

Derivative Actions in Business Litigation

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In most cases, causes of action against corporate officers and directors belong solely to corporations pursuant to the rule in *Barger v. McCoy Hilliard & Parks*, a 1997 North Carolina Supreme Court case. But if the corporation fails to bring the action in its own name, a shareholder may bring an action derivatively in the name of the corporation against its directors or officers for fraud, negligence, or other dishonest acts. However, before such an action may be filed, the shareholder must satisfy two procedural hurdles.

Demand to the Corporation

The shareholder must make a written demand to the corporation setting out his grievances and requesting the corporation take action to remedy those issues. North Carolina courts have allowed various forms of written demands, including emails, to meet this requirement.

Waiting Period

The shareholder must also wait at least 90 days from the date the demand was made unless, prior to the expiration of the 90 days, the shareholder was notified that the corporation rejected the demand, or unless irreparable injury to the corporation would result by waiting for the expiration of the 90-day period.

Demand Futility ? Not in North Carolina

While some states recognize the doctrine of demand futility (the demand requirement for derivative actions is excused where there is a reasonable doubt that the directors are disinterested and independent and the challenged transaction was otherwise the product of a valid exercise of business judgment), North Carolina adopted the universal demand requirement in 1995, requiring that all derivative actions first satisfy the demand requirement, regardless of futility.

Dismissal by the Corporation

Although the shareholder can initiate the action once the demand and waiting period requirements are met, the corporation can still move to dismiss the derivative action in one of two ways:

1. A majority vote of independent directors present at a meeting of the board of directors (or a majority of a committee appointed by the board) determines in good faith after conducting a reasonable inquiry that the maintenance of the derivative proceeding is not in the best interest of the corporation; or

2. The court may appoint a panel of one or more independent persons upon motion of the corporation to make a determination whether the maintenance of the derivative action is in the best interest of the corporation.

The first, and most important, step in determining whether or not to make a demand on your corporation is to address these issues with a competent business litigation attorney. While derivative actions can be an uphill battle, your case may warrant pushing forward.