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CORPORATE OPPORTUNITIES AND CORPORATE COMPETITION IN ILLINOIS: A COMPARATIVE DISCUSSION OF FIDUCIARY DUTIES

WILLIAM LYNCH SCHALLER*

No man can serve two masters; for either he will hate the one, and love the other; or else he will hold to the one, and despise the other.¹

I. INTRODUCTION

Loyalty and betrayal are major themes of life and law. One can find this throughout literature and history,² and one can certainly find it in lawsuits and law reports.³ Given its pride of place in the world of human harm, disloyalty's damage is often as incalculable as it is incomparable.⁴

Illinois courts have long understood how vulnerable firms are to fiduciary disloyalty, and they frequently call upon noncompetition agreements and trade secret law to remedy it.⁵

* Partner, Baker & McKenzie, Chicago, Illinois. This Article is dedicated to my wife Jane Reynolds Schaller—loyalty and love personified—for making me better in every way.

1. Dickson v. People *ex rel.* Brown, 17 Ill. 191, 193 (1855) (quoting *Matthew* 6:24 for this “revealed truth”).

2. See, e.g., GABRIELLA TURNATURI, BETRAYALS: THE UNPREDICTABILITY OF HUMAN RELATIONS 26 (Lydia G. Cochrane trans., Univ. Chi. Press 2007) (“In literature and in history from Judas to our own day, there are no positive figures of traitors or betrayers (except for Flavius Josephus, who is credited with using betrayal for good ends), and no instances of betrayals that are not attributable to evil or to some sort of perversion.”).

3. Christina L. Boyd & David A. Hoffman, *Disputing Limited Liability*, 104 NW. L. REV. 853, 915 n.1 (2010) (noting that for the period from 2000 to 2005, a Westlaw pleading search for the words “loyalty/disloyalty” within the same sentence as “director/officer” turned up 2405 complaints).

4. See Christina Le Beau, *A Betrayal of Trust*, CRAIN'S CHI. BUS., Apr. 10, 2006, at 39, available at <http://www.chicagobusiness.com/article/20060408/ISSUE02/100025628/a-betrayal-of-trust> (recounting shock and sense of betrayal small firm founders experienced when one of their trusted employees lied about leaving to compete).

5. See *Reliable Fire Equip. Co. v. Arredondo*, 2011 IL 111871, 965 N.E.2d 393 (2011) (holding that Illinois Appellate Court's entire noncompete jurisprudence over the last 30 years is at odds with Illinois Supreme Court's recent *Mohanty* decision); *Mohanty v. St. John Heart Clinic, S.C.*, 225 Ill. 2d 52, 78, 866 N.E.2d 85, 100 (2006) (enforcing physician restrictive covenants as

But the principal weapons they deploy to combat disloyalty are the corporate opportunity doctrine and its close cousin, the corporate competition prohibition.⁶ Indeed, corporate opportunity and corporate competition claims are actually far more powerful than their restrictive covenant and trade secret counterparts, as these fiduciary duty theories do not require proof of an agreement, evidence of secrecy measures, or other factual and legal clutter that tends to derail contract and trade secret charges.⁷ Moreover, under the deterrence rationale of these doctrines, fiduciaries bear the heavy burden of proving their full disclosure, complete loyalty, and utmost good faith during their agency relationships—a burden they can seldom meet when challenged.⁸ In addition, fiduciary breach claims are creatures of equity and hence not subject to jury trials and their attendant expense and delay.⁹

Despite their similarities and considerable overlap, corporate opportunity and corporate competition cases differ in important respects. For one thing, their liability standards are not the same: unless a fiduciary can show he disclosed and tendered a corporate opportunity, he is foreclosed from seizing it under the prophylactic Illinois “line-of-business” test.¹⁰ By contrast, a fiduciary can *never* compete with his principal, regardless of his disclosure and

reasonable); *Brunswick Corp. v. Outboard Marine Corp.*, 79 Ill. 2d 475, 478-79, 404 N.E.2d 205, 207 (1980) (summarizing Illinois common law trade secret principles prior to the adoption of the Illinois Trade Secrets Act in 1987); *ILG Indus., Inc. v. Scott*, 49 Ill. 2d 88, 94-95, 273 N.E.2d 393, 397 (1971) (upholding production injunction barring manufacture of entire product to prevent use of trade secret components); *Stathis v. Geldermann, Inc.*, 295 Ill. App. 3d 844, 858, 692 N.E.2d 798, 808 (1st Dist. 1998) (recognizing conversion claim with respect to intangible assets).

6. Jodi L. Popofsky, Note, *Corporate Opportunity and Corporate Competition: A Double-Barreled Theory of Fiduciary Liability*, 10 HOFSTRA L. REV. 1193 (1982) (comparing and contrasting corporate opportunity and corporate competition doctrines in terms of liability, defenses and remedies).

7. See, e.g., *Citadel Inv. Group, LLC v. Teza Techs., LLC*, 398 Ill. App. 3d 724, 735-36, 924 N.E.2d 95, 105-06 (1st Dist. 2010) (even though defendants’ nine-month employment noncompete agreements were enforceable, and even though defendants were in breach of those covenants for eight months, court refused to extend covenant restraint period to remedy defendants’ noncompliance); *Ancraft Prods. Co. v. Universal Oil Prods. Co., Inc.*, 84 Ill. App. 3d 836, 405 N.E.2d 1162 (1st Dist. 1980) (rejecting trade secret theft, tortious interference and civil conspiracy claims in a case that should have been brought under the corporate opportunity doctrine).

8. See, e.g., *Labovitz v. Dolan*, 189 Ill. App. 3d 403, 413, 545 N.E.2d 304, 311 (1st Dist. 1989) (when there is a claim for breach of fiduciary duty, “the burden of proof shifts to the fiduciary to show by clear and convincing evidence that a transaction is equitable and just.”).

9. *Prodromos v. Everen Sec., Inc.*, 389 Ill. App. 3d 157, 173-75, 906 N.E.2d 599, 613-15 (1st Dist. 2009) (collecting Illinois cases holding there are no jury trial rights in fiduciary duty cases).

10. *Kerrigan v. Unity Savings Ass’n*, 58 Ill. 2d 20, 28, 317 N.E.2d 39, 43-44 (1974).

tender.¹¹ Another important difference is that the “preparing to compete” defense, so common in corporate competition cases,¹² has no role in true corporate opportunity cases.¹³ Remedies in these cases vary as well: compensation forfeiture should be virtually automatic in corporate competition cases but not necessarily in corporate opportunity cases,¹⁴ while the “head start” relief limitation should be ignored in corporate opportunity cases but not necessarily in corporate competition cases.¹⁵ As one might guess, these subtle substantive and remedial distinctions have significant procedural ramifications in turn.¹⁶

In this Article, I primarily provide a descriptive rather than prescriptive approach to Illinois corporate opportunity and corporate competition principles, as I think most of the rules are well settled even if not always well articulated or well understood, particularly in relation to one another. To this end, I begin with the scope and consequences of fiduciary status, including special burdens of proof and significant remedies designed to implement the fiduciary deterrence rationale. I then study the definitional contours of corporate opportunity and corporate competition cases in Illinois to show their differing elements and factual applications. These differences are most pronounced—and most misunderstood—with respect to the preparing to compete and head start defenses, so I spend some time on these key subjects. I end with a procedural emphasis: how a fiduciary duty case is framed can and should lead to summary determinations of liability

11. *Patient Care Servs., S.C. v. Segal*, 32 Ill. App. 3d 1021, 1028-29, 337 N.E.2d 471, 478 (1st Dist. 1975).

12. *Radiac Abrasives, Inc. v. Diamond Techs., Inc.*, 177 Ill. App. 3d 628, 630, 638, 532 N.E.2d 428, 429, 434 (2d Dist. 1988) (finding employees were legitimately preparing to compete before resignation in corporate competition case).

13. *Regal-Beloit Corp. v. Drecol*, 955 F. Supp. 849, 864 n.8 (N.D. Ill. 1996) (rejecting preparing to compete defense in corporate opportunity case).

14. *See Vendo Co. v. Stoner*, 58 Ill. 2d 289, 312-13, 321 N.E.2d 1, 14 (1974) (granting compensation forfeiture in corporate opportunity/corporate competition case); *White Gates Skeet Club, Inc. v. Lightfine*, 276 Ill. App. 3d 537, 538, 658 N.E.2d 864, 866 (2d Dist. 1995) (granting compensation forfeiture in corporate opportunity case).

15. *Compare LCOR, Inc. v. Murray*, No. 97 C 1302, 1997 WL 136278, at *12 (N.D. Ill. Mar. 19, 1997) (granting preliminary injunction, without time limitation, to remedy corporate opportunity usurpation), *with Regal-Beloit Corp.*, 955 F. Supp. at 867 (limiting head start injunction to six months, without citing any authority for this time limitation, in corporate opportunity case), and *ABC Trans National Transport, Inc. v. Aeronautics Forwarders, Inc.*, 90 Ill. App. 3d 817, 834-35, 413 N.E.2d 1299, 1312-13 (1st Dist. 1980) (limiting damages to the four-month head start defendants gained in corporate competition case).

16. *Unichem Corp. v. Gurtler*, 148 Ill. App. 3d 284, 290, 498 N.E.2d 724, 728 (1st Dist. 1986) (affirming trial court’s grant of summary judgment, on liability, in favor of plaintiff, in fiduciary duty/corporate competition case).

and certain remedies in favor of plaintiffs, a risk defendants rarely appreciate at the time of their conduct.

This Article has a larger purpose. It is the first of three in which I examine dimensions of the Illinois corporate opportunity doctrine in an effort to clarify and extend this essential law in a crucial way: by eliminating the third party “refusal to deal” defense. My intent in this initial piece is to establish a baseline for my next article, in which I painstakingly analyze Illinois corporate opportunity cases in chronological order, focusing in every instance on the often critical yet unremarked role third parties played in the underlying events and the ultimate outcome, almost always taking the form of their willingness or unwillingness to deal with the plaintiff.¹⁷ Building on these first two works, my third will argue for the abolition of the “third party refusal to deal” defense in Illinois corporate opportunity cases as a matter of precedent and policy—an argument that, if accepted, will give true force to the deterrence rationale behind this pivotal regime.¹⁸

II. CORPORATE OPPORTUNITY AND CORPORATE COMPETITION: RIGHTS, REMEDIES, AND RATIONALES

To understand corporate opportunity and corporate competition claims, one must first appreciate the capaciousness of Illinois fiduciary duty law—it covers a much wider range of players than many initially realize, from outside directors down to mere employees. One must also appreciate the total deterrence policy of fiduciary duty law and the stinging remedies it provides, such as compensation forfeiture, prime rate prejudgment interest, and wrongful gains disgorgement, all available even when the victimized principal has suffered no loss.¹⁹ In addition, one must grasp the distinction between corporate opportunity usurpation and corporate competition, including the important point that “preparing to compete” and “head start”—frequently asserted defenses to corporate competition claims—are not defenses to corporate opportunity claims. Taken together, these dynamics should produce summary liability determinations and partial or total relief awards in favor of plaintiffs almost as a matter of course in Illinois corporate opportunity cases, especially when

17. William Lynch Schaller, *The Origin and Evolution of the Third Party “Refusal to Deal” Defense in Illinois Corporate Opportunity Cases* (forthcoming).

18. William Lynch Schaller, *Corporate Opportunities and the Third Party “Refusal to Deal” Defense: Policy and Practice Lessons from Illinois* (forthcoming).

19. See generally, William Lynch Schaller, *Unfair Competition by Fiduciaries: Inflicting the “Sting of Disability”*, BUS. TORTS LIT., Winter 2010, at 4 (discussing examples of multi-million dollar monetary awards and other relief in fiduciary duty cases).

fiduciaries compete for a corporate opportunity.

A. *Who Is a “Fiduciary”?*

Illinois decisions routinely recognize certain relationships as fiduciary in nature. Familiar examples include trustees, guardians, executors, administrators, attorneys, joint venturers, and partners. Officers, directors, and sometimes even shareholders of corporations are also recognized as fiduciaries.²⁰ Members or managers of Illinois limited liability companies may also be fiduciaries, depending upon whether the entity is organized as member managed or manager managed.²¹ Public officials have

20. See *Autotech Tech. Ltd. P’ship v. Automationdirect.com*, 471 F.3d 745, 748 (7th Cir. 2006) (“Fiduciary duties exist as a matter of law in certain relationships including partnerships and joint ventures.”); *Ill. Rockford Corp. v. Kulp*, 41 Ill. 2d 215, 224, 242 N.E.2d 228, 234 (1968) (a fiduciary relationship existed between shareholders in two-man corporation); *Carroll v. Caldwell*, 12 Ill. 2d 487, 498, 147 N.E.2d 69, 75 (1957) (joint venturers, as a matter of law, stand in a fiduciary relation to each other as to matters within the scope of the relation); *Santella v. Kolton*, 393 Ill. App. 3d 889, 901-03, 912 N.E.2d 1248, 1259-60 (1st Dist. 2009) (removal of directors for breach of fiduciary duty, including usurpation of a corporate opportunity in the form of title to key trademarks, did not constitute an immediately appealable interlocutory injunction order); *Obermaier v. Obermaier*, 128 Ill. App. 3d 602, 609-10, 470 N.E.2d 1047, 1053-54 (1st Dist. 1984) (majority shareholder breached fiduciary duties in negotiating a deal that allowed him to receive more for his shares from a buyer than minority shareholder received); *Graham v. Mimms*, 111 Ill. App. 3d 751, 760-61, 444 N.E.2d 549, 555 (1st Dist. 1982) (listing common categories of fiduciaries); Lyman Johnson and Dennis Garvis, *Are Corporate Officers Advised About Fiduciary Duties?*, 64 BUS. LAW. 1105, 1106-08 (2009) (noting paucity of law and literature on officer fiduciary duties); Larry E. Ribstein, *Are Partners Fiduciaries?*, 2005 U. ILL. L. REV. 209 (2005) (examining anew the assumptions behind treating partners as fiduciaries); William Lynch Schaller, *Competing After Leaving: Fiduciary Duties of Closely Held Corporation Shareholders After Hagshenas v. Gaylord*, 84 ILL. B.J. 354 (1996) (criticizing Illinois decisions analogizing closely held corporations to partnerships and imposing partner-like fiduciary duties upon mere shareholders); ANTHONY BIANCO, *THE BIG LIE: SPYING, SCANDAL, AND ETHICAL COLLAPSE AT HEWLETT-PACKARD* 208-313 (PublicAffairs 2010) (book-length analysis of public company director infighting at Hewlett-Packard, originating with director leaks, followed by improper “pretexting” investigation, and ending with resignations or terminations of multiple directors and in-house lawyers).

21. See, e.g., *Moede v. Pochter*, 710 F. Supp. 2d 683, 686 (N.D. Ill. 2009) (non-manager members did not breach limited liability company operating agreement by not informing another member of member-manager’s breach); *Trover v. 419 OCR, Inc.*, 397 Ill. App. 3d 403, 408-10, 921 N.E.2d 1249, 1254-55 (5th Dist. 2010) (limited liability company was not required to participate in arbitration over breach of fiduciary duty and corporate waste by members; limited liability company was not a signatory to the members’ arbitration agreement); *Katris v. Carroll*, 362 Ill. App. 3d 1140, 1146, 842 N.E.2d 221, 226 (1st Dist. 2005) (member who was not a manager of a manager-managed limited liability company owed no fiduciary duties, and therefore did not usurp corporate opportunity in preparing rival software program for another firm);

similarly been deemed fiduciaries in Illinois, thereby precluding them from using their public positions for private gain.²² More generally, “[e]very person who accepts the responsibility of acting on behalf of another is a fiduciary.”²³ Indeed, “[w]hen a principal-agent relationship is present, a fiduciary relationship arises as a matter of law.”²⁴

Agency law is of obvious importance to business organizations, since all businesses act through their agents. For this reason, managers and employees are fiduciaries as a matter of law to the extent they serve as agents of their employer.²⁵ The

Anest v. Audino, 332 Ill. App. 3d 468, 475-76, 773 N.E.2d 202, 209 (2d Dist. 2002) (Illinois Limited Liability Company Act originally adopted corporate law fiduciary duty principles for members and managers, and now explicitly imposes such duties by amendment).

22. *See, e.g., Chi. Park Dist. v. Kenroy, Inc.*, 78 Ill. 2d 555, 564, 402 N.E.2d 181, 186 (1980) (constructive trust can be imposed upon benefits obtained by third persons through their knowledge of or involvement in a public official’s breach of fiduciary duty); *City of Chi. ex rel. Cohen v. Keane*, 64 Ill. 2d 559, 563-64, 357 N.E.2d 452, 455 (1976) (recognizing cause of action for breach of fiduciary duty against alderman who voted for public purchase of private land he owned); *Vill. of Wheeling v. Stavros*, 89 Ill. App. 3d 450, 454, 411 N.E.2d 1067, 1070 (1st Dist. 1980) (“A constructive trust may be imposed upon benefits obtained by a third person through his knowledge of or involvement in a public official’s breach of fiduciary duty.”).

23. *Graham*, 111 Ill. App. 3d at 760, 444 N.E.2d at 555; *see also* RESTATEMENT (THIRD) OF AGENCY §1.01 (2006) (defining agency as “the fiduciary relationship that arises when one person (a ‘principal’) manifests assent to another person (an ‘agent’) that the agent shall act on the principal’s behalf and be subject to the principal’s control, and the agent manifests assent or otherwise consents so to act”); RESTATEMENT (SECOND) OF AGENCY §1(1) (1958) (“Agency is the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act.”). Illinois courts have repeatedly rejected the argument that officers and directors of corporate fiduciaries are themselves fiduciaries, however. *See* 1515 N. Wells, LP v. 1513 N. Wells, LLC, 392 Ill. App. 3d 863, 873, 913 N.E.2d 1, 20 (1st Dist. 2009) (Illinois rejects the view that controlling shareholders have a fiduciary duty); *Franz v. Calaco Dev. Corp.*, 352 Ill. App. 3d 1129, 1137, 818 N.E.2d 357, 366 (2d Dist. 2004) (chief operating officer cannot be held liable for breach of fiduciary duty without piercing the corporate veil).

24. *Stathis*, 295 Ill. App. 3d at 859, 692 N.E.2d at 809; *see also* *Ray v. Winter*, 67 Ill. 2d 296, 304, 367 N.E.2d 678, 682 (1977) (“Where, however, one voluntarily acts as an agent for another, a fiduciary relationship exists as a matter of law.”); *Prodromos*, 341 Ill. App. 3d at 724-25, 793 N.E.2d at 156-57 (agency relationship does not depend on an express appointment or acceptance by the principal and agent, and no fee agreement or engagement letter is necessary to create an agency relationship).

25. *Foodcomm Int’l v. Barry*, 328 F.3d 300, 304 (7th Cir. 2003) (applying Illinois law) (employees, as agents, are fiduciaries who cannot compete before resigning); *E.J. McKernan Co. v. Gregory*, 252 Ill. App. 3d 514, 530, 623 N.E.2d 981, 993-94 (2d Dist. 1993) (an employee need not be an officer or a director to be held accountable as a fiduciary under agency law); *Lowell Wadmond, Conflicts of Business Interests*, 17 BUS. LAW. 48, 49 (1961) (“The

Illinois Supreme Court settled this question in 1883 in *Davis v. Hamlin*.²⁶ The court there explicitly rejected the argument that fiduciary duty law does not apply to “master and servant, or employer and employe[e],” stressing that “[t]he subject is not comprehended within any such narrowness of view.”²⁷ The Illinois Supreme Court still holds this expansive view,²⁸ as well it should given the pervasive use of agents in all forms of business.

The consequence of fiduciary status is equally clear: agents owe their principal a fiduciary duty of undivided loyalty. “Under standard agency doctrine [an agent] is obligated to act solely for the benefit of [his principal] in all matters connected with his agency, and to refrain from competing with [his principal].”²⁹ These bedrock obligations, set forth in Sections 387 and 393 of the venerable Restatement (Second) of Agency, have been explicitly and repeatedly embraced by the Illinois Supreme Court, and they serve as the basis for the corporate opportunity and corporate competition doctrines.³⁰

Less well understood, but equally important, is the difference between an agent’s affirmative duty to seek business for the firm and his negative duty not to interfere with the firm’s business. The scope of an agency can be broad or narrow, according to the parties’ agreement;³¹ not all agents are charged with finding new customers, new employees, or new technology for the firm, for

relation between an employee and his employer, where the employee’s duties are purely ministerial and mechanical, is normally described as that of master and servant. However, as soon as we reach that level of employee-employer relationship in which the employee’s job involves discretion and decision making—and this of course would include all key employees and officers—the relationship is more aptly described as that of principal and agent.”).

26. *Davis v. Hamlin*, 108 Ill. 39 (1883).

27. *Id.* at 48.

28. *Lawlor v. N. Am. Corp.*, 2012 IL 112530, ¶ 69, __ N.E.2d __, __ (2012) (“Employees as well as officers and directors owe a duty of loyalty to their employer.”); *Mullaney, Wells & Co. v. Savage*, 78 Ill. 2d 534, 546, 402 N.E.2d 574, 580 (1980) (acknowledging that its prior corporate opportunity decisions happened to have involved officers and directors, and then holding that employee Savage was a fiduciary of plaintiff by virtue of his agency status, even though he was not an officer or director of plaintiff).

29. *Mullaney*, 78 Ill. 2d at 546, 402 N.E.2d at 580.

30. *Id.* at 546-47, 402 N.E.2d at 580 (invoking corporate opportunity doctrine and citing §§ 387 and 393); *Vendo Co. v. Stoner*, 58 Ill. 2d 289, 305, 321 N.E.2d 1, 10 (1974) (invoking corporate opportunity doctrine by name, invoking corporate competition doctrine in substance, and citing §§ 387 and 393).

31. *Armstrong v. Guigler*, 174 Ill. 2d 281, 294, 673 N.E.2d 290, 296-97 (1996) (discussing express and implied fiduciary duties and the “unique character” of fiduciary duties in general); *Kinzer v. City of Chicago*, 128 Ill. 2d 437, 445, 539 N.E.2d 1216, 1220 (1989) (fiduciary duties are the product of contract, agency and equity law); RESTATEMENT (SECOND) OF AGENCY § 13 (1958) (“An agent is a fiduciary with respect to matters within the scope of his agency.”).

example.³² A case in point is *Blackman Kallick Bartelstein v. Sorkin*.³³ There, the court held that Sorkin, an accounting firm employee, had no fiduciary duty to seek out financial investment work from a client for whom his firm only did accounting work. The court therefore rejected a claim that Sorkin had a duty to report an investment opportunity to his employer just because the opportunity was presented by a firm client.

Particular agents may have no duty to pursue or report new work, as in *Sorkin*, but all agents are duty bound to refrain from hindering their firm's efforts.³⁴ Although many Illinois Appellate Court decisions readily recognize that officers and directors must avoid hindering or exploiting their employer's business, they frequently imply—but do not quite state—that mere employees are free to do so.³⁵ This officer-director/employee distinction cannot

32. *Katris*, 362 Ill. App. 3d 1140, 1147, 842 N.E.2d at 226 (employee Doherty, who was a member but not a manager of the manager-managed limited liability company therein, did not become a fiduciary of the company for corporate opportunity purposes when he was elected “Director of Technology,” as he had no managerial authority); *Dolezal v. Plastic and Reconstructive Surgery, S.C.*, 266 Ill. App. 3d 1070, 1086, 640 N.E.2d 1359, 1369 (1st Dist. 1994) (employer knew of and acquiesced in employee's operation of competing satellite medical office).

33. *Blackman Kallick Bartelstein v. Sorkin*, 214 Ill. App. 3d 663, 574 N.E.2d 121 (1st Dist. 1991).

34. RESTATEMENT (SECOND) OF AGENCY § 387 (agent's duty to “act solely for the benefit of principal in all matters connected with agency”); *Id.* at § 389 (agent's “duty not to deal with his principal as an adverse party in a transaction connected with agency without principal's knowledge”); *Id.* at § 391 (agent's duty not to act on behalf of an adverse party in a transaction connected with his agency without principal's knowledge); *Id.* at § 392 (agent acting for two principals, with the knowledge of both, has a duty of fairness to each and must disclose all facts which would reasonably affect their judgment); *Id.* at § 393 (agent has a “duty not to compete with [his] principal concerning the subject matter of his agency”); *Id.* at § 394 (agent has a “duty not to act or to agree to act during the period of his agency for persons whose interests conflict with those of [his] principal in matters in which the agent is employed”); *Id.* at § 395 (agent has a duty not to use or disclose his confidential information “given him by [his] principal or acquired by him during the course or on account of his agency or in violation of his duties as an agent, in competition with or to the injury of [his] principal, on his own account or on behalf of another,” even if “such information does not relate to the transaction in which he is then employed”).

35. See, e.g., *Bernstein and Grazian, P.C. v. Grazian and Volpe, P.C.*, 402 Ill. App. 3d 961, 978 n.7, 931 N.E.2d 810, 825 n.7 (1st Dist. 2010) (“The law is clear that employees are held to different standards with respect to fiduciary duties than are corporate officers. Generally, an employee's duty is one of loyalty and noncompetition, while an officer's duty is not to actively exploit the company for his personal gain or hinder its ability to continue its business.”); *Cooper Linse Hallman Capital Mgmt., Inc. v. Hallman*, 368 Ill. App. 3d 353, 357, 856 N.E.2d 585, 589 (1st Dist. 2006) (corporate officers “stand on a different footing” than employees when it comes to pre-resignation competitive activities); *E.J. McKernan*, 252 Ill. App. 3d at 530, 623 N.E.2d at 994 (holding

be squared with *Mullaney, Wells & Co v. Savage*³⁶, where the Illinois Supreme Court made a point of holding that, even though Savage was just an employee, and not an officer or director, he still had a duty “to act solely for the benefit of [his principal] in all matters connected with his agency.”³⁷ The officer-director/employee distinction also cannot be reconciled with *Davis v. Hamlin*,³⁸ where the Illinois Supreme Court specifically held that employees cannot interfere with their employer’s business.³⁹ Surely sabotage by any employee, from highest to lowest, is not an act “for the benefit” of the employer, and it therefore should not be permitted by Illinois fiduciary duty law under any circumstances.⁴⁰

There is only one place where the officer-director/employee distinction arguably may make some sense: the affirmative duty to protect the corporation. In *Unichem Corp. v Gurtler*,⁴¹ for example, Gurtler, the president of Unichem, looked the other way as his son—a Unichem employee—set up a rival firm. The court affirmed summary judgment against Gurtler for breach of fiduciary duty, holding that Gurtler had a duty to disclose facts which threatened the plaintiff corporation’s existence. This result can be justified on the ground that the scope of agency for an officer or director includes overseeing the overall operations of the firm, a rationale that applies with equal force to the narrower regime a manager runs, such as supervising his subordinates.⁴² A mere employee, on the other hand, has no supervisory responsibilities at all and, therefore, arguably has no fiduciary obligation to blow the whistle

that officers may be liable for transactions after termination of employment if such transactions are based on information gained during employment, without clarifying that ordinary employees are held to the same standard); *Veco Corp. v. Babcock*, 243 Ill. App. 3d 153, 160-61, 611 N.E.2d 1054, 1059 (1st Dist. 1993) (“The law governing the right of former employees to compete is distinct from and irrelevant to a breach of fiduciary duty claim against officers.”).

36. *Mullaney*, 78 Ill. 2d 534, 546, 402 N.E.2d 574.

37. *Id.* at 546, 402 N.E.2d at 580.

38. *Davis*, 108 Ill. 39.

39. *Id.* at 48.

40. *LCOR Inc.*, 1997 WL 136278 (fiduciary purposely failed to forward his principal’s deal papers to deal counterparty; fiduciary then falsely told the deal counterparty that his principal wanted him to lie to the counterparty about why the deal was being delayed; and then fiduciary subsequently tendered his own competing deal to the counterparty); *Lawlor*, 2012 IL 112530 at *69, __ N.E.2d at __ (“Accordingly, a fiduciary cannot act inconsistently with his agency or trust and cannot solicit his employers’ customers for himself.”).

41. *Unichem*, 148 Ill. App. 3d 284, 498 N.E.2d 724 (1st Dist. 1986).

42. *Golden v. McDermott, Will & Emery*, 299 Ill. App. 3d 982, 990, 702 N.E.2d 581, 587 (1st Dist. 1998) (“[A]n agent is a fiduciary with respect to matters within the scope of his agency.” (quoting RESTATEMENT (SECOND) OF AGENCY § 13 (1958))).

on fellow employees engaged in wrongdoing.⁴³ But even this low level employee question is not free from doubt, as some cases have imposed upon employees an affirmative duty to disclose their knowledge of competitors' conduct, particularly when they themselves are participating in such competitive activities under the guise of "preparation."⁴⁴

The default expectation for officers, full-time employees and most agents assumes exclusive loyalty to the principal, and this has been the general pattern of Illinois corporate opportunity cases. But there can be circumstances in which the parties do not expect exclusive loyalty, as might be the case when a director serves on multiple boards of companies within the same general industry, perhaps as a result of overlapping start-up, venture capital or private equity investments.⁴⁵ Those in this position would do well to clarify their relationships and their corresponding fiduciary duties via written agreements.⁴⁶ For example, in *Dremco*,

43. Cf. *Graham*, 111 Ill. App. 3d at 761, 444 N.E.2d at 556 ("Among other factors, the precise nature and intensity of the duty of loyalty depends upon the degree of independent authority exercised by the fiduciary and the reasonable expectations of the parties at the beginning of the relationship.").

44. *Regal-Beloit*, 955 F. Supp. at 864 n.8 (even if employees' "conduct could be regarded merely as preparation for competition, that conduct was actionable to the extent it directly conflicted with [their employer] Regal-Beloit's interests—specifically Regal-Beloit's interest in acquiring Brad Foote for itself"); *Standard Brands v. U.S. Partition & Packaging Corp.*, 199 F. Supp. 161, 171-72 (E.D. Wis. 1961) ("Protection of the principal's interest requires a full disclosure of acts undertaken in preparation for entering into competition"); *Fowler v. Varian Assocs., Inc.*, 196 Cal. App. 3d 34, 42, 241 Cal. Rptr. 539, 543-44 (6th Dist. 1987) ("Fowler had an acknowledged obligation to share with his employer information about competitors' plans"—including a competitor he was organizing).

45. See, e.g., *Burg v. Horn*, 380 F.2d 897, 901 (2d Cir. 1967) (noting that courts must consider that individuals often serve on several boards and are subject to competing fiduciary duties); *Triple Five of Minn., Inc. v. Simon*, 404 F.3d 1088, 1096 (8th Cir. 2005) (noting this holding in *Burg*); *Fronk v. Fowler*, 923 N.E.2d 503, 515 (Mass. 2010) (rejecting limited partners' business opportunity claim where real estate limited partnership agreement expressly allowed general partners to acquire other real estate business opportunities without the limited partners); Miguel Bustillo & Joann S. Lublin, *Board Ties Begin to Trip Up Companies*, WALL ST. J., April 8, 2010, at B1 (noting "interlocking directorships" prohibition in the Clayton Act and commenting that "[t]hese days, potential conflicts are popping up as hedge funds, private-equity firms and venture capitalists take significant positions in multiple, and often, related companies"); Terence Woolf, Note, *The Venture Capitalist's Corporate Opportunity Problem*, 2001 COLUM. BUS. L. REV. 473 (discussing special corporate opportunity perils venture capitalists face when investing in overlapping companies); ABA SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS, MERGERS AND ACQUISITIONS 436-43 (7th ed. 2012) (discussing direct and indirect interlock limitations on service of directors and officers, as imposed under § 8 of the Clayton Act and other laws).

46. E. Norman Veasey and Christine T. Di Guglielmo, *How Many Masters Can a Director Serve?: A Look at the Tensions Facing Constituency Directors*,

*Inc. v. South Chapel Gardens, Inc.*⁴⁷ the Illinois Appellate Court held that a joint venture to develop a single property did not make the joint venturers fiduciaries for purposes of developing another property that happened to be nearby. The specificity of the parties' contract, which plainly contemplated pursuit of a single property, saved the *Dremco* defendant.

Contractual limits have their own limits when it comes to fiduciaries, however. Illinois limited liability company members, for example, cannot use contracts to totally eliminate their fiduciary duties, though they can identify specific types or categories of activities that do not violate fiduciary duties if not manifestly unreasonable⁴⁸—in sharp contrast to Delaware limited liability company members, who enjoy the right to eliminate their fiduciary duties by contract.⁴⁹ Illinois limited liability company members also cannot abolish their duty of good faith and fair dealing, though they can set forth standards for measuring good faith and fair dealing so long as those standards are not manifestly unreasonable.⁵⁰ These statutory restrictions are in keeping with the general rule that fiduciary duties cannot be

63 BUS. LAW. 761 (2008) (discussing conflicting loyalties directors face in serving their corporation and their constituent sponsors and questioning whether these conflicts can be avoided through contracts).

47. *Dremco, Inc. v. South Chapel Gardens, Inc.*, 274 Ill. App. 3d 534, 654 N.E.2d 501 (1st Dist. 1995).

48. 805 ILL. COMP. STAT. ANN. 180/15-5(b)(6)(A) (2010); *Thorpe v. Levenfeld*, No. 04 C 3040, 2005 WL 2420373, at *12 (N.D. Ill. Sept. 29, 2005) (under the Illinois Limited Liability Company Act, an operating agreement cannot “eliminate or reduce a member’s fiduciary duties, but may . . . identify specific types or categories of activities that do not violate these duties, if not manifestly unreasonable”).

49. 6 Del. Code 18-1101(e) (permitting contractual elimination of fiduciary duties in Delaware limited liability companies, subject to the implied contractual duty of good faith and fair dealing); John M. Cunningham, *Reforming LLC Fiduciary Law: A Brief for the Unrepresented*, BUS. L. TODAY, Nov.–Dec. 2009, at 51, available at <http://apps.americanbar.org/buslaw/blt/2009-11-12/cunningham.shtml> (briefly noting conflicting fiduciary duty provisions found in state limited liability company acts and then using Delaware law to exemplify proposed statutory reforms to protect unrepresented members); Paul M. Altman and Srinivas M. Raju, *Delaware Alternative Entities and the Implied Contractual Covenant of Good Faith and Fair Dealing Under Delaware Law*, 60 BUS. LAW. 1469 (2005) (discussing Delaware Revised Uniform Limited Partnership Act and the Delaware Limited Liability Company Act and noting Delaware courts give parties wide latitude to modify default fiduciary duties); Robb Tretter & Adam M. Adler, *Court Bars Derivative Suits Against LLC Managers: Del. Chancery Relied on Language of LLC Act; Creditors of LLCs Will Need Contract to Bring Such Suits*, NAT’L L.J., Feb. 21, 2011, at 15 (describing ruling in *CML V LLC v. Bax*, 6 A.3d 238 (Del. Ch. 2010), in which the court construed 6 Del. Code 18-1002 as limiting derivative action standing to limited liability members and assignees).

50. 805 ILL. COMP. STAT. ANN. 180/15-5(b)(7) (2010).

waived in their entirety in advance via contract under Illinois law.⁵¹

B. Deterrence Rationale Underlying Fiduciary Duty Law

Because it plays such a central role in business organizations, fiduciary duty law fundamentally differs from other Illinois laws: its primary purpose is deterrence of disloyalty, not simply compensation of victims.⁵² This deterrence rationale was captured colorfully and forcefully in *Winger v. Chicago City Bank & Trust Co.*:

Nothing less than incapacity is able to shut the door to temptation, where the danger is imminent and the security against discovery is great. The wise policy of the law has therefore put the sting of disability into the temptation, as a defensive weapon against the strength of the danger which lies in the situation.⁵³

Illinois courts have, therefore, explicitly rejected the argument that loss must be shown before a conflict of interest gives rise to relief against a fiduciary.⁵⁴ Indeed, the public policy of deterrence is so strong that Illinois courts have repeatedly required fiduciaries to forfeit all compensation attributable to the

51. *1515 N. Wells*, 392 Ill. App. 3d at 874, 913 N.E.2d at 11 (“Nor is the practice of imposing purported advance waivers of fiduciary duties in limited partnership enterprises to be given judicial recognition.” (quoting *Labovitz*, 189 Ill. App. 3d at 417, 545 N.E.2d at 313)).

52. *Vendo*, 58 Ill. 2d 289 at 305-06, 321 N.E.2d at 10:

Plaintiff was not, as defendants urge, limited to the recovery of the profits which accrued to Lektro-Vend. See RESTATEMENT (SECOND) OF AGENCY §§ 399, 401, 407 (1958)). The limitation on a plaintiff's recovery proposed by defendants would mean that a fiduciary could violate his duty without incurring any risk. For if his misconduct were discovered the most he could lose would be the profit gained from his illegal venture; the law would have operated only to restore him to the same position he would have been in had he faithfully performed his duties.

Id.; *Graham*, 111 Ill. App. 3d at 762-63, 444 N.E.2d at 557.

This “inveterate and uncompromising” application of the constructive trust remedy “does not rest upon the narrow ground of injury or damage to the corporation resulting from betrayal of confidence, but upon a broader foundation of a wise public policy that, for the purpose of removing all temptation, extinguishes all possibility of profit flowing from a breach of the confidence imposed by the fiduciary relation.”

Id. (quoting *Guth v. Loft, Inc.*, 5 A.2d 503, 510 (Del. 1939)).

53. *Winger v. Chicago Bank & Trust Co.*, 394 Ill. 94, 116, 67 N.E.2d 265, 279 (1946) (quoting *Higgins v. Lansingh*, 154 Ill. 301, 366, 40 N.E. 362, 380-81 (1895)).

54. *Keane*, 64 Ill. 2d at 567-68, 357 N.E.2d at 456 (“As the cases already discussed make clear, however, such a [loss] limitation cannot be imported into either the statutes or the common law rule. To do so would plainly rob them of their effectiveness.”) (citations omitted); *Winger*, 394 Ill. 94, 116, 67 N.E.2d at 278 (“Actual injury is not the principle upon which the law proceeds.”).

period of their disloyalty – independent of any loss by the victim or any gain by the fiduciary.⁵⁵

Furthering this deterrence philosophy is a strong resistance to exceptions that might undercut it. The Illinois Appellate Court drove home this point with special force in *Paulman v. Kritzer*⁵⁶, quoting Judge Cardozo’s famous observation in *Meinhard v. Salmon*:

A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the “disintegrating erosion” of particular exceptions.⁵⁷

To be sure, the Illinois Supreme Court shares this view, having offered the very same *Meinhard* quote over a decade before *Paulman* in its opinion in *Bakalis v. Bressler*.⁵⁸

C. Special Burden of Proof on the Fiduciary

The importance of deterrence is also reflected in and reinforced by special evidentiary rules, such as placing the burden of clear and convincing proof on the fiduciary to segregate funds if he has commingled his own with those of his principal,⁵⁹ and placing the same heightened burden of proof on the fiduciary to show full disclosure and fairness as to questioned transactions.⁶⁰

55. *Grace v. E.J. Kozin Co.*, 538 F.2d 170, 175 (7th Cir. 1976) (applying Illinois law) (requiring fiduciary to forfeit compensation for disloyalty, even though plaintiff failed to prove any loss); *Vendo*, 58 Ill. 2d at 313-14, 321 N.E.2d at 14 (affirming compensation forfeiture of \$170,835, in addition to damages award of \$7,345,000); *Steinmetz v. Kern*, 375 Ill. 616, 621, 32 N.E.2d 151, 154 (1941) (“In the application of this rule it makes no difference whether the result of the agent’s conduct is injurious to the principal or not, as the misconduct of the agent affects the contract from considerations of public policy rather than of injury to the principal.”).

56. *Paulman v. Kritzer*, 74 Ill. App. 2d 284, 219 N.E.2d 541 (2d Dist. 1966).

57. *Id.* at 294, 219 N.E.2d at 546 (quoting *Meinhard v. Salmon*, 161 N.E. 545, 546 (N.Y. 1928) (Cardozo, J.)).

58. *Bakalis v. Bressler*, 1 Ill. 2d 72, 81-82, 115 N.E.2d 323, 328 (1953).

59. *Winger*, 394 Ill. at 111, 67 N.E.2d at 277 “[T]here is a duty resting upon trustees not to commingle their own property with that of the beneficiaries . . . and when they do so commingle, . . . the burden then rests upon the trustees to show by strong and convincing evidence, the property, or the part thereof that belonged to them before the commingling took place.” *Id.*; *Graham*, 111 Ill. App. 3d at 751, 444 N.E.2d at 549 (fiduciary has burden of proving segregation as to commingled funds); James Barr Ames, *Following Misappropriated Property Into Its Product*, 19 HARV. L. REV. 511 (1906) (discussing early English and American tracing case law).

60. *Shlensky v. S. Parkway Bldg. Corp.*, 19 Ill. 2d 268, 283, 166 N.E.2d 793, 801-02 (1960) (presumption of fraud attaches to self-dealing transactions; interested directors have the burden of proving challenged transaction was

The broad application of these rules to all agents, from officers and directors down to mere employees,⁶¹ and to all firms, from corporations to partnerships to limited liability companies,⁶² is in keeping with the “prophylactic purpose” of Illinois fiduciary duty law.⁶³

These special pleading and proof rules for self-dealing transactions play a similar but secondary role in corporate opportunity and corporate competition cases. Diversion of a corporate opportunity is inherently unfair to the corporation,⁶⁴ and thus the “line-of-business” test adopted in *Kerrigan v. Unity Savings Association*⁶⁵ does not ask whether it was “fair” for the fiduciary to divert the transaction from his corporation. Rather, as discussed in more detail below, the line-of-business test shifts the burden to the fiduciary to show by clear and convincing evidence that the fiduciary disclosed and tendered the transaction to the

“fair” to their Illinois corporation); *Doner v. Phoenix Joint Stock Land Bank*, 381 Ill. 106, 114-15, 45 N.E.2d 20, 24-25 (1942) (agent who has profited by his agency must prove his fidelity by “clear and convincing” evidence); *Bakalis*, 1 Ill. 2d at 81, 115 N.E.2d at 328 (“burden of proof was in fact upon the defendant, because of the fiduciary relationship, to show by clear, convincing, unequivocal and unmistakable evidence that he had been completely frank and honest with his partner, had made full disclosure, and had not dealt secretly behind his back”); *Grossberg v. Haffenberg*, 367 Ill. 284, 11 N.E.2d 359 (1937) (partner who obtained property from firm rebutted presumption of fraud); *LID Associates v. Dolan*, 324 Ill. App. 3d 1047, 1061-63, 756 N.E.2d 866, 879-80 (1st Dist. 2001) (applying “fairness” test to three challenged fiduciary transactions); *Labovitz*, 189 Ill. App. 3d at 413, 545 N.E.2d at 311 (when there is a claim for breach of fiduciary duty, “the burden of proof shifts to the fiduciary to show by clear and convincing evidence that a transaction is equitable and just”).

61. *Mullaney*, 78 Ill. 2d at 534, 402 N.E.2d at 580 (fiduciary duty rules are not limited to officers and directors; they apply to all agents); *Davis*, 108 Ill. 39, 48 (rejecting argument that fiduciary duty rules did not apply to relation of “master and servant, or employer and employe[e]”); *E. J. McKernan Co.*, 252 Ill. App. 3d at 530, 623 N.E.2d at 993 (“An employee need not be an officer or a director to be accountable since an agent must act solely for the principal in all matters related to the agency and refrain from competing with the principal.”).

62. *Bakalis*, 1 Ill. 2d at 72, 115 N.E.2d at 323 (managing partner breached fiduciary duties in secretly acquiring in his own name real estate the partnership leased and needed to survive); *Anest*, 332 Ill. App. 3d at 468, 773 N.E.2d at 202 (extending corporate opportunity doctrine to limited liability company); *Cf. Abdalla v. Qadorh-Zidan*, 913 N.E.2d 280 (Ind. App. 2009) (holding that common law fiduciary duties, similar to the ones imposed on partnerships and closely-held corporations, are applicable to Indiana limited liability companies); *Patmon v. Hobbs*, 280 S.W.3d 589 (Ky. App. 2009) (holding that corporate opportunity doctrine applied to limited liability company fiduciary duty dispute).

63. *Kerrigan*, 58 Ill. 2d at 28, 317 N.E.2d at 43.

64. Eric G. Olinsky, *Corporate Opportunity Doctrine and Interested Party Director Transactions: A Framework for Analysis in an Attempt to Restore Predictability*, 24 DEL. J. CORP. L. 451, 463, 513 (1999).

65. *Kerrigan*, 58 Ill. 2d at 28, 317 N.E.2d at 43.

corporation and that the corporation thereafter consented to the fiduciary taking it for himself. These are demanding standards no accused fiduciary has met in an Illinois corporate opportunity case decided after *Kerrigan*; indeed, with the exception of the discredited decision in *Peterson Welding Supply Co. v. Cryogas Products, Inc.*,⁶⁶ every time a fiduciary has won an Illinois corporate opportunity case on liability after *Kerrigan*, the court has failed to cite *Kerrigan*, its “line-of-business” test, or indeed any corporate opportunity test *at all*.⁶⁷ Corporate competition cases are subject to even more exacting standards: competing on matters connected with the agency relationship before resignation is categorically unfair. As a result of these strict standards, only waiver, release, abandonment, ratification, or similar affirmative defenses can save the fiduciary in corporate opportunity and corporate competition cases, and the fiduciary must meet the clear and convincing proof standard when invoking these defenses.⁶⁸

66. *Peterson Welding Supply Co. v. Cryogas Products, Inc.*, 126 Ill. App. 3d 759, 764, 467 N.E.2d 1068, 1073 (1st Dist. 1984); see *Levy v. Markal Sales Corp.*, 268 Ill. App. 3d 355, 368, 643 N.E.2d 1206, 1215-16 (1st Dist. 1994) (*Peterson Welding Supply* does not correctly state Illinois law in light of *Kerrigan* and subsequent Illinois Supreme Court corporate opportunity decisions).

67. See, e.g., *Prodromos*, 389 Ill. App. 3d 157, 906 N.E.2d 599 (failing to cite *Kerrigan* or any other corporate opportunity decision or test); *Delta Medical Systems, Inc. v. Mid-America Medical Systems, Inc.*, 331 Ill. App. 3d 777, 772 N.E.2d 768 (1st Dist. 2002) (failing to cite *Kerrigan* or any other corporate opportunity decision or test).

68. *Williams Electronic Games, Inc. v. Garrity*, 366 F.3d 569, 580 (7th Cir. 2004) (employees had already been fired before release was negotiated, so they were not fiduciaries at time of negotiations); *MPC Containment Systems, Ltd. v. Moreland*, 2008 WL 1775501, at *3 (N.D. Ill. Apr. 17, 2008) (claim for fiduciary breach must be waived or ratified deliberately by the corporation, and the corporation’s decision must be specific as to the particular breach); *Borsellino v. Putnam*, 2011 IL App (1st) 102242, ¶¶ 102-18, 962 N.E.2d 1000, 1019-24 (1st Dist. 2011) (release, entered into after initial corporate opportunity litigation, barred subsequent corporate opportunity action); *Janowiak v. Tiesi*, 402 Ill. App. 3d 997, 1006-08, 932 N.E.2d 569, 580-81 (1st Dist. 2010) (trustee’s resignation did not automatically end his fiduciary duty of full disclosure in connection with release); *Lozman v. Putnam*, 379 Ill. App. 3d 807, 884 N.E.2d 756 (1st Dist. 2008) (finding laches barred plaintiff’s corporate opportunity claim); *Goldberg v. Michael*, 328 Ill. App. 3d 593, 766 N.E.2d 246 (2d Dist. 2002) (directors of and counsel for homeowner’s association all had resigned years before association negotiated settlement agreements and releases with them, so they were not fiduciaries at time of negotiations); *Golden*, 299 Ill. App. 3d at 982, 702 N.E.2d at 581 (discussing conflict of authority in Illinois as to whether a fiduciary relationship among partners ceases upon dissolution of the partnership, as background to analyzing enforceability of release secured by fiduciaries); *Weisblatt v. Colky*, 265 Ill. App. 3d 622, 625-26, 637 N.E.2d 1198, 1200 (1st Dist. 1994) (even though attorney Colky still had an appearance on file for plaintiff in her underlying divorce action, “the fact that Colky and plaintiff were engaged in litigation [against one another], considered along with plaintiff’s acquisition of

D. Remedies for Breach of Fiduciary Duty

Illinois law provides significant relief against fiduciary wrongdoers, including compensatory damages, disgorgement of wrongful gains, constructive trusts, accountings, prime rate prejudgment interest awards, forfeiture of salary and other compensation, punitive damages, and of course preliminary and permanent injunctions.⁶⁹ Civil conspiracy, aiding and abetting, and similar claims can extend such relief to reach those who assist fiduciary malefactors.⁷⁰ Moreover, under the “continuation” theory,

independent counsel to represent her in the transaction with Colky embodied by the release, persuades us that she and Colky were no longer fiduciaries for purposes of the transaction”); *Peskin v. Deutsch*, 134 Ill. App. 3d 48, 55, 479 N.E.2d 1034, 1039 (1st Dist. 1985) (“In appraising the validity of a release in the context of a fiduciary relationship, the court must regard the defendant as having the burden of showing by clear and convincing evidence that the transaction embodied in the release was just and equitable.”); *Peterson Welding*, 126 Ill. App. 3d at 759, 467 N.E.2d at 1073, (finding laches barred plaintiff’s corporate opportunity claim); *Babray v. Carlino*, 2 Ill. App. 3d 241, 276 N.E.2d 435 (1st Dist. 1971) (strict fiduciary duties apply even when partners are negotiating dissolution of the partnership).

69. See, e.g., *Funderburg v. Shappert*, 23 Ill. 2d 220, 177 N.E.2d 845 (1961) (imposing constructive trust on newspaper ownership interest fiduciary acquired in breach of a confidential relationship); *Caparos v. Morton*, 364 Ill. App. 3d 159, 845 N.E.2d 773 (1st Dist. 2006) (ordering complete forfeiture of management fees paid by limited partnership during general partner’s three years of disloyalty); *Smith-Shrader Co. v. Smith*, 136 Ill. App. 3d 571, 483 N.E.2d 283 (1st Dist. 1985) (affirming nine-year permanent injunction for breach of fiduciary duty); *Hill v. Names & Addresses, Inc.*, 212 Ill. App. 3d 1065, 571 N.E.2d 1085 (1st Dist. 1991) (thorough discussion of damages and disgorgement in fiduciary duty case); *Sobel v. Franks*, 261 Ill. App. 3d 670, 633 N.E.2d 820 (1st Dist. 1994) (ordering compensation forfeiture for disloyalty); William Lynch Schaller, *Disloyalty and Distrust: The Eroding Fiduciary Duties of Illinois Employees*, 3 DEPAUL BUS. L.J. 1, 53-70 (1990) (detailed analysis of Illinois fiduciary duty remedy case law); RESTATEMENT (SECOND) OF AGENCY § 407 (principal’s choice of remedies); Cf. *Ryan v. Bd. of Tr.*, 236 Ill. 2d 315, 924 N.E.2d 970 (2010) (ordering forfeiture of former Illinois Governor Ryan’s entire pension as a result of his criminal conviction in connection with his public duties).

70. See, e.g., *Dowd & Dowd, Ltd. v. Gleason*, 181 Ill. 2d 46, 693 N.E.2d 358 (1998) (acknowledging civil conspiracy as a viable theory in breach of fiduciary duty case); *Mullaney*, 78 Ill. 2d at 534, 402 N.E.2d at 574 (fiduciary, his secret partner, and their new entity were all equally liable for the fiduciary’s wrongdoing against his principal); *Katris*, 362 Ill. App. 3d 1140, 842 N.E.2d 221 (employee Doherty was not plaintiff’s fiduciary and therefore was free to prepare rival software program for another firm; accordingly, Carroll and Ernst could not collude with Doherty in usurping a corporate opportunity); *Multiut Corp. v. Draiman*, 359 Ill. App. 3d 527, 834 N.E.2d 43 (1st Dist. 2005) (rejecting wife’s “compliant spouse” argument and holding her equally liable with her husband for civil conspiracy to breach fiduciary duties); *Regnery v. Meyers*, 287 Ill. App. 3d 354, 364, 679 N.E.2d 74, 80 (1st Dist. 1997) (“A third party who colludes with a fiduciary in committing a breach of duty, induces or participates in such breach, and obtains the benefits therefrom is directly liable to the aggrieved party.”); *Stathis*, 258 Ill. App. 3d at 700-01, 630 N.E.2d

if an employee begins competing or usurping a corporate opportunity before resigning, his resignation does not relieve him—or those who assist him—from liability for his pre-resignation acts.⁷¹ The “continuation” theory also bars a fiduciary and those who collude with him from undertaking a transaction founded upon information acquired during his employment, regardless of his resignation.⁷²

Of particular importance is restitutionary relief in the form of constructive trusts.⁷³ A leading example of this remedy in a

at 933-34 (third party conspired with fiduciary to usurp a corporate opportunity); *Preferred Meal Sys. v. Guse*, 199 Ill. App. 3d 710, 726, 557 N.E.2d 506, 516 (1st Dist. 1990) (“The judge was also in error in holding that Excel, the company organized and principally financed by Guse, should also be exempt from being enjoined, considering that it was the instrumentality employed by all three individual defendants in implementing and perfecting the breach of their [fiduciary] duty to Preferred.”); *Magnus v. Lutheran Gen. Health Care Sys.*, 235 Ill. App. 3d 173, 183, 601 N.E.2d 907, 914 (1st Dist. 1992) (a constructive trust is an appropriate remedy “where a third party has been unjustly enriched due to knowingly acquiring property as the result of a fiduciary’s breach of duty”); *Zokoych v. Spalding*, 36 Ill. App. 3d 654, 344 N.E.2d 805 (1st Dist. 1976) (holding bank liable for conspiring in co-defendant’s breach of fiduciary duties); *Patient Care Servs.*, 32 Ill. App. 3d at 1032, 337 N.E.2d at 481 (citing *Pepper v. Litton*, 308 U.S. 295, 311 (1939)) (“We note in passing that it makes no difference whether or not the corporate opportunity seizure took place at Segal’s personal behest or through the vehicle of Segal’s corporation.”); Austin W. Scott, *The Fiduciary Principle*, 37 CALIF. L. REV. 539, 554 (1949) (discussing liability of third parties who receive property from a fiduciary in breach of his duties, unless the third parties are *bona fide* purchasers for value without notice of the breach).

71. *E.J. McKernan Co.*, 252 Ill. App. 3d at 531, 623 N.E.2d at 994 (resignation does not sever employee’s fiduciary liability for transactions begun before but completed after resignation); *Cf. Abdalla*, 913 N.E.2d 280 (adopting the analogous “shareholder termination rule,” under which termination of the fiduciary relationship does not shield the fiduciary from his duties or obligations concerning transactions which have their inception before the termination of the relationship).

72. *LCOR Inc.*, 1997 WL 136278, at *9 (“Moreover, even assuming *arguendo* that Murray did not begin competing for River Run until after his resignation, he would remain bound by his fiduciary duty not to undertake a transaction founded on information acquired during his employment.”); *Mile-O-Mo Fishing Club, Inc. v. Noble*, 62 Ill. App. 2d 50, 57, 210 N.E.2d 12, 15 (5th Dist. 1965) (“This rule applies not only to transactions consummated while the fiduciary relation exists, but also to transactions consummated after it has ended, if the transactions began during the existence of the relationship or were founded on information or knowledge acquired during the relationship.”).

73. *Keane*, 64 Ill. 2d at 566-67, 357 N.E.2d at 456-57 (emphasizing that restitution against a fiduciary does not require proof of loss by the principal); *Bakalis*, 1 Ill. 2d at 82, 115 N.E.2d at 328 (requiring defendant partner to transfer usurped real estate title to both partners as tenants in common; requiring both partners to assume the property’s mortgage; requiring innocent partner to reimburse defendant for half of what defendant paid for property; and requiring defendant to account for half of real estate profits from the time he diverted property to himself up to the date of the title transfer order);

corporate opportunity action can be found in *Paulman v. Kritzer*.⁷⁴ There a fiduciary acquired stock and real estate for himself that should have been obtained for the corporation's benefit. The court ordered the fiduciary to transfer the diverted property to the corporation, but conditioned the transfer upon the corporation (i) reimbursing the fiduciary for the amount he had paid to secure the property in his own name and (ii) indemnifying the fiduciary for personal liability in connection with the challenged transactions. A later case involving similar facts, *White Gates Skeet Club, Inc. v. Lightfine*,⁷⁵ went a step further and held that, although the fiduciary was entitled to reimbursement of the amount he had paid for the usurped real estate, he was not entitled to prejudgment interest on that amount. Denying the fiduciary an award of prejudgment interest on the returned money, the court felt, was more consistent with the deterrence policy underpinning fiduciary duty law.⁷⁶

E. What Is a "Corporate Opportunity"?

Strictly speaking, corporate opportunity cases are characterized by a particular and narrow fact pattern: (1) a third party presents an identifiable, concrete deal relating to the corporate employer's business, such as the chance to purchase the building housing the employer's business; (2) the deal is a "zero-sum" game in the sense that only the corporate employer or its fiduciary—but not both—can seize it, leaving the loser permanently shut out; and (3) the fiduciary diverts the deal to himself, whether before or after his resignation. These circumstances force the court to engage in an after-the-fact "what if" inquiry: Would the corporate employer have been interested in and able to pursue the opportunity if its fiduciary had disclosed all the facts and tendered the opportunity?

This question should always be answered in the employer's favor if the opportunity falls within the employer's "line of

Graham, 111 Ill. App. at 762, 444 N.E.2d at 556 ("When a fiduciary breaches his duty of loyalty by misappropriating corporate assets, or by usurping corporate opportunities, restitution can be compelled by means of a constructive trust."); *Mile-O-Mo Fishing Club, Inc.*, 62 Ill. App. 2d at 58-59, 210 N.E.2d at 16 (ordering fishing club president and his wife to convey diverted real estate to club upon club's reimbursement of the sum president paid for the property); RESTATEMENT (SECOND) OF AGENCY § 403 (if an agent receives anything of value as a result of his violation of his duty of loyalty, he is subject to a liability to deliver it, its value, or its proceeds, to his principal).

74. *Paulman v. Kritzer*, 38 Ill. 2d 101, 230 N.E.2d 262 (1967).

75. *White Gates Skeet Club, Inc. v. Lightfine*, 276 Ill. App. 3d at 541-42, 658 N.E.2d at 868.

76. *Id.* at 541, 658 N.E.2d at 868 ("In the present case, we agree with the club that the award of interest to the defendants, who breached their fiduciary duty by usurping a corporate opportunity, would be against public policy.")

business,” a pro-employer test with a “prophylactic purpose” the Illinois Supreme Court established in its leading corporate opportunity opinion, *Kerrigan v. Unity Savings Association*.⁷⁷ Under *Kerrigan*, a corporation’s “line of business” includes any “business that is reasonably incident to its present or prospective operations.”⁷⁸ When such an opportunity arises, corporate fiduciaries must fully disclose and timely tender the opportunity to the corporation.⁷⁹ Only if the corporation then declines the opportunity may fiduciaries pursue it for themselves.⁸⁰ If fiduciaries fail to make such disclosure and to tender the opportunity, the “prophylactic purpose” of the corporate opportunity rule requires that the fiduciaries be foreclosed from exploiting the opportunity for themselves.⁸¹

Indeed, as I have noted elsewhere, even disclosure and tender are not enough under Illinois law; to seize an opportunity, a fiduciary also needs his principal’s consent.⁸² In *Mullaney, Wells & Co. v. Savage*,⁸³ for example, the Illinois Supreme Court rejected the notion that the employee-fiduciary, an investment banker, could “begin to act on his own,” without plaintiff’s consent, while still employed by plaintiff, with respect to an investment opportunity that originated but faltered during his employment.⁸⁴ *Patient Care Services, S.C. v. Segal*,⁸⁵ involving a battle over a hospital contract five years before *Mullaney* was decided, offered a similar, if implicit, lack of consent holding in response to an officer/director-fiduciary’s argument that he was free to pursue the opportunity since his employer was aware of and simultaneously pursuing the same contract.⁸⁶ The very fact that the employer was

77. *Kerrigan*, 58 Ill. 2d at 28, 317 N.E.2d at 44.

78. *Id.*, 317 N.E.2d at 43.

79. *Id.* (“Since the individual defendants, as directors, admittedly controlled Unity, the requisite disclosure and tender would necessarily have had to be made to Unity’s shareholders.”).

80. *Id.* (“It may be conceded that if a corporation has been informed by a director of a business opportunity, which it declines, the director may then be free to pursue the opportunity himself.”); *Levy*, 268 Ill. App. 3d at 367, 643 N.E.2d at 1216 (“Therefore, Gust and Bakal could not take advantage of the Apple opportunity without first offering it to Markal and having Markal reject it.”).

81. *Kerrigan*, 58 Ill. 2d at 29, 317 N.E.2d at 44.

82. William Lynch Schaller, *Growing Pains: Intellectual Property Considerations for Illinois Small Businesses Seeking to Expand*, 35 LOY. U. CHI. L.J. 845, 929 (2004) (noting Illinois Supreme Court’s “strict insistence on full disclosure, timely tender, and clear consent”).

83. *Mullaney*, 78 Ill. 2d at 547, 402 N.E.2d at 581.

84. *Id.* at 549, 402 N.E.2d at 581 (“To accord Savage the option of substituting himself as the investing party without the consent of the plaintiff [principal] is to place him in a position where his personal interests will conflict with his duties to his principal.”).

85. *Patient Care Servs.*, 32 Ill. App. 3d 1021, 337 N.E.2d 471.

86. *Id.* at 1031, 337 N.E.2d at 480.

seeking the contract for itself negated any good faith on the fiduciary's part and, one would think, any consent on the employer's part.⁸⁷ To like effect was *Regal-Beloit Corp. v. Drecoll*,⁸⁸ in which the court issued an injunction against employee-fiduciaries who secretly sought to purchase the same business as their employer; consent by the employer was obviously absent.

Taking the consent principle to its logical extreme, one would expect fiduciary liability to attach even where the corporation initially declines an opportunity but then changes its mind,⁸⁹ as occurred in *Lindenhurst Drugs, Inc. v. Becker*.⁹⁰ This only makes sense: after all, aside from the usual push and pull characteristic of all negotiations and exemplified by *Regal-Beloit* and *Lindenhurst Drugs*, disclosure of the fiduciary's personal interest in the opportunity in many instances would spur the corporation to intervene and seize the opportunity for itself rather than face competition by an ex-insider, the toughest competitor of all.⁹¹ Indeed, *Kerrigan* intimated a fiduciary must disclose his intent to pursue an opportunity,⁹² *Patient Care Services* subsequently held that a fiduciary's disclosure of his intent to pursue an opportunity

Defendants' case authority holding that a corporate officer or director violates his fiduciary duty . . . by failing to inform the corporation of a business opportunity he seized as his own has no applicability to the present case. The cases cannot be inverted to hold that once he gives notice he is ipso facto free to contest with the corporation the business opportunity.

87. *Id.* at 1032, 337 N.E.2d at 480-81:

However, where an officer or director, as here, desires to seize the only asset his financially solvent corporation presently possesses, when the corporation has manifested its desire to retain it, and when the corporation obviously needs to retain it, the mere fact that such officer and director has announced his intention in advance to throw down the gauntlet and do battle with his corporation over the opportunity will not constitute good faith.

88. *Regal-Beloit Corp. v. Drecoll*, 955 F. Supp. at 862.

89. *Cf. Pratt v. Shell Petroleum Corp.*, 100 F.2d 833 (10th Cir. 1938) (ordering fiduciary to transfer property to his principal, even though principal had previously rejected fiduciary's recommendation that principal acquire the property).

90. *Lindenhurst Drugs, Inc. v. Becker*, 154 Ill. App. 3d 61, 67, 506 N.E.2d 645, 650 (2d Dist. 1987) (rejecting defense argument that an admitted corporate opportunity "later became an individual opportunity because of plaintiff's failure to pursue the opportunity").

91. Laura Koss-Feder, *The Worst Kind of Competition: Former Employees*, CRAIN'S CHI. BUS., June 13, 2005, at 27, available at <http://www.chicagobusiness.com/article/20050611/ISSUE02/100023841/the-worst-kind-of-competition-former-employees> (reporting small business owner's lament over loss of business to a former employee).

92. *Kerrigan*, 58 Ill. 2d at 28, 317 N.E.2d at 43 ("In the present case, however, no claim is made that Unity was informed of the possibility that it might enter into the insurance business or of the intention of the defendants to do so on their own if Unity did not.").

for himself does not by itself free the fiduciary to pursue the opportunity,⁹³ and *Mullaney* then followed these holdings with its explicit requirement of principal consent.⁹⁴ Thus, a fiduciary should seldom take comfort from a principal's seeming lack of interest in a disclosed opportunity, as this does not necessarily amount to abandonment⁹⁵ and certainly does not amount to consent.⁹⁶ Express and implied consent are, accordingly, rarely serious defenses in Illinois corporate opportunity cases.⁹⁷

Although the “line-of-business” inquiry is the most common basis for assessing corporate opportunity liability in Illinois, there is an alternative ground: misappropriation of corporate property to seize an opportunity. Use of company assets—like inside information, personnel, cash, computers, or even simply company time⁹⁸—equitably estops a fiduciary from later denying the

93. *Patient Care Servs.*, 32 Ill. App. 3d at 1031, 337 N.E.2d at 480 (“The cases cannot be inverted to hold that once he gives notice he is ipso facto free to contest with the corporation the business opportunity.”).

94. *Mullaney*, 78 Ill.2d at 549, 402 N.E.2d at 579 (“To accord Savage the option of substituting himself as the investing party without the consent of the plaintiff [principal] is to place him in a position where his personal interests will conflict with his duties to his principal.”).

95. *Vendo*, 58 Ill. 2d at 306, 321 N.E.2d at 10.

We are not called on here to review the business prudence of plaintiff's decisions, however, and we cannot say that plaintiff would have declined an offer to purchase the Lektro-Vend, with its advanced technology, or to seek to develop such a machine itself had a genuine opportunity to do so been extended to it.

Id.; *Becker*, 154 Ill. App. 3d at 70, 506 N.E.2d at 651 (2d Dist. 1987) (“[T]he corporation's unwillingness to take advantage of the opportunity in question must be clearly manifested.”).

96. This is not to say that a principal may delay unreasonably in response to a tender by the fiduciary. *See, e.g.*, *Spar Mountain Mining Co. v. Schwerin*, 305 Ill. 309, 137 N.E. 245 (1922) (plaintiff mining company's agent/general manager, Scherwin, purchased real estate on own his account and immediately tendered it to his principal on the same terms; plaintiff unreasonably delayed for nearly one year thereafter—until it discovered that valuable mineral rights were under the farm—before demanding that Scherwin sell the property to plaintiff).

97. *Goldberg*, 328 Ill. App. 3d 593, 766 N.E.2d 246 (opportunity that was fully disclosed and not within homeowners association's line of business did not constitute corporate opportunity); *Dremco, Inc. v. South Chapel Gardens, Inc.*, 274 Ill. App. 3d 534, 654 N.E.2d 501 (1st Dist. 1995) (joint venture agreement, limited to a single property, did not restrict partner from purchasing neighboring property for himself); *Tarin v. Pellonari*, 253 Ill. App. 3d 542, 625 N.E.2d 739 (1st Dist. 1993) (plaintiffs knew of defendants' creation of rival auto repair business yet delayed two years before suing them); *Northwestern Terra Cotta Corp. v. Wilson*, 74 Ill. App. 2d 38, 219 N.E.2d 860 (1st Dist. 1966) (board of directors, after having been specifically notified that shares could be purchased for \$7 per share, determined that \$7 was too high and that corporation could not afford to pay it).

98. *Comedy Cottage v. Berk*, 145 Ill. App. 3d 355, 355-56, 495 N.E.2d 1006, 1007-08 (1st Dist. 1986) (fiduciary misused confidential company information

opportunity fell within the corporation's line of business, even if it was not feasible for the corporation to pursue the opportunity.⁹⁹ Indeed, even though the Illinois Supreme Court's *Kerrigan* decision is the fountainhead of "line of business" corporate opportunity liability in Illinois, a careful reading of the case shows it was also decided on asset misappropriation grounds.¹⁰⁰ The *Kerrigan* court specifically observed that the mortgage insurance "referral" opportunities came to the defendants by virtue of their positions as Unity's directors and were created through Unity's lending activities: "those factors alone would in our opinion be enough to fix liability upon defendants."¹⁰¹ The Illinois Supreme Court then held that asset misappropriation had occurred:

Whether the funneling of prospective customers to Plaza is regarded as an appropriation of an asset of Unity, denominated as good will,

concerning lease renewal opportunity; the fact that this information did not rise to the level of a trade secret did not negate the existence of a fiduciary duty with respect to the lease transaction); Schaller, *supra* note 82, at 935 (collecting cases imposing fiduciary liability for misuse of company time, computers, money and personnel). *But see Cooper*, 368 Ill. App. 3d at 362, 856 N.E.2d at 594 (excusing fiduciary's misuse of company computers to prepare business plan for rival start-up firm, on the ground that such "conduct did not rise to the level of a breach of their fiduciary duties"—even though all Illinois cases cited by the court held to the contrary with respect to such conduct); Dionne Searcey, *Some Courts Raise Bar on Reading Employee Email: Companies Face Tougher Tests to Justify Monitoring Workers' Personal Accounts; Rulings Hinge on "Expectation of Privacy,"* WALL ST. J., Nov. 19, 2009, at A17, available at <http://online.wsj.com/article/SB125859862658454923.html> (discussing recent Ninth Circuit and New Jersey cases recognizing employees' privacy rights in their personal emails on their employers' computer systems, and noting that the Ninth Circuit case was then on appeal to the United States Supreme Court, which later reversed in *City of Ontario v. Quon*, 130 S. Ct. 2619 (2010)); Diane L. Webb, *Waiver of Otherwise Privileged Communications by Use of Workplace Computer Equipment and Systems*, BUS. TORTS JOURNAL, Spring 2010, at 17 (canvassing cases accepting and rejecting employee privacy assertions in connection with their communications with personal counsel on company computers).

99. *Graham*, 111 Ill. App. 3d at 763:

Therefore, when a corporation's fiduciary uses corporate assets to develop a business opportunity, the fiduciary is estopped from denying that the resulting opportunity belongs to the corporation whose assets were misappropriated, even if it was not feasible for the corporation to pursue the opportunity or it had no expectancy in the project.

100. *Kerrigan*, 58 Ill. 2d at 23, 317 N.E.2d at 41 (defendant directors of plaintiff Unity Savings leased Plaza Insurance Agency's premises from Unity, built Plaza's mortgage insurance business with customers referred by Unity, and advertised Plaza as an "agent" of Unity).

101. *Id.* at 29. The lower court decision made clear that borrowers were required, under the terms of Unity's loans, to insure their mortgaged real estate against fire and other casualty. "The insurer had to be a responsible one, acceptable to Unity." *Kerrigan v. Unity Savings Assoc.*, 11 Ill. App. 3d 766, 773, 297 N.E.2d 699, 704 (1st Dist. 1973).

or whether it is regarded as an employment of Unity's facilities without compensation to it, the result is the same: The defendants were actively exploiting their position as directors of Unity for their personal benefit.¹⁰²

The breadth of the "line-of-business" and "asset-misappropriation" tests is best understood against the alternative tests the Illinois Supreme Court has not adopted. Courts in some states follow the "interest-or-expectancy" test, and others embrace the "fairness" test,¹⁰³ both of which are less draconian than the "line-of-business" and "asset-misappropriation" tests. The "interest-or-expectancy" inquiry, invoked for example in *Glasser v. Essaness Theatres Corporation*¹⁰⁴ and *Comedy Cottage, Inc. v. Berk*,¹⁰⁵ asks whether the corporation would likely have been able to secure the opportunity for itself based upon its existing rights or something close to them, thereby limiting opportunities to those very close to the corporation's current activities.¹⁰⁶ The "fairness" inquiry, on display in *Paulman v. Kritzer*,¹⁰⁷ weighs indeterminate variables—the officer's good faith, the degree of his disclosure, the manner in which the offer was communicated to the officer, the action taken by the corporation, and the need or interest of the corporation in the opportunity—and is thus inherently unpredictable in its application.¹⁰⁸ By contrast, the "line-of-

102. *Kerrigan*, 58 Ill. 2d at 29.

103. Popofsky, *supra* note 6, at 1197-1208 (surveying authorities addressing "interest-or-expectancy" and "fairness" tests).

104. *Glasser v. Essaness Theatres Corp.*, 414 Ill. 180, 192, 111 N.E.2d 124, 130 (1953).

105. *Comedy Cottage, Inc. v. Berk*, 145 Ill. App. 3d 355, 359-60, 495 N.E.2d 1006 (1st Dist. 1986).

106. Kenneth B. Davis, Jr., *Corporate Opportunity and Comparative Advantage*, 84 IOWA L. REV. 211, 212 (1999) ("[U]nlike the 'interest or expectancy' test, the . . . ['line-of-business'] test does not require that the corporation has previously done something to establish its rights in the opportunity."); Eric Talley, *Turning Servile Opportunities to Gold: A Strategic Analysis of the Corporate Opportunities Doctrine*, 108 YALE L.J. 277, 292 (1998) ("The 'interest' component of this approach refers to projects over which the corporation has an existing contractual right. The 'expectancy' component proscribes projects that, while not already secured through an express contract, are likely, given current rights, to mature into contractual rights at some future date.");

107. *Paulman*, 74 Ill. App. 2d at 294, 219 N.E.2d at 541 ("Whether a corporate officer has seized a corporate opportunity for his own depends not on any single factor nor is it determined by any fixed standard."), *aff'd*, 38 Ill. 2d 101, 230 N.E.2d 262 (1967).

108. Compare Eric Talley, *supra* note 104, at 293-95 (reviewing deficiencies of the "fairness" test, including judicial inability to articulate exactly what "fairness to the corporation" means); Victor Brudney & Robert Charles Clark, *A New Look at Corporate Opportunities*, 94 HARV. L. REV. 997, 1020 (1981) (arguing that "case law gives. . .['fairness'] no principled content and seems designed to leave the courts with boundless discretion. . .[thereby] generat[ing] much uncertainty about the operational meaning of the legal rule, but no

business” and “asset-misappropriation” tests, if triggered, result in automatic liability in virtually all instances—as one would expect given Illinois’ strong emphasis on deterrence.

Whatever the merits or demerits of the “interest-or-expectancy” and “fairness” approaches, these tests were not embraced in *Kerrigan* or the subsequent Illinois Supreme Court corporate opportunity decisions in *Vendo Co. v. Stoner*,¹⁰⁹ *Mullaney, Wells & Co. v. Savage*,¹¹⁰ and *Dowd & Dowd, Ltd. v. Gleason*.¹¹¹ Thus, the “fairness” discussion endorsed in the Illinois Supreme Court’s pre-*Kerrigan* decision in *Paulman*¹¹² (a case decided under Delaware law in any event¹¹³), as well as the “interest-or-expectancy” discussions found in the Illinois Supreme Court’s pre-*Kerrigan* decision in *Glasser* and the Illinois Appellate Court’s decision in *Comedy Cottage*¹¹⁴ (a case that also recited the *Paulman* “good-faith” test while completely omitting any reference to the *Kerrigan* “line-of-business” test), do not correctly state modern Illinois corporate opportunity law.

The same is true of *Northwestern Terra Cotta Corp. v. Wilson*¹¹⁵ and *Peterson Welding Supply Co. v. Cryogas Products*,

offsetting benefits”); Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 459-60 (1897) (“The law is full of phraseology drawn from morals, and by the mere force of language continually invites us to pass from one domain to the other without perceiving it, as we are sure to do unless we have the boundary constantly before our minds.”); Michael Begert, Comment, *The Corporate Opportunity Doctrine and Outside Business Interests*, 56 U. CHI. L. REV. 827, 838 (1989) (“But, while a fairness test recognizes the inherently subjective nature of the present corporate opportunity doctrine, it fails to provide corporate participants with the guidance they need.”); with Joseph William Singer, *Normative Methods for Lawyers*, 56 U.C.L.A. L. REV. 899, 915 (2009) (“[O]ur legal rules, traditions, customs, institutions, and precedents are partially defined by moral principles, norms, and conceptions of a just society. Normative concerns inevitably shape both social policy and interpretations of precedent.”).

109. *Vendo*, 58 Ill. 2d at 305, 321 N.E.2d at 10 (discussing *Kerrigan* and the corporate opportunity doctrine while noting the general discussion of fiduciary duties of officers and directors in *Paulman*).

110. See *Mullaney*, 78 Ill. 2d at 548-49 (invoking *Kerrigan* corporate opportunity rule and its “prophylactic purpose” rationale, without citation at any point to *Paulman*).

111. *Dowd*, 181 Ill. 2d at 475-76, 693 N.E.2d at 358 (briefly discussing corporate opportunity without citation to authority).

112. *Paulman*, 38 Ill. 2d 101, 230 N.E.2d 262.

113. The Illinois Supreme Court in *Paulman* specifically approved the Illinois Appellate Court’s legal analysis, 230 N.E.2d at 263, which explicitly applied Delaware corporate opportunity law to determine the fiduciary duties owed to the Delaware corporation that had been victimized by its officer and director, Kritzer. *Paulman*, 74 Ill. App. 2d at 289, 219 N.E.2d 543.

114. *Comedy Cottage, Inc.*, 145 Ill. App. 3d at 355, 360, 495 N.E.2d at 1006, 1011.

115. *Northwestern*, 74 Ill. App. 2d at 46, 219 N.E.2d at 864 (citing no Illinois Supreme Court case and adopting the “interest, actual or in expectancy” test).

*Inc.*¹¹⁶ As the Illinois Appellate Court expressly pointed out in its later decision in *Levy v. Markal Sales Corp.*,¹¹⁷ these two appellate court decisions have serious shortcomings: *Northwestern Terra Cotta* was decided before *Kerrigan*, and *Peterson Welding Supply* relied upon pre-*Kerrigan* cases. Similar defects are also found in *Lindenhurst Drugs, Inc. v. Becker*,¹¹⁸ in which the appellate court combined the *Paulman* “good-faith” and *Comedy Cottage* “interest-or-expectancy” tests, cited *Northwestern Terra Cotta* and *Peterson Welding Supply*, and even quoted the *Kerrigan* “line-of-business” test—all without recognizing that *Kerrigan* was controlling. Unfortunately, this lack of doctrinal discipline still creeps into Illinois corporate opportunity opinions from time to time, clouding analysis with irrelevant issues and unnecessary facts and thereby needlessly expanding and prolonging what otherwise should be exceptionally straightforward litigation.¹¹⁹

116. *Peterson Welding*, 126 Ill. App. 3d 759, 764, 219 N.E.2d 860, 864 (citing *Kerrigan* for the “line-of-business” test, but actually relying upon *Paulman* and *Northwestern Terra Cotta* for the proposition that no fiduciary breach occurs “where the alleged opportunity did not exist for the corporation to obtain and utilize”).

117. *Levy*, 268 Ill. App. 3d at 355, 368, 643 N.E.2d 1206, 1216. In particular, the *Levy* court commented as follows:

Gust and Bakal cite only two cases to support their argument. One was decided before *Kerrigan*, *Northwestern Terra Cotta Corp. v. Wilson*, 74 Ill. App. 2d 38, 219 N.E.2d 860 (1966), and the other relies solely on cases decided before 1968, *Peterson Welding Supply Co. v. Cryogas Products, Inc.*, 126 Ill. App. 3d 759, 467 N.E.2d 1068 (1st Dist. 1984). We find both cases inapplicable here, and we will apply the law of *Kerrigan* as explained in *Vendo* and *Mullaney*.

Id.

118. *Lindenhurst Drugs, Inc.*, 154 Ill. App. 3d at 66-69, 506 N.E.2d at 649-51.

119. See, e.g., *Prodromos*, 341 Ill. App. 3d at 725, 793 N.E.2d at 157 (reversing summary judgment grant in favor of defense without identifying precise corporate opportunity test the court was employing), *appeal following remand*, 389 Ill. App. 3d 157, 906 N.E.2d 599 (1st Dist. 2009) (second appeal, after 6 years of additional litigation, concerning events that began 11 years earlier in 1998—again with no specific corporate opportunity theory identified); *Delta Medical Systems, Inc.*, 331 Ill. App. 3d at 796-97, 772 N.E.2d at 785 (rejecting corporate opportunity claim without citation to any corporate opportunity decision or test); *Goldberg*, 328 Ill. App. 3d at 599, 766 N.E.2d at 251 (holding that “an element of the theory of usurpation of corporate opportunity is the failure to first disclose the opportunity to the corporation”—even though *Kerrigan* establishes no such “element” and *Patient Care Services* holds that disclosure does not by itself preclude corporate opportunity liability); *Dremco, Inc.*, 274 Ill. App. 3d at 537-39, 654 N.E.2d at 504-05 (reciting correct formulation of “line-of-business” test derived from *Kerrigan*, but then citing *Lindenhurst Drugs* and *Peterson Welding Supply* for erroneous “capacity to engage” qualification, followed by erroneous recitation of “interest-or-expectancy” test, and then ending with irrelevant statement that “capacity” defense asks whether corporation was “unable to take advantage of the opportunity for financial or legal reasons”).

F. What Is “Corporate Competition”?

In contrast to corporate opportunity claims, corporate competition charges do not present “what if” inquiries: the corporate employer by definition already has an existing business relationship with some third party or is actively seeking to establish such a relationship, only to have its efforts thwarted by its own employees seeking the same third-party business relationship for themselves. Such pre-resignation unfair competition may take the form of fiduciaries failing to inform their employer that other employees are forming a rival company or engaging in other fiduciary breaches;¹²⁰ soliciting fellow employees to join a rival business;¹²¹ soliciting customers to leave their employer;¹²² using the corporation’s facilities or equipment to assist them in developing their new business, or appropriating its money or equipment for that purpose;¹²³ using the corporation’s confidential business information for their new business, either

120. *Preferred Meal Systems*, 199 Ill. App. 3d at 726, 557 N.E.2d at 515 (Singer and Reynolds breached their fiduciary duty to plaintiffs by not informing them of “Guse’s and/or their own activities,” which included orchestrating their mass departures to a rival concern); *Unichem Corp. v. Gurtler*, 498 N.E.2d 724, 728 (Ill. App. Ct. 1986) (Unichem’s president, Gurtler, breached his fiduciary duties by failing to advise Unichem of the impending departures of his wife and son from Unichem to Gurtler Chemicals).

121. *Unichem*, 148 Ill. App. 3d at 290, 498 N.E.2d at 728 (defendant William Gurtler encouraged Lester Gurtler, one of Unichem’s employees, to leave Unichem and join a rival business – Gurtler Chemicals—which William Gurtler himself was going to join in the near future, and defendant William Gurtler failed to inform Unichem’s other officers that his wife and son were actively soliciting Unichem employees in an attempt to have them leave Unichem and join Gurtler Chemicals).

122. *Veco Corp.* 243 Ill. App. 3d at 161, 611 N.E.2d at 1059-60 (former high-ranking officers of insurance broker solicited key customers prior to resigning, as evidenced by six customer “broker of record” letters switching brokers immediately after the officers resigned); *Smith-Shrader Co.*, 136 Ill. App. 3d at 580, 483 N.E.2d at 290 (prior to resignation, officer solicited a customer representing 85% of plaintiff’s business); *H. Vincent Allen & Assoc. v. Weis*, 63 Ill. App. 3d 285, 291, 379 N.E.2d 765, 769 (1st Dist. 1978) (prior to resignation, defendant former vice-president actively sought key personnel and valuable accounts of plaintiff).

123. *Preferred Meal Systems*, 199 Ill. App. at 716, 557 N.E.2d at 509 (officers breached their fiduciary duties by using their employer’s data and computers to prepare a business plan for their rival firm); *Radiac Abrasives, Inc.*, 177 Ill. App. 3d at 630, 638, 532 N.E.2d at 429, 434 (2d Dist. 1988) (key employees’ sale and immediate repurchase of their employer’s “used” equipment likely constituted breach of fiduciary duty); *ABC Trans National Transport, Inc. v. Aeronautical Forwarders, Inc.*, 62 Ill. App. 3d 671, 683, 379 N.E.2d 1228, 1237 (1st Dist. 1978) (reciting the rule that it is a breach for a fiduciary to use “the company’s facilities or equipment to assist him in developing his new business, or [to appropriate] its money or equipment for that purpose”).

before or after their departure;¹²⁴ or orchestrating a mass exodus of other employee's before or shortly after the fiduciaries' own resignations from the corporation.¹²⁵

And, of course, such fiduciary unfair competition can include competition for a corporate opportunity, as in *Vendo Co. v. Stoner*.¹²⁶ There vending machine manufacturer Vendo caught its president, Stoner, secretly financing a rival's development of a superior vending machine, the Lektro-Vend. After learning of the Lektro-Vend's debut at a trade show, Vendo instructed Stoner to approach the Lektro-Vend's owners about an acquisition. Stoner found himself in an epic conflict of interest at that point: he "had a foot in each camp."¹²⁷ Although the Illinois Supreme Court did not employ the "corporate competition" label, the court certainly appreciated that the problem at hand was competition—to be precise, wrongful competition for a corporate opportunity, followed by more wrongful competition armed with the stolen opportunity: "In the present case, however, the acts of defendants in misappropriating the Lektro-Vend and their use of it to compete against plaintiff are intertwined, the latter being, so to speak, the means by which the former was brought to bear against plaintiff."¹²⁸

G. The "Head Start" Defense

Clearly, then, corporate competition cases can involve diversion of a single deal with a permanent, mutually exclusive outcome, such as when a fiduciary competes for a corporate opportunity like Stoner did with respect to the Lektro-Vend in *Vendo*. But more often corporate competition cases concern fiduciaries who have gained an unfair head start in invading their employer's ongoing business relationship with a third party—say, monthly sales of coal by their employer to a longstanding customer. In almost all instances this ongoing employer/third-party relationship is terminable at will by either party, and as such the wrongdoer might have legitimately won the customer's

124. *Affiliated Hospital Products, Inc. v. Baldwin*, 57 Ill. App. 3d 800, 806, 373 N.E.2d 1000, 1005 (1st Dist. 1978) (discussing the general rule prohibiting fiduciaries from misappropriating confidential information).

125. *ABC Trans National Transport*, 62 Ill. App. 3d at 685, 379 N.E.2d at 1238 (noting defendant Brownstein's admission that "plaintiff would be destroyed by a massive walkout" of its employees, led by Brownstein and his co-conspirators).

126. *Vendo*, 58 Ill. 2d at 304, 321 N.E.2d at 9 ("Assuming that plaintiff, whether prudently or imprudently, failed to make the best use of Stoner's abilities [by relegating him to a "figurehead" role], such a failure certainly did not release Stoner from his duty not to assume a position which would be adverse to that of his employer.").

127. *Id.* at 304, 321 N.E.2d at 9.

128. *Id.* at 306-07, 321 N.E.2d at 11.

business in whole or in part at some point in the future, after quitting the principal's employ, through fair competition. This eventual competition or "head start" defense, as it were, appeared for example in *ABC Transnational Transport, Inc. v. Aeronautics Forwarders, Inc.*,¹²⁹ where the court limited the victimized employer's recovery to four months of damages and four months of salary forfeiture, on the theory that its disloyal employees could have quit and competed legitimately after quitting, had they chosen to do so.¹³⁰

This "head start" remedy defense is irrelevant, by definition, in corporate opportunity cases. Once the employer's rights attach under the "line-of-business" or "asset-misappropriation" tests, the fiduciary is foreclosed from seizing the opportunity for himself—period. The usurped building, real estate, technology or other opportunity is turned over to the victimized corporation *in toto* under constructive trust principles. This should be equally true if the employer chooses simply to enjoin the fiduciary from seizing the opportunity: the injunction should be broad in scope and unlimited in time, in order to further the complete deterrence policy of Illinois fiduciary duty law.¹³¹ After all, the loss of a single—and wrongful—competitor from any market is *de minimus*, and the court is merely being asked to vindicate the rights of the company as against its fiduciary, not as against the world.¹³²

129. See generally *ABC Trans National Transport, Inc.* 90 Ill. App. 3d 817, 413 N.E.2d 1299 (1st Dist. 1980).

130. But see *Dowd & Dowd, Ltd.*, 352 Ill. App. 3d at 383, 388, 816 N.E.2d at 769, 774 (rejecting defendants' argument that plaintiff would have lost all of customer Allstate's business if defendant Gleason had resigned without soliciting Allstate before her termination); *Veco Corp.*, 243 Ill. App. 3d at 162, 611 N.E.2d at 1060 (rejecting "proximate cause" defense that Veco would have lost its customer business, regardless of its employees' fiduciary disloyalty via pre-resignation customer solicitation, because employees "could have left Veco's employ at any time").

131. Compare *LCOR Inc.*, 1997 WL 136278 (granting preliminary injunction without time limit to bar fiduciary from seizing real estate opportunity); *Comedy Cottage, Inc.*, 145 Ill. App. 3d at 362, 495 N.E.2d at 1012 (granting preliminary injunction without time limit to bar fiduciary from interfering with real estate lease he tried to usurp), with *Durasys, Inc. v. Leyba*, 992 F.2d 1465, 1471 (7th Cir. 1993) (denying permanent injunction to prevent usurpation of City of Chicago airport computerized parking system contract; public interest in parking trumped private interest in loyalty); *Regal-Beloit Corp.*, 955 F. Supp. at 867 (granting preliminary injunction to bar fiduciaries from seizing business acquisition opportunity, but limiting the injunction to 6 months on the theory that fiduciaries could have legitimately quit and then sought the opportunity for themselves); *Allstate Amusement Co. of Illinois, Inc. v. Pasinato*, 96 Ill. App. 3d 306, 309-10, 421 N.E.2d 374 (1st Dist. 1981) (denying preliminary injunctive relief to preclude usurpation of lease, holding that plaintiff had an adequate remedy at law).

132. Compare *Kerrigan*, 11 Ill. App. 3d at 773, 297 N.E.2d at 704 ("Therefore, the business opportunity in the sale of this insurance belonged to Unity. As against the individual defendants, its directors and officers, this

H. The “Preparing to Compete” Defense

Despite their general similarity, corporate opportunity and corporate competition cases also differ with respect to another key defense: “preparing to compete.” An employee or other agent may legitimately take certain preparatory steps during the agency relationship, such as recruiting potential employees, securing a lease or loan, buying equipment, or even purchasing a rival business, as these preliminary activities do not normally amount to competition or otherwise bring employees or agents into direct conflict with their principal.¹³³ Such seemingly innocuous “preparation” becomes wrongful “competition,” however, if the employer is seeking to employ the same person,¹³⁴ to obtain the same lease or loan,¹³⁵ to buy the same equipment,¹³⁶ or to acquire the same rival business.¹³⁷

The interplay between “preparation” and corporate opportunity law is more subtle. Unlike corporate competition cases, in which employees invariably know they are undercutting their employer’s interests by diverting to themselves the very business their employer holds or is seeking, some corporate opportunity cases present situations in which employees doubt their employer would be interested in or able to pursue the opportunity. For example, a new technology or a nearby building might not seem necessary or suitable to their employer’s business, or their employer might be in financial straits, so employees might

business interest was protected by the doctrine of corporate opportunity.”) *with* *Shellmar Products Co. v. Allen-Qualley Co.*, 87 F.2d 104, 110 (7th Cir. 1936) (“We are dealing here not with Allen-Qualley’s [trade secret] right against the world, but with that company’s right against appellant”) and *Pidot v. Zenith Radio Corp.*, 308 Ill. App. 197, 215, 31 N.E.2d 385, 393 (1st Dist. 1941) (“We agree with the contention of plaintiffs that the basis of recovery is breach of confidence and that it is not necessary for plaintiffs to establish that their design was new and novel as against the world.”).

133. *Alpha Sch. Bus Co., Inc. v. Wagner*, 391 Ill. App. 3d 722, 736, 910 N.E.2d 1134, 1149 (1st Dist. 2009) (“[E]mployees may plan, form, and outfit a competing business while still working for their employer.”).

134. *Dowd & Dowd, Ltd.*, 181 Ill. 2d at 476, 693 N.E.2d at 367 (employees usurped corporate opportunity in recruiting for themselves the same people their employer was interviewing).

135. *Mullaney, Wells & Co.*, 78 Ill. 2d 534, 402 N.E.2d 574 (ex-employee usurped corporate opportunity in providing combined debt and equity financing to firm his employer had unsuccessfully tried to provide debt financing).

136. *Radiac Abrasives*, 177 Ill. App. 3d 628, 532 N.E.2d 428 (employees’ sale of their employer’s equipment to used equipment dealer, followed by their immediate repurchase of the same equipment for their own use in their secret start-up, constituted potential breach of fiduciary duty).

137. *Regal-Beloit Corp.*, 955 F. Supp. at 864 (defendants went beyond mere “preparation” and in fact were “competing” with their employer when they sought to purchase rival gear business they knew their employer wanted to acquire).

begin investigating the opportunity before resigning, without raising the subject with their employer, and then complete the deal for themselves after quitting. This was in fact Savage's argument in *Mullaney*: his employer had never done a transaction the size of his option deal with third party Blossman,¹³⁸ the pursuit of which Savage characterized as mere "preparation" since he resigned from Mullaney, Wells & Co. the day before exercising the Blossman options.¹³⁹ While such employee activities may be "preparatory" in some sense, the "line-of-business" test does not ask whether employees acted in good faith or whether their employer was actively seeking the opportunity; in fact, the Illinois Supreme Court explicitly deemed both of these inquiries irrelevant in *Kerrigan* itself.¹⁴⁰ The "line-of-business" test instead asks whether the opportunity was reasonably incident to their employer's present or prospective business and, if so, whether the employees disclosed and tendered the opportunity. If satisfied, the corporate opportunity doctrine transforms "preparation" into "usurpation" in these circumstances—precisely the result that obtained in *Mullaney*.

More subtle still is the "asset-misappropriation" test's potential application to "preparation." If corporate assets are used during "preparation," departing employees are foreclosed from contesting the corporate opportunity doctrine's application under

138. *Mullaney*, 78 Ill. 2d at 549, 402 N.E.2d at 582.

139. Supreme Court Brief of Defendant-Appellee/Cross-Appellant Savage, at 120-121:

The law has long recognized, not only that an agent may make personal investments, but also that an agent may take actions in furtherance of his anticipated business objectives preparatory to his departure from employment. Thus, in *James C. Wilborn & Sons, Inc. v. Heniff*, 95 Ill. App. 2d 155 (1st Dist. 1968), Heniff purchased machinery, set up his factory and otherwise participated in setting up his organization in order to compete with Wilborn (his employer) in the manufacture of sliding windows. The court declared that it was not a breach of duty for an agent to form a rival concern and to make preparations to this end while still in the employ of his principal (95 Ill. App. 2d at 163). In no way was Savage setting up a rival investment banking business when securing an option to purchase the stock held by the Blossman family in the Blossman gas company.

140. See *Kerrigan*, 58 Ill. 2d at 28, 317 N.E.2d at 43 ("Defendants stress their belief that Unity could not have legally engaged in the [insurance] business. But that belief, assuming it was held in 1962 [at the time of the usurpation], cannot operate as a substitute for defendants' duty to present the question to Unity for Unity's independent evaluation."). The Illinois Supreme Court later reiterated this important holding in *Mullaney*, 78 Ill. 2d at 549, 402 N.E.2d at 581-82 ("It is not an answer to state, as does the appellate court, that there is no evidence that the plaintiff either 'contemplated' or 'would have desired to make' a stock purchase of this magnitude. That is a decision to be made by the plaintiff upon disclosure of the pertinent facts.").

equitable estoppel principles, as *Graham v. Mimms* illustrates.¹⁴¹ Indeed, under *Graham*, if corporate assets are used, the doctrine's application is automatic even if the opportunity falls *outside* the employer's line of business and even if it is not feasible for the corporation to pursue the opportunity.¹⁴² All too often employees use their employer's information, equipment, or personnel to develop an opportunity as part of their pre-resignation "preparation," thereby opening the door to corporate opportunity liability. Even if an employee avoids these pitfalls, potential opportunity usurpation liability can still arise if he simply uses his employer's time to "prepare." Thus, when corporate assets are misused, "preparing" becomes "stealing" from a corporate opportunity perspective.

I. Summary Determinations

Properly understood, the pro-plaintiff configuration of Illinois fiduciary duty law allows, if not compels, summary determinations in plaintiff's favor in many corporate opportunity and corporate competition cases.¹⁴³ A number of decisions reflect this reality.

First among equals is *Kerrigan* itself. Courts and commentators seldom note the procedural aspects of that case, which came to the Illinois Supreme Court on cross-motions for summary judgment, the defendants' motion having been granted. The court opened its opinion with a careful analysis of the complaint's factual allegations that the defendant-directors admitted in their answer. Among these admissions were (i) that the defendants controlled Unity's affairs, (ii) that defendants' insurance agency, Plaza, had its offices in the same building as Unity under a lease from Unity, (iii) that Unity "referred" its borrowers to Plaza to obtain fire, homeowner's and other insurance in connection with loans made by Unity, and (iv) that Plaza's articles of incorporation authorized Plaza to make loans on the same terms as Unity, though Plaza had not done so.¹⁴⁴ Given these admissions, the defendants principally relied upon their affirmative defense that Unity lacked the authority to write insurance and that Unity in fact was forbidden by law from doing

141. See *Graham*, 111 Ill. App. 3d at 763, 444 N.E.2d at 557 ("[W]hen a corporation's fiduciary uses corporate assets to develop a business opportunity, the fiduciary is estopped from denying that the resulting opportunity belongs to the corporation whose assets were misappropriated, even if it was not feasible for the corporation to pursue the opportunity or it had no expectancy in the project.").

142. *Id.*

143. The Illinois Code of Civil Procedure permits summary determinations of discrete issues. See 735 ILL. COMP. STAT. ANN. 5/2-1005(a)-(b), (d). The Federal Rules of Civil Procedure also permit summary determinations of discrete issues. See also FED. R. CIV. P. 56(a)-(b), (d).

144. *Kerrigan*, 58 Ill. 2d at 23-24, 317 N.E.2d at 41.

so.¹⁴⁵ After offering its “line-of-business” holding and determining that Unity was permitted to write insurance, the Illinois Supreme Court seized upon the key admissions in the defendants’ answer and ruled that “in the view we take of this case, the question of defendants’ liability is established on the basis of the pleadings and no trial is required.”¹⁴⁶ Remand was therefore expressly limited to “ascertain[ing] the amounts to which the plaintiff is entitled and to determin[ing] what other relief should be granted.”¹⁴⁷

Just days after deciding *Kerrigan*, the Illinois Supreme Court handed down its second and even more procedurally extraordinary fiduciary duty decision in *Vendo*. As noted, that case arose when Vendo learned its president, Stoner, had been secretly financing a rival firm even as Vendo was asking him to acquire that firm for Vendo. The litigation finally reached the Illinois Supreme Court after two trials and two lower court appeals. The first Illinois Appellate Court opinion resulted in rejection of trade secret claims and reversal of a \$1.1 million non-compete damages award against Stoner,¹⁴⁸ although the court found salary forfeiture appropriate for Stoner’s in-term non-compete violation.¹⁴⁹ The second Illinois Appellate Court opinion again ended with a reversal in Stoner’s favor on the non-compete damages award (which had ballooned to \$7.3 million on remand); this time the appellate court concluded Vendo had not shown Stoner’s misconduct had caused Vendo’s losses.¹⁵⁰ Unhappy with this result, the Illinois Supreme Court allowed Vendo to amend its pleadings before that court to allege a breach of fiduciary duty claim as the basis for liability,¹⁵¹ and the supreme court then proceeded to affirm the \$7.3 million dollar

145. *Id.* at 24, 317 N.E.2d at 42.

146. *Id.* at 32, 317 N.E.2d at 45.

147. *Id.* at 31-32, 317 N.E.2d at 45.

148. *See Vendo*, 105 Ill. App. 2d at 278-92, 245 N.E.2d at 271-79 (citing case history and trade secret determinations).

149. *Id.* at 288-90, 245 N.E.2d at 277 (the court attributed Stoner’s salary forfeiture to his breach of “fiduciary undertaking”); *see also id.* at 288, 245 N.E.2d at 277. This offhand characterization was clearly just a description of Stoner’s in-term covenant contract breach, as the court made a point of saying earlier in its opinion that Vendo had originally sued Stoner for breach of his non-compete agreement and then amended its complaint to add a claim for trade secret theft. *Id.* at 277, 245 N.E.2d at 271.

150. *See Vendo*, 13 Ill. App. 3d at 293-95, 300 N.E.2d at 634-35 (explaining how the misconduct was not responsible for the losses and stating that “[n]either the evidence in the first trial nor in the trial on remand establishes that Stoner was responsible for Vendo’s failure to have FIFO.”).

151. *See Vendo*, 58 Ill. 2d at 307, 321 N.E.2d at 11. Although the second appellate court opinion did not mention it, according to the Supreme Court, Vendo had sought on remand to amend its complaint to include a fiduciary duty claim. *See also id.* (“We are not confronted here with the situation in which a litigant attempts to interject on appeal a theory never addressed in the trial court. Plaintiff made its theory quite explicit in the trial on remand.”).

judgment and a \$170,000 salary forfeiture award against Stoner solely on fiduciary duty grounds—despite a complete change in theory and without so much as a remand.¹⁵²

Of a piece with *Kerrigan* and *Vendo* was the procedural outcome in *Mullaney*. A master in chancery found Savage guilty of usurping a corporate opportunity in diverting to himself the Blossman transaction that he originated while still employed by Mullaney, Wells & Co. The trial court sustained exceptions to the master's report and entered judgment for the defense, and the appellate court affirmed. The Illinois Supreme Court rejected Savage's various defenses on appeal but did not remand for further proceedings. Instead, the Supreme Court reversed the trial and appellate courts and remanded the case with instructions to the trial court "to enter judgment in favor of the plaintiff."¹⁵³

Patient Care Services yielded an equally pro-plaintiff outcome from a procedural standpoint. Plaintiff sought to renew its emergency room services with a hospital, only to find its own fiduciary seeking—and winning—the very same contract for himself. This head-to-head competition for a corporate opportunity resulted in a trial that somehow ended in judgment for the defense. The Illinois Appellate Court did not simply reverse the trial court's defense judgment. The appellate court went much further: it entered judgment in favor of plaintiff and then remanded the case with directions to the trial court "to impress a constructive trust on the business assets of defendants and to order an accounting in accordance with the views expressed in this opinion."¹⁵⁴

While *Kerrigan* was a pure corporate opportunity case, and while *Vendo*, *Mullaney* and *Patient Care Services* presented combination corporate opportunity/corporate competition cases, the same pro-plaintiff result can be found in the pure corporate competition opinion in *Unichem*. The court there had no difficulty in determining that Gurtler, as Unichem's president, was in a fiduciary relationship with the firm.¹⁵⁵ In turning his back on Unichem while his son diverted company assets to a rival, Gurtler obviously breached his fiduciary duty of loyalty as a matter of law. The trial court so ruled in granting summary judgment in favor of Unichem on liability and ordering an accounting, and the Illinois Appellate Court readily affirmed this summary judgment on appeal.¹⁵⁶

152. *Id.* at 314, 321 N.E.2d at 15.

153. *Mullaney*, 402 N.E.2d at 582.

154. *Patient Care Servs.*, 32 Ill. App. 3d at 1034, 337 N.E.2d at 482.

155. *See Unichem*, 148 Ill. App. 3d at 290, 498 N.E.2d at 727-28 (the court entered a summary judgment that Gurtler had breached his fiduciary duty).

156. *Id.* at 297, 498 N.E.2d at 732.

Hill v. Names and Addresses, Inc.,¹⁵⁷ another pure corporate competition case, also ended in summary judgment for plaintiff, or more precisely, the counter-plaintiff. Hill sued her former employer, Names and Addresses, for compensation, prompting Names and Addresses to counterclaim for breach of fiduciary duty. Hill's conduct rivaled Gurtler's for outrageousness: before resigning she solicited six customers who immediately followed her to her new employer. The trial court found Hill breached her fiduciary duty of loyalty as a matter of law in soliciting her employer's customers prior to her resignation. The trial court therefore entered summary judgment against Hill on compensation forfeiture, and the Illinois Appellate Court later affirmed this procedural ruling.¹⁵⁸

Implicit in each of these cases is another key procedural point: the courts thought proximate cause, warranting at least some relief, existed in these cases as a matter of law, or the courts thought proximate cause was irrelevant in these cases as a matter of policy. *Kerrigan* and *Patient Care Services* both ordered remands for an accounting and other relief, the courts having concluded that the defendants were at a minimum required to disgorge the gains they obtained through their undisputed diversions of business from their principals. *Vendo* arrived before the Illinois Supreme Court with proven losses but the wrong theory, yet no remand was necessary, the court evidently believing that proximate cause existed as to a theory the jury did not even consider. Similarly, *Mullaney* ended with the Illinois Supreme Court reversing the trial and appellate courts and entering judgment in favor of plaintiff on the \$800,000 restitution claim therein without remand. And *Hill* and *Unichem* both recognized that at least some recovery was appropriate on summary judgment—salary forfeiture in *Hill* and damages on diverted customer business in *Unichem*.

All of these opinions should be understood as standing for a well-established but seldom cited principle: proximate cause “may be determined as a matter of law when the facts not only are undisputed but allow no difference in the judgment of reasonable men as to the inferences to be drawn therefrom.”¹⁵⁹ Indeed, in many if not most corporate opportunity and corporate competition cases—and certainly in all cases where a fiduciary competes for a corporate opportunity his principal is actually seeking—liability, proximate cause, disgorgement and compensation forfeiture should all exist *as a matter of law* because the legally operative facts are undisputed and reasonable minds cannot differ as to the

157. *Hill*, 212 Ill. App. 3d 1065, 571 N.E.2d at 1085.

158. *Id.* at 1075-77, 571 N.E.2d at 1091-92.

159. *Prodromos*, 341 Ill. App. 3d at 727-28, 793 N.E.2d at 159.

inferences to be drawn.

Given this pro-plaintiff procedural vortex created by *Kerrigan*, *Vendo* and *Mullaney*, fiduciaries who fail to meet the disclosure, tender and consent criteria have almost nowhere to go. They can try to argue that they weren't fiduciaries for the opportunity in question, or that the opportunity was not within the corporation's line of business, but these are seldom successful in traditional cases involving officers and key employees. And even these weak defenses disappear when a fiduciary competes for a corporate opportunity: on these facts, the corporation has demonstrated its actual interest in the opportunity by affirmatively pursuing it, thereby automatically bringing the opportunity within the corporation's line of business. In these scenarios, fiduciaries have only one place to retreat: the friendly testimony of the very customers or other third parties they have diverted—the third-party “refusal to deal” defense. And retreat to them they do, early and often, in case after case, as I will demonstrate in my next article focusing on the chronological evolution of Illinois corporate opportunity opinions and the decisive roles third parties played in so many of those cases.¹⁶⁰

III. CONCLUSION

It's easy to say fiduciary duties are important; it's not so easy to distinguish among the many branches of fiduciary duty law. All are powerful, but they vary significantly in application and outcome, not to mention enforcement. Corporate opportunity and corporate competition claims epitomize these nuances due to their considerable overlap in life and law.

Corporate opportunity charges, however, are particularly dangerous: they can arise in unexpected circumstances, and they cannot be easily defeated short of trial. Indeed, quite the opposite is true—corporate opportunity complaints can result in quick determinations in favor of plaintiffs, forcing defendants to account fully for their misconduct and to pay a hefty price commensurate with this bedrock deterrence law. Should a defendant be allowed to escape this regime simply by calling friendly third parties as witnesses to say, after-the-fact, that they never liked plaintiff anyway? Not if the Illinois experience has anything to teach, and not if Illinois policy and practice matter, as I argue, respectively, in my next two articles in this series.¹⁶¹

160. Schaller, *supra* note 17.

161. *Id.*; Schaller, *supra* note 18.

