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Volume 53
Issue 2 *Spring 1988*

Article 9

Spring 1988

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Recommended Citation

John E. Jackson III, *Corporate Opportunity Doctrine: A Historical View with a Proposed Solution, The*, 53 Mo. L. Rev. (1988)
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THE CORPORATE OPPORTUNITY DOCTRINE: A HISTORICAL VIEW WITH A PROPOSED SOLUTION

Chemical Dynamics, Inc. v. Newfeld[1]

Corporations bestow enormous trust and power upon their officers and directors. In return, the directors owe a fiduciary duty[2] of utmost good faith to their corporation and its shareholders.[3] Common law has long implied a promise from an officer to give to the enterprise the benefit of his best care and judgment and to exercise the discretion conferred to him solely in the corporation's interest; and not in his own personal interests.[4] Fulfillment of this duty requires an undivided and unselfish loyalty to the corporation which is free of conflict between the duty and the self-interest arising from human nature.[5] Although officers and directors do not, in the technical sense, owe the higher duty of trustee to the corporation,[6] courts often have held that directors and

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1. 728 S.W.2d 590 (Mo. Ct. App. 1987).

2. In Pepper v. Litton, 308 U.S. 295 (1939), the United States Supreme Court addressed the high standards required of a fiduciary. It found that a fiduciary:

> cannot serve himself first and his *cestuis* second. He cannot manipulate the affairs of his corporation to their detriment and in disregard of the standards of common decency and honesty. . . . He cannot by the use of the corporate device avail himself of privileges normally permitted outsiders in a race of creditors. He cannot utilize his inside information and his strategic position for his own preferment. . . . He cannot use his power for his personal advantage and to the detriment of the stockholders and creditors no matter how absolute in terms that power may be and no matter how meticulous he is to satisfy technical requirements. For that power is at all times subject to the equitable limitation that it may not be exercised for the aggrandizement, preference, or advantage of the judiciary to the exclusion or detriment of the *cestuis*.

Id. at 311.

3. *See, e.g.*, American Inv. Co. v. Lichtenstein, 134 F. Supp. 857 (E.D. Mo. 1955); Ramacciotti v. Joe Simpkins, Inc., 427 S.W.2d 425 (Mo. 1968); Johnson v. Duensing, 351 S.W.2d 27 (Mo. 1961) (en banc); Merrill v. Davis, 359 Mo. 1191, 225 S.W.2d 763 (1950); Hyde Park Amusement Co. v. Mogler, 358 Mo. 336, 214 S.W.2d 541 (1948); Bromschwig v. Carthage Marble & White Lime Co., 334 Mo. 319, 66 S.W.2d 889 (1933).

4. 19 AM. JUR. 2D *Corporations* § 1272 (1986).

5. *See, e.g.*, Guth v. Loft, Inc., 23 Del. Ch. 255, 5 A.2d 503 (1939); Paulman v. Kritzer, 74 Ill. App. 2d 284, 219 N.E.2d 541 (1966), *aff'd*, 38 Ill. 2d 101, 230 N.E.2d 262 (1967); *see* American Inv. Co. v. Lichtenstein, 134 F. Supp. 857 (E.D. Mo. 1955); Merrill v. Davis, 359 Mo. 1191, 225 S.W.2d 763 (1950); Punch v. Hipolite Co., 340 Mo. 53, 100 S.W.2d 878 (1936).

6. Paddock v. Siemoneit, 147 Tex. 571, 577, 218 S.W.2d 428, 431 (1949). While

officers owe, in many respects, a "trustee-like" duty to the corporation and its stockholders.[7]

The general fiduciary duty of directors and officers to the corporation gives rise to the corporate opportunity doctrine. The doctrine is designed to "prevent a corporation's fiduciaries from misappropriating business opportunities to which the corporation has a superior right."[8] It is lucidly set forth in the leading case of *Guth v. Loft, Inc.*[9]: "[I]f there is presented to a corporate officer or director a business opportunity which . . . is one in which the corporation has an interest or a reasonable expectancy . . . the law will not permit him to seize [that] opportunity for himself."[10]

The rationale of the corporate opportunity doctrine reasons that, if any possibility of personal profit is extinguished, a director will not be tempted to breach the fiduciary duty owed his corporation.[11] If a director or officer usurps the corporation's business opportunity for personal gain, the usual remedy is the imposition of a constructive trust for the benefit of the corporation upon any property or profits acquired.[12] When applying the corporate opportunity doctrine, however, it must be remembered that the doctrine is not intended to dissuade corporate executives from making acquisitions which might be advantageous to the corporation; rather, it acts only to prevent the director from acquiring those opportunities which the corporation needs or is seeking.[13]

Chemical Dynamics

The Missouri case of *Chemical Dynamics, Inc. v. Newfeld* presented the question of whether an officer of the plaintiff corporation usurped a corporate opportunity by purchasing an option held on a building which the corporation was renting.[14] Chemical Dynamics, the plaintiff corporation, is a closely held family corporation.[15] Plaintiff A. Y. Schultz and defendants, Sol Schultz and

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a director and managing officer of a corporation occupies the position of a fiduciary toward the corporation, he is not strictly a trustee, and his "duties and liabilities are not necessarily identical with those of other fiduciaries." *Id.*

7. *See, e.g.*, Alexander v. Hillman, 296 U.S. 222, 240 (1935) (holding that in passing upon counterclaims against officers and directors in receivership proceedings, the officers and directors are to be "dealt with as if they were technically trustees for [the] creditors and stockholders").

8. Note, *When Opportunity Knocks: An Analysis of the Brudney and Clark and ALI Principles of Corporate Governance Proposals for Deciding Corporate Opportunity Claims*, 11 J. CORP. L. 255, 255 (1986).

9. 23 Del. Ch. 255, 5 A.2d 503 (1939).

10. *Id.* at 272-73, 5 A.2d at 511.

11. Paulman v. Kritzer, 74 Ill. App. 2d 284, 291, 219 N.E.2d 541, 544 (1966), *aff'd*, 38 Ill. 2d 101, 230 N.E.2d 262 (1967).

12. *E.g.*, Durfee v. Durfee & Canning, Inc., 323 Mass. 187, 80 N.E.2d 522 (1948); Lutherland, Inc. v. Dahlen, 357 Pa. 143, 53 A.2d 143 (1947).

13. Burg v. Horn, 380 F.2d 897, 899 (2d Cir. 1967).

14. *Chemical Dynamics*, 728 S.W.2d at 592.

15. *Id.* at 591 (of 40 outstanding shares, 23 are held either by the Schultz family

Lawrence Newfeld, were the managing officers and directors of the corporation.[16] In 1967 the corporation entered into a lease for a building for use as its offices and manufacturing facilities.[17] The lease contained a provision which gave to the corporation an option to purchase the property for the sum of $300,000 and to assume an existing deed of trust with an original face amount of $250,000.[18]

By October 1970, the corporation was having financial difficulties and was six to seven months behind with its rental payments. The owners of the property sued for back rent and possession and received a judgement in their favor. On November 20, 1970, the owners arrived at the corporate quarters to evict the corporation.[19] After negotiating with Sol Schultz, the owners agreed to allow the corporation to remain in the building and to assign the lease with the purchase option in return for payment of $21,492.38.[20] The owners demanded payment by 2:00 that same day, so Sol Schultz contacted several shareholders about loaning the corporation the necessary funds. They all refused.[21] Lawrence Newfeld, one of the defendants, agreed to borrow money and lend it to the corporation.[22] In return, Newfeld received a promissory note from the corporation, a chattel mortgage on the corporation's equipment, and an assignment of the lease with the purchase option from the original owners.[23] Both A. Y. Schultz and Sol Schultz signed the lease assignment as agents of the corporation.[24]

In February 1973 the owners notified Newfeld that they were willing to sell the building for $336,000. In April 1973 Newfeld informed the owners of his intention to exercise the original option for $300,000.[25] Newfeld assumed the first deed of trust in the amount of $213,793.13 from the owners.[26] In 1975, after every creditor of the corporation had been paid in full, A. Y. Schultz demanded that the property be returned to the corporation.[27] Sol and Newfeld refused to return the building, and the corporation never acquired

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or by the Schultz family trust, and 17 are held by 20 separate non-family shareholders).

16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.* Newfeld signed a second mortgage on his home to secure the loan.
23. *Id.*
24. *Id.* at 592.
25. *Id.* In allowing Newfeld to purchase the building for the option price of $300,000, the owners apparently extended the original purchase option.
26. *Id.* A portion of this was financed in the form of a loan from Harry Schultz to Newfeld in the amount of $70,000. In return, Newfeld gave Schultz a second deed of trust on the property and a promissory note payable on demand.
27. *Id.* (he demanded this because "there was no longer any danger of the building being confiscated by creditors").

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title to the property, which had increased considerably in value.[28]

In 1976, A. Y. instituted a suit on behalf of the corporation. The trial court found that the corporation "knowingly, willingly and voluntarily sold, bargained, granted and transferred its entire interest in the lease, including the option to purchase the real estate, to Newfeld as consideration for the loan of November 20, 1970."[29] For the court of appeals, "[t]he pivotal question is whether . . . the option to purchase the building constituted a corporate opportunity."[30] The court answered this question in the negative and upheld the trial court's decision.[31]

THE CORPORATE OPPORTUNITY DOCTRINE

In understanding the court's decision, a look at the development of the corporate opportunity doctrine and the tests which have developed to implement that doctrine will be helpful. Initially, the traditional tests which courts have used to determine whether a corporate opportunity exists will be focused upon, along with the problems which have plagued and forced restructuring of these tests. Then a proposed test whose goal is to alleviate the problems of the traditional "court created" tests will be considered.

TRADITIONAL TESTS

Interest or Expectancy Test

"The interest or expectancy test is the oldest and most relaxed[32] of the . . . principal tests developed by the courts in determining the existence of a corporate opportunity."[33] The first application of the test was in *Lagarde v. Anniston Lime and Stone Co.*[34] In that case, the court maintained that a director's self-dealing should be condemned only in those situations where property is acquired in which the corporation "has an interest already existing, or in which it has an expectancy growing out of an existing right, or to cases where the officers' interference will in some degree balk the corporation in effecting the purposes of its creation."[35] In *Lagarde*, the company owned one-third of certain lands used in the quarrying of limestone. It had a contract to purchase

28. *Id.*
29. *Id.*
30. *Id.* at 593.
31. *Id.* at 594.
32. Since an officer's self-dealing is only condemned in situations where the corporation has an existing interest or an expectancy growing out of an existing right, an officer is afforded great leeway in his private dealings. Therefore the threshold of liability is higher than other corporate opportunity tests.
33. Comment, *Tests of Corporate Opportunity*, 8 CUMB. L. REV. 941, 944 (1978).
34. 126 Ala. 496, 28 So. 199 (1900).
35. *Id.* at 502, 28 So. at 201.

one-half of the remaining two-thirds, and had been negotiating unsuccessfully for the other one-half. Using knowledge acquired from their relationship with the company, two of the directors convinced the owners of the outstanding property to sell it to them on an individual basis. The court held that the land which the company had a contract to purchase was acquired wrongfully in violation of the corporate opportunity doctrine, but the land which was in the midst of negotiation was not covered by the doctrine and therefore was acquired legally.[36] Simply stated, "corporate fiduciaries are precluded from taking on an individual basis opportunities in which the corporation has an interest or expectancy",[37] but "does not require of its officers that they steer from their own to the corporation's benefit, enterprises, or investments, which, though capable of profit to the corporation, have in no way become subjects of their trust or duty."[38]

In later years, some courts adopted variations of *Lagarde* that tend to make it easier to find an officer or director liable for usurping a corporate opportunity. In *Litwin v. Allen,*[39] the court described situations in which an interest or expectancy could be found under the then current law. These include, for example, "the fact that the directors had undertaken to negotiate in the field on behalf of the corporation, or that the corporation was in need of the particular business opportunity . . ., or that the opportunity was seized and developed at the expense, and with the facilities of the corporation."[40] In summarizing these examples, the question which determines if the corporate opportunity doctrine has been violated is whether the directors have profited at the expense of their corporation; whether they have gained because of their disloyalty to the corporation's interests and welfare.[41]

A further evolution of the interest or expectancy test is found in *Abbott Redmont Thinlite Corp. v. Redmont.*[42] The test here was whether the corporation had an interest or "tangible expectancy" in the disputed opportunity.[43] "The likelihood of realization from the opportunity" was the key to whether an interest or expectancy was in fact tangible and thus within the rule which precludes an officer from violating a fiduciary duty to gain profit for himself.[44] If it is likely[45] that the corporation will in fact embrace the opportunity, then

36. *Id.*
37. Note, *supra* note 8, at 262.
38. *Lagarde*, 126 Ala. at 502, 28 So. at 201.
39. 25 N.Y.S.2d 667 (N.Y. Sup. Ct. 1940).
40. *Id.* at 686.
41. *Id.*
42. 475 F.2d 85 (2d Cir. 1973).
43. *Id.* at 88.
44. *Id.* at 89.
45. In using the word "likely," the court is retaining a great amount of control over the test by keeping it within the realm of subjectivity. In essence, the court will be making a factual determination based upon the particulars in every case, instead of a legal determination based upon law. By using words such as "likely," courts are forced to proceed in a case by case manner which keeps the law in a state of uncertainty.

the expectancy is said to be tangible and falls within the boundaries of the corporate opportunity doctrine.

As is apparent, there has been a movement by the courts to increase officer's or director's potential liability by changing the meaning of the words "interest or expectancy". By expanding the definition of those terms,[46] the interest or expectancy test is broadened to the point where it has become a mere test of fairness.[47] Thus, while many courts nominally follow the interest or expectancy test,[48] most have modified the test for the sake of fairness,[49] and in so doing have changed it altogether.

Line of Business Test

The line of business test developed in response to the perceived harshness of the *Lagarde* test. Succinctly stated, "when a corporate fiduciary is presented with a business opportunity that falls within the corporation's line of business, the corporation has a prior claim to that opportunity."[50] An opportunity is within the corporation's line of business whenever the opportunity is closely related to the existing or potential activities of the corporation.[51] A more definite explanation of what is the "line of the corporation's business" can be found in *Guth v. Loft, Inc.*.[52] In *Guth*, Loft Inc. was engaged in the sale of beverages. Guth, the vice president, was dissatisfied with the services of the Coca-Cola company and decided to search for another supplier. He acquired a Pepsi-Cola franchise to supply Loft, but did so in his own name. To enhance this franchise, Guth used the assets of Loft without the knowledge or acquiescence of the board of directors. In finding that Guth had violated the corporate opportunity doctrine, the court developed the "line of business" test:

> where a corporation is engaged in a certain business, and an opportunity is presented to it embracing an activity as to which it has fundamental knowledge, practical experience and ability to pursue, which, logically and natu-

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46. Compare the standard for liability under *Lagarde* with the standard for liability under *Litwin*. Under *Lagarde*, "interest or expectancy" is limited to those opportunities which have become subject to a director's trust or duty, even though they are capable of profit to the corporation. However, under *Litwin*, "interest or expectancy" is expanded to whether the directors have profited at the expense of their corporation, or gained because of their disloyalty to the corporation. *See supra* notes 33-41 and accompanying text.

47. Compare discussion of fairness test, *infra* notes 63-69.

48. *E.g.*, Farber v. Servan Land Co., 541 F.2d 1086 (5th Cir. 1976); Tovrea Land & Cattle Co. v. Linsenmeyer, 100 Ariz. 107, 412 P.2d 47 (1966); Raines v. Toney, 228 Ark. 1170, 313 S.W.2d 802 (1958).

49. The courts are trying to protect the interest of the corporation and its stockholders from the "self interest" of the officers or directors. In this sense, the test becomes one of what is fair to the stockholders in comparison to what is fair to the directors.

50. 11 J. CORP. L. 255, 257 (1986).

51. Miller v. Miller, 301 Minn. 207, 224-25, 222 N.W.2d 71, 81 (1974).

52. 23 Del. Ch. 255, 5 A.2d 503 (1939).

rally, is adaptable to its business having regard for its financial position, and is one that is consonant with its reasonable needs and aspirations for expansion, it may be properly said that the opportunity is in the line of the corporation's business.[53]

Although this explanation of what is in the "line of business" may seem definite, courts have had problems applying it to specific facts.[54] This uncertainty has led many courts to seek a more simple definition. One court held that a corporation's charter powers define the scope of its line of business.[55] Another court held that the line of business is restricted to the corporation's existing operations.[56] The most recent court to discuss the issue seems to have combined these views, stating that the trier of fact should be concerned with the relationship of the opportunity to the corporation's purposes[57] and present activities.[58] Finally, other courts ask whether the opportunity "was so closely associated with the existing and prospective activities of the corporation that the defendants should fairly[59] have acquired that business for or made it available to the corporation."[60] The courts are noticeably confused about what encompasses a corporation's "line of business,"[61] and again it seems as if they chose the safe harbor of "fairness" in determining the line of business of a corporation.

Fairness Test

The fairness test grew out of a dislike for the alleged objectivity of previous corporate opportunity tests. In this test, objectivity is abandoned, and courts "look only to the equitable considerations involved in the situation presented."[62] The case which originated this proposition is *Durfee v. Durfee and Canning, Inc.*[63] Defendant in *Durfree* was an officer of two corporations,

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53. *Id.* at 279, 5 A.2d at 514.
54. *See, e.g.*, Johnston v. Greene, 35 Del. Ch. 479, 121 A.2d 919 (1956).
55. Weismann v. Snyder, 338 Mass. 502, 505, 156 N.E.2d 21, 23 (1959).
56. Lancaster Loose Leaf Tobacco Co. v. Robinson, 199 Ky. 313, 317-18, 250 S.W. 997, 998-99 (1923).
57. A corporation's purposes would be stated in the corporate charter.
58. Miller v. Miller, 222 N.W.2d 71, 81 (Minn. 1974).
59. It seems that the courts are again trying to establish a sense of fairness within the line of business test. As can be seen throughout the text, all traditional corporate opportunity tests eventually turn to "fairness" in establishing whether a corporate opportunity has been usurped. This evolution is not to be criticized, only recognized for the effect it has on the discussed tests.
60. Rosenblum v. Judson Eng'g Corp., 99 N.H. 267, 272, 109 A.2d 558, 563 (1954).
61. *Cf.* Guth v. Loft, Inc., 23 Del. Ch. 255, 5 A.2d 503 (1939); Lancaster Loose Leaf Tobacco Co. v. Robinson, 199 Ky. 313, 250 S.W. 997 (1923); Weismann v. Snyder, 338 Mass. 502, 156 N.E.2d 21 (1959); Miller v. Miller, 301 Minn. 207, 222 N.W.2d 71 (1974) (examples of various courts' formulations of what falls within a corporation's line of business).
62. Comment, *supra* note 33, at 950.
63. 323 Mass. 187, 80 N.E.2d 522 (1948).

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both dealing in natural gas. Without informing either corporation, Defendant caused one to buy its gas supply from the other, to the Defendant's personal gain. In determining that a corporate opportunity had been usurped, the court rejected the interest or expectancy test and held that the

> true basis of the governing doctrine [of corporate opportunity] rests fundamentally on the unfairness in the particular circumstances of a director, whose relation to the corporation is fiduciary, "taking advantage of an opportunity . . . when the interests of the corporation justly call for protection. This calls for the application of ethical standards of what is fair and equitable . . . [in] particular sets of facts."[64]

Since there is a great amount of subjectivity involved, the "application of the fairness test must always, of necessity, be a question for the trier of fact."[65] In application, Massachusetts is the only state which strictly follows the fairness test.[66] Jurisdictions which purport to follow this test usually combine it[67] with the line of business test,[68] or with the interest or expectancy test.[69]

"Restricted" Line of Business Test

Another test, purporting to follow *Guth*, makes liability of a corporate officer even more difficult to establish by adding a "five factor" test. In *Solimine v. Hollander*,[70] the court listed five conditions, the existence of any one of which precludes officer liability. Under the "five factor" test, a business opportunity does not belong to the corporation:

> a) Wherever the fundamental fact of good faith is determined in favor of the director or officer charged with usurping the corporate opportunity, or
> (b) where the company is unable to avail itself of the opportunity, or
> (c) where availing itself of the opportunity is not essential to the company's business, or
> (d) where the accused fiduciary does not exploit the opportunity by the employment of his company's resources, or
> (e) where by embracing the opportunity personally the director or officer is not brought into direct competition with his company and its business.[71]

As with many other tests of corporate opportunity, *Solimine* is just another caveat to a preceding test[72] looking for a clearer and more useful definition.

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64. *Id.* at 199, 80 N.E.2d at 529 (quoting BALLANTINE ON CORPORATIONS 204-05 (1946)).
65. Comment, *supra* note 33, at 951.
66. *See* Production Mach. Co. v. Howe, 327 Mass. 372, 99 N.E.2d 32 (1951).
67. In essence, this "combining" of the fairness test with other tests is in application only. The only case which specifically combined the fairness test in theory with another test was Miller v. Miller, 301 Minn. 207, 222 N.W.2d 71 (1974); *see infra* notes 74-78.
68. Miller v. Miller, 301 Minn. 207, 222 N.W.2d 71 (1974).
69. Abbott Redmont Thinlite Corp. v. Redmont, 475 F.2d 85 (2d Cir. 1973).
70. 128 N.J. Eq. 228, 16 A.2d 203 (1940).
71. *Id.* at 246-47, 16 A.2d at 215.
72. *Solimine* adheres to the decision set forth in *Guth*, yet adds five additional

Although it achieved its goal of enhanced clarity, it does not adequately protect of the rights of corporations.[73]

Miller "Two Step" Test

The last of the traditional corporate opportunity tests is found in *Miller v. Miller*.[74] It is a two part test which, in essence, combines the line of business test and the fairness test.[75] The first step is a flexible application of the line of business test, the inquiry being:

> whether, within or without its corporate powers, the opportunity embraces areas adaptable to its business and into which the corporation might easily, naturally, or logically expand; the competitive nature of the opportunity-whether prospectively harmful or unfair-; whether the corporation, by reason of insolvency or lack of resources, has the financial ability to acquire the opportunity; and whether the opportunity includes activities as to which the corporation has fundamental knowledge, practical experience, facilities, equipment, personnel, and the ability to pursue.[76]

If the opportunity is labelled "corporate", then the inquiry proceeds to the second step, the fairness test. If the fiduciary did not violate his duties of loyalty, good faith and fair dealing toward the corporation, then there will be no liability.[77] Thus, the *Miller* test "establishes a middle of the road standard that is more rigorous than the lax interest or expectancy test, but less demanding than the subjective fairness test when used alternatively with the line of business test."[78]

Proposed Test

The most recent corporate opportunity test is that supported by the American Law Institute.[79] This test requires an affirmative act on the part of

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factors which could prevent liability. *Id.*

73. Because of the additional five factors, establishing that a corporate opportunity has been usurped is very difficult. Therefore the rights of the corporation could be infringed by the unlikelihood of finding that there was in fact a corporate opportunity.

74. 301 Minn. 207, 222 N.W.2d 71 (1974).

75. Comment, *supra* note 33, at 952.

76. *Miller*, 301 Minn. at 225, 222 N.W.2d at 81.

77. *Id.* at 226-27, 222 N.W.2d at 81-82.

78. Comment, *supra* note 33, at 954.

79. PRINCIPLES OF CORPORATE GOVERNANCE § 5.05 (Tent. Draft No. 5, 1986). Section 5.05 states:

> a) A director or senior executive may not take advantage of a corporate opportunity unless:
> (1) he first offers the corporate opportunity to the corporation and makes disclosure concerning the conflict of interest and the facts concerning the corporate opportunity;
> (2) the corporate opportunity is rejected by the corporation; and
> (3) (A) the rejection of the opportunity is fair to the corporation; or
> (B) the rejection is authorized, following such disclosure, by disinterested di-

the corporate fiduciary before he may take advantage of a corporate opportunity.[80] In essence, if the director or officer wishes to pursue the opportunity for his personal benefit, he must first present it to the corporation.[81] After presentation, the corporation is forced either to act upon the opportunity or to reject it,[82] opening the door for the director to pursue the matter on an individual basis. These affirmative duties placed upon fiduciaries and corporations make the ALI test the most useful and worthy test of those presented. In a simplistic and straightforward fashion, this test sets the basis for what must be done when a corporate opportunity is deemed to exist.[83] In no uncertain terms a fiduciary must present the opportunity to the corporation, and the corporation must accept or reject the invitation. The certainty of these guidelines are what the law has sought, and through their use, such certainty is produced.

ANALYSIS OF *Chemical Dynamics*

With these various tests set out, the question becomes what test the court used in *Chemical Dynamics*, and how it compares with the American Law Institute proposed test. Initially, the court's analysis leads to the belief that the court used the line of business test[84] as stated in *Guth*. The court pursued this idea as a threshold barrier[85] and purported to use the test in concluding that this was a situation in which the corporate opportunity doctrine was inapplicable[86] in that the opportunity was on an individual rather than on a corporate level.

Although the court could feasibly determine that the facts of this case

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> rectors, in a manner that satisfies the standards of the business judgment rule; or
>
> (C) the rejection is authorized or ratified by disinterested shareholders, following such disclosure, and the shareholders' action is not equivalent to a waste of corporate assets.

80. *Id.* § 5.05(a)(1).

81. *Id.*

82. *Id.* § 5.05 comment a, illustration 3 (1986) (rejection may be based upon lack of interest of the corporation, its financial inability, legal restrictions placed on the corporation, or unwillingness of a third party to deal with the corporation).

83. This is good because courts have waned on the more abstract tests because of problems in applying them.

84. *Supra* notes 50-61.

85. *Chemical Dynamics*, 728 S.W.2d at 593. The court defined the corporate opportunity doctrine as:

> forbid[ding] a corporate director from acquiring for his own benefit an opportunity that would have been valuable and germane to the corporation's business.
>
> . . . This duty applies to an opportunity which is "in the line of the corporation's business and is of practical advantage to it, [or] is one in which the corporation has an interest or a reasonable expectancy. . . ."

Id. (quoting Guth v. Loft, Inc., 23 Del. Ch. 255, 272-73, 5 A.2d 503, 511 (1939)). This is the definition of the line of business test).

86. *Id.*

warranted the use of the line of business test, the court instead adopted and applied the fairness test,[87] possibly without realizing what they had done.[88] The court did not explicitly mention the fairness test in their opinion, but signs of the test are abundant, with an array of statements sounding in equity. For example, the court stated:

> Newfeld was willing to invest his own funds to save a corporation which was operating at a loss and which was unable to pay its creditors. [He] risked his own money when other experienced businessmen had refused to do so. No element of fraud appears anywhere in the entire transaction. . . . Further, there is no evidence that, when Newfeld exercised the option in 1973, he acted surreptitiously or in bad faith. . . . Had [he] not funded the corporation in 1970, there was a real danger that the corporation could not have continued and that, by 1973, the investment of every shareholder would have been lost.[89]

These statements show that the court's analysis contained an application of equitable standards,[90] which are the basis of the fairness test.[91] The court chose to conclude that no corporate opportunity existed, but used the fairness test instead of the line of business test in reaching that conclusion. Classifying the test is merely a matter of manipulating labels for its analysis.[92] Whether the court deems its decision to be based on the "line of business" or "fairness"

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87. *Supra* notes 63-69.

88. By not using the fairness test, but in using its equitable standards, the court is implying that it is ignorant of the specific test, yet knowledgeable of its intended purpose.

89. *Chemical Dynamics*, 728 S.W.2d at 593.

90. An important distinction can be made at this juncture concerning the focal points of discussion usually accompanying the fairness and line of business tests. When the fairness test is applied, the inquiry tends to focus on the individual actors. The court seeks to determine whether the director or officer acted in a self-serving manner, or whether the good of the corporation was in mind. But when the line of business test is applied, the inquiry shifts to the business itself. The court only wishes to determine what are the existing or potential activities of the corporation.

In the court's decision here, most of the analysis centered around the activities of Lawrence Newfeld. His actions were discussed at length to determine if he acted in bad faith or in the best interest of the corporation. Conversely, the court's discussion concerning the activities of the business is scant at best. In fact, the court's treatment of this issue is virtually non-existent. This helps to highlight the fact that, although the court purports to follow the line of business test, its analysis and discussion was based entirely on the equitable and individual factors constituting the fairness test.

91. *Supra* note 62.

92. The court might not have wanted to "explicitly" change the law of corporate opportunity in Missouri. It is possible that the court felt more comfortable in making a substantive change while retaining the "line of business" label. It is also possible that the court is happy with the line of business test, yet felt that equitable standards were more useful under the particular facts of this case. Therefore, instead of changing the law, the court just "bent" it a little while looking for a certain outcome. A final possibility could be that the court was modifying the line of business test, adding fairness to the analysis. In this way, the court would be adopting an approach similar to that used in *Miller*.

test, the outcome is the same. Therefore, the court can continue to use its own interpretation of the line of business test, or it can use the original fairness test. In substance, there is no difference.

In comparison, the ALI test is a straightforward and less confusing test than that applied by the court. The ALI test breaks down the inquiry into three basic questions. The first question to be asked is whether the director or senior executive "first offer[ed] the corporate opportunity to the corporation and [made] disclosure concerning the conflict of interest and the facts concerning the corporate opportunity."[93] Even with the time constraints,[94] Sol Schultz[95] managed to offer and to disclose[96] the opportunity of loaning the corporation the needed money in return for the option to purchase the building to several shareholders.[97] Therefore, step one has been fulfilled. The next question is whether the "corporate opportunity [was] rejected by the corporation."[98] This is also answered affirmatively in that all of the shareholders who were offered the opportunity refused to accept.[99] The third requirement can be satisfied by one of three questions, any one of which is determinative without the other two.[100] The third of the three is applicable in this case:[101] whether the "rejection [was] authorized or ratified by disinterested shareholders. . . ."[102] Several shareholders of the corporation authorized rejection of the offer,[103] whereby Newfeld, after such rejection, took the opportunity per-

93. PRINCIPLES OF CORPORATE GOVERNANCE, *supra* note 79, § 5.05(a)(1).

94. *Chemical Dynamics*, 728 S.W.2d at 591 (the payment had to be made by 2:00 that same day).

95. Even though it was Sol Schultz instead of Lawrence Newfeld who in fact offered the opportunity to the shareholders, this would not seem to have an adverse effect on whether the opportunity was disclosed in accordance with § 5.05. The statute's purpose is to inform the shareholders that a corporate opportunity exists. Whether this is done by the director who wishes to capitalize on the opportunity, or done by a third party who has both knowledge and authority seems to make no difference. The spirit of the statute is notice, and in either situation, notice is given.

96. *Id.* The statute is silent as to how much and what type of disclosure is needed under § 5.05(a)(1). However, in light of the fact that Sol Schultz asked for the loan "in return for the option to purchase the building," it would seem logical that the shareholders knew the situation and also knew the consequences if the offer was refused. Also, since this was a "closely held" corporation, it might be assumed that most of those holding stock would be informed, not necessarily of the everyday workings of the corporation, but at least of major problems concerning its stability.

97. *Id.*

98. PRINCIPLES OF CORPORATE GOVERNANCE, *supra* note 79, § 5.05(a)(2).

99. *Chemical Dynamics*, 728 S.W.2d at 591.

100. PRINCIPLES OF CORPORATE GOVERNANCE, *supra* note 79, § 5.05(a)(3).

101. It should be noted that even if the trier of fact concludes that the rejection was not authorized or ratified by disinterested shareholders, § 5.05(a)(3)(A) may still apply. This section asks whether the "rejection of the opportunity is fair to the corporation." In this sense, a defendant may sidestep the issue of whether the rejection was authorized by the shareholders. He need only present to the court the question of whether the rejection was "fair". *Id.* § 5.05(a)(3)(A).

102. *Id.* § 5.05(a)(3)(C).

103. *Chemical Dynamics*, 728 S.W.2d at 591. Although not on the record, it can

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sonally.[104] The conclusion of this analysis shows that all three questions of the ALI test were answered in the affirmative, absolving Newfeld from any wrongdoing and allowing him to capitalize on the opportunity. As is shown, the ALI test is much more simple than the confusing test used in *Chemical Dynamics*, and much easier to apply.

CONCLUSION

The history of the corporate opportunity doctrine has been plagued with vagueness and uncertainty. In search of a more suitable test, courts have created, modified and combined to no satisfactory end. Not until the ALI test had there been a corporate opportunity test which combines both the fairness of the traditional tests with the certainty of application for which courts have yearned. Although in *Chemical Dynamics* the facts were such as to not make a difference in the ultimate outcome, one must look ahead to the future benefits of a test which, in its application, has a more certain outcome.

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be assumed that the offer was also tendered to A. Y. Schultz, along with Sol Schultz and Lawrence Newfeld. Therefore, § 5.05(a)(3)(B) could also apply.

104. *Id.*