarified that, absent well-pleaded facts reflecting a “wrong abhorrent to equity,” there are no exceptions to the standing requirements for derivative actions set forth in 8 Del. C. Section 327.

Background

In April 2012, Abbott Laboratories incorporated AbbVie Inc. as its wholly owned subsidiary to hold Abbott’s research-based pharmaceutical business. In November 2012, Abbott’s board of directors approved the separation of Abbott and AbbVie. On Jan. 1, 2013, as part of a special dividend, Abbott distributed all shares of AbbVie common stock to Abbott stockholders, including the plaintiffs.

The separation agreement approved in November 2012 contained provisions for the transfer of assets and liabilities to AbbVie, including those relating to TriCor,

a former Abbott product, and mutual releases under which Abbott and AbbVie released one another of all liability in connection with the assets transferred to AbbVie and the assets retained by Abbott. AbbVie’s release extended to claims against Abbott’s directors. At the time of the release, a qui tam action alleging that Abbott engaged in marketing TriCor for off-label uses was pending.

In 2014, the plaintiffs filed suit asserting proposed derivative claims on behalf of AbbVie. The plaintiffs alleged Abbott’s directors engaged in self-dealing when they approved the release of potential claims by AbbVie against them and that AbbVie had been harmed because it was incurring litigation expenses and faced potential liability relating to the qui tam action. The plaintiffs sought rescission of the release so that AbbVie could pursue claims against Abbott’s directors to recoup any loss to AbbVie that might result from the qui tam action.

The defendants moved to dismiss on the ground that the plaintiffs could not satisfy the standing requirements for derivative actions



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set forth in 8 Del. C. Section 327—i.e., the plaintiffs were not AbbVie stockholders when the separation agreement containing the release was approved in November 2012 and received their AbbVie stock by dividend rather than by “operation of law.”

Rejection of Request for ‘Equitable Standing’

Relying on *Shaev v. Wyly*, 1998 Del. Ch. LEXIS 2 (Del. Ch. Jan. 6, 1998), *aff’d*, 719 A.2d 490 (Del. 1998), the plaintiffs argued they should be accorded “equitable standing” to address a wrong that would otherwise go unremedied. In *Shaev*, a longtime stockholder in a parent company received shares in a subsidiary via dividend after that entity was spun off from the parent. Prior to the spinoff,

the subsidiary's directors granted themselves stock options with an alleged net value between \$139 million and \$245 million. The *Shaev* plaintiff filed a proposed derivative action on behalf of the subsidiary alleging that the subsidiary's directors breached their fiduciary duty of loyalty by granting themselves excessive compensation in a self-interested transaction. In holding that the plaintiff had standing to sue even though he was not a stockholder of the subsidiary when the stock options were approved, the *Shaev* court observed that the sole purpose of 8 Del. C. Section 327—to prevent the purchase of shares in order to bring a derivative action relating to acts that occurred prior to the purchase—would not be served by denying the *Shaev* plaintiff standing. The *Shaev* plaintiff did not purchase shares of the subsidiary for the purpose of filing a derivative suit; instead, he had owned shares of the parent for many years and only became a shareholder of the subsidiary because the parent declared a stock dividend. The *Shaev* court held the parent's "decision to divest itself of its entire interest in [the subsidiary] cannot, as a matter of law, deprive plaintiff of standing to bring a derivative action on behalf of [the subsidiary], even where the challenged actions occurred before plaintiff owned shares in" the subsidiary.

Because they did not purchase AbbVie shares in order to bring suit, the plaintiffs argued they should be accorded "equitable standing" just like the plaintiff in *Shaev*. Glasscock explained, however, that the holding in *Shaev* was not based on the plaintiff's motives, but on the wrong that would occur if the plaintiff were denied standing: "I do not read *Shaev* to say that the ownership requirement of Section 327 only applies where the court determines that the plaintiff's motive is champertous, and otherwise is waived; such a policy determination would be for the legislature. Instead, I read *Shaev* to hold that this court will not countenance a wrong to stockholders by fiduciaries that is both egregious and irremediable; instead, this court will employ a special equitable standing on behalf of a stockholder, where the complaint discloses a wrong abhorrent to equity."

In contrast to *Shaev* where the director defendants allegedly conferred upon themselves options that would have allowed them to extract from the subsidiary between \$139 million and \$245 million, Glasscock "d[id] not find it reasonably conceivable that the [AbbVie] release lacked any business purpose." Glasscock noted the plaintiffs' pleadings were devoid of factual allegations showing that the release had no value or that there was a substantial likelihood of personal liability on the part of Abbott's directors for bad faith or

failure of oversight in connection with the marketing of TriCor. Because "the release, unlike the self-dealing transfer of assets in *Shaev*, does not offend equity so as to require equitable standing," Glasscock dismissed the plaintiffs' action for lack of standing.

The Limited Scope of 'Equitable Standing'

AbbVie makes clear that plaintiffs will not be accorded "equitable standing" in derivative actions unless, at a minimum, there are well-pleaded facts reflecting egregious wrongdoing by directors that harmed the company. In the absence of such factual allegations, "there are no grounds to depart from the general rule set forth in 8 Del. C. Section 327," the court said.

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