



California Corporate & Securities Law

Court Decides Buy-Out Claims Are Derivative

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When a shareholder sues corporate officers and directors, she must decide whether to bring a direct action (which may be a class action) or a derivative suit. The consequence of making the wrong decision may be dismissal of the shareholder's suit as was the case recently in *Sweeney v. Harbin Electric, Inc.*, 2011 U.S. Dist. LEXIS 82872 (D. Nev. July 27, 2011).

In *Sweeney*, the plaintiff filed a class action suit when he learned that the board of directors of a Nevada corporation had received a buy-out offer from the corporation's chief executive officer and an investment fund. The plaintiff alleged breach of fiduciary duty against all of the defendants (except the corporation) and aiding and abetting breach of fiduciary duty against the corporation. U.S. District Court Judge [Robert C. Jones](#) granted the defendants' motion to dismiss finding that the case was a derivative action. In doing so, Judge Jones quoted the following from my treatise:

A derivative action is distinguishable from a direct action in two significant respects. First, a derivative action must be brought for injury to the corporation as opposed to injury to the stockholder. Injury to the corporation is often asserted in connection with alleged breaches of fiduciary duty by the directors or officers. Second, a successful derivative action results in a recovery by the corporation while a direct action results in a recovery by the stockholder.

Nevada Law of Corporations & Business Organizations § 6.15, at 6-30 (1998).^[1] Judge Jones also cited the Nevada Supreme Court's decision in *Cohen v. Mirage Resorts, Inc.*, 62 P.3d 720 (Nev. 2003), a case that also happens to cite my treatise for a different point.

Judge Jones also found that the plaintiff's claims were unripe because there was only a proposal, not an actual agreement. In a footnote, the judge also ruled that the aiding and abetting claim against the corporation was unmeritorious on its face because a corporation "cannot be directly liable for aiding and abetting the breach of a duty that is owed to itself."

[1] This treatise was recently superseded by *Bishop & Zucker on Nevada Corporations and Limited Liability Companies*.

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