

Appellate Court Case No. A08-0114

STATE OF MINNESOTA  
IN SUPREME COURT

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In re UnitedHealth Group Incorporated Shareholder Derivative Litigation and

In re UnitedHealth Group Incorporated PSLRA Litigation

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**SUPPLEMENTAL BRIEF OF THE STATE OF MINNESOTA,  
BY ITS ATTORNEY GENERAL, LORI SWANSON,  
AS *AMICUS CURIAE***

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## INTRODUCTION

The above-captioned matters are before this Court on a certified question from the United States District Court for the District of Minnesota, as reformulated.<sup>1</sup> The State of Minnesota, by its Attorney General, Lori Swanson (“the State”), filed an opening *amicus curiae* Brief in this matter with the leave of this Court.<sup>2</sup> Presently, the Court has permitted any party or entity having previously filed a brief in this matter to file a supplemental brief addressing the following question:

To what extent, if any, should the authority of a board of directors to expand, “if the Board deems appropriate,” the number of members of a previously established Special Litigation Committee affect the determination under Minnesota law as to whether the Special Litigation Committee is sufficiently independent to merit deference under the business judgment rule?

The State suggests that this question should be answered as follows: If a board of directors possesses the authority to expand, “if the board deems appropriate,” the number of members of a previously established special litigation committee, then the special litigation committee is not sufficiently independent of the board to merit any level of deference from the courts.

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<sup>1</sup> Pursuant to Minn. R. Civ. App. P. 129.03, the State certifies that no counsel for any party in this matter authored any portion of this Supplemental Brief and that no person or entity other than the State made any monetary contribution to the preparation or submission of this Supplemental Brief.

<sup>2</sup> The instant Supplemental Brief is filed in the form of informal briefs under Minn. R. Civ. App. P. 128.01, as authorized by the Court’s Order dated April 22, 2008.

## ARGUMENT

Minnesota Statutes § 302A.241, subd. 1 (2006), permits a board of directors to establish “a special litigation committee consisting of one or more independent directors or other independent persons to consider legal rights or remedies of the corporation and whether those rights and remedies should be pursued.” The special litigation committee, however, must not be subject to “the direction and control of the board.” Minn. Stat. § 302A.241, subd. 1 (2006). Rather, the special litigation committee must be “sufficiently independent from the board of directors to dispassionately review the derivative lawsuit.” *Janssen v. Best & Flanagan*, 662 N.W.2d 876, 888 (Minn. 2003) (citations omitted).

“Directorial independence means that a director’s decision is based on the corporate merits of the subject before the board rather than extraneous consideration or influences.” *In re PSE&G S’holder Litig.*, 801 A.2d 295, 314 (N.J. 2002) (citations and internal quotations omitted), case cited by *Janssen*, 662 N.W.2d at 888. When determining a special litigation committee’s independence, courts consider, among other factors, “the committee’s autonomy from the officers and directors.” *House v. Estate of J.K. Edmondson*, 245 S.W.3d 372, 382 n.9 (Tenn. 2008) (citation omitted). A special litigation committee that is not independent from the board receives no deference from the courts. *See Janssen*, 662 N.W.2d at 888.

Here, the resolution of the UnitedHealth Group Incorporated Board of Directors (“Board”) establishing the Special Litigation Committee (“SLC”) and naming its two members includes the following provision:

FURTHER RESOLVED, that the number of members of the Special Litigation Committee can be expanded in the future through Board action if the Board deems appropriate.

(Appendix to Opening Brief of Lead Plaintiffs in the Federal Shareholder Derivative Litigation at ALP-159.) This provision vests the Board with complete discretion, if it “deems appropriate,” to add an infinite number of members to the SLC, at any time, and as often as the Board likes. There are several reasons why a board’s authority to expand, “if the board deems appropriate,” the number of members of a previously established special litigation committee renders the committee not sufficiently independent of the board to merit any level of deference from the courts.

First, a board’s authority to expand the membership of a special litigation committee is at odds with Minn. Stat. § 302A.241, subd. 1 (2006). The statute requires a special litigation committee to be free from “the direction and control of the board.” By possessing the authority to manipulate the number of members on a special litigation committee, the board maintains “direction and control” over the committee. Indeed, the board in such circumstances holds a powerful trump card: if a special litigation committee is not acting the way the board wants it to act, the board can simply increase the number of members on the committee in an attempt to dilute the original membership and obtain a different result. Even if a board never exercises this authority, the fact that the board holds this trump card may coerce the members of the committee (consciously or sub-consciously) to act in a way that the board wants anyway. If a special litigation committee’s membership may be infinitely increased at any time by the board, the committee is subject to the “direction and control” of the board and lacks independence.

Second, a board's authority to expand the membership of a special litigation committee is at odds with *Janssen*. This Court in *Janssen* expressly rejected any attempt by a corporation to "reconstitute its litigation committee and revamp its investigation." *Janssen*, 662 N.W.2d at 889 n.6. Instead, this Court allowed a board of directors only "one opportunity" to investigate claims made in a derivative litigation. *See id.* at 890. This Court cautioned that "[i]f the courts allow corporate boards to continually improve their investigation to bolster their business decision, the rights of shareholders and members will be effectively nullified." *Id.* The same concerns recognized in *Janssen* apply where a board can reconstitute a special litigation committee and revamp the investigation by adding an infinite number of members to the committee as often as the board "deems appropriate."

Third, a board's authority to expand the membership of a special litigation committee is at odds with other relevant case law concerning the necessary independence of special litigation committees. For example, a special litigation committee is not independent if its decisions are based on "extraneous consideration or influences." *See PSE&G*, 801 A.2d at 314, case cited by *Janssen*, 662 N.W.2d at 888. Certainly, a committee is not independent if it is influenced by the "extraneous" fact that the board could expand the committee's membership at any time. Furthermore, a board's authority to enlarge the committee's membership naturally brings into question "the committee's autonomy from the officers and directors." *House*, 245 S.W.3d at 382 n.9 (citation omitted). No façade of independence can remedy the lack of autonomy of a committee whose membership can be enlarged by the board at a drop of a hat.

Finally, a board's authority to expand the membership of a special litigation committee calls to mind President Franklin D. Roosevelt's controversial "court packing plan." Roosevelt proposed "that for each member of the Supreme Court who was over 70 years of age—six of the nine were of that vintage—and did not elect to retire, the president would be empowered to appoint an additional justice to the Court and thereby enlarge the Court's membership up to a total of 15." William H. Rehnquist, *Judicial Independence*, 27 *Litigation* 4, 7 (Winter 2001). But the aging court was not Roosevelt's real concern. "The true reason for the proposal, of course, was to enable the president to pack the Court all at once in such a way that it would no longer invalidate New Deal social legislation." *Id*

The board's authority to "pack" a special litigation committee is functionally similar. The board's power to expand the membership of the special litigation committee compromises the independence of the committee. The board does not have to actually enlarge the special litigation committee's membership to have an affect on the committee's decision-making. Indeed, the mere fact that a board could expand a special litigation committee's membership undermines the committee's independence.

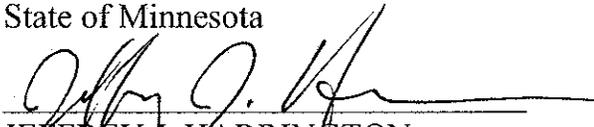
**CONCLUSION**

For the reasons expressed above, if a board of directors possesses the authority to expand, "if the board deems appropriate," the number of members of a previously established special litigation committee, then the special litigation committee is not sufficiently independent of the board to merit any level of deference from the courts.

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