

Court Dismisses Derivative Suit Against Citigroup’s Directors and Officers

BY JIM GOODFELLOW

In *Louisiana Municipal Police Employees Retirement System v. Pandit, et al.*, the District Court for the Southern District of New York dismissed the plaintiffs’ claim because demand was not futile for the purposes of litigating their shareholder derivative action.

The plaintiffs alleged that the defendants, as a result of Citigroup’s involvement in the auction-rate securities market and alleged manipulation of that market, caused Citigroup to incur billions of dollars in fines and losses. The plaintiffs argued that demand was futile because of the substantial likelihood that the directors would face personal liability in connection with the subject matter of the plaintiffs’ lawsuit.

The defendants moved to dismiss the complaint pursuant to Federal Rule of Civil Procedure 23.1, which requires that plaintiffs plead with particularity any effort made to obtain the desired action (demand) or the reasons for not making such effort (typically “demand futility”).

In its decision, the court applied a “red flags” test, in analyzing the plaintiffs’ demand futility argument. It found that the test was not satisfied, as plaintiffs failed to plead with sufficient particularity that the defendant directors and officers ignored “red flags” that they would face a substantial likelihood of liability for the deterioration of the company’s financial position. The court held that the so-called “red flags” alleged were merely indications of a deteriorating economic picture, and not of any likelihood of liability on the part of the directors and officers.

Unintentional Business Error No Accident

BY JACOB HATHORN

The Indiana Supreme Court has held in *Tri-Etch, Inc. v. Cincinnati Insurance Company* that a security company’s negligent performance of its alarm-monitoring duties was no “accident” for purposes of determining whether coverage existed under the company’s CGL and umbrella insurance policies.

Among the security services that Tri-Etch provided to a liquor store was daily monitoring to ensure activation of the store’s night alarm system when the store closed at midnight. One night, Tri-Etch noted a failure by the store to activate its alarm, but did not alert the store’s manager until shortly after 3:00 a.m. The alarm was never activated that night because the store clerk on duty, Michael Young, was abducted by a robber, tied to a nearby tree in a local park, and severely beaten. Young was not discovered until 6:00 a.m., and died of his injuries later that day. Young’s Estate brought a wrongful death action against Tri-Etch, alleging that Young would have been discovered earlier and would have survived had Tri-Etch performed its duty to notify the store manager that the alarm had not been set within thirty minutes of the store’s closing time. A jury awarded \$2.5 million to the Estate.

Tri-Etch looked to its insurers to satisfy the judgment. It had a \$1 million CGL policy with Scottsdale Insurance Company, as well as a second \$1 million CGL policy and \$2 million umbrella policy, both issued by Cincinnati Insurance Company. After Scottsdale tendered its \$1 million policy limit, Tri-Etch settled with the Estate by assigning its claims against Cincinnati to the Estate. The Estate then filed an action against Cincinnati to recover the unpaid \$1.5 million balance of the wrongful death judgment. Cincinnati prevailed on summary judgment, but suffered a reversal when the Court of Appeals, noting that Cincinnati’s CGL and umbrella policies both insured against liability for bodily injury caused by an “occurrence,” which both policies defined as an “accident,” ruled that the Estate’s loss arose from an “occurrence” because it was caused by Tri-Etch’s unintentional oversight in failing to make the 12:30 a.m. call.



Late call was a fatal mistake

The Indiana Supreme Court reversed, concluding that Tri-Etch’s failure to timely contact the store owner was more accurately an “error or omission” than an “accident.” The Court refused to construe “accident” so broadly as to encompass claims based on negligent performance of commercial or professional services, which would ordinarily be covered, if at all, under an E&O or malpractice policy. While the exhausted Scottsdale policy had included errors and omissions coverage, the Cincinnati CGL and umbrella policies both expressly excluded such claims arising from Tri-Etch’s alarm-monitoring services. Consequently, Cincinnati never owed a duty to indemnify Tri-Etch for the remaining \$1.5 million.