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Harvey Gelb

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THE CORPORATE OPPORTUNITY DOCTRINE—RECENT CASES AND THE ELUSIVE GOAL OF CLARITY

*Harvey Gelb**

I. INTRODUCTION

Diane, a director and public relations executive of a corporation called Discount Department Stores Inc., ("DDS"), which owns fifteen department stores, was having lunch in a restaurant located next to the DDS headquarters building. She was approached by Alice, a real estate agent, who had met Diane sometime ago at a soccer game involving their children. Alice asked Diane if she could join her for lunch, indicating that she had a business matter she wished to discuss. Alice told Diane that she was the selling agent for the owner of a large piece of real estate with an asking price of \$300,000. Diane was familiar with the real estate, having seen it several times while on her way to check progress on the construction of a new DDS department store, but until Alice told her, Diane was unaware it was for sale. Diane told Alice she would contact her later to discuss the real estate, but must hurry off to a DDS board of directors meeting slated to start in ten minutes at DDS headquarters.

Suppose that Diane, thinking that the real estate would be ideal for a shopping center, may want to buy it for herself. Should she be concerned that she may be obligated to give DDS an opportunity to acquire it, in preference to herself? This is the kind of situation which brings into play issues involving the corporate opportunity doctrine.

* Winston S. Howard Distinguished Professor of Law, University of Wyoming College of Law. B.A., 1957, Harvard College; J.D., 1960, Harvard Law School. The author is grateful for summer research grants for work on this article provided by the University of Wyoming College of Law George Hopper Faculty Research Fund. The author thanks research assistants Deby L. Forry, Tassma A. Powers, and Susan E. Schell for their fine assistance.

This article considers a number of significant issues involving the corporate opportunity doctrine raised or suggested by several cases decided in the last few years. Particular attention is given to two cases with different approaches to corporate opportunity questions—a Delaware approach and a Maine approach utilizing principles formulated by the American Law Institute.

The assortment and potential severity of remedies for breaches of fiduciary duty, including the usurpation of corporate opportunities, are striking and frightening, or appetizing, depending on whether one is thinking as a plaintiff or defendant. For example, in *Levy v. Markal Sales Corp.*,¹ which is discussed later in this article, remedies included a forced buyout of the shares of a frozen-out plaintiff-shareholder for \$499,999, forfeiture of salary and other benefits paid to wrongdoers in the amount of \$1,699,118, direct recovery of a portion of compensatory damages of \$53,131 by the plaintiff-shareholder and punitive damages of \$3,000,000.² Another potential remedy in cases involving the usurpation of a corporate opportunity is the imposition of a constructive trust with respect to improperly acquired property in favor of the wronged corporation.³ In today's legal climate, it would be foolish for Diane to buy the property Alice is offering without proper consideration of her fiduciary duties, including those involving the corporate opportunity doctrine. Corporate officials and investors should be aware of the high stakes that may be involved in corporate opportunity cases.

Some comments put into perspective the discussion on legal clarity which follows. First, in the two principal approaches discussed, those of Maine (the ALI approach) and Delaware, the yearning of courts for clarity in the corporate opportunity area is evident and understandable. It is preferable that corporate investors receive desirable protection through legal rules which are clear enough to deter fiduciary transgression or to compensate its victims. Furthermore, a sensible outcome exists if a

1. 643 N.E.2d 1206 (Ill. 1994), *cert. denied*, 116 S. Ct. 171 (1995).

2. *See id.*; regarding remedies, see also *Enstar Group Inc. v. Grassgreen*, 812 F. Supp. 1562 (Ala. 1993); *E.J. McKernan Co. v. Gregory*, 623 N.E.2d 981 (Ill. App. Ct. 1993); and WILLIAM L. CARY & MELVIN ARON EISENBERG, *CASES AND MATERIALS ON CORPORATIONS* 662 (7th ed. 1995).

3. *See* JAMES D. COX ET AL., *CORPORATIONS* § 11.7 (1995).

rule allows a corporate official to proceed justifiably in his or her own self interest without undue delay or inappropriate anxiety about usurping a corporate opportunity. Second, although clarity is desirable where reasonably attainable, difficult issues may remain even where there are judicial efforts to achieve clarity. A number of the difficult issues discussed in this article include: the factual determination of the capacity in which a corporate official has received an offer; the appropriate time for the official to assess his or her obligations to the corporation and the information to be taken into account in making the assessment; the significance of financial inability of the corporation in determining the official's obligations; and the meaning and significance of "line of business" and "interest or expectancy" considerations. Also relevant are the significance of an official taking an opportunity without first presenting it to the corporation, the significance of the use of corporate assets to develop an opportunity which the official desires, and the role of laches in determining liability in a corporate opportunity case. Third, the difficulty in achieving clarity should not be surprising in the corporate opportunity area, where the loyalty of officials is sometimes questioned in the presence of various factual and equitable considerations.

There are limits to the scope of this article. First, this article focuses on corporate opportunity claims and is not aimed at dealing with legal theories which, in some cases, may overlap with the corporate opportunity cause of action. For example, cases involving the corporate opportunity doctrine may also involve claims for the misappropriation of corporate property, or for improperly competing with one's corporation. Consider, for example, the possible overlap of theories set forth by the American Law Institute ("ALI") in *Principles of Corporate Governance* section 5.04 (use by a director or senior executive of corporate property, material non-public corporate information, or corporate position)⁴ and ALI section 5.06 (competition with the corporation)⁵ with ALI section 5.05 (taking of corporate opportunities by directors or senior executives).⁶ Second, this article fo-

4. AMERICAN LAW INSTITUTE, PRINCIPLES OF CORPORATE GOVERNANCE § 5.04 (1992) (hereinafter ALI sections).

5. *Id.* § 5.06.

6. *Id.* § 5.05.

cuses on the duties of corporate directors and officers and not on those of subordinate employees under agency law. In referring to its own Part V, which involves the duty of fair dealing including rules pertaining to the taking of corporate opportunities, the ALI *Principles of Corporate Governance* states:

By and to whom is the duty of fair dealing owed? It has been traditionally recognized by the courts that directors owe a duty of fair dealing to their corporation. The courts have usually treated officers in the same category as directors when imposing and enforcing the duty of fair dealing. With respect to officers, Part V deals only with senior executives [§ 1.33], but officers other than senior executives are generally subject to the same duties of fair dealing as those imposed on senior executives, as a matter of either corporation law or agency law. The obligations of subordinate employees are measured by the duty of fair dealing applicable to agents. See Restatement, Second, Agency §§ 387-398.⁷

Third, this article does not attempt, in treatise-like fashion, to cover or refer to numerous cases, but focuses on several recent illustrative cases and a number of issues arising in or suggested by them.

II. MAINE REVIEWS SEVERAL APPROACHES AND FOLLOWS THE ALI TEST

Court decisions offer various tests for determining the application of the corporate opportunity doctrine to given situations.⁸ In a significant 1995 case, *Northeast Harbor Golf Club, Inc. v. Harris*,⁹ the Supreme Judicial Court of Maine ("Maine Supreme Court") reviewed the line of business, fairness, line of business plus fairness, and ALI tests, and decided to adopt the ALI approach.

In this case, Harris, the president of Northeast Harbor Golf Club, a Maine corporation, was alleged to have committed a breach of fiduciary duty as president of the Club by buying and developing property abutting the Club's golf course. There were

7. *Id.*

8. *See id.* § 5.05 n.2.

9. 661 A.2d 1146 (Me. 1995).

actually three purchases of real estate by Harris. As to the first purchase, a broker testified that he contacted Harris because she was president and he believed that the Club would be interested in buying the property to prevent development. Harris, however, purchased the property, later informing the board of directors of her purchase, her intention to hold the property in her own name, and that the Club would be protected.

Harris testified that she told a number of board members about her attempt to purchase a second parcel, and formally disclosed to the board at a meeting that she had purchased the property.¹⁰ According to the minutes of that board meeting, she told the board that she had no present development plans for that parcel. The board took no formal action in response to the Harris purchase. Harris acquired a third property in order to gain access to the second parcel. Harris subsequently divided the real estate into lots owned by herself and her children, and eventually she and her children began the process of obtaining approval for subdivision purposes. Although a majority of the board refused to take action after the board learned of the subdivision, a group of directors formed an organization to oppose the subdivision as violating the local zoning ordinance. After plans to develop the subdivision became apparent, the board became more divided over the propriety of development near the golf course.

One member of the board testified that he had relied on Harris's representations that she would not develop the properties.¹¹ According to the testimony of that member, matters came to a head "when a number of directors concluded that the development plans irreconcilably conflicted with the Club's interests."¹² Harris was asked to resign and, after a substantial change in board membership, the board authorized a suit against her for breach of her fiduciary duty to act in the best interests of the corporation.¹³

Allegations were made that during her term Harris breached her fiduciary duty by purchasing the lots without providing

10. See *id.* at 1146.

11. See *id.* at 1148.

12. *Id.*

13. See *id.* at 1146-1148.

notice and an opportunity for the Club to buy the property and by subdividing the lots for future development.¹⁴ The Club sought an injunction to prevent development and sought to impose a constructive trust on the property for the benefit of the Club. The trial court found that there was no usurpation of a corporate opportunity because acquisition of the real estate was not in the Club's line of business, and that the corporation lacked the financial ability to buy the real estate.¹⁵ The court placed great emphasis on Harris's good faith, noting her long, dedicated history of service to the Club, her personal oversight of its growth and her frequent financial contributions.¹⁶ The court found the development activities generally compatible with the business of the corporation.¹⁷

For convenience, discussion of *Northeast Harbor* is divided into three segments: a) Review of Tests by the Maine Supreme Court; b) Adoption of the ALI Approach; and c) Laches and Other Issues on Remand.

A. Review of Tests by the Maine Supreme Court

1. The Line of Business Test

The Maine Supreme Court, pointing to the confusion about the specific extent of the duty of loyalty when it is contended that a fiduciary has taken for herself a corporate opportunity, reviewed different versions of the corporate opportunity doctrine. The following passage from its opinion deals with the court's review of the line of business test:

Various courts have embraced different versions of the corporate opportunity doctrine. The test applied by the trial court . . . is generally known as the "line of business" test. The seminal case applying the line of business test is *Guth v. Loft, Inc.* In *Guth*, the Delaware Supreme Court adopted an intensely factual test stated in general terms as follows:

14. See *id.* at 1148.

15. See *id.*

16. See *id.*

17. See *id.*

"[I]f there is presented to a corporate officer or director a business opportunity which the corporation is financially able to undertake, is, from its nature, in the line of the corporation's business and is of practical advantage to it, is one in which the corporation has an interest or a reasonable expectancy, and, by embracing the opportunity, the self-interest of the officer or director will be brought into conflict with that of his corporation, the law will not permit him to seize the opportunity for himself."

The "real issue" under this test is whether the opportunity "was so closely associated with the existing business activities . . . as to bring the transaction within that class of cases where the acquisition of the property would throw the corporate officer purchasing it into competition with his company." The Delaware court described that inquiry as "a factual question to be decided by reasonable inferences from objective facts."¹⁸

The Maine Supreme Court noted significant weaknesses in the line of business test. It stated that the question of whether an activity is within the line of business of a corporation is "conceptually difficult to answer."¹⁹ The court indicated that although the Club is in the business of running a golf course and not developing real estate, the record would support a finding that the Club had determined that the development of surrounding real estate was detrimental to its best interests. The record also showed occasional consideration by the Club of "expanding its operations to include the development of surrounding real estate."²⁰

The court also indicated that the *Guth* test includes an element of financial ability, and that the court below relied on the Club's supposed financial incapacity as a basis for excusing the president's conduct. The court pointed to the following problems in connection with financial incapacity:

Often, the injection of financial ability into the equation will unduly favor the inside director or executive who has

18. *Id.* at 1149 (citations omitted) (citing *Guth v. Loft, Inc.*, 5 A.2d 503 (Del. 1939)).

19. *Id.*

20. *Id.*

command of the facts relating to the finances of the corporation. Reliance on financial ability will also act as a disincentive to corporate executives to solve corporate financing and other problems.²¹

2. The Fairness Test

The Maine Supreme Court also pointed to the test adopted in Massachusetts known as the fairness test. Quoting a Massachusetts case, the Maine Supreme Court said that the

true basis of governing doctrine rests on the unfairness in the particular circumstances of a director, whose relation to the corporation is fiduciary, taking advantage of an opportunity [for her personal profit] when the interest of the corporation justly call[s] for protection. This calls for application of ethical standards of what is fair and equitable . . . in particular sets of facts.²²

Referring to the need under the Massachusetts test for a broad-ranging, intensely factual inquiry, the Maine Supreme Court stated that the "test suffers even more than the *Guth* test from a lack of principled content," and "[i]t provides little or no practical guidance to the corporate officer or director seeking to measure her obligations."²³

3. The Minnesota Test

The court also referred to the Minnesota test, which combines the line of business test with the fairness test.²⁴ The Minnesota test involves a "two-step analysis, first determining whether a particular opportunity was within the corporation's line of business, then scrutinizing the equitable considerations existing prior to, at the time of, and following the officer's acquisition."²⁵ The court pointed to the weakness of the Minnesota

21. *Id.*

22. *Id.* at 1149-50 (quoting *Durfee v. Durfee & Canning, Inc.*, 80 N.E.2d 522, 529 (Mass. 1948)).

23. *Id.* at 1150.

24. *See id.* (citing *Miller v. Miller*, 222 N.W.2d 71, 81 (Minn. 1974)).

25. *Id.* (quoting *Miller*, 222 N.W.2d at 81).

test of merely piling the "uncertainty and vagueness of the fairness test on top of the weaknesses of the line of business test."²⁶

B. Adoption of the ALI Approach

The Maine Supreme Court stated that despite their weaknesses, the above-mentioned approaches to the corporate opportunity doctrine rest on a single fundamental policy that "recognizes that a corporate fiduciary should not serve both corporate and personal interests at the same time."²⁷ Nevertheless, the court pointed to the need to moderate the potentially harsh consequences of strict adherence to that policy. The court stated: "It is important to preserve some ability for corporate fiduciaries to pursue personal business interests that present no real threat to their duty of loyalty."²⁸

The Maine Supreme Court decided to follow still another approach for the resolution of the corporate opportunity problem—the approach set forth in ALI section 5.05.²⁹

Section 5.05 is aimed at directors and senior executives and does not purport to cover the conduct of others.³⁰ Section 5.05 forbids a director or senior executive from taking advantage of a corporate opportunity without first offering it to the corporation and making certain disclosures to the corporation.³¹ In addition, the opportunity must be rejected by the corporation.

26. *Id.*

27. *Id.*

28. *Id.*

29. See *id.* at 1150-51 (citing ALI, *supra* note 4, § 5.05).

30. See ALI, *supra* note 4, § 5.05. A "senior executive" means an officer as described in the definition of officer in ALI § 1.27(a) or (b). *Id.* § 1.33. An "officer" "means (a) the chief executive, operating, financial, legal, and accounting officers of a corporation; (b) to the extent not encompassed by the foregoing, the chairman of the board of directors (unless the chairman neither performs a policy making function other than as a director nor receives a material amount of compensation in excess of director's fees), president, treasurer, and secretary, and a vice-president or vice-chairman who is in charge of a principal business unit, division, or function (such as sales, administration, or finance) or performs a major policy making function for the corporation; and (c) any other individual designated by the corporation as an officer." *Id.* § 1.27; see *supra* note 7 and accompanying text for reference to subordinate employees.

31. See ALI, *supra* note 4, § 1.14(a)-(b) for the definition of disclosure.

The rejection will be effective to protect the director or senior executive if it satisfies any of the following three tests under section 5.05(a)(3):

Either:

(A) The rejection of the opportunity is fair to the corporation;

(B) The opportunity is rejected in advance, following such disclosure, by disinterested directors [§ 1.15], or, in the case of a senior executive who is not a director, by a disinterested superior, in a manner that satisfies the standards of the business judgment rule [§ 4.01(c)]; or

(C) The rejection is authorized in advance or ratified, following such disclosure, by disinterested shareholders [§ 1.16], and the rejection is not equivalent to a waste of corporate assets [§ 1.42].³²

The problem of defining a corporate opportunity is dealt with in section 5.05(b). Under this section, a corporate opportunity means:

(1) Any opportunity to engage in a business activity of which a director or senior executive becomes aware, either:

(A) In connection with the performance of functions as a director or senior executive, or under circumstances that should reasonably lead the director or senior executive to believe that the person offering the opportunity expects it to be offered to the corporation; or

(B) Through the use of corporate information or property, if the resulting opportunity is one that the director or senior executive should reasonably be expected to believe would be of interest to the corporation. . . .³³

In addition, for a senior executive, a corporate opportunity means "any opportunity to engage in a business activity of which a senior executive becomes aware and knows is closely related to a business in which the corporation is engaged or expects to engage."³⁴

Section 5.05 also deals with the burden of proof and states that the party who challenges the taking of a corporate oppor-

32. ALI, *supra* note 4, § 5.05(a)(3).

33. *Id.* § 5.05(b).

34. *Id.* § 5.05(b)(2).

tunity has the burden of proof, except that if such party establishes that the requirements of subsection (a) (3) (B) or (C) are not met, then the burden is on the director or senior executive to prove that the rejection and the taking of the opportunity were fair to the corporation.³⁵

Furthermore, section 5.05 contains a rule for curing a defective disclosure of the facts concerning the corporate opportunity where the disclosure was made in good faith. It also contains a special rule concerning the delayed offer of corporate opportunities, which reads as follows:

Relief based solely on failure to first offer an opportunity to the corporation under Subsection (a)(1) is not available if: (1) such failure resulted from a good faith belief that the business activity did not constitute a corporate opportunity, and (2) not later than a reasonable time after suit is filed challenging the taking of the corporate opportunity, the corporate opportunity is to the extent possible offered to the corporation and rejected in a manner that satisfies the standards of Subsection (a).³⁶

The Maine Supreme Court pointed to "the central feature of the ALI test [a]s the strict requirement of full disclosure prior to taking advantage of any corporate opportunity,"³⁷ accepted the notion that the ALI test is an opportunity to bring some clarity to a murky area of the law, and decided to follow the ALI test. It saw the disclosure-oriented approach as providing a clear procedure for the corporate officer to insulate herself through proper disclosure from the possibility of a legal challenge.³⁸

The court felt that the disclosure requirement recognizes the paramount importance of the duty of loyalty while protecting the ability of the fiduciary, pursuant to proper procedure, to pursue her own business ventures free from the possibility of a lawsuit.³⁹ The court specifically referred to testimony by the broker respecting the property first purchased by Harris which,

35. See *id.* § 5.05(c).

36. *Id.* § 5.05(e).

37. *Northeast Harbor Golf Club, Inc.*, 661 A.2d 1146, 1151 (citation omitted).

38. See *id.* at 1152.

39. See *id.*

if believed by the fact finder, would support a finding that the property was offered to Harris specifically in her capacity as president; if the factfinder reached that conclusion, then the opportunity to acquire the property would be a corporate opportunity.⁴⁰

Suppose Harris reasonably believed the property was not offered to her in connection with her corporate functions. The court's position evidently turns on the intent of the broker, not the reasonable belief of the corporate official. The court's position might be supported by the language of section 5.05(b)(1)(A), where the reasonable belief language could be held to apply not to the "performance of functions" portion, but only to the "or under circumstances" portion. Although such an interpretation may, at times, bring about unfair or unreasonable results, it is possible.

C. Laches and Other Issues on Remand

Having formulated the applicable legal standard, the court remanded the case for further proceedings in light of the new legal standard. It should also be noted that the court made it clear that Harris had raised the defenses of laches and the statute of limitations, which had not been ruled on below. The Maine Supreme Court refused to indicate how it would rule on the application of either doctrine in this case.⁴¹ As to the issue of remedy, which had not been addressed by the trial court in the first trial, the Maine Supreme Court pointed out that "the court has broad discretion to fashion an equitable remedy based on the facts and circumstances of the case"⁴² and declined to invade the province of the lower court "by commenting prematurely on what remedy, if any, may be appropriate."⁴³

40. *See id.* at 1151.

41. *See id.* at 1152 n.3.

42. *Id.*

43. *Id.*

III. BROZ CASE—DELAWARE SUPREME COURT

In a significant recent case involving the corporate opportunity doctrine, *Broz v. Cellular Information Systems, Inc.*,⁴⁴ the Delaware Supreme Court took a different approach than did the Maine Court in *Northeast Harbor*.

Robert F. Broz, president and sole stockholder of RFB Cellular, Inc. ("RFBC"), a corporation in the business of providing cellular telephone service, was also a member of the board of directors of Cellular Information Systems, Inc. ("CIS"), a publicly-held Delaware corporation and competitor of RFBC.⁴⁵ The Delaware Supreme Court pointed out that Broz's efforts were devoted primarily to the business operations of RFBC, that he was an outside director of CIS at the time of the events at issue, and that CIS was fully aware of his relationship with RFBC and his obligations arising from the relationship. Broz purchased for RFBC, from Mackinac Cellular Corp. ("Mackinac"), a cellular telephone service license issued by the Federal Communications Commission, the Michigan-2 Rural Service Area Cellular License ("Michigan-2"). CIS brought an action against Broz and RFBC contending that the purchase was a usurpation of a corporate opportunity belonging to CIS.

A brokerage firm representing Mackinac contacted Broz in May 1994, regarding the possible acquisition of Michigan-2 by RFBC. Michigan-2 was not offered to CIS, which had been having financial difficulties and had divested itself of a number of license systems. Broz spoke of his interest in acquiring Michigan-2 to the CIS chief executive officer and was told by the latter that CIS was not interested in Michigan-2. Broz also spoke to two other CIS directors who indicated a lack of interest on the part of CIS in Michigan-2. At trial, each CIS director testified about his belief that, at the time the opportunity was presented to Broz, CIS would not have been interested in it.

Before Broz acquired Michigan-2, another corporation, PriCellular, Inc. ("PriCellular"), became involved in steps to acquire CIS and commenced a tender offer on August 2, 1994, for all outstanding shares of CIS. Because of financing difficul-

44. 673 A.2d 148 (Del. 1996).

45. See *id.* at 150.

ties, PriCellular delayed the closing date of the tender offer from September 16, 1994, until October 14, 1994, and again until November 9, 1994. On August 6, September 6, and September 21, 1994, Broz made written offers to Mackinac to purchase Michigan-2. During this same time period, PriCellular also negotiated with Mackinac to arrange an option to purchase that license. CIS was aware that both PriCellular and Broz were bidding for Michigan-2, but did not interpose itself in the bidding war.

In late September 1994, PriCellular and Mackinac agreed on an option to buy Michigan-2 at an exercise price of \$6.7 million. The option was nontransferable to any party other than a subsidiary of PriCellular. According to the Delaware Supreme Court, it could not, therefore, have been transferable to CIS. The agreement also provided that Mackinac could sell Michigan-2 to any party willing to top the exercise price by at least \$500,000. On November 14, 1994, Broz agreed to pay \$7.2 million for the Michigan-2 license. On November 23, 1994, PriCellular completed its financing and closed its tender offer for CIS. Before that time, PriCellular had no equity interest in CIS. Thereafter, members of the CIS board of directors, including Broz, were discharged and replaced with PriCellular nominees. In March 1995, CIS commenced the action involved in the *Broz* case in the Delaware Court of Chancery.⁴⁶

The court of chancery took the position that CIS could require its director, Broz, to abstain from the Michigan-2 transaction, despite the fact that it came to the director in an independent way. The court pointed out that the transaction fell quite close to the core transactions for which the corporation was formed, and that, by no later than the time the tender offer was extended, the circumstances of the company changed so that it was quite plausibly in the interest of the corporation and financially feasible for it to pursue the Michigan-2 transaction.⁴⁷ The court of chancery found that, in the circumstances as existed "at the latest after October 14, 1994 (date of PriCellular's option contract on Michigan 2 RSA),"⁴⁸ it was the

46. See *id.* at 151-53.

47. See *id.* at 153.

48. *Id.*

obligation of Broz as a CIS director, to take the transaction to the CIS board for its formal action. The court of chancery held that:

[E]ven though knowledge of the availability of the Michigan 2 RSA license and its associated assets came to Mr. Broz wholly independently of his role on the CIS board, that opportunity was within the core business interests of CIS at the relevant times; that at such time CIS would have had access to the financing necessary to compete for the assets that were for sale; and that the CIS board of directors were not asked to and thus did not consider whether such action would have been in the best interests of the corporation. In these circumstances I conclude that Mr. Broz as a director of CIS violated his duty of loyalty to CIS by seizing this opportunity without formally informing the CIS board fully about the opportunity and facts surrounding it and by proceeding to acquire rights for his benefit without the consent of the corporation.⁴⁹

The Delaware Supreme court reversed the court of chancery. For the sake of convenience, discussion of the analysis of the Delaware Supreme Court may be divided into several segments: a) the doctrines of *Guth*⁵⁰ and its progeny; b) flexible application of the tests from *Guth* and its progeny; c) importance of how the director learned of the opportunity; d) factors analysis; and e) need for formal presentation.

A. *The Doctrines of Guth and Its Progeny*

In considering the application of the corporate opportunity doctrine, the Delaware Supreme Court referred to the holding from *Guth* as follows:

[I]f there is presented to a corporate officer or director a business opportunity which the corporation is financially able to undertake, is, from its nature, in the line of the corporation's business and is of practical advantage to it, is one in which the corporation has an interest or a reasonable expectancy, and, by embracing the opportunity, the

49. *Id.* at 154 (quoting *Cellular Info. Sys. Inc. v. Broz*, 663 A.2d 1180, 1186 (Del. Ch. 1995 (citing *Yiannatsis v. Stephanis*, 653 A.2d 275 (Del. 1995))).

50. *Guth v. Loft, Inc.*, 5 A.2d 503 (Del. Ch. 1939).

self-interest of the officer or director will be brought into conflict with that of the corporation, the law will not permit him to seize the opportunity for himself.⁵¹

The court then explained the corporate opportunity doctrine from *Guth* and its progeny as holding that the corporate officer or director may not take the business opportunity if:

(1) the corporation is financially able to exploit the opportunity; (2) the opportunity is within the corporation's line of business; (3) the corporation has an interest or expectancy in the opportunity; and (4) by taking the opportunity for his own, the corporate fiduciary will thereby be placed in a position inimicable to his duties to the corporation.⁵²

The court also referred to a corollary derived by the *Guth* court stating:

that a director or officer *may* take the corporate opportunity if: (1) the opportunity is presented to the director or officer in his individual and not his corporate capacity; (2) the opportunity is not essential to the corporation; (3) the corporation holds no interest or expectancy in the opportunity; and (4) the director or officer has not wrongfully employed the resources of the corporation in pursuing or exploiting the opportunity.⁵³

B. *Flexible Application of the Tests from Guth and Its Progeny*

Notwithstanding the manner of listing factors from the tests from *Guth* and its progeny, the court made it clear that the tests "provide guidelines to be considered by a reviewing court in balancing the equities of an individual case."⁵⁴ The court pointed out that "[n]o one factor is dispositive and all factors must be taken into account insofar as they are applicable."⁵⁵ Referring to the multitude of factual settings involved in corporate opportunity cases and the difficulty of crafting hard and

51. *Broz*, 673 A.2d at 154 (quoting *Guth*, 5 A.2d at 510).

52. *Id.* at 155.

53. *Id.* (citing *Guth* 5 A.2d at 509).

54. *Broz*, 673 A.2d at 155.

55. *Id.*

fast rules to deal with such an array of complex situations, the court pointed out that "the determination of '[w]hether or not a director has appropriated for himself something that in fairness should belong to the corporation is 'a factual question to be decided by reasonable inference from objective facts.'"⁵⁶ The court found that the facts did not support the conclusion that Broz misappropriated a corporate opportunity.

C. Importance of How the Director Learned of the Opportunity

In explaining its position, the court placed significance on the fact that Broz learned of the Michigan-2 opportunity in his individual, and not his corporate, capacity. The license was not offered to CIS. Thus, "many of the fundamental concerns undergirding the law of corporate opportunity are not present (e.g., misappropriation of the corporation's proprietary information)."⁵⁷ This, according to the court, reduced the burden on Broz to show adherence to his fiduciary duties at CIS. Still, the court did not find this point to be dispositive, indicating that determining if there has been a usurpation of a corporate opportunity by the fiduciary "necessitates a careful examination of the circumstances, giving due credence to the factors enunciated in *Guth* and subsequent cases."⁵⁸

D. Factors Analysis

The court then turned to an analysis of factors relied on by the trial court.

1. Financial Ability and Timing

The court, in dealing with the issue of whether CIS was financially capable of exploiting the Michigan-2 opportunity, determined that the finding of the lower court of financial capability was not supported by the evidence. The lower court was of the view that PriCellular could eliminate financial obstacles to the acquisition of Michigan-2 by CIS. The Delaware Supreme

56. *Id.* (quoting *Johnston v. Greene*, 121 A.2d 919, 923 (Del. 1956) (quoting *Guth*, 5 A.2d at 513)).

57. *Broz*, 673 A.2d at 155.

58. *Id.*

Court pointed out that “[a]t the time that Broz was required to decide whether to accept the Michigan-2 opportunity, PriCellular had not yet acquired CIS, and any plans to do so were wholly speculative.”⁵⁹ Broz was not obligated to consider the two contingencies of a PriCellular acquisition of CIS and action thereafter by PriCellular to remove financial obstacles to the acquisition of Michigan-2.⁶⁰ Significantly, the court took the position that “Broz was required to consider the facts only as they existed at the time he determined to accept the Mackinac offer and embark on his efforts to bring the transaction to fruition.”⁶¹

2. Line of Business

Second, the court referred to the line of business factor stating that “it may properly be said that the opportunity is within the corporation’s line of business.”⁶²

3. Interest or Expectancy and Timing

Third, the court pointed to the factor laid down in the *Guth* case indicating that “for an opportunity to be deemed to belong to the fiduciary’s corporation, the corporation must have an interest or expectancy in that opportunity.”⁶³ Quoting another case, the court explained “[f]or the corporation to have an actual or expectant interest in any specific property, there must be some tie between that property and the nature of the corporate business.”⁶⁴ Stressing that the crucial time was when the opportunity was presented, the court pointed out that, at that time, CIS was actively divesting its license holdings. The court referred to the testimony of the entire CIS board that the Michigan-2 license would not have been of interest to CIS, even absent its financial difficulties and its then-current desire

59. *Id.* at 156.

60. *See id.*

61. *Id.*

62. *Id.* at 156 n.7 (quoting *Guth v. Loft, Inc.*, 5 A.2d 503, 513 (Del. 1956)). See *infra* notes 140 and 141 and accompanying text for further discussion of the line of business factor in the *Broz* case.

63. *Id.* at 156.

64. *Id.* (quoting *Johnston v. Greene*, 121 A.2d 919, 924 (Del. 1956)).

to liquidate its cellular license holdings. The court concluded that CIS had no interest or expectancy in the Michigan-2 opportunity.

4. Conflicting Interest and Timing

The court also examined the question of whether the taking of the opportunity by Broz resulted in a conflict with his duties to the corporation and his self-interest. The court said:

Broz took care not to usurp any opportunity which CIS was willing and able to pursue. Broz sought only to compete with an outside entity, PriCellular, for acquisition of an opportunity which both sought to possess. Broz was not obligated to refrain from competition with PriCellular. Therefore, the totality of the circumstances indicates that Broz did not usurp an opportunity that properly belonged to CIS.⁶⁵

5. Need for Formal Presentation

The court next considered the position of the court of chancery that, in the circumstances existing “at the latest after October 14, 1994, (the date of PriCellular’s option contract on Michigan 2 RSA),”⁶⁶ Broz was obligated “as a director of CIS to take the transaction to the CIS board for its formal action”⁶⁷ The Delaware Supreme Court found that the trial court erroneously grafted onto the law of corporate opportunity a new “requirement of formal presentation under circumstances where the corporation does not have an interest, expectancy or financial ability.”⁶⁸ Explaining that the director or officer must analyze the situation *ex ante* to determine if an opportunity rightfully belongs to a corporation, the supreme court stated that “[i]f the director or officer believes, based on one of the factors articulated above, that the corporation is not entitled to

65. *Broz*, 673 A.2d at 157.

66. *Id.* (quoting *Cellular Info. Sys., Inc. v. Broz*, 663 A.2d 1180, 1185 (Del. Ch. 1995)).

67. *Broz*, 673 A.2d at 157.

68. *Id.*

the opportunity, then he may take it for himself."⁶⁹ The court explained that "presenting the opportunity to the board creates a kind of 'safe harbor' for the director, which removes the specter of a *post hoc* judicial determination that the director or officer has improperly usurped a corporate opportunity."⁷⁰

The Delaware Supreme Court refused to accept the finding of the trial court that Broz was required to consider PriCellular's prospective, post-acquisition plans for CIS in determining whether to forgo the opportunity or seize it for himself. According to the supreme court, the lower court felt that if Broz had done this, he would have determined that CIS was entitled to the opportunity because of its alignment of interests with PriCellular. The supreme court disagreed, stating that Broz was under no duty to consider PriCellular's interest when he chose to buy Michigan-2. The court emphasized timing, stating that "a director's right to 'appropriate [an] . . . opportunity depends on the circumstances existing at the time it presented itself to him without regard to subsequent events."⁷¹ The court pointed out that when Broz purchased Michigan-2, PriCellular had not yet acquired CIS and any plans to do so would have been speculative and that Broz was not required to consider the contingent and uncertain plans of PriCellular in reaching his determination on how to proceed.

IV. ILLINOIS- MARKAL CASE-LINE OF BUSINESS AND USE OF CORPORATE RESOURCES

Both the line of business test and the improper use of corporate resources have been referred to earlier. As indicated above, the *Broz* case refers to the wrongful use of corporate resources by a director in pursuing or exploiting the opportunity. The court considered it significant that Broz learned of the opportunity in his individual capacity and did not misappropriate corporate proprietary information. In addition, ALI section 5.05 attaches significance to the issue of whether the corporate di-

69. *Id.*

70. *Id.*

71. *Id.* at 158 (quoting *Guth v. Loft, Inc.*, 5 A.2d 503, 513 (Del. Ch. 1939)).

rector or senior executive becomes aware of the opportunity through the use of corporate information or property.⁷²

A recent Illinois case is helpful in considering both the line of business test and the use of corporate resources issue.⁷³ Markal Sales Corporation ("Markal") served as a sales representative for electronic manufacturers including manufacturers of CB radios, consumer electronic components, and audio equipment.⁷⁴ Levy, a forty-percent shareholder of Markal, sued two of its directors, Gust, a forty-percent shareholder, and Bakal, a twenty-percent shareholder.⁷⁵ The latter two had an agreement providing for employment with Markal.⁷⁶ The employment contract called for devotion of substantially all time, attention and energies to Markal business for one, and for full-time employment with Markal for the other.⁷⁷ Gust was contacted by a sales manager of Apple Computers ("Apple") to discuss representation of Apple. Gust and Bakal negotiated with the Apple sales manager and set up G/B Marketing ("G/B") to serve as Apple's representative.⁷⁸

The court cited language indicating that individuals who control corporations owe them and their shareholders a fiduciary duty;⁷⁹ that the three shareholders had mutual obligations similar to partners and a fiduciary duty to deal openly and honestly with each other;⁸⁰ "and to 'exercise the utmost good faith and honesty in all dealings and transactions' relating to each other and to Markal."⁸¹

72. See *ALI, supra* note 4, § 5.05.

73. *Levy v. Markal Sales Corp.*, 643 N.E.2d 1206 (Ill. App. Ct. 1994), *cert. denied*, 116 S. Ct. 171 (1995).

74. See *id.* at 1210.

75. See *id.*

76. See *id.*

77. See *id.*

78. See *id.* at 1211.

79. See *id.* at 1214 (citing *Graham v. Mimms*, 444 N.E.2d 549, 560 (Ill. App. Ct. 1982)).

80. See *id.*, 643 N.E.2d at 1214 (citing *Illinois Rockford Corp v. Kulp*, 242 N.E.2d 228 (Ill. 1968)).

81. *Id.*, 643 N.E.2d at 1214 (quoting *Couri v. Couri*, 447 N.E.2d 334 (Ill. 1983)).

The court set forth the following principles:

Gust and Bakal, as fiduciaries, could not place themselves "in a position where their own individual interests might interfere with the performance of their duties to their corporation" and could not use their positions for their own personal gain. Also, they were governed by the "corporate opportunity doctrine, [which] prohibits a corporation's fiduciary from taking advantage of business opportunities which are considered as 'belonging' to the corporation." Gust and Bakal, as the directors and fiduciaries of Markal, "have the burden of establishing the fairness and propriety of the[ir] transactions."⁸²

The court held that Gust and Bakal breached their fiduciary duties to the corporation and the complaining shareholder because of their failure to offer the Apple opportunity to Markal, and because of the use of Markal assets for the benefit of G/B and another corporation handling Apple sales which Gust and Bakal formed.⁸³

The Illinois court's use of the "line of business" test evidently did not allow for the financial inability excuse from *Guth* and *Broz*. The court cited the general rule that a corporation's fiduciary, who wants to take advantage of a business opportunity which is in the corporation's line of business, must first disclose and tender the opportunity to the corporation, even if the fiduciary believed that the corporation was legally or financially incapable of taking advantage of the opportunity.⁸⁴

In resolving the case before it, the court indicated it had to determine whether the Apple opportunity was reasonably incident to Markal's present or future business.⁸⁵ Among the testimony that the court cited to support the trial judge's findings that the Apple opportunity was reasonably incident to a prospective business of Markal was the evidence that Markal was interested in entering the computer field and making the sale of computers part of its prospective business; that the original

82. *Id.*, 643 N.E.2d at 1214 (citations omitted).

83. *See id.* at 1215-16.

84. *See id.* at 1215 (citing *Graham v. Mimms*, 444 N.E.2d 549, 549 (Ill. App. Ct. 1982)).

85. *See id.* at 1216.

negotiations with Apple were conducted by Gust and Bakal when they were solely employees of Markal; and that Markal was being considered as an Apple representative.⁸⁶ Having "determined that the Apple opportunity was reasonably incident to a prospective business of Markal,"⁸⁷ the court took the position that Gust and Bakal could not take advantage of it without first offering it to Markal and without a rejection by Markal in the face of possible detriment, such as losing present clients by becoming the Apple representative.⁸⁸ The court indicated that Markal should have the chance to decide the question for itself and to explore other ways of dealing with the problem of pursuing the Apple opportunity.⁸⁹

In the alternative, the court indicated that the breach of duty by Gust and Bakal should also be affirmed because of their use of Markal assets to develop and support G/B, estopping them from arguing the unavailability of the Apple opportunity to Markal.⁹⁰ It is significant to note the kinds of assets which the court looked to in deciding that corporate resources were improperly used. For one thing, the court pointed to the use of time of Gust and Bakal to benefit G/B.⁹¹ This use of time occurred even though they had an agreement calling for either the devotion of substantially all time or full time to Markal.⁹² Also, there had been an underpayment of rent from G/B to Markal according to certain evidence; in addition, evidence supported the conclusion that Markal paid several employees' salaries and expenses while they worked for G/B.⁹³ The court concluded that the defendants owed fiduciary duties to Markal, but used Markal assets to benefit themselves and develop the

86. *See id.*

87. *Id.*

88. *See id.*

89. *See id.*

90. *See id.* at 1217.

91. *See id.*

92. *See id.*

93. *See id.* at 1218.

Apple opportunity and that these acts estopped them from arguing that Markal could not have represented Apple.⁹⁴

V. *GUTH* COROLLARY AND USE OF CORPORATE ASSETS
ESTOPPEL (*RAPISTAN*)

In *Rapistan Corp. v. Michaels*,⁹⁵ a Michigan Court of Appeals applying Delaware law had to consider whether the acquisition of a related business, Alvey Inc., was a corporate opportunity for Rapistan Corporation which was usurped by three of its executives.⁹⁶ The trial court found that the three Rapistan executives learned that Alvey was for sale in their capacities as individuals and not as Rapistan managers.⁹⁷ The Michigan court discussed what it referred to as the seminal Delaware case, *Guth*, the *Guth* Rule and the *Guth* Corollary.⁹⁸ According to the Michigan court, the *Guth* Corollary draws a distinction between an opportunity which comes to a corporate officer or director as an individual rather than in his official capacity, indicating that if such an opportunity is not essential to the corporation, or is not one in which it has an interest or expectancy, or is not one in which the officer-director has wrongfully used the corporation's resources, then the officer-director may treat the opportunity as his own.⁹⁹

Referring to the *Guth* Corollary, the Michigan court laid out the path to be followed in dealing with the corporate opportunity issue:

First, a court, when determining whether a business opportunity is a corporate opportunity, must ascertain whether the opportunity was presented to a corporate officer in the officer's individual or representative capacity. Second, after determining the manner in which the opportunity was presented, the court must determine the nature of the opportunity. Third, the nature of the opportunity is analyzed differently, depending on whether the opportunity is pre-

94. *See id.*

95. 511 N.W.2d 918 (Mich. Ct. App. 1994).

96. *See id.* at 921.

97. *See id.* at 922

98. *See id.*

99. *See id.* at 923 (citing *Guth v. Loft, Inc.*, 5 A.2d 503 (Del. 1939)).

sented to a corporate official in the official's individual or corporate representative capacity. Accordingly, we cannot say that the trial court committed legal error when it concluded that Delaware law required it to consider the capacity of the corporate officer at the time of the presentation of the opportunity as a factor in determining whether a corporate opportunity existed and when it concluded that Delaware law required it to review the nature of the opportunity in light of the capacity of the corporate officer when the opportunity was received.¹⁰⁰

The court rejected the notion that the trial court erred as a matter of law by failing to consider if the acquisition of Alvey was desirable to Rapistan saying that "[t]he *Guth* Corollary contains no requirement that the trial court examine the desirability of the opportunity."¹⁰¹ Admitting that the business of Alvey was related to the business of Rapistan, the court indicated that "the acquisition of Alvey was not so indispensably necessary to the conduct of the business of Rapistan that the deprivation of the acquisition threatened the viability of Rapistan."¹⁰² The court rejected the position that the trial court erred by finding the opportunity not essential to Rapistan.¹⁰³ In addition, the court rejected the position that the trial court erred by failing to recognize an expectation or interest by Rapistan in the acquisition of Alvey.¹⁰⁴ In these connections the court said "[w]e cannot conclude, after reviewing the trial court's findings, that those findings establish that Rapistan had any urgent or practical need to acquire Alvey, or that the acquisition of Alvey fit into an established corporate policy or into the particular business focus of Rapistan."¹⁰⁵

The Michigan Court of Appeals also upheld the trial court's failure to find that the use of corporate resources estopped the three corporate executives from denying that a certain acquisition was a corporate opportunity.¹⁰⁶ The court felt that the

100. *Rapistan*, 511 N.W.2d at 924 (citations omitted).

101. *Id.*

102. *Id.*

103. *See id.*

104. *See id.*

105. *Id.* (citations omitted).

106. *See id.* at 925.

evidence did not "establish a sufficient application of corporate assets to merit intervention as a matter of equity."¹⁰⁷ Although the court refused to apply the estoppel doctrine, its comments on that doctrine are of interest.

The court indicated that an estoppel to deny the existence of a corporate opportunity would be proper "if the representative wrongfully embarked the corporation's assets in the development or acquisition of the business opportunity."¹⁰⁸ The court referred to two interesting reasons for applying the estoppel doctrine. First, "the fiduciary is seen as having previously asserted to the corporation that the opportunity was worth pursuing, and as an equitable matter the fiduciary will not be allowed to deny the truth of his prior assertion."¹⁰⁹ Second, the court offered a more realistic reason behind the equitable rule, which was explained as follows:

[T]he "core principle" of the corporate opportunity doctrine is that a corporation's fiduciary will not be permitted to usurp a business opportunity which was developed through the use of corporate assets. "The principle rests on the same considerations that forbid appropriations of the assets themselves, but adds the remedy of tracing the misappropriated assets into their product—a conventional remedy in the law of trusts."¹¹⁰

The court indicated that the estoppel rule would apply where there has been a use of corporate assets to develop the opportunity "even if it was not feasible for the corporation to pursue the opportunity or it had no expectancy in the project."¹¹¹ The court pointed out that the rule against misapplying corporate funds applies equally to business opportunities outside the line of business of the corporation.¹¹²

The court also listed items which could be regarded as corpo-

107. *Id.*

108. *Id.*

109. *Id.* (citations omitted)

110. *Id.* at 926 (quoting *Graham v. Mimms*, 444 N.E.2d 549, 557 (Ill. App. Ct. 1982) (citations omitted)).

111. *Rapistan*, 511 N.W.2d at 926.

112. *See id.* (citing *In re Trim-Lean Meat Prods., Inc.*, 4 B.R. 243, 247 (Bankr. Del. 1980)).

rate assets for purposes of applying the corporate opportunity doctrine. The court pointed to a fiduciary's compensated time as a corporate asset, indicating that the estoppel would apply to a person who uses company time to develop the opportunity.¹¹³ The court also pointed to use of the compensated time of other corporate employees as assets.¹¹⁴ The court indicated that "[c]orporate assets also include cash, facilities, contracts, goodwill, and corporate information."¹¹⁵ The court distinguished between "hard" assets, such as cash, facilities, and contracts, and "soft" assets, such as goodwill, working time, and corporate information, saying that, generally speaking, estoppel is applied more consistently when "hard" assets are used.¹¹⁶ The court indicated that the concept of a corporate asset and its relationship to the diverted opportunity is "less clear when what is involved is the time of an executive or information about a new project discovered by an officer during, but not strictly within, the course of his employment."¹¹⁷ In *Rapistan*, the court concluded that corporate funds, facilities, personnel, and compensated time were used by corporate executives to further the attempt to acquire the corporate opportunity, but such use involved only minimal amounts.¹¹⁸ The court noted that "[g]enerally, it appears that estoppel applies where there has been a significant use of corporate assets by a fiduciary and where there is a direct and substantial nexus or causal connection between the assets [used] and the creation, pursuit, and acquisition of the business opportunity."¹¹⁹ The court found the use of corporate assets in this case minimal, and also that the record failed to demonstrate a direct and substantial nexus or causal connection between the use of corporate assets and the creation, development, and acquisition of the corporate opportunity.¹²⁰ Finally, the court pointed out that the evidence

113. See *Rapistan*, 511 N.W.2d at 926.

114. See *id.* (citing *Graham*, 444 N.E.2d at 549).

115. *Rapistan*, 511 N.W.2d at 926 (citing Victor Brudney & Robert C. Clark, *A New Look at Corporate Opportunities*, 94 HARV. L. REV. 997, 1006-07 (1981)).

116. See *Rapistan*, 511 N.W.2d at 926 (citing Brudney & Clark, *supra* note 115, 1008-09).

117. *Rapistan*, 511 N.W.2d at 926 (quoting Brudney & Clark, *supra* note 115, 1008-09).

118. *Rapistan*, 511 N.W.2d at 926.

119. *Id.* at 927.

120. See *id.*

failed to establish that confidential or proprietary information was used by the former corporate executives.¹²¹

VI. AMBIGUITIES IN CORPORATE OPPORTUNITY CASES-
REFLECTIONS ON *BROZ*, *NORTHEAST HARBOR*,
MARKAL AND *RAPISTAN*

A. *The Capacity Issue*

Although both the Delaware Court in *Broz* and the Maine Court in *Northeast Harbor* sought a degree of clarity in applying corporate opportunity principles, it is evident that both legal and factual issues made the clarity goal difficult to achieve. Both the Delaware court, in *Broz*, and the Maine court, using the ALI section 5.05 approach in *Northeast Harbor*, consider the capacity in which the director learns of an opportunity to be of great importance. In *Broz*, the *Guth* Corollary features the capacity issue as a factor and further indicates that, if the license had been offered to CIS, an issue as fundamental as the misappropriation of the proprietary information of the corporation could be present. The *Rapistan* case, applying Delaware law, also emphasizes the capacity issue. In defining a corporate opportunity, ALI section 5.05(b)(1) is similar in its concern about the situation in which the director or senior executive becomes aware of an opportunity in connection with the performance of functions or under circumstances that would reasonably lead the official to believe that the person offering the opportunity expects it to be offered to the corporation.

Although the seizure of an opportunity for himself or herself by a corporate official, when the opportunity has been presented to the official for the purpose of transmission to the corporation, may sometimes be clearly and contemptibly disloyal, in some cases determining the reasonable belief of the corporate official or the capacity in which the official has received an opportunity may not be easy. Consider the corporate official who receives a phone call at her home or even her corporate office from a realtor with whom she is well acquainted who

121. See *id.*

tells her about a good real estate opportunity; or consider that the same realtor has told her about the opportunity while playing golf with her. It may not be obvious to the corporate official as to whom the offer is being directed, or it may seem to the corporate official that the offer is being tendered to her as an individual. Testimony may indicate later that the realtor intended the offer to be transmitted to the corporation or to the official as an individual, or to both, or that the realtor had not really given any thought to the matter or to consideration of the separate capacities of the recipient of the offer.

In both the *Broz* and the *Northeast Harbor* cases, the courts refer to the question of the intent of the offeror. Yet it seems that the test for this issue more appropriately should involve the thinking and reasonable belief of the offeree (i.e., the corporate official who received the information). In any event, how can an official be perceived as disloyal in terms of the corporate opportunity doctrine if the official reasonably believes the offer to be made to himself or herself as an individual, unless other reasons for applying the doctrine of corporate opportunity to the official exist? The comment to ALI section 5.05(b) states:

Accordingly, the focus under this provision [referring to section 5.05(b)(1)(A)] is on whether a reasonable person in the position of the senior executive or director would assume that an opportunity was proffered for personal or corporate benefit. The director or senior executive has a duty of reasonable inquiry as to whether the opportunity was intended for the corporation.¹²²

One can imagine, perhaps with some difficulty, the director or officer on the golf course turning to the offeror and making a reasonable inquiry—are you offering this opportunity to me or to the corporation I work for or serve? One can stretch the imagination to contemplate the kind of response the inquiry would elicit. Indeed, it seems quite possible that there will be situations in which it is not clear to the corporate official as to what is the intent of the offeror, and the offeror may have been unclear in his or her mind as to whom the offer is being made by virtue of seeing a certain coincidence of interests on the part

122. ALI, *supra* note 4, § 5.05(b) cmt. (b)(1).

of the director or officer and the corporation she serves.

Furthermore, determining factually or legally under ALI section 5.05 if the awareness of an opportunity comes from the use of corporate information or property may be difficult. As a matter of legal interpretation, does the language mean that if the official learns of the opportunity by reading a newspaper or magazine provided in the corporate library, or on a corporate computer, or by using a corporate telephone, that it involves the use of corporate property? In looking at *Northeast Harbor* and the ALI test, other legal issues arise: does purchasing land to prevent development involve an opportunity to engage in a business activity within the meaning of ALI section 5.05(b)(1) or (2)? The Maine Supreme Court seemed to assume so, and this is not an unreasonable interpretation. Nevertheless, the language should be more clear. Under (b)(2) the added question arises of whether the business activity involved "is closely related to a business in which the corporation is engaged or expects to engage."¹²³ The answer to this question is hardly self-evident. Of course, there is nothing startling about the idea that litigation may involve difficult legal and factual questions, and the capacity issue appears at times to be of such importance in considering the duties of corporate officials, that on occasion it will have to be faced even with its difficulties. Also daunting is the question of how to advise corporate officials, who are the recipients of presentations or offers from others, regarding ways in which to inquire or react in order to protect themselves from trouble. Perhaps how a corporate official becomes aware of an opportunity should not be so significant, because of difficult factual questions connected to that issue. It may be that as a matter of policy a director should be held to a high standard of fiduciary responsibility no matter how he or she becomes aware of certain opportunities.

B. *The Timing Issue and the Information to be Assessed by a Corporate Official*

The *Broz* case also illustrates the importance of and ambiguities involved with the question of timing. At what point in

123. ALI, *supra* note 4, § 5.05(b)(2).

time must a corporate official determine the relevant facts as to whether a particular opportunity is a corporate opportunity? The Delaware Supreme Court opinion contains variations in language on this point and is not free of ambiguity in other respects. In considering the financial ability factor, the court stated that "Broz was required to consider the facts only as they existed at the time he determined to accept the Mackinac offer and embark on his efforts to bring the transaction to fruition."¹²⁴ In connection with the interest or expectancy test, the court seems concerned about the interest of CIS "at the time [the opportunity] was presented to Broz."¹²⁵ Thus, the court stated that "Broz was required to consider the situation only as it existed when the opportunity was presented."¹²⁶ Again, in connection with whether Broz was required to consider the interests of PriCellular when he chose to purchase Michigan-2, the court said:

As stated in *Guth*, a director's right to "appropriate [an] . . . opportunity depends on the circumstances existing at the time it presented itself to him without regard to subsequent events." At the time Broz purchased Michigan-2, PriCellular had not yet acquired CIS. Any plans to do so would still have been wholly speculative. Accordingly, Broz was not required to consider the contingent and uncertain plans of PriCellular in reaching his determination of how to proceed.¹²⁷

In explaining the policy behind its timing position, the court pointed to certainty and predictability as values to be promoted in Delaware corporation law and stated:

Broz, as an active participant in the cellular telephone industry, was entitled to proceed in his own economic interest in the absence of any countervailing duty. The right of a director or officer to engage in business affairs outside of his or her fiduciary capacity would be illusory if these individuals were required to consider every potential, future occurrence in determining whether a particular business

124. *Broz v. Cellular Info. Sys., Inc.*, 673 A.2d 148, 156 (Del. 1996).

125. *Id.* at 156 n.8.

126. *Id.*

127. *Id.* at 158 (citations omitted).

strategy would implicate fiduciary duty concerns. In order for a director to engage meaningfully in business unrelated to his or her corporate role, the director must be allowed to make decisions based on the situation as it exists at the time a given opportunity is presented. Absent such a rule, the corporate fiduciary would be constrained to refrain from exploiting any opportunity for fear of liability based on the occurrence of subsequent events. This state of affairs would unduly restrict officers and directors and would be antithetical to certainty in corporation law.¹²⁸

It is evident that the court in some of its timing phraseology emphasizes the time of *presentation* of the offer or opportunity to the director, but uses different language in connection with the financial ability issue when it uses the time the director determined to *accept* the offer and *embark* on efforts to bring the transaction to fruition. Obviously, the time of presentation and the time of determining to accept and embark may be quite different. While it is possible to decide in advance to accept a particular offer if tendered, it may be that an offer is presented before a director determines to accept it and even that a final determination to accept an offer may actually occur sometime after an offer is made. What problems exist with respect to the formulations of the court? A person may determine to accept an offer if a mutual agreement can be reached or certain conditions are met or financing can be obtained. Does this constitute a sufficient determination to accept which would satisfy that portion of the court's language? Must the determination be communicated or dispatched in the form of an acceptance or otherwise to the offeror or someone else, or is determination without communication or dispatch sufficient? Has the director determined to embark on efforts so as to meet the requirement at such time that the director decides to tell the offeror that she wishes to negotiate, or when she consults or decides to consult her own lawyer about the transaction, or at some other point?

Suppose there is a mental decision to accept but no thought about embarking on efforts to bring the transaction to fruition and the corporation has a change in circumstances which en-

128. *Id.* at 159.

ables it to consider the offer—what happens then? Are the equities between the director and the corporation different if the director has spent significant resources of her own in embarking on efforts to bring the transaction to fruition? Consider how matters would be different if the director's position is determined by when the offer is presented rather than when there is a determination to accept and embark.

In addition, what does the court mean when it speaks of the "situation only as it existed"¹²⁹ or uses similar language? Such a situation as seen by a corporate official may comprise existing facts, highly probable developments, and less likely possibilities of varying degrees. Limiting corporate officials' responsibility to existing facts may place the corporation too much in harm's way. Is it the intent of the Delaware court to excuse the director or officer totally from considering the potential impact of subsequent probable occurrences, no matter how highly probable and important they may be? For example, should the corporate official be allowed to seize an important opportunity which her corporation would otherwise be very likely to obtain?

C. The Financial Inability Issue

As indicated above, in *Broz*, the court found that the lower court erred in finding CIS financially capable of exploiting the Michigan-2 opportunity at the time that Broz was required to consider that factor. Recall that the financial ability factor was listed expressly in *Guth* and in the factors set forth in the *Broz* case. In support of its position on financial inability, the Delaware Supreme Court stated that:

The record shows that CIS was in a precarious financial position at the time Mackinac presented the Michigan-2 opportunity to Broz. Having recently emerged from lengthy and contentious bankruptcy proceedings, CIS was not in a position to commit capital to the acquisition of new assets. Further, the loan agreement entered into by CIS and its creditors severely limited the discretion of CIS as to the acquisition of new assets and substantially restricted the

129. *Id.* at 156 n.8.

ability of CIS to incur new debt.¹³⁰

The court gave no weight to possible moves to alleviate the financing problem which PriCellular might have undertaken.¹³¹ The court not only questioned PriCellular's own financial situation but more significantly said that "the fact that PriCellular had available sources of financing is immaterial to the analysis."¹³² It is worth noting that the test regarding financial ability or inability employed by the Delaware Supreme Court appears to embrace a rather flexible approach to that issue in the corporate opportunity area. In a 1995 case, the Delaware Court of Chancery had taken the position that mere "technical insolvency," such as the inability to pay current bills when due or to secure credit, is not enough to show financial inability.¹³³ The chancery court stated that the corporation must be actually insolvent.¹³⁴ That finding was challenged, but the Delaware Supreme Court refused to consider or determine whether the insolvency-in-fact standard is the appropriate one in corporate opportunity cases.¹³⁵ The court said:

While a few jurisdictions have subscribed to this standard, we do not adopt the "insolvency-in-fact" test. Since the question of what test should be used to determine financial inability is not presently before the Court, we merely note that the Court of Chancery could consider, in the appropriate case, a number of options and standards for determining financial inability, including but not limited to, a balancing standard, temporary insolvency standard, or practical insolvency standard.¹³⁶

Additionally, it should be noted that, in corporate opportunity cases, financial inability as an excuse for a fiduciary taking an opportunity may be somewhat suspect. In the *Northeast Harbor* case, the Maine Supreme Court furnished reasons for this suspect status which are noted above.¹³⁷ In particular, the

130. *Id.* at 155.

131. *See id.*

132. *Id.* at 156.

133. *See Yiannatsis v. Stephanis*, 653 A.2d 275, 278 (Del. 1995).

134. *See id.*

135. *See id.* at 279.

136. *Id.* at 279 n.2 (citations omitted).

137. *See supra* text accompanying note 21.

disincentive to corporate executives to solve financial problems rather than rely on financial inability as an excuse to usurp a corporate opportunity is an important consideration. Courts should be cautious in defining financial inability and accepting it as an excuse for bypassing a corporation's chance to obtain a corporate opportunity. Although the ALI approach would not support a failure to offer a corporate opportunity to the corporation in cases in which that would be required simply because of a financial inability excuse, the question of financial ability could come up under section 5.05(a)(3) in considering the validity of a rejection by the corporation of the offer of an opportunity. The comment to section 5.05(a) states:

Under § 5.05(a)(3) the rejection should occur in a manner that meets the applicable standard provided in § 5.05(a)(3) (or § 5.12(a)(Taking of Corporate Opportunities by a Controlling Shareholder) if the director or senior executive is also a controlling shareholder [§ 1.10]). Rejection in the context of § 5.05(a)(3) may be based on one or more of a number of factors, such as lack of interest by the corporation in the opportunity, the corporation's financial inability to acquire the opportunity, legal restrictions on the corporation's ability to accept the opportunity, or unwillingness of a third party to deal with the corporation.¹³⁸

It should be evident that there are important issues as to how much weight to give to the financial inability factor, how to define financial inability, and the factual determination of financial inability.

D. Line of Business and Interest or Expectancy Issues

In the *Broz* case, the court felt that "while it may be said with some certainty that the Michigan-2 opportunity was within CIS' line of business, it is not equally clear that CIS had a cognizable interest or expectancy in the license."¹³⁹ In a footnote, the court explained how the line of business language in the *Guth* opinion is less than clear, in that such language suggests that the business strategy and financial well-being of the corporation are relevant in determining if the opportunity is

138. ALI, *supra* note 4, § 5.05(a) cmt.

139. *Broz v. Cellular Info. Sys., Inc.*, 673 A.2d 148, 156 (Del. 1996).

within the line of business.¹⁴⁰ The court said “[s]ince we find that these considerations are decisive under the other factors enunciated by the Court in *Guth*, we do not reach the question of whether they are here relevant to a determination of the corporation’s line of business.”¹⁴¹

The court concluded that “CIS had no interest or expectancy in the Michigan-2 opportunity.”¹⁴² As to this point the court explained:

Under the third factor laid down by this Court in *Guth*, for an opportunity to be deemed to belong to the fiduciary’s corporation, the corporation must have an interest or expectancy in that opportunity. As this Court stated in *Johnston*, “[f]or the corporation to have an actual and expectant interest in any specific property, there must be some tie between that property and the nature of the corporate business.” Despite the fact that the nature of the Michigan-2 opportunity was historically close to the core operations of CIS, changes were in process. At the time the opportunity was presented, CIS was actively engaged in the process of divesting its cellular license holdings. CIS’ articulated business plan did not involve any new acquisitions. Further, as indicated by the testimony of the entire CIS board, the Michigan-2 license would not have been of interest to CIS even absent CIS’ financial difficulties and CIS’ then current desire to liquidate its cellular license holdings. Thus, CIS had no interest or expectancy in the Michigan-2 opportunity.¹⁴³

ALI section 5.05 does not use the line of business phrase. In subsection (b)(2), it defines corporate opportunity as “[a]ny opportunity to engage in a business activity of which a senior executive becomes aware and knows is closely related to a business in which the corporation is engaged or expects to engage.”¹⁴⁴ Since Broz was only a director, he would not even be tested under subsection (b)(2) which applies to a senior executive. Section (b)(1), which applies to a director or senior executive, does not appear to apply to Broz either, based on the

140. See *id.* at 156 n.7.

141. *Id.*

142. *Id.* at 156-57.

143. *Id.* (citation and footnote omitted).

144. ALI, *supra* note 4, § 5.05(b)(2).

findings as to how he became aware of the opportunity. Under the ALI test, it would seem that Broz would be in the clear without presenting the opportunity to CIS. This result would be achieved without going through the kind of analysis which the Delaware court used.

The ALI comment to section 5.05(b)(2) states that "[s]ection 5.05(b)(2) makes § 5.05 applicable to those properties or activities that a senior executive knows are closely related to the business in which the corporation is engaged or expects to engage."¹⁴⁵ The comment explains how subsection (b)(2) expands the scope of corporate opportunity beyond the concept of an existing line of business to cover both existing or contemplated activities of the corporation. The comment explains that this approach establishes a more flexible standard "because it does not limit the doctrine's applicability to a particular 'line of business,' and applies the doctrine to a contemplated activity in which the corporation may subsequently engage."¹⁴⁶ An important question based on the more flexible standard just referred to would be whether Broz, if he had been a senior executive, would have a more exacting duty under ALI section 5.05 to consider contemplated activities which the Delaware court might find too speculative to be worthy of consideration. Of course in the Broz case itself, by the time the acquisition of the license would fit in with a contemplated activity concept, it may be that Broz's activities may have already firmed up his rights to pursue the opportunity.

The ALI approach weaves the interest or expectancy test right into subsection (b)(2). It explains as follows:

Some older judicial decisions applied the doctrine of corporate opportunity to a contract right, property, or business activity in which the corporation has an "interest or expectancy." Section 5.05(b) does not expressly state this concept in a black-letter rule because § 5.05(b)(2) includes the concept of an interest or expectancy by covering a contemplated activity of a corporation.¹⁴⁷

145. *Id.* § 5.05(b) cmt. (b)(2).

146. *Id.*

147. *Id.*

The comment to section 5.05(b)(2) also explains that it covers "business activities that the senior executive knows are closely related to a business in which the corporation is engaged or expects to engage."¹⁴⁸ The comment further indicates that "[i]f the senior executive has such knowledge, the opportunity must be offered to the corporation without regard to the senior executive's own judgment whether the corporation would be capable of or interested in pursuing the opportunity."¹⁴⁹ In addition, the ALI comment explains that a business activity under section 5.05(b) "includes the acquisition or use of any contract rights or other tangible or intangible property."¹⁵⁰

It may be that the ALI explanation of the interest or expectancy test under section 5.05 as stated above will actually limit the use of the corporate opportunity doctrine. To begin, section 5.05(b)(2) covers senior executives but not directors. In addition the ALI comment states:

Section 5.05(b)(2) does not impose on a director or senior executive the obligation to first offer to the corporation securities of the corporation that are to be sold to or acquired from other shareholders. On the other hand, if a director or senior executive knows that the corporation is interested in reacquiring its own securities, there may be an obligation under § 5.06 to offer any securities thereafter acquired to the corporation if the acquisitions would interfere with the corporation's reacquisition program.¹⁵¹

As a matter of theory and practice, courts may consider it desirable to use the interest or expectancy test as part of the corporate opportunity doctrine to cover stock acquisitions in cases involving directors as well as senior executives. Thus, if as a matter of corporate policy, the corporation is in a situation in which it is reacquiring its shares, a director's or senior executive's acquisition of such shares may be considered improper based on an interest or expectancy analysis.¹⁵² In any

148. *Id.*

149. *Id.*

150. *Id.* § 5.05(b) cmt.a.

151. *Id.* § 5.05(b) cmt. (b)(2).

152. See *Kelegian v. Mgrdichian*, 39 Cal. Rptr. 2d 390 (Cal. 1995); *Yiannatsis v. Stephanis*, 653 A.2d 275 (Del. 1995). These two cases point towards use of an interest and expectancy analysis in stock purchase cases.

event, application of the interest or expectancy test, while sometimes useful, may not always be clear.

E. Failure to Present Opportunity to Board Issue

The contrast between the Delaware position and the ALI position on the usurpation of a corporate opportunity is clearly shown in the situation involving the failure to present an opportunity to the board. When a corporate opportunity exists under the ALI approach, a director or senior executive must first offer it to the corporation. In the *Broz* case, the Delaware court stated, "[I]t is not the law of Delaware that presentation to the board is a necessary prerequisite to a finding that a corporate opportunity has not been usurped."¹⁵³ There is important language in the *Broz* case regarding the lower court position that Broz, as a director, had to take the transaction to the CIS board for its formal action. The Delaware Supreme Court said, "[I]n so holding, the trial court erroneously grafted a new requirement onto the law of corporate opportunity, viz., the requirement of formal presentation under circumstances where the corporation does not have an interest, expectancy or financial ability."¹⁵⁴ The Delaware Supreme Court pointed out that "the director or officer must analyze the situation *ex ante* to determine whether the opportunity is one rightfully belonging to the corporation."¹⁵⁵ The court went on to say, "[I]f the director or officer believes, based on one of the factors articulated above, that the corporation is not entitled to the opportunity, then he may take it for himself."¹⁵⁶ As noted before, under the ALI test, Broz as a director, but not senior executive, would have no responsibility to make a presentation to the board, because there was no corporate opportunity under the terms of section 5.05(b)(1). Subsection (b)(1) applies to directors or senior executives, while section 5.05(b)(2) applies only to senior executives. Plainly, however, under the *Broz* case, Delaware directors or officers are not treated in the same manner as under ALI section 5.05.¹⁵⁷ Even an officer who is a senior executive could

153. *Broz v. Cellular Info. Sys., Inc.*, 673 A.2d 148, 157 (Del. 1996).

154. *Id.*

155. *Id.*

156. *Id.*

157. *See id.* at 157-58.

avoid formal presentation to the board based on one of the factors articulated in *Broz*. It should be emphasized, however, that the Delaware court does recognize the value of presenting an opportunity to the board as follows:

Of course, presenting the opportunity to the board creates a kind of "safe harbor" for the director, which removes the specter of a *post hoc* judicial determination that the director or officer has improperly usurped a corporate opportunity. Thus, presentation avoids the possibility that an error in the fiduciary's assessment of the situation will create future liability for breach of fiduciary duty.¹⁵⁸

Although the Delaware Supreme Court concluded that the court of chancery had erred in adding the requirement of formal presentation to Delaware's corporate opportunity jurisprudence, it further pointed to the advantage of presentation stating:

Recognizing the interests the Court of Chancery sought to promote, however, we note that formal presentation to the board is often the preferred—or "safe"—approach, and we noted that this litigation might have been unnecessary had this precaution been observed.¹⁵⁹

The Delaware test seems more strict with regard to directors who are not senior executives than the ALI test which would let them off the hook if the corporate opportunity does not exist under section 5.05(b)(1). On the other hand, the Delaware court is more lenient in not technically requiring presentation to the board in all situations which would require such presentation under the ALI.

Whether the corporation is adequately protected by the presentation and rejection procedures of ALI section 5.05 is open to question. Both the rejection procedures and burden of proof rules give a great deal of weight to action by so-called "disinterested" directors, or "disinterested" superiors, or "disinterested" shareholders. Furthermore, the waste test¹⁶⁰ and business judgment rule¹⁶¹ give enormous latitude to the decisions made

158. *Id.*

159. *Id.* at 158 n.10.

160. See ALI, *supra* note 4, § 5.05(a)(3); see ALI, *supra* note 4, § 1.42 for a definition of waste of corporate assets.

161. See ALI, *supra* note 4, § 4.01 for an explanation of the Business Judgment

by such "disinterested" persons. Surely, where the taking of a corporate opportunity is involved, the potential for harm to the corporation should not leave investors and creditors too much at the mercy of so-called disinterested directors, or superiors, or even disinterested shareholders.¹⁶² Moreover, the ALI section 5.05 rule, permitting late ratification where there has been defective disclosure or late rejections of offers even after suits have been filed, may weaken the protection given to the corporation significantly.

F. Use of Assets Issue

In *Markal*,¹⁶³ the Illinois court took the position that the fiduciaries should be estopped from arguing that Markal could not have represented Apple because they had used Markal assets to benefit themselves and develop the Apple opportunity. Discussion in the *Rapistan* case demonstrates some of the difficulties involved in the application of the "use of corporate assets" test.¹⁶⁴ The court pointed to a distinction between the use of "hard" assets and "soft" assets in applying the estoppel doctrine.¹⁶⁵ Such a distinction seems hard to justify. For example, the use of corporate facilities may not have nearly the impact on a corporation as the use of a corporate executive's working time in developing a corporate opportunity. The court also pointed to "significant use" and "nexus" factors in dealing with the use of assets issue.¹⁶⁶ These latter factors may often be relevant in determining if there has been a usurpation of a corporate opportunity. In some situations, it may be inequitable

Rule.

162. The degree of protection provided to the corporation by a disinterested director vote may vary. For example, directors may show favoritism toward each other or be reluctant to assume an adversarial role toward the aspirations of other directors. See Harvey Gelb, *Corporate Disloyalty-A Wyoming Case and the ALI Project*, 21 LAND & WATER L. REV. 126-27 (1986). Moreover, the protective impact of a disinterested shareholder vote may be reduced, eliminated or illusory depending on such factors as the degree of diligence the shareholders could be expected to achieve in a given situation. See *id.* at 123.

163. *Levy v. Markal Sales Corp.*, 643 N.E.2d 1206 (Ill. App. Ct. 1994), *cert. denied*, 116 S. Ct. 171 (1995).

164. See *Rapistan Corp. v. Michaels*, 511 N.W.2d 918 (Mich. Ct. App. 1994).

165. See *id.* at 926.

166. See *id.* at 926-27.

or inappropriate to impose liability on corporate officials on the basis of the corporate opportunity doctrine because of the minor or immaterial use of assets.

ALI section 5.05 differs from *Rapistan* and *Guth* in that its language is quite narrow. It classifies an opportunity as a "corporate opportunity" when a director or senior executive becomes aware of it in certain ways, such as through the use of corporate property or in connection with the performance of certain functions.¹⁶⁷ Nevertheless, suppose the director or senior executive becomes aware of the opportunity independently of the corporate functions or other factors listed under section 5.05(b)(1) and then uses corporate assets to develop the opportunity. Such a use is technically not within the language of the ALI section. The narrowness of the ALI language is in contrast to the language of the *Guth* Corollary which speaks of the wrongful employment of the resources of the corporation in pursuing or exploiting the opportunity. The *Rapistan* court also speaks of the use of assets in the broader context. An ALI comment under section 5.04 states as follows:

The use of corporate time to engage in personal activities should not be treated as the use of corporate property for which reimbursement is to be made. However, the fact that a full-time senior executive has used a corporate position to permit himself to gain a personal pecuniary benefit during business hours will be included among the relevant facts to be considered in determining whether the executive has taken a corporate opportunity.¹⁶⁸

This comment does not resolve the potential problem created by the narrow language of section 5.05(b)(1). Furthermore, while remedies may be available under ALI section 5.04 or otherwise with respect to the use of corporate property, such remedies may not match up with those which may be available under the corporate opportunity doctrine in the "use of corporate assets" situation.¹⁶⁹ Finally, some of the questions raised earlier about the ambiguity of the ALI test with respect to whether there is a use of corporate property in situations, such as where

167. See ALI, *supra* note 4, § 5.05(b)(1).

168. *Id.* § 5.04 cmt. (b)(1).

169. See *id.* § 5.04.

the corporate official learns of the opportunity by reading a magazine in the corporate library, will need to be resolved. Perhaps factors like "significant use" and "nexus" relied on in *Rapistan* will also be read into the ALI approach.

G. Laches

Recall that the Maine Supreme Court left open the use of the doctrine of laches in the *Northeast Harbor* case.¹⁷⁰ Arguably, the Delaware *Broz* case could also involve the kind of delay and inaction that might raise a laches issue. The practical importance of the doctrine of laches in corporate opportunity cases is well illustrated in *Tarin v. Pellonari*,¹⁷¹ a case decided by an Illinois appellate court. The plaintiff and two defendants were directors and shareholders in a radiator business referred to in the case as BOYCH. The defendants created a new radiator business referred to as Cool Rite, which plaintiff contended was in competition with BOYCH. In a suit filed on May 4, 1990, plaintiff sought the imposition of a constructive trust for the benefit of BOYCH and himself, based upon misappropriated corporate opportunities and assets. The lower court concluded that this claim was barred by laches.¹⁷² The court pointed to trial court findings that the plaintiff knew as early as 1988 that the defendants were in the process of opening a new radiator shop; that in February, 1989 the plaintiff became aware that the formation of Cool Rite could hurt BOYCH; that plaintiff knew as early as February 1989 that suppliers were shipping merchandise to Cool Heat, which would be used by Cool Rite.¹⁷³ The lower court found that the plaintiff never expressed concern about the organization of Cool Rite or threatened the defendants with a law suit.¹⁷⁴

The court pointed out that the plaintiff waited until May 4, 1990, to file the lawsuit and, while idly sitting on his rights, defendants were investing their time and money in starting up the business. The lower court noted that there was a strong

170. *Northeast Harbor Golf Club, Inc. v. Harris*, 661 A.2d 1146 (Me. 1995).

171. 625 N.E.2d 739 (Ill. App. Ct. 1993).

172. *See id.* at 744.

173. Name brand radiator made by BOYCH.

174. *See id.*

inference the plaintiff delayed filing suit, waiting to see how successful Cool Rite would be, before investing money to hire a lawyer and assert his interest in a business that might not be successful. The appellate court found the record supported the trial court's findings of fact regarding when the plaintiff learned of defendants' activities and that the trial court did not abuse its discretion by applying laches to the case.¹⁷⁵

The result in this case should be a warning to potential plaintiffs about the dangers of sitting on their rights to the detriment of the opposing party. A good argument could be made that the plaintiff should not be precluded from suit simply by waiting to see how successful Cool Rite would be. Why should a plaintiff not be in a position to properly evaluate a case before suing? More to the point, plaintiffs failure to express concern about the organization of Cool Rite or to threaten a law suit may make it inappropriate to allow plaintiff to proceed later. Thus, a defendant who determines to accept an offer and embark on the expenditure of funds to pursue an opportunity, while lulled into believing that there is a lack of interest on the part of the potential plaintiff, may have a good laches defense.

VII. CONCLUSION

It is evident that, in accepting the ALI section 5.05 position regarding corporate opportunity, the Maine Supreme Court was seeking to bring clarity to a murky area of the law. Furthermore, in *Broz*, the Delaware Supreme Court supported certainty and predictability as values to be promoted in Delaware corporation law. Still, it can be expected that there will be a number of occasions where uncertainty will arise either because of legal issues or factual issues, whether it be under the ALI test adopted by Maine, or the Delaware test, or some other test. The topics discussed above regarding capacity, timing and information to be assessed, financial inability, line of business and interest or expectancy, and laches suggest some of the difficult issues that exist. Even the use of assets as a trigger for the application of the corporate opportunity doctrine is not without

175. See *id.* at 550-51.

its analytical difficulties. Still, the ALI test and the Delaware court statements regarding presentation to the board of directors to achieve a safe harbor should encourage corporate officials, as a matter of preventive law, to avoid or lower the risk of severe damage remedies by giving the corporation the first crack at a particular opportunity in appropriate situations. Nevertheless, in some circumstances, the safe harbor may not be absolutely safe. For example, even rejection by the board of directors or shareholders under the ALI test is potentially subject to further challenge.¹⁷⁶ Alas, despite court efforts to achieve clarity in corporate opportunity cases, the determination of fiduciary responsibilities and liabilities in various settings will at times be difficult to make.

176. See *supra* text accompanying note 32 regarding rejection.

