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Are Illinois Courts Still Champions of Fiduciary Duties?

Charles W. Murdock[*] & *Michael Huiras*[**]

Illinois courts have departed from the corporate-law jurisprudence that traditionally served as a champion of fiduciary duties. Historically, Illinois courts have consistently protected minority shareholders and punished directors and those in control for engaging in unfaithful, abusive, and deceitful behavior. In recent years, however, the Illinois Supreme Court has taken a technical approach to fiduciary duties, resulting in wrongdoers getting away with unconscionable conduct.

First, this Article will demonstrate why Illinois has historically been characterized as a "shareholder" state by comparing the Illinois and Delaware corporate statutes and examining Illinois courts' favorable fiduciary duty jurisprudence. In the latter half of the twentieth century, the Illinois Supreme Court took a firm stance against fiduciaries when they engaged in conflicts of interest, seized corporate opportunities, and competed with the entity they served. The Illinois Supreme Court did not limit its stance to situations involving the fiduciary-entity relationship; however, it also held fiduciaries to the same standard when they dealt among themselves. Consistent with these approaches, the Illinois Supreme Court also took a broad approach to the related concept of oppression when it interpreted the term to mean abusive and not necessarily illegal or fraudulent.

Next, by examining two recent Illinois Supreme Court decisions, Indeck Energy Services, Inc. v. DePodesta *and* Walworth Investments-LG, LLC v. Mu Sigma, Inc.*, this Article will examine whether there is a countervailing trend in state judiciary practices.* Indeck *represents the Illinois Supreme Court's departure from its long-standing jurisprudence covering the fiduciary duty of loyalty, specifically, the standard for establishing the usurpation of a corporate opportunity. In* Walworth*, the court, applying Delaware law, took an extremely technical approach in interpreting an anti-reliance clause. This analysis will illustrate the Illinois Supreme Court's failure to recognize*

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the defendant's fraudulent behavior, which induced the plaintiff to agree to the anti-reliance clause.

Finally, the Article concludes with a discussion of Illinois courts' jurisprudence covering anti-reliance clauses in fraud in the inducement claims, offering solutions courts and lawyers can take to address the problem.

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INTRODUCTION

Historically, Illinois has been characterized as a "shareholder" state, compared to Delaware, which has typically been viewed as a "management" state.[1] This is due in part to the differences in their state corporate statutes. The 1933 Illinois Business Corporation Act was arguably the first modern corporation statute and the basis for the Model Business Corporation Act (MBCA).[2] The various pro-shareholder aspects of the 1933 BCA were expanded upon in the 1983 Illinois Business Corporation Act (ILBCA).[3]

Delaware's General Corporation Law (DEGCL) does not share these aspects and is arguably pro-management, as unlike Illinois jurisprudence, Delaware case law affords management much more discretion, thereby facilitating their policy goals.[4] While the ILBCA provides detailed rights for shareholders, it is equally important to attribute the pro-shareholder

1. *See* William L. Cary, *Federalism and Corporate Law: Reflections Upon Delaware*, 83 YALE L.J. 663, 670 (1974) (recognizing that Delaware court decisions have created a "favorable climate for management" and relaxed fiduciary standards).

2. MODEL BUS. CORP. ACT (AM. BAR ASS'N 2023); Mark D. West, *The Puzzling Divergence of Corporate Law: Evidence and Explanations from Japan and the United States*, 150 U. PA. L. REV. 527, 529 (2001) ("[T]he Illinois Business Corporation Act of 1933, a statute often described as the first 'modern' United States corporate code."); *see also* Ray Garrett, *Model Business Corporation Act*, 4 BAYLOR L. REV. 412, 424 (1952) ("The initial draft of the Model Act was based upon the Illinois Business Corporation Act of 1933.").

3. 805 ILL. COMP. STAT. 5 (1983); *see also infra* notes 11–13, 16–22 and accompanying text (providing examples of the 1983 BCA's pro-shareholder provisions).

4. DEL. CODE ANN. tit. 8, §§ 101–398 (1953); *see also infra* text at notes 9–10 (discussing the Delaware Business Corporation Act); *infra* text accompanying notes 24–38 (analyzing the approach Delaware courts take when dealing with fiduciary duties); *see e.g.*, *In re* Tesla Motors, Inc. S'holder Litig., 298 A.3d 667, 734 (Del. 2023) (affirming the Delaware Court of Chancery's holding that CEO Elon Musk did not breach his fiduciary duties to minority shareholders and that Tesla's acquisition of SolarCity was entirely fair).

status of Illinois to its state jurisprudence, particularly that of the Illinois Supreme Court.[5]

For several decades, Illinois Supreme Court precedent has been noteworthy in guarding the fiduciary duties owed by directors and officers to the corporation,[6] and by controlling shareholders to minority shareholders.[7] However, three recent Illinois court decisions raise concerns as to whether Illinois courts will continue to take this strong stance against corporate fiduciaries when they engage in disloyal conduct. These cases, then, are the trigger for this Article. In critiquing these decisions, it is important to keep in mind the caveat of Judge William Bauer in a talk a few years ago before the securities law committee of the Chicago Bar Association. He pointed out that whenever you see what you think is a bad judicial decision, there is often some bad lawyering behind it.[8]

However, before analyzing and critiquing these cases, it is important to provide the historical perspective against which they were decided.

I. A Brief Comparison of the Illinois and Delaware Corporate Statutes

As stated, the 1933 Illinois Business Corporation Act has been regarded as the first modern corporation statute. As a well-organized and clearly written statute, it became the model for the MBCA. With respect to Delaware, one commentator has stated: "When compared to some corporation laws where the drafters have attempted to regulate every nuance of corporate behavior or deal with every conceivable eventuality, the Delaware statute has a spare, almost open quality. Every effort is made to simplify drafting and to avoid complexity."[9]

It is doubtful that anyone who has ever worked with the DEGCL would conclude that it "has a spare, almost open quality." Moreover, the fact that it does not seek "to regulate every nuance of corporate behavior or deal with every conceivable eventuality" is one of the reasons why

5. *See* CHARLES W. MURDOCK & STEPHEN F. REED, 8 ILLINOIS PRACTICE, BUSINESS ORGANIZATIONS § 14:2, § 14:2 n.1 (2d ed. 2010 Supp. 2023) ("For example, while Illinois requires dissenter's rights in both a merger and a sale of substantially all the assets of a corporation, the Delaware statute does not require dissenter's rights in a sale of assets transaction.").

6. *See* discussion *infra* Part II.C (dissecting previous Illinois Supreme Court decisions concerning the fiduciary duties directors owe to the corporations they serve).

7. For a review of Illinois Supreme Court decisions dealing with the fiduciary duties controlling shareholders owe minority shareholders, see discussion *infra* text at notes 118–40.

8. E-mail from Hon. Patricia S. Spratt, J., Cir. Ct. of Cook County, to Charles W. Murdock, Professor of L., Loyola Univ. Chi. Sch. of L. (May 7, 2024, 05:06 CST) (on file with author).

9. *See* Lewis S. Black, Jr., *Why Corporations Choose Delaware*, DEL. DEP'T OF STATE 2 (2007), https://corpfiles.delaware.gov/pdfs/whycorporations_english.pdf [https://perma.cc/7BEV-JVW3] ("Indeed, [the DEGCL] is written with a bias against regulation.").

management has so much discretion and why Delaware fails to provide adequate protection for minority shareholders.[10]

For example, the ILBCA entitles shareholders the right to dissent both from a corporation's merger and a sale of substantially all its assets, while the DEGCL only provides such rights for mergers, therefore allowing corporations to conduct transactions substantially similar to mergers without providing shareholders appraisal rights.[11] An asset sale or merger will require a majority vote of all the shareholders under DEGCL, whereas the ILBCA as a default proposition, only requires a two-thirds vote.[12] Illinois also provides for cumulative voting as a default option, thereby providing the opportunity for minority shareholders to have representation on the board of directors.[13]

With respect to closely held corporations, the ILBCA is arguably much more favorable than DEGCL. Although both states have close corporation acts,[14] under the *Galler* decision, the Illinois Supreme Court has recognized that a corporation organized under the 1933 Illinois Business Corporation Act provisions can nonetheless be a closely held corporation.[15] The *Galler* holding—representing a broad acceptance of shareholder agreements—in essence, has been codified in ILBCA Sections 7.70 and 7.71.[16] While the Delaware Supreme Court has also acknowledged the validity of shareholder agreements in the *Ringling Brothers* litigation, it simultaneously overruled the Court of Chancery's grant of specific performance, which resulted in an ineffective

10. *Id.*; *see also* Manichaean Cap., LLC v. Exela Techs., Inc., 251 A.3d 694, 699 (Del. Ch. 2021) (noting how nuisance blocking, "prompted the Delaware General Assembly to create a statutory right of appraisal as a means to quash the minority's blocking right while also addressing the nonconsensual taking of the stockholders' property (their stock)"); *infra* notes 11–20.

11. 805 ILL. COMP. STAT. 5/11.65(a)(1), (2); DEL. CODE ANN. tit. 8, § 262(b), (c).

12. *See* DEL. CODE ANN. tit. 8 § 251(c) (merger or consolidation of domestic corporations); *but see* 805 ILL. COMP. STAT. 5/10.20(d) (stating that in Illinois the shareholders, by a two-thirds vote, can amend the articles to provide that thereafter organic changes will only require a majority vote).

13. *See* 805 ILL. COMP. STAT. 5/7.40; *see also* William W. Kurnik, *Cumulative Voting for Corporate Directors under the Illinois Constitution*, 8 J. MARSHALL J. PRAC. & PROC. 327 (1974) (discussing the aftermath of the mandatory director cumulative voting provision in the 1870 Illinois Constitution, and that despite the 1970 Constitution no longer mandating cumulative voting for post-1970 corporations, the legislature has retained cumulative voting as a default option).

14. 805 ILL. COMP. STAT. 5/12.56; DEL. CODE ANN. tit. 8, §§ 341–56.

15. Galler v. Galler, 203 N.E.2d 577, 583–84 (Ill. 1964) ("[A] close corporation is one in which the stock is held in a few hands, or in a few families, and wherein it is not at all, or only rarely, dealt in by buying or selling." (citing Brooks v. Willcuts, 78 F.2d 270, 273 (8th Cir. 1935))).

16. 805 ILL. COMP. STAT. 5/7.70(b), 7.71(d); *compare* 805 ILL. COMP. STAT. 5/7.71(a) (requiring unanimous agreement), *with Galler*, 203 N.E.2d at 584 (requiring only that there be no complaining minority interest).

enforcement mechanism, thus creating uncertainty regarding shareholder agreement enforcement in Delaware.[17]

Contrariwise, ILBCA Sections 7.70 and 7.71 explicitly authorize a court to grant specific enforcement of shareholder agreements.[18] Section 7.70 authorizes pooling agreements, in which the shareholders agree to vote in a certain fashion, and Section 7.71 authorizes agreements affecting director discretion, such as the election of officers, establishment of salaries, and declaration of dividends.[19]

Additionally, in a closely held corporation, the ILBCA requires cumulative voting, a crucial feature of the statute. Consider three equal shareholders, Tom, Dick, and Harriet. Who is the minority shareholder? At the outset, we do not know because they all love each other. It is only when there is a falling out that a problem exists. Under Delaware's voting regime, Dick and Harriet could vote together and exclude Tom from the board of directors. Under cumulative voting in Illinois, Tom would be able to ensure a seat on the board.[20]

Also, Illinois recognizes the concept of oppression, which was introduced into corporate law by the 1933 Illinois Business Corporation Act.[21] In essence, oppression is the kissing cousin of the fiduciary duty of majority shareholders to deal fairly with minority shareholders.[22] The ILBCA made this concept even more viable by expanding the alternative remedies that a court can utilize in framing the appropriate remedy.[23]

II. ILLINOIS COURTS' FAVORABLE JURISPRUDENCE

Many attorneys do not appreciate the scope of Illinois jurisprudence in the corporate sphere and the insight that Illinois courts have demonstrated in resolving corporate issues when they reflexively incorporate closely held businesses in Delaware. The sophistication of Delaware courts is often cited as a basis for incorporating in Delaware. However, that so-called sophistication can also lead to decisions and patterns that are confusing, as well as lengthy opinions that often say the right thing and do the wrong thing.

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17. Ringling Bros.-Barnum & Bailey Combined Shows, Inc. v. Ringling, 53 A.2d 441, 448 (Del. 1947) (overruling the chancellor who, in effect, granted specific performance).

18. 805 ILL. COMP. STAT. 5/7.70(b), 7.71(d) (providing that a voting agreement created under each respective Section is specifically enforceable in accordance with the principles of equity).

19. 805 ILL. COMP. STAT. 5/7.70(a), 7.71(a).

20. *See, e.g.*, 805 ILL. COMP. STAT. 5/7.40(a) (discussing voting of shares).

21. *See infra* text at notes 143–44 (discussing the concept of oppression in Illinois).

22. *See infra* text at notes 146–47 (analyzing Illinois Supreme Court case interpretations of "oppression").

23. *See infra* text at notes 149–50 (recognizing the 1983 BCA's expanded remedies for oppressive conduct).

A. A Brief Digression Examining Delaware Jurisprudence

Consider the extensive 2006 *Walt Disney Co. Derivative Litigation* case, which culminated in a forty-five-page opinion by the Delaware Supreme Court.[24] In *Disney*, the "old board" authorized a contract for a new CEO, and included provisions making it more profitable for the CEO to be terminated than to fulfill their five-year contract, along with the "new board" approving a $130 million severance payment predicated upon Disney's terminating the new president after one year. The payment was based upon a determination that there was no cause for firing him, even though he was incompetent.[25] The *Disney* court acknowledged that, "although the compensation committee's decision-making process fell far short of corporate governance 'best practices,' the committee members breached no duty of care."[26]

Also, consider Delaware's inconsistent approach when it comes to defending against tender offers. In *Unocal Corp. v. Mesa Petroleum Co.*, the Delaware Supreme Court recognized that a board might have a conflict of interest in initiating defensive tactics against a tender offer.[27] In so doing, it determined that such action would be appropriate if the response taken by the board was proportional to the threat posed.[28] A year later, in *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, the Delaware Supreme Court rejected defensive tactics when, according to the court, it was evident that the company would be broken up.[29] In such a situation, rather than defending the corporate bastion, the duty of the board was to serve as an auctioneer and get the best price.[30] It is here that we hear the maxim that the responsibility of the board of directors is to "maximize shareholder value."

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24. *In re* Walt Disney Co. Derivative Litig., 906 A.2d 27 (Del. 2006). See Lawrence Lederman, *Disney Examined: A Case Study in Corporate Governance and CEO Succession*, 52 N.Y.L. SCH. L. REV. 557, 558 (2007), for a discussion of *Disney*'s prevalence in case law regarding executive compensation, and how judicial review is limited in matters regarding executive compensation.

25. *In re* Disney, 906 A.2d at 37, 57.

26. *Id.* at 55–56, 60 ("In a 'best case' scenario, all committee members would have received before or at the committee's first meeting . . . a spreadsheet or similar document prepared by a compensation expert . . . . [These spreadsheets] would form the basis of the committee's deliberations and decision.").

27. Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 955 (Del. 1985) (acknowledging that due to conflicts of interest, objectivity in making decisions by directors is difficult).

28. *Id.* (discussing how an assessment of the reasonableness of a defensive measure considers analyzing the nature of the takeover bid and its effect on the corporate enterprise).

29. Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 184 (Del. 1986) ("[When] dissolution of the company becomes inevitable, the directors cannot fulfill their enhanced *Unocal* duties by playing favorites with the contending factions. Market forces must be allowed to operate freely to bring the target's shareholders the best price available for their equity." (citing *Unocal*, 493 A.2d at 955)).

30. *Id.* at 182 (shifting the duty of the board mooted the whole question of defensive measures).

Just three years later, in *Paramount Communications, Inc. v. Time, Inc.*, the Delaware Supreme Court identified two scenarios where a company is in the "*Revlon* mode"—and finding that Time fell in neither, accepted, in effect, Time's "just say no defense."[31] A few years later in *Paramount Communications, Inc v. QVC Network, Inc.* the Delaware Supreme Court, in a twist of events affirmed the chancery court decision to not apply *Time* and instead apply *Revlon*.[32] When the Paramount board favored Viacom on the basis that it provided more long-term value, the chancellor distinguished the *Time* case on the basis that there was no change in control in *Time*, but there was currently, and rejected the defensive tactics by Paramount because, when there is a change of control, the court must be satisfied that the transaction produces the best value for the shareholders of the target company.[33]

Consider also the 1947 *Ringling* litigation, where the Delaware Supreme Court had before it a voting agreement between two sisters each owning 31.5 percent of company shares, and the remaining 37 percent being held by their brother.[34] Seven directors were to be elected, and cumulative voting was applicable—each of the three could elect two directors, but no shareholder, on their own, could elect the seventh.[35] Accordingly, the two sisters entered an agreement to pool their votes, allowing them to elect five directors between them so long as they were bound by the agreement terms.[36] One of the sisters brought suit to enforce the agreement after the other failed to follow the terms.[37] The Delaware chancery court upheld the contract, ordering specific performance, but

31. Paramount Communications, Inc. v. Time, Inc., 571 A.2d 1140, 1154–55 (Del. 1989) (holding that the corporation's board of directors were not under a *Revlon* duty to either auction the corporation or maximize short-term shareholder value because it entered into the initial merger agreement).

32. *See* Paramount Commc'ns, Inc. v. QVC Network, Inc., 637 A.2d 34 (Del. 1994) *aff'g*, 635 A.2d 1245, 1252 (Del. Ch. 1993) (holding that a proposed change in corporate control triggers heightened scrutiny, such that there is a fiduciary duty on the target company's board of directors to obtain information about competing offers).

33. *Id.* at 1265 ("[T]he directors argue[] they have no duty to abandon a deliberately conceived corporate plan in favor of a short-term shareholder profit. Rather, they do have a fiduciary duty to manage the corporation in the proper exercise of their business judgment, and that obligation is what justifies their chosen course of action.").

34. Ringling Bros.-Barnum & Bailey Combined Shows, Inc. v. Ringling, 53 A.2d 441, 448 (Del. 1947).

35. *Id.* The company had 1,000 outstanding shares and seven directors to elect. Under the cumulative voting formula, 876 votes were necessary to elect one director (1,000 shares * 7 director vacancies / (7 director vacancies + 1)). Therefore, the two sisters alone would each have 2,205 votes (7,000 votes * 31.5%).

36. *Id.* at 443–44.

37. *Id.* at 445 ("[O]rdering that a new election be held before a master, with the direction that the master should recognize and give effect to the agreement if its terms were properly invoked.").

the Delaware Supreme Court, while upholding the contract, decided that the best remedy was to disallow the votes of the sister who did not vote in accordance with the contract.[38] If the agreement had been invalid, the sisters would have had a four-to-three majority; however, with the enforcement mechanism determined by the Delaware Supreme Court, the directors were split three-to-three, with the likelihood that the brother, who held a plurality of shares, could elect the seventh director. With friends like the Delaware Supreme Court, you do not need enemies.

B. Illinois Supreme Court Jurisprudence Regarding Shareholder Agreements

Contrariwise, consider the decision of the Illinois Supreme Court in the *Galler* litigation.[39] Two families, each owning 47.5 percent, entered into a shareholder agreement that not only dealt with voting for directors but also covered filling vacancies, repurchasing shares upon the death of a shareholder, and reallocating distribution of dividends and voting power after a redemption of shares.[40]

These activities went beyond what shareholders normally do, and intruded upon matters traditionally within the province of the Board of Directors. Nevertheless, the Illinois Supreme Court, in what is now one of the leading cases in the country on closely held corporations, took a pragmatic approach, analyzed the differences between a publicly traded corporation and a closely held corporation, defined what is a common-law closely held corporation, and enforced a very broad shareholders agreement.[41]

Moreover, Illinois courts know how to enforce a judicial order. If a party does not comply with a judicial order, the recalcitrant party can be held in contempt.[42] In addition, the ILBCA explicitly provides that both pooling agreements as well as agreements affecting director discretion are valid and are specifically enforceable.[43]

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38. *Id.* at 447–48.

39. Galler v. Galler, 203 N.E.2d 577 (Ill. 1964) (holding that the agreement at issue was valid, and a closely held corporation is different than a shareholder of a large corporation).

40. *Id.* at 579–81.

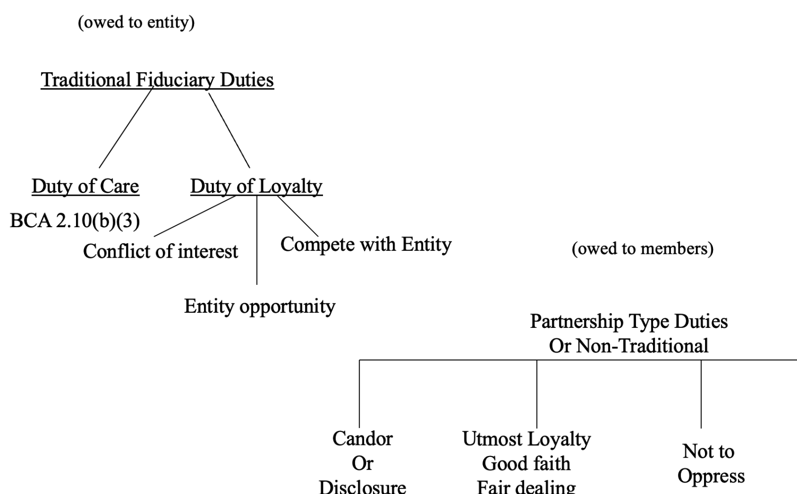
41. *Id.* at 583–85.

42. *See* Wilson v. United States, 221 U.S. 361, 377 (1911) ("A command to the corporation is in effect a command to those who are officially responsible for the conduct of its affairs. If they . . . prevent compliance or fail to take appropriate action within their power . . . they, no less than the corporation itself, are guilty of disobedience, and may be punished for contempt."); *see generally* MURDOCK & REED, *supra* note 5, § 8.22.

43. 805 ILL. COMP. STAT. 5/7.70(b), 7.71(d) (1983); *see also supra* text at notes 16–18 (comparing 1983 BCA and DEGCL).

C. Illinois Supreme Court Jurisprudence Regarding Fiduciary Duties

During the 1960s and 1970s, the Illinois Supreme Court, issued several significant decisions that expanded and clarified fiduciary duty concepts, and demonstrated the court's concern that fiduciaries be held to a high standard of conduct. For reference, the attached exhibit illustrates the scope of fiduciary duties, namely, the three broad prongs of the fiduciary duty of loyalty, which is owed to the entity[44] along with the fiduciary duty that controlling shareholders owe to other minority shareholders.[45]



Let us now consider these landmark decisions.

1. The Duty of Loyalty: Conflict of Interest

In *Shlensky*, the Illinois Supreme Court reversed the appellate court's decision that held in cases challenging a director's conflict of interest, plaintiffs have the burden of establishing that the director-defendant's conflicted transactions were unfair or fraudulent.[46] The court rejected

44. The duty of loyalty owed to the entity encompasses engaging in conflicts of interests, seizing corporate opportunities, and competing with the corporation. *Cf.* 805 ILL. COMP. STAT. 180/15-3(b) (1983) (Illinois Limited Liability Act) (defining a member's duty of loyalty to a member-managed company and its other members).

45. *See infra* text at note 72 (discussing Illinois Supreme Court jurisprudence regarding fiduciary duties in *Mullaney, Wells & Co. v. Savage*, 402 N.E.2d 574 (Ill. 1980), and *Vendo Co. v. Stoner*, 321 N.E.2d 1 (Ill. 1974), and discussing Illinois courts' historical approach to fiduciary duties owed to members).

46. Shlensky v. S. Parkway Bldg. Corp., 166 N.E.2d 793, 802–06 (Ill. 1960), *rev'g* 159 N.E.2d 31 (Ill. App. Ct. 1959). A portion of the following discussion on *Shlensky* is excerpted from one

the defendants' reliance on *White v. Stevens*, which stated, without any citation to authority, that "[t]here is no presumption [in transactions with one or more common directors] that the contract is unfair or oppressive, but the person attacking it must prove its unfairness."[47]

Instead, the *Shlensky* court followed the approach in *Winger v. Chicago City Bank & Trust Co.*, and construed *Winger* court as holding "that transactions between corporations with common directors may be avoided only if unfair, and that the directors who would sustain the challenged transaction have the burden of overcoming the presumption against the validity of the transaction by showing its fairness."[48] The *Shlensky* court stated that this rule—that directors shall have the burden of establishing the fairness of their conflicting transactions—is essentially the same as the United States Supreme Court's rule in *Geddes v. Anaconda Copper Mining Co.*,[49] and that it "not only protects shareholders from exploitation, but permits flexibility in corporate dealings."[50]

In *Shlensky*, the minority shareholders of South Parkway Building Corporation (Building Corporation) brought suit against four of the Building Corporation's six board of directors, challenging the transactions the board made with companies with common directors (the Union Amusement Company and the South Center Department Store).[51] The plaintiffs alleged that the director-defendants gave preferential treatment to the other companies at the expense of the Building Corporation.[52] Englestein, the principal defendant-director, controlled the companies with which the Building Corporation transacted.[53] Two director-defendants were employees at the competing corporations controlled by Englestein, and another was Englestein's personal attorney and legal counsel to each of the corporations.[54]

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of the author's treatises on business organizations. MURDOCK & REED, *supra* note 5, §§ 10.2, 11.6, 14.2.

47. *Shlensky*, 166 N.E.2d at 800 (quoting White v. Stevens, 158 N.E. 101, 103 (Ill. 1927)).

48. *See* Winger v. Chicago City Bank & Tr. Co., 67 N.E.2d 265 (Ill. 1946); *Shlensky*, 166 N.E.2d at 800 (citing *Winger*, 67 N.E.2d at 276 (Ill. 1946)).

49. 254 U.S. 590, 599 (1921) (holding that directors bear the burden of establishing the fairness and propriety of the transactions of fiduciaries).

50. *Shlensky*, 166 N.E.2d at 801 (citing *Geddes*, 254 U.S. at 599).

51. *Id.* at 795–96. The Building Corporation had seven directors, but one resigned in protest of one of the transactions in question. *Id. at* 796.

52. *Id.*

53. *Id.*

54. *Id.* at 796–97 ("Of the six [Building Corporation] directors approving the [South Center Department Store] transaction, Bernstein was Englestein's attorney and attorney for the Store; Mackie was . . . a director of the Store and of Harry M. Englestein & Company; and Englestein was president, treasurer, director and owner of the Store, as well as director and managing agent of the Building Corporation . . . . The five Building Corporation directors who [voted to approve the

The defendant-directors contended that the transactions were valid since a disinterested majority of the board of directors approved the transaction.[55] The court rejected this argument stating that the defendant-directors could not be characterized as disinterested and only representing the interests of the Building Corporation due to their relationships with Englestein.[56] It reasoned that "it is not the mere number of common directors which determines whether approval has been given by an independent and disinterested majority of directors, but rather whether a majority of the directors are dominated by an individual or a group."[57]

Central to the court's inquiry into whether the directors were independent was the concept of fairness.[58] The court found that since Englestein controlled a majority of the directors by employing them in his other businesses, these directors could not be characterized as independent.[59] The *Shlensky* court's approach to conflict of interest cases was reasonable as it protects the corporation and minority shareholders without unduly hamstringing directors who act fairly and in the best interests of the corporation.

2. The Duty of Loyalty: Seizing an Entity Opportunity

The Illinois Supreme Court continued to hold fiduciaries to a high standard of fairness when it decided *Kerrigan v. Unity Savings Ass'n*, fourteen years later.[60] In *Kerrigan*, a shareholder of Unity Savings Association (Unity) brought suit against five individuals, three of whom were directors of Unity, for their involvement with Plaza Insurance Agency Inc. (Plaza), which offered insurance to Unity's mortgage

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Union transaction] included Englestein, the director and owner of Union; Mackie, the president of Union; and Bernstein, counsel for Union.").

55. *Id.* at 799.

56. *Id.* at 802.

57. *Id.* (citing Geddes v. Anaconda Copper Mining Co., 254 U.S. 590, 599 (1921)). The *Shlensky* decision stands in stark contrast to the decision of the Delaware Supreme Court in *Aronson v. Lewis*, 473 A.2d 805 (Del. 1984), where the Supreme Court of Delaware held that a 47 percent shareholder in a publicly traded corporation did not control the Board of Directors. In *Shlensky*, in order for any other shareholder or shareholders to exercise control, they would have needed to put together 48 percent of the remaining 53 percent, something that would be almost a statistical improbability in a publicly traded corporation. Contrariwise, Aronson would have needed only to gain the support of 4 percent of the remaining 53 percent to assure control.

58. *Shlensky*, 166 N.E.2d at 802–03.

59. *Id.* at 803 (explaining that because three of the five directors who approved the transaction were employed by the other business, "the action was taken by a board that was dominated, both numerically and in fact, by Englestein and his 'business colleagues'").

60. Kerrigan v. Unity Sav. Ass'n, 317 N.E.2d 39 (Ill. 1974). A portion of the following discussion on *Kerrigan* is excerpted from one of the author's treatises on business organizations. *See generally* MURDOCK & REED, *supra* note 5, §§ 14.11, 14.13, 14:2.

customers.[61] The plaintiff argued that by engaging in the mortgage insurance business, the defendants were claiming a corporate opportunity that belonged to Unity for their own benefit. The defendants asserted that they could not be held liable for breaching their fiduciary duty because Unity lacked the power to write such insurance; consequently, there was no corporate opportunity for them to appropriate.[62]

The court disagreed and interpreted Illinois law to permit Unity to engage in the insurance business.[63] Critically, the *Kerrigan* court held that the defendants failed to present the insurance opportunity to Unity before engaging in it.[64]

The Illinois Supreme Court reasoned that despite the existing legal, financial, or other reasons against Unity becoming an insurance broker:

> [I]f the doctrine of business opportunity is to possess any vitality, the corporation or association must be given the opportunity to decide, upon full disclosure of the pertinent facts, whether it wishes to enter into a business that is reasonably incident to its present or prospective operations.
>
> . . .
>
> If directors fail to make such a disclosure and to tender the opportunity, the prophylactic purpose of the rule imposing a fiduciary obligation requires that the directors be foreclosed from exploiting that opportunity on their own behalf.[65]

The court further stated that "[s]ince the individual defendants, as directors, admittedly controlled Unity, the requisite disclosure and tender would necessarily have had to be made to Unity's shareholders."[66]

The court observed that "[o]ur decisions have long applied the overriding rule that directors are not to be placed in a position where their own individual interests might interfere with the performance of their duties to their corporation."[67] The court did acknowledge that "if a corporation has been informed by a director of a business opportunity, which it declines [by action of an independent body], the director may then be free to pursue the opportunity himself."[68]

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61. *Kerrigan*, 317 N.E.2d at 41.
62. *Id.* at 42.
63. *Id.* at 43 (citing Goodman v. Perpetual Bldg. Ass'n, 320 F.Supp. 20 (D.D.C. 1970)).
64. *Id.*
65. *Id.* at 43–44.
66. *Id.* at 43.
67. *Kerrigan*, 317 N.E.2d at 44 (first citing Gilman, Clinton & Springfield R.R. Co. v. Kelly, 77 Ill. 426 (1875); and then citing Farwell v. Pyle-Nat'l Elec. Headlight Co., 124 N.E. 449 (Ill. 1919)).
68. *Id.* at 43 (citing Diedrick v. Helm, 14 N.W.2d 913 (Minn. 1944)).

Kerrigan provided yet another example of the Illinois Supreme Court holding corporate fiduciaries to the highest standards, subjecting conflicting transactions to the closest scrutiny, and ensuring they are conducted with the utmost fairness. Although *Kerrigan* referred to the defendants as having a conflicting interest, there is a basic difference between a conflict of interest and a corporate opportunity.[69] In a conflict of interest scenario, the directors are entering into a transaction that either they should have avoided or was disadvantageous to the corporation.[70] Thus, there is a transaction entered into by the corporation. On the other hand, in a corporate opportunity scenario, the evil is that the corporation is denied a transaction that would have been advantageous.[71]

In *Mullaney, Wells & Co. v. Savage*, the Illinois Supreme Court upheld their decision in *Kerrigan* requiring a fiduciary to inform the corporation of a corporate opportunity when it arises.[72] The plaintiff Mullaney, Wells & Co. (MWC), an investment banking firm, brought suit against defendant Barnard A. Savage, Jr. for seizing an investment opportunity while he was an employee of MWC.[73] In 1957, Savage drafted and signed an employment agreement with MWC "to undertake the establishment and direction of MWC's industrial financing division" which entitled Savage to a base salary of $6,000 plus 50 percent of MWC's net profits from the division.[74] Savage's responsibilities in controlling the division included "the origination and negotiation of private placements and the underwriting of corporate securities in the industrial field."[75] Despite directing a division of the company, Savage was not a director or officer of MWC.[76] The transaction at issue involved Savage and his associate's stock investment in Blossman Hydratane Gas, Inc. (Blossman), a corporation engaged in the liquid petroleum gas business.[77] Savage first learned of Blossman in January from an investment consultant friend, who suggested the company's stock was undervalued.[78] Savage subsequently calculated Blossman's stock market value using MWC's investment

69. *See generally* MURDOCK & REED, *supra* note 5, § 14:1.
70. *See generally id.* § 14:7.
71. *See generally id.* § 14.11.
72. 402 N.E.2d 574, 582 (Ill. 1980). A portion of the following discussion on *Mullaney* is excerpted from one of the author's treatises on business organizations. MURDOCK & REED, *supra* note 5, §§ 14.11, 14.12, 14.14, 14.26.
73. *Mullaney*, 402 N.E.2d at 575.
74. *Id.* at 575–76.
75. *Id.* at 576.
76. *Id.* (noting that the scope of Savage's duties outlined in the contract are in dispute between the parties).
77. *Id.*
78. *Id.*

manual and teletype service and discovered the stock had a value of $8.25 per share.[79]

On February 5, Savage wrote to Blossman's president, using MWC stationery, stating that an MWC client was interested in making a substantial investment in Blossman.[80] Blossman's president replied five days later, stating that he was interested but would have to demand a price per share three times the current market value.[81]

During the next several months, Savage and Blossman's president continued their discussions and even had a number of face-to-face meetings.[82] Also present at these meetings was Williams, whom Savage "decided to bring into the negotiations because of Williams' many financial contacts."[83] Despite having financial contacts, it became apparent to Savage that Blossman's large existing indebtedness made expansion of its operations through debt financing unfeasible unless investors were also offered options to purchase Blossman stock at its market price. Blossman however, "was not prepared to offer options to purchase stock at any price less than $9 or $10 per share."[84] Savage did not report the financial situation or possible offer to MWC.[85]

In April 1960, Williams proposed that Blossman and Savage should "become 'partners' in the Blossman company by purchasing stock in it."[86] The parties agreed that Blossman would give Savage and Williams "an option to purchase stock in the company."[87] Notably, Savage informed Blossman "that this investment would be for the individual benefit of [himself] and Williams, not" MWC.[88] Moreover, Savage ceased using MWC's letterhead in his correspondence to Blossman and asked Blossman not to send anything to MWC.[89]

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79. *Id.* ("[Savage] ascertained the current market value of the stock, which was being traded at about 3 3/4 points per share.").

80. *Id.* at 576–77 (recognizing that at this point, Savage was acting as the agent of MWC).

81. *Id.* at 577.

82. *Id.* at 577–78.

83. *Id.* at 578 ("Williams and Savage had become acquainted in the course of business dealings between Williams and the plaintiff on which Savage had worked.").

84. *Id.*

85. *Id.* ("There is no evidence that Savage reported this situation either to [MWC] or to the officers of the plaintiff.").

86. *Id.* at 576.

87. *Id.* (emphasizing that the purchase would be at the then market price).

88. *Id.* at 578.

89. *Id.* ("[D]uring the summer of 1960 Savage, who had been corresponding with Blossman on [MWC]'s letterhead, began preparing and typing his letters to Blossman away from [MWC]'s office, using the letterhead of a different concern, Inland Block Company, in which he and Williams held an interest.").

Blossman, Savage, and Williams executed the stock option contract on November 7, 1960. The agreement gave Savage and Williams an option to buy 271,000 shares of common stock at $8 per share. Savage and Williams paid no consideration, and the option remained open until April 1, 1961. In November 1960, Blossman's stock price was about $3 per share. The stock subject to the option represented approximately 51 percent of the total stock outstanding.[90]

In February 1961, Blossman's stock rose from $3 to $10 per share due to "some favorable publicity that the company had received in a financial publication."[91] Blossman's president "asked Savage and Williams to release him from the option contract, but [] they refused to do so."[92] One month later, MWC discovered Savage's option contract through telephone calls with a director of Blossman.[93] MWC "decided to fire Savage," but Savage resigned before they could do so.[94]

In 1963, MWC brought suit against Savage for allegedly breaching his fiduciary duty in seizing the Blossman transaction for his own personal benefit.[95] The trial court ruled that Savage did not owe MWC a fiduciary duty but a contractual duty pursuant to their employment agreement.[96] Thus, since the trial court found that the Blossman transaction was outside the scope of the employment agreement, the trial court ruled in favor of Savage.[97]

The Appellate Court of Illinois for the First District affirmed but noted that even though Savage was not a director or officer of MWC, he stood in an agency relationship with MWC and, therefore, was subjected to

90. *See id.* (explaining the terms of the stock options which included the price of $8 per share while the stocks were traded at $3 a share, the amount of 271,000 stocks, the lack of consideration under April and that, and the "stock subject to the option amounted to about 5.1% of the total stock then outstanding").

91. *Id.*

92. *Id.* at 579.

93. *See Mullaney*, 402 N.E.2d at 579 ("[MWC] first heard about the option contract on March 28 through telephone calls made to Charles M. Miller, a vice-president of [MWC], by a director of the Blossman company and by Blossman.").

94. *See id.* ("Miller confronted Savage with his knowledge of the option . . . . Savage cleaned out his desk and departed, taking with him files on the Blossman matter. He left behind a letter of resignation . . . .").

95. *See id.* at 575 ("[The plaintiff sued Savage, Williams, and Glen Ellyn Corporation] in connection with the disposition of stock which had been acquired through an alleged violation of fiduciary duties by the defendant Savage, who was an employee of the plaintiff at the time.").

96. Mullaney, Wells & Co. v. Savage, 383 N.E.2d 1270, 1281 (Ill. App. 1st Dist. 1978), *rev'd*, 402 N.E.2d 574 (Ill. 1980).

97. *Id.* (finding that Savage owed no fiduciary duty to MWC).

fiduciary obligations.[98] Nevertheless, the appellate court held that Savage did not breach his fiduciary duty to MWC because Savage's fiduciary duties were limited by the scope of the duties enumerated in the employment agreement.[99] That is, the appellate court believed that Savage's duties arose only when Savage acted, "for a fee, as a broker between businesses in need of funds and potential investors" ("three-party transactions") and that they did not arise in direct investments ("two-party transactions").[100] Since the appellate court found that the Blossman transaction was a two-party transaction, it affirmed the trial court's ruling in favor of Savage.[101]

The Illinois Supreme Court disagreed. First, it critiqued the appellate court's reasoning behind its conclusion that the Blossman transaction did not fall within the scope of Savage's employment agreement.[102] It noted that the employment agreement entitled Savage to 50 percent of MWC's net profits—not brokerage fees.[103]

Moreover, the court suggested that the distinction between the two types of transactions was irrelevant. It reasoned that even if Savage had no contractual duty to affirmatively seek out two-party investment transactions on behalf of MWC and that he engaged the Blossman transaction with the utmost good faith, he still breached his fiduciary duty because he failed to present the Blossman opportunity to MWC.[104] It stated:

> It does not follow . . . that Savage, while still remaining as an employee of the plaintiff, could then, in the appellate court's words, "begin to act on his own." To accord Savage the option of substituting himself as the investing party without the consent of the plaintiff is to place him in a

98. *Mullaney*, 402 N.E.2d at 580 ("The appellate court did proceed on the assumption, nevertheless, that the plaintiff and Savage stood in the relationship of principal and agent, and that Savage was subject to fiduciary obligations with respect to the subject matter of his agency.").

99. *See id.* ("Since the Blossman transaction did not involve a brokerage fee, it was not within the scope of his contractual duties.").

100. *Id.* (quoting Mullaney, Wells, & Co. v. Savage, 383 N.E.2d 1270, 1282 (Ill. App. Ct. 1978)).

101. *Id.* ("Savage's contractual duties were limited to [three-party transactions] since in the court's view the only compensation above his base pay to which he was entitled was a share of a brokerage fees.").

102. *See id.* at 581 ("To accord Savage the option of substituting himself as the investing party without the consent of the plaintiff is to place him in a position where his personal interests will conflict with his duties to his principal.").

103. *Id.* at 578, 581 ("The term used in the contract is not net fees but net profits. . . . '[A]fter deducting the salary taken by Savage [it] will be divided on a 50-50 basis between Mullaney Wells and Co. and Barnard A. Savage, Jr.'" (quoting employment contract)).

104. *Id.* at 581.

> position where his personal interests will conflict with his duties to his principal.[105]

It continued, emphasizing the importance of the fiduciary's obligation to present the opportunity to the corporation:

> 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.[106]

The Illinois Supreme Court relied on the *Kerrigan* decision, quoting the significance of the disclosure rule to the fiduciary duty of loyalty: "If the directors fail to make such a disclosure and to tender the opportunity, the prophylactic purpose of the rule imposing a fiduciary obligation requires that the directors be foreclosed from exploiting that opportunity on their own behalf."[107]

The court noted that since Savage never mentioned the Blossman transaction to MWC, he breached his fiduciary duty by seizing the Blossman transaction for his own benefit without presenting the transaction to MWC or receiving MWC's consent.[108]

The *Mullaney* case exemplifies Illinois courts' pragmatic approach to holding fiduciaries to high standards of conduct. It rejected Savage's technical arguments concerning the fiduciary duties only arising within the scope of his employment agreement. Rather, it took a holistic approach and concluded that once one becomes a fiduciary, he or she is obligated to act with the utmost loyalty in all circumstances concerning the principal. That is, fiduciaries cannot act on their own for their own benefit in an opportunity that falls within the purview of the principal without the principal's permission. Savage's failure to mention to MWC the Blossman transaction is the essence of the *Mullaney* decision to reverse the appellate court's decision.

3. The Duty of Loyalty: Competing with the Entity

The Illinois Supreme Court again took an expansive approach to fiduciary duties in *Vendo Co. v. Stoner*, when it upheld a judgment over seven million dollars against Defendant Stoner for assisting a competing

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105. *Id.* (quoting Mullaney, Wells, & Co. v. Savage, 383 N.E.2d 1270, 1283 (Ill. App. Ct. 1978)).

106. *Id.* at 581–82 (quoting *Mullaney*, 383 N.E.2d at 1283).

107. *Id.* at 582 (quoting Kerrigan v. Unity Sav. Ass'n, 317 N.E.2d 39, 43 (Ill. 1974)).

108. *Mullaney*, 402 N.E.2d at 582 ("And even at that late date it was not Savage who disclosed the facts; he merely confirmed information that had just been disclosed by an outside person associated with the Blossman company. We thus conclude that the defendant Savage did breach his fiduciary obligations to the plaintiff.").

corporation while he served on the board of directors of Plaintiff Vendo Company.[109]

Stoner contended that he was not liable because Vendo "did not take advantage of [his] talents and gave him the role of a mere figurehead."[110] The court rejected this argument, stating that Plaintiff's failure to make the best use of Stoner's abilities, whether prudently or imprudently, "certainly d[oes] not release Stoner from his duty not to assume a position which would be adverse to that of his employer."[111] By assisting a competitor of Vendo, the court held that Stoner breached his fiduciary duty because he had a "foot in each camp . . . creat[ing] the possibility of his taking an unfair advantage of [Vendo]."[112] In addition to the seven million dollar judgment, the court upheld the $170,835 judgment against Stoner individually that represented his salary during the time he was breaching his fiduciary duty.[113] Stoner argued that this award constituted an improper double recovery, but the court rejected this argument, stating that "[i]t borders upon the frivolous for defendants to claim a right to retain the compensation which the judgment restored to plaintiff."[114]

The court's reasoning is clear: limiting Plaintiff's recovery would allow Stoner to violate his fiduciary duty without incurring any risk.[115] If the court entertained and accepted Stoner's arguments, then fiduciaries would have little disincentive to cheat. The *Vendo* case, which dealt with the third prong of the duty of loyalty owed to the entity, is significant for a couple of reasons. Besides serving on the board of directors, Stoner also had a consulting contract that included a covenant not to compete for five years.[116] However, in determining Stoner's liability, the court did not rely upon the covenant not to compete but rather focused on his fiduciary duty as a director. The court indicated that, even if the covenant

109. *See* Vendo Co. v. Stoner, 321 N.E.2d 1, 15 (Ill. 1974). A portion of the following discussion on *Vendo* is excerpted from one of the author's treatise on business organizations. MURDOCK & REED, *supra* note 5, §§ 14.2, 14.14, 14.16, 14.20, 14.26.

110. *Vendo Co*., 321 N.E.2d at 9.

111. *Id.*

112. *Id.*

113. *Id.* at 14–15.

114. *Id.* at 14.

115. *See id.* at 10 (explaining the plaintiff's recovery was not limited to profits from the venture and such "limitation on a plaintiff's recovery . . . would mean that a fiduciary could violate his duty without incurring any risk." (citing RESTATEMENT (SECOND) OF AGENCY § 399, 401, 407 (AM. L. INST. 1958)).

116. *See id.* at 5. Because the covenant not to compete was given in connection with the sale of the business, the five year period was not unusual, even though covenants not to compete for two years or less are suspicious when they cover someone who was a mere employee and not a selling shareholder. It would be unfair to the buyer to pay the seller for the going concern value of the business and then have the seller use such funds thereafter to compete with the buyer, thereby destroying part of the value that the buyer thought that it had purchased.

not to compete were invalid, that would not affect Stoner's liability as a director for the breach of his fiduciary duty.[117]

The case is also significant because it determined that a director who is breaching his fiduciary duties is not entitled to compensation during the period in which he is an unfaithful fiduciary. The court rejected Stoner's argument that the forfeiture of compensation, when coupled with the damages arising from the breach of fiduciary duty, constituted a double recovery.

Both *Kerrigan* and *Vendo* were authored by Justice Schaefer, who has been recognized as an outstanding jurist.[118] If Hubert Humphrey had been elected president in 1968, both Justice Schaefer and Judge Trainor of the California Supreme Court very likely would have been appointed as United States Supreme Court justices.

The *Vendo Co.* decision is yet another example of the Illinois Supreme Court holding wrongdoers accountable by imposing strict fiduciary standards.

4. Illinois Historical Approach to Fiduciary Duties Owed to Members

The Illinois courts' high standard toward fiduciary duties was not constricted only to scenarios dealing with fiduciaries and entities.[119] The Illinois Supreme Court has also held that organization members owe fiduciary duties to other members.[120] For example, in *Tilley v. Shippee*, the Illinois Supreme Court held that two shareholders owed mutual duties and obligations similar to those of partners because "[t]heir decision to form and operate as a corporation rather than a partnership does not change the fact that they were embarking on a joint enterprise . . . ."[121]

117. *See Vendo Co.*, 321 N.E.2d at 9 ("Quite apart from any liability which may be predicated upon a breach of the covenants against competition contained in the sales agreement and employment contract, it is clear that Stoner violated his fiduciary duties to plaintiff during the period when he was a director and officer of plaintiff.").

118. *See* ILLINOIS SUPREME COURT, MEMORIAL SERVICE FOR JUSTICE WALTER SCHAEFER (Sept. 9, 1986), https://www.illinoiscourthistory.org/resources/f3a12416-6c23-44df-8955-4e2451 7956eb/memorial_schaefer.pdf [https://perma.cc/8MFV-LU56].

119. *See* Charles W. Murdock, *Squeeze-outs, Freeze-outs, and Discounts: Why Is Illinois in the Minority in Protecting Shareholder Interests*, 35 LOY. U. CHI. L.J. 737, 747–51 (2004) (discussing the history of the Illinois Supreme Court and its relationship to fiduciary duties); *see also* MURDOCK & REED, *supra* note 5, § 1.12 (providing an additional broad overview of Illinois' jurisprudence).

120. *See generally* Murdock, *supra* note 119, at 747–51; *see also* Winger v. Chicago City Bank & Tr. Co., 67 N.E.2d 265, 275–276 (Ill. 1946) (discussing the duties members of organizations owe to other members).

121. Tilley v. Shippee, 147 N.E.2d 347, 352 (Ill. 1958); *see also* Murdock, *supra* note 119, at 748 (discussing the significance of the ruling in *Tilley*); Thomas J. Bamonte, *Expanding the Fiduciary Duties of Close Corporation Shareholders: The Dilemma Facing Illinois Corporate Law*, 15

In *Tilley*, the two parties acquired a business including its real estate, name, and additional assets for $60,000, along with its non-real estate assets for around $3,000.[122] The deal was finalized at a bank that provided the defendant with a $30,000 secured loan against the property, along with $10,000 from the plaintiff and $20,000 from the defendant.[123] Upon incorporating the business, the plaintiff and defendant were allotted one-third and two-thirds of the shares, respectively, and it was recorded that the defendant took title, and leased the real estate to the newly formed corporation with rental payments going toward the mortgage.[124] Nevertheless, the venture failed, leading the defendant to terminate the lease and claim ownership of all real estate.[125] Upon discovering this claim, the plaintiff sought to impose a constructive trust on the basis that he owned a one-third interest in the real estate.[126]

The *Tilley* court's analysis explained not only was it implausible for the plaintiff to have invested $10,000 for a mere one-third stake in "business" assets worth $3,000, but also that the corporation's rent payments—which the plaintiff had one-third ownership—contributed toward settling the mortgage debt.[127] Accordingly, the Supreme Court affirmed the imposition of establish a constructive trust, mandating that the plaintiff be responsible for one-third of the mortgage obligation.[128]

In *Illinois Rockford Corp. v. Kulp*,[129] two shareholders each holding half of the company, sought to sell their stock. One took the lead and negotiated a sale, telling the other that each would receive $25,000.[130] However, the defendant had a side agreement whereby he would receive an additional $225,000.[131] The Supreme Court stated that "Kulp stood in a fiduciary relationship to Leeb [the other shareholder] and Rockford, that he failed to deal openly and honestly with Leeb, and that, in fact, his conduct was fraudulent."[132]

Like the *Shlensky* decision discussed above, the Illinois Supreme Court took a holistic approach to ensure those in a fiduciary position act fairly.

N. ILL. UNIV. L. REV. 257, 261–62 (discussing further the expansion of fiduciary duties under Illinois courts in *Hagshenas v. Gaylord*).

122. *Tilley*, 147 N.E.2d at 349.
123. *Id.* at 349–50.
124. *Id.* at 350.
125. *Id.*
126. *Id.*
127. *Id.* at 351.
128. *Tilley*, 147 N.E.2d at 352.
129. Illinois Rockford Corp. v. Kulp, 242 N.E.2d 228, 228–29 (Ill. 1968).
130. *Id.* at 231.
131. *Id.* at 234.
132. *Id.* at 233.

Numerous Illinois appellate court cases have followed the Supreme Court in determining that shareholders who exercise control have a fiduciary duty to the other shareholders.[133]

In amending the Illinois Limited Liability Company Act in 1998 the state legislature followed the approach of the Illinois courts relating to the fiduciary duties that members owed to other members by making the enumerated duties nonexclusive.[134] The Illinois legislature adopted many of the 1996 Uniform Limited Liability Company Act provisions, but not those provisions that made the enumerated duties exclusive.[135]

The Uniform Act provided that "[t]he only fiduciary duties a member owes to a member-managed company and its other members are the duty of loyalty and the duty of care imposed by subsections (b) and (c)."[136] This clause does not cover fiduciary duties members owe each other because the fiduciary duties of loyalty set forth in the Uniform Act are owed to the entity, not other members.[137] In fact, one court in Tennessee, which followed the exclusively enumerated fiduciary duty approach, held that it must dismiss the breach of fiduciary duty claim brought against another member because the statute does not provide such cause of action.[138]

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133. *See* Zokoych v. Spalding, 344 N.E.2d 805, 815 (Ill. App. Ct. 1976); Jaffe Com. Fin. Co. v. Harris, 456 N.E.2d 224, 230 (Ill. App. Ct. 1983); Battaglia v. Battaglia, 596 N.E.2d 712, 719 (Ill. App. 1992). For a discussion and analysis of additional Illinois cases demonstrating the fiduciary duties shareholders owe to one another, see MURDOCK & REED, *supra* note 5, § 10:2.

134. 805 ILL. COMP. STAT. 180 (1998).

135. *Compare* 805 ILL. COMP. STAT. 180/15-3, *with* UNIF. LTD. LIAB. CO. ACT § 409(a) (1996) (UNIF. L. COMM'N, amended 2013).

136. UNIF. LTD. LIAB. CO. ACT § 409(a) (1996). The Uniform Act was modified in 2006 to eliminate the exclusivity mandate. (UNIF. L. COMM'N, amended 2013).

137. Loyalty set forth in the Uniform Act provides:

> (b) A member's duty of loyalty to a member-managed company and its other members includes the following:
>
> > (1) to account to the company and to hold as trustee for it any property, profit, or benefit derived by the member in the conduct or winding up of the company's business or derived from a use by the member of the company's property, including the appropriation of a company's opportunity;
> >
> > (2) to act fairly when a member deals with the company in the conduct or winding up of the company's business as or on behalf of a party having an interest adverse to the company; and
> >
> > (3) to refrain from competing with the company in the conduct of the company's business before the dissolution of the company.

805 ILL. COMP. STAT. 180/15-3(b).

138. *See* McGee v. Best, 106 S.W.3d 48, 64 (Tenn. Ct. App. 2002) ("The statute in question defines the fiduciary duty of members of a member-managed LLC as one owing to the LLC, not to individual members. We cannot contravene the intent of the Legislature.").

On the other hand, the Illinois Limited Liability Company Act makes clear that the enumerated duties are not exclusive.[139] This approach allows courts to fully consider fairness by enforcing duties, such as the obligation of good faith and fair dealing as fiduciary obligations.[140] Illinois has been aptly characterized as a "shareholder" state because of its non-exclusive approach to enumerated fiduciary duties.[141]

5. The Related Concept of Oppressive Conduct

In addition to members' fiduciary duties owed to other members, there is the similar concept of oppression. As referenced above, the Illinois Business Corporation Act of 1933 was the first state statute to recognize oppression as a ground for corporate dissolution.[142] It provided that courts have the power to liquidate a corporation's assets and business in an action by a shareholder who establishes that the corporation's directors or controlling members engaged in acts that are illegal, oppressive, or fraudulent.[143] Even though many courts have viewed this power of corporate dissolution to be drastic,[144] the Illinois Supreme Court, in *Central Standard Life Insurance Co. v. Davis*, broadly interpreted "oppressive" and rejected the defendants' argument that the term is synonymous with "illegal" and "fraudulent."[145] With respect to what constitutes oppressive conduct, the Supreme Court cited a 1951 Scottish case in which the court defined oppressive conduct as "an abuse of power by some person or persons controlling the corporation, resulting in injury to the rights of some parts of the members."[146]

The Illinois appellate court in *Gray v. Hall* determined that even normal business practices can constitute oppressive conduct, such as retaining earnings instead of paying dividends, if it is shown that such conduct

139. *See* 805 ILL. COMP. STAT. 180/15-3(a) (explaining general fiduciary duties a member owes to a member managed company and its other members, including, inter alia, the duty of care and loyalty).

140. *Id.* § 15-3(d) ("The implied contractual covenant of good faith and fair dealing applies to the operating agreement and members of a member-managed company in the same manner and to the same extent that it applies at law to other contracts and parties to the contracts.").

141. MURDOCK & REED, *supra* note 5, § 18:13 ("Even Illinois, generally viewed as a "shareholder" state . . . ."); *see also supra* notes 1–23 and accompanying text.

142. White v. Perkins, 189 S.E.2d 315, 319 (Va. 1972) ("The statutory recognition of this ground first occurred in Illinois in 1933." (citing Cent. Standard Life Ins. Co. v. Davis, 141 N.E.2d 45, 59 (Ill. 1957))).

143. *See* Cent. Standard Life Ins. Co. v. Davis, 141 N.E.2d 45, 50 (Ill. 1957).

144. *See* MURDOCK & REED, *supra* note 5, § 18:13 (stating that the net effect of dissolution, in many circumstances, basically results in a purchase of the complaining shareholder's shares by the defendant shareholder); *id.* ("The real reason that courts view dissolution as a drastic remedy is the concern that death of the entity leads to death of the enterprise.").

145. *Cent. Standard*, 141 N.E.2d at 50.

146. *Id.* at 50 (citing Elder v. Elder & Watson (1952), SC 49, 55 (Scot.)).

aimed to "freeze out" minority shareholders.[147] Illinois courts, interpreting the 1933 Business Corporation Act, took this liberal approach to oppression despite corporate dissolution being the sole remedy. And, accepting that corporate dissolution is a drastic remedy, such an approach indicates a protective view of minority shareholders.

When Illinois enacted the ILBCA, it added alternative remedies in section 12.55 for those challenging oppressive conduct in lieu of dissolution.[148] In *Schirmer v. Bear*, the Illinois Supreme Court noted that the availability of alternative, less drastic remedies by the Illinois legislature demonstrated that the conduct necessary to establish oppressive conduct under the new statute need not be as severe as that which would justify:

> Prior to the enactment of section 12.55, minority shareholders seeking redress were left without a remedy in those instances where the defendant's conduct, even though wrongful, did not justify dissolving the corporation. Section 12.55 was specifically enacted to correct this problem by increasing the remedies available to minority shareholders and by enlarging the discretionary authority of the circuit courts to award relief in situations which do not warrant dissolution but which do warrant some other, less severe remedy. Requiring plaintiffs to prove not only that the defendants engaged in misconduct but also that the misconduct was so extreme as to justify dissolution of the corporation defeats this legislative intent by severely curtailing the discretion invested in the circuit courts to order the alternative remedies. Therefore, we decline to adopt defendants' proposed construction of Section 12.55.[149]

Illinois courts have recognized that the same conduct may give rise to either a common-law breach of fiduciary duty by controlling shareholders or a statutory oppression claim.[150]

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147. Gray v. Hall, 295 N.E.2d 506, 509 (Ill. App. Ct. 1973) ("[T]he non-payment of dividends might indicate oppressive behavior where the corporation retains large amounts of earnings for no apparent reason except to 'freeze out' minority stockholders.").

148. 805 ILL. COMP. STAT. 5/12.55, 5/12.56 (setting forth shareholder remedies for public and non-public corporations when there is oppressive conduct). For further discussion of alternative remedies, see MURDOCK & REED, *supra* note 5, § 18.22 ("These were appointing a custodian, appointing a provisional director, or ordering the corporation to buy the shares of the petitioner. The corporation or other shareholders could also petition the court to purchase the plaintiff's shares, which the court could order if equitable.").

149. Schirmer v. Bear, 672 N.E.2d 1171, 1176 (Ill. 1996) (citing 805 ILL. COMP. STAT. 5/12.55, *amended by* 805 ILL. COMP. STAT. 5/12.56). *See also* MURDOCK & REED, *supra* note 5, § 18.21 (relied upon by the Illinois Supreme Court in *Schirmer*, explaining the alternative remedies to dissolution in Illinois before the 1995 amendments).

150. In 2017, the Appellate Court of Illinois, Fifth District, found that the same set of facts can essentially give rise to both a breach of fiduciary duty by controlling shareholders and to oppressive conduct by such shareholders, stating:

> As set forth above, although the circuit court found that the majority shareholders breached their fiduciary duties to the plaintiffs by failing to have annual meetings, and by issuing profit-sharing bonuses to the majority shareholders without board action, the

III. IS THERE NOW A COUNTERVAILING TREND?

Considering the above, it is surprising that not only has the Supreme Court of Illinois recently ruled against fiduciary duty principles in two separate cases,[151] but also an appellate court ruling was made that, while technically correct, may have weakened the effectiveness of ILBCA Section 12.56 and the concept of oppression as a means of protecting disadvantaged minority shareholders.[152] Two recent Supreme Court of Illinois decisions misrelied upon Delaware law, *Indeck Energy Servs. v. DePodesta* and *Walworth Investments-LG, LLC v. Mu Sigma, Inc.*, and while it is possible that both decisions could be limited to their facts—the misapplication of the law in the *Indeck Energy Services* case has already resulted in a federal court following this poorly reasoned decision.[153]

A. Indeck Energy Services, Inc. v. DePodesta

In *Indeck Energy Services, Inc., v. DePodesta*, the Illinois Supreme Court reversed an appellate decision and found the usurpation of a corporate opportunity—reinstating the trial court's finding for the defendants and introducing a hitherto unknown qualification of the corporate opportunity doctrine into Illinois law.[154] *Indeck* also apparently, relied on inapplicable Delaware case law in holding that the defendants did not breach their fiduciary duty of loyalty, because an "unsuccessful attempt to build the plants does not give rise to a claim of misappropriation of corporate opportunity."[155]

1. The Unconscionable Conduct of the *Indeck* Defendants

In *Indeck*, the conduct of the primary defendants, Christopher DePodesta and Karl Dahlstrom, was so egregious that it is hard to

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> circuit court also found that the very same conduct on the part of the majority shareholders constituted a basis for its finding of oppression under section 12.56 of the Act, and the circuit court elected to utilize the remedies set forth in the Act to provide redress to the plaintiffs for the conduct of the majority shareholders.

Bone v. Coyle Mech. Supply, Inc., 2017 IL App (5th) 150117-U, ¶ 64 (citing 805 ILL. COMP. STAT. 5/12.56). On appeal, the court considered only whether the evidence demonstrated oppressive conduct. *Id.*

151. *Compare* Indeck Energy Servs., Inc. v. DePodesta, 2021 IL 125733, 183 N.E.3d 746, *with* Walworth Invs.-LG, LLC v. Mu Sigma, Inc., 2022 IL 127177, 215 N.E.3d 843 (noting that both of these Supreme Court of Illinois cases recently ruled against fiduciary duty principles).

152. Staisz v. Resurrection Physicians Provider Grp., Inc., 2022 IL App (1st) 210316, ¶ 25, 209 N.E.3d 361, 367; *see also* 805 ILL. COMP. STAT. 5/12.56 (explaining the non-public corporation shareholder remedies that can be ordered by the Circuit Court if the directors are deadlocked).

153. *See generally Indeck*, 2021 IL 125733, 183 N.E.3d 746.

154. *Id.* ¶ 45, 183 N.E.3d at 746. A portion of the following discussion on *Kerrigan* is excerpted from one of the author's treatise on business organizations. MURDOCK & REED, *supra* note 5, §§ 14.11, 14.14, 14.21

155. *Indeck*, 2021 IL 125733, ¶ 48, 183 N.E.3d at 760; *see* discussion *infra* at notes 166–68.

understand why the Illinois Supreme Court would give them a pass—consequently, it is important to first understand the facts and parties involved in the case.

At Indeck Energy Services, Inc. (Indeck), DePodesta served as vice president of business development and Dahlstrom, director of business development. Before joining Indeck, Dahlstrom founded Halyard Energy Ventures, LLC (HEV), "a consulting, management, and administration firm that develops electrical power generation projects."[156] "DePodesta later became a member of HEV."[157]

Indeck specializes in developing and operating independent power projects fueled by both conventional and alternative sources.[158] In 2011, Indeck decided to develop a power plant project in a region of Texas known as the Electrical Reliability Council of Texas (ERCOT).[159] Lagowski, Indeck's president, directed DePodesta and Dahlstrom to analyze the project and make a recommendation on whether and where to develop it.[160] The two recommended a site in Wharton County, Texas, for development.[161] In August 2013, DePodesta and Dahlstrom were unhappy at Indeck and interviewed with Merced Capital Partners, L.P. (Merced), ultimately resigning that November.[162]

Merced, an investment adviser, is affiliated with its investment fund Merced Partners III, L.P. (Merced III), which, in turn owns Carson Bay Energy Holdings IV (Carson Bay).[163] Carson Bay owned two turbines which were ideal for the new ERCOT project.[164] A Mutual Confidentiality Agreement (MCA) that stated "The Parties wish to enter into discussions regarding the development by Indeck of simple cycle gas turbine projects in the [ERCOT] and an opportunity to be presented by the Company [Carson Bay] to Indeck"—DePodesta signed for Indeck.[165]

A few days after signing the MCA, Hendrick Vroege, who was in charge of the turbines and worked for both Carson Bay and Merced, had a call with only DePodesta and Dahlstrom representing Indeck.[166] Over

156. *Id.* ¶¶ 5–7, 183 N.E.3d at 749.

157. *Id.*

158. *Id.*

159. *Id.* ¶ 11, 183 N.E.3d at 750.

160. *Id.*

161. *Id.* ("Lagowski advised . . . they must speak with him before signing any contract on the Texas projects.").

162. *Indeck*, 2019 IL App (2d) 190043, ¶ 15, 165 N.E.3d 913, 919, *aff'd in part, rev'd in part*, 2021 IL 125733, 183 N.E.3d 746.

163. *Indeck*, 2021 IL 125733, ¶ 9, 183 N.E.3d at 750.

164. *Id.*

165. *Id.* ¶ 12, 183 N.E.3d at 750.

166. *Id.* ¶ 9, 183 N.E.3d at 750.

the next few months, DePodesta and Dahlstrom, while still working for Indeck, met with Vroege to discuss the project.

Nonetheless, DePodesta and Dahlstrom's actions did not align with Indeck's best interests. For instance, they told Vroege that "[Indeck] wanted a "free option" on the turbines Carson Bay sought to sell."[167] Lagowski testified that he never authorized DePodesta and Dahlstrom to make this offer and that it was unreasonable and a deal-killer.[168] Moreover, Defendants withheld from Indeck Vroege's offer to contribute the $60 million turbines "as equity in an Indeck project, in lieu of selling them."[169] Instead, DePodesta and Dahlstrom told Indeck that Carson Bay was offering a 30-to-60-day option to purchase the turbines for a substantial, 10 to 15 percent nonrefundable down payment. Indeck refused this position, and Dahlstrom reiterated to Vroege that Indeck was looking for the free option.[170]

This pattern of withholding material facts would persist into July 2013, with a failure to disclose Merced's interest in investing in extended, high-value development endeavors.[171] On June 13, 2013, "DePodesta e-mailed Dahlstrom an outline of capital startup requirements to start their own company to develop natural gas power generation projects."[172] "The following morning, Dahlstrom told [a subordinate] that she should look for a new job because 'he did not think Indeck was committed to development."[173] In July, Dahlstrom contacted Vroege to "catch up regarding the GE turbines."[174] The two met on July 22, 2013, and "the trial court found that Dahlstrom's ultimate goal in discussing the turbines was to gauge Carson Bay's interest in partnering with Defendants [HEV], not Indeck," to develop the power plants.[175]

By October 2013, a joint venture agreement was established between HEV (Dahlstrom's company) and Merced III to develop natural gas power plants in Texas, using the turbines owned by Carson Bay—essentially, the very prospect Lagowski assigned them to secure on behalf of Indeck.[176] Throughout the negotiation period for this deal, DePodesta and Dahlstrom employed resources from Indeck, including time, equipment, and materials, and an Indeck business plan, to put together the

167. *Id.* ¶ 15, 183 N.E.3d at 751.
168. *Id.*
169. *Id.*
170. *Id.* ¶ 15, 183 N.E.3d at 751.
171. *Id.* ¶ 19, 183 N.E.3d at 752.
172. *Id.* ¶ 16, 183 N.E.3d. at 751.
173. *Id.*
174. *Id.* ¶ 17, 183 N.E.3d at 751.
175. *Id.*
176. *Id.* ¶¶ 25–26, 183 N.E.3d at 753.

"Halyard Energy Power Development Strategy"—this is the opportunity that the two misappropriated.[177]

Pursuant to the joint venture agreement, DePodesta and Dahlstrom agreed not to inform Indeck about their negotiations and that they would leave Indeck and work exclusively in the new venture.[178] During the deal's negotiations, DePodesta and Dahlstrom used "Indeck's time, equipment, materials, and facilities" in forming the deal.[179] In fact, Dahlstrom admitted that he used Indeck's "Natural Gas Development Plan" as a baseline to start the HEV–Merced III deal.[180] Additionally, "Dahlstrom copied and removed from Indeck's premises thousands of documents and files, including business development documents related to the Wharton project."[181] "DePodesta also copied thousands of documents and files from Indeck's computers."[182]

In November 2013, DePodesta and Dahlstrom resigned from Indeck and executed the joint venture documents with Merced III.[183] "Both admitted they did not tell anyone at Indeck that they had signed the LOI with Merced III, that they intended to pursue an opportunity with a new LLC, that they intended to set up a new LLC with affiliates of EBF, or that they were going to be involved in developing peaking plants in ERCOT."[184]

2. The *Indeck* Litigation

Indeck sued DePodesta, Dahlstrom, and the associated entities, alleging breaches of contract, fiduciary duties, and the usurpation of a corporate opportunity. Indeck claimed that the defendants exploited proprietary information and opportunities that rightfully belonged to Indeck to their own advantage, specifically targeting the development of power generation projects within the ERCOT region which Indeck had initially pursued.[185] The *Indeck* Court cited a prior Illinois Supreme Court case which recognized that "[i]n a claim for usurpation of a corporate

177. *Indeck*, 2019 IL App (2d) 190043 ¶ 29, 165 N.E.3d 913, 921, *aff'd in part, rev'd in part*, 2021 IL 125733, 183 N.E.3d 746.

178. *Id.* ¶ 25, 183 N.E.3d at 753.

179. *Id.* ¶ 21, 183 N.E.3d at 752.

180. *Id.*

181. *Id.* ¶ 27, 183 N.E.3d at 753.

182. *Id.* ¶ 27, 183 N.E.3d at 753–54.

183. *Id.* ¶¶ 28–29, 183 N.E.3d at 754.

184. *Id.* ¶ 28, 183 N.E.3d at 754.

185. *Id.* ¶¶ 31–32, 183 N.E.3d at 754–56 ("[Count I] sought an injunction to enforce the [confidentiality] agreement and enjoin defendants from using and disclosing Indeck's confidential, proprietary, and trade secrets information. Counts II and III are not at issue before this court. In count IV, titled 'Disgorgement,' Indeck alleged that . . . defendants breached their [fiduciary] duties . . . .").

opportunity, the injury of which the plaintiff complains is the taking or seizing of a corporate opportunity by its fiduciary."[186]

While all three courts found that Defendants breached their fiduciary duties, there was disagreement as to whether there was usurpation of a corporate opportunity.[187]

The trial court held that Indeck had failed to prove that DePodesta and Dahlstrom stole any corporate opportunities from Indeck and cited one specific opportunity identified by Indeck that could not have been taken in 2013—the opportunity to buy two gas powered turbine generators—as the generators were still available for purchase at the time of trial.[188] In direct alignment with established Illinois jurisprudence on corporate opportunity, the appellate court countermanded this judgment, "concluding that the trial court erred in determining [Indeck] had not presented sufficient evidence to show usurpation."[189] The appellate court's rationale was that by forming the joint venture with Merced to develop, construct, and operate electric-power-generation projects in ERCOT—an activity identical to Indeck's plan—there was a duty to tender or disclose the opportunity to Indeck.[190] Additionally, the appellate court noted that under the corporate opportunity doctrine, consent should have been sought from Indeck to pursue such opportunity.[191]

The Illinois Supreme Court reversed the appellate court's decision and affirmed the trial court's ruling.[192] It held that in order to sustain a cause of action for usurpation of a corporate opportunity, the plaintiff must establish that it was injured by the seizure of a corporate opportunity.[193] Thus, it held that Indeck could not prevail on its claim for usurpation of a corporate opportunity because DePodesta and Dahlstrom's plan ultimately failed, implying that both the turbines and the funding opportunity with Merced were still available to Indeck.[194]

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186. *Id.* ¶ 47, 183 N.E.3d at 759 (citing *Mullaney, Wells & Co. v. Savage*, 402 N.E.2d 574, 578 (1980)) ("[I]t is a breach of fiduciary obligation for a person to seize for his own advantage a business opportunity which rightfully belongs to the corporation by which he is employed.").

187. *Id.* ¶¶ 35, 39, 52, 183 N.E.3d at 756, 758, 761.

188. *Id.* ¶ 34, 183 N.E.3d at 756.

189. *Id.* ¶ 39, 183 N.E.3d at 758.

190. *See generally id.*

191. *Id.* ¶ 41, 183 N.E.3d at 758 (quoting Indeck Energy Services v DePodesta, ¶ 70, 2019 IL App. (2nd) 190043, 165 N.E.3d 913, 931).

192. *See id.* ¶ 49, 183 N.E.3d at 761.

193. *See id.* ¶ 47, 183 N.E.3d at 759–60 ("Usurpation of a corporate opportunity is a distinct cause of action for breach of fiduciary duty that involves a particular type of injury: the taking or seizing of a corporate opportunity and the commensurate loss of that opportunity by the corporation.").

194. *See id.* ¶¶ 48–49, 52, 183 N.E.3d at 760–61 ("[B]ecause defendants' plans did not come to fruition, there were no wrongful gains made by defendants and no wrongful appropriation.").

In evaluating Indeck's claim regarding the funding opportunity, the Supreme Court rigidly interpreted Indeck's allegations, taking the assertion that the committed actions "foreclosed potential future project opportunities that Indeck could have developed with Merced Capital and Carson Bay," as well as "the ability to develop other projects in the ERCOT area with Merced Capital and/or its facilities" as their primary argument.[195] The Supreme Court interpreted these allegations as Indeck claiming Defendants "had appropriated for themselves the exclusive right to work with Merced on projects in the ERCOT area . . . ."[196] Therefore, since Defendants' plan failed and Indeck still had the opportunity to work with Merced at the time of trial, the Supreme Court did not find that the opportunity was seized.[197]

However, as stated above, the opportunity that Defendants appropriated was that which existed in 2013, which the Illinois Supreme Court found Indeck alleged adequately.[198] The only way this decision could be justified would be on the basis that Indeck sought the wrong remedy in requesting disgorgement and a constructive trust.[199] The *Indeck* court's reasoning represents a departure from its precedent because it failed to consider the duty that arises when fiduciaries are presented with an opportunity in which the corporation they serve has the capacity to engage. The *Kerrigan* decision provided that when fiduciaries are presented with a corporate opportunity, they must first (1) disclose the opportunity to the corporation, (2) tender the opportunity to the

195. *Id.* ¶ 49, 183 N.E.3d at 760.

196. *Id.*

197. *Id.* ¶¶ 47–48, 52 183 N.E.3d at 759–61.

198. According to the Illinois Supreme Court, plaintiff alleged the following:

> [D]efendants became aware of opportunities Indeck could pursue with Carson Bay, Merced/EBF, and Merced III, which it referred to as the "Carson Bay-Merced Opportunities" or "Opportunities." The complaint alleged that these "Opportunities" "contemplated establishing a continuing relationship between Indeck Energy and Carson Bay, its affiliates and its representatives to develop several simple cycle gas turbine projects in the ERCOT area of Texas. These opportunities also included an 'opportunity' that Carson Bay would present to Indeck Energy."

Id. ¶ 32, 183 N.E.3d at 755.

199. *Id.* ¶¶ 58–61, 183 N.E.3d at 762–63 (explaining that "the appropriate remedy for a breach of fiduciary duty lies within the equitable discretion of the court," and that the lower court was within its discretion to deny the remedy of disgorgement and refuse to impose a constructive trust). *See also* MURDOCK & REED, *supra* note 5, § 14:14 ("While the trial court and the majority declined to impose a constructive trust because future profits were speculative, this issue could have been avoided by simply imposing a constructive trust upon the stock of Halyard Energy Ventures, LLC (HEV), the vehicle defendants used to usurp the opportunity that they should have obtained for Indeck."); *id.* § 14:21 ("Had the trial court and the majority imposed a constructive trust on the stock of defendants' company, HEV, then any fees earned would have belonged to HEV and defendants, by having breached their fiduciary duties to the now owner of HEV, could have been subject to forfeiture, thereby extracting the benefits of their breach from the defendants.").

corporation, and (3) if the corporation does not wish to engage in the opportunity, obtain the corporation's consent.[200] The *Kerrigan* court implemented this rule to prevent the situation that occurred in *Indeck*.

Fiduciaries are required to observe the "utmost fidelity" in their dealings which impact the corporation that they control, which is why the court in *Kerrigan* held that the defendants breached their fiduciary duty of loyalty by seizing an opportunity that they thought the corporation they served could not legally pursue.[201] The *Indeck* court failed to consider the *Kerrigan* court's purpose behind its decision and consequently let DePodesta and Dahlstrom's misappropriation and deceit go unscathed.[202]

3. The Inapplicability of the Delaware and Other Authority Relied Upon By The Illinois Supreme Court

As stated above, the *Indeck* court did not cite any Illinois case law but instead cited two Delaware cases to support its rule of law that "[d]efendants' unsuccessful attempt to build the plants does not give rise to a claim of misappropriation of corporate opportunity."[203] The two Delaware cases cited in the majority opinion were *McGowan v. Ferro*,[204] and *Carlson v. Hallinan*,[205] neither of which were appropriate authority for the decision by the Illinois Supreme Court in the *Indeck* case.

In *McGowan,* while the Chancery Court did state "[t]he pursuit of this opportunity was not successful. It does not, therefore, give rise to a claim for misappropriation of corporate opportunity."[206] However, the Delaware chancellor previously had observed that "[t]he director defendants, on behalf of Empress, did consider an acquisition of the Flamingo Hilton, but decided to discontinue the efforts to acquire that property at a

200. Kerrigan v. Unity Sav. Ass'n, 317 N.E.2d 39, 43–44 (Ill. 1974).

201. *Id.* at 45; *see* Klein v. Indep. Brewing Ass'n, 83 N.E. 434, 440 (Ill. 1907) ("The rule is the same that applies to all persons acting in any fiduciary capacity that requires the utmost fidelity to the interests of the cestui que trust." (quoting Gilman v. Kelly, 77 Ill. 426, 434 (1875))).

202. *Compare Kerrigan*, 317 N.E.2d at 43 ("But if the doctrine of business opportunity is to possess any vitality, the corporation or association must be given the opportunity to decide, upon full disclosure of the pertinent facts, whether it wishes to enter into a business that is reasonably incident to its present or prospective operations."), *with Indeck*, 2021 IL 125733, ¶ 48, 183 N.E.3d at 760 (finding the corporate usurpation claim was insufficient "because the defendants' plans did not come to fruition.").

203. *Indeck*, 2021 IL 125733, ¶ 48, 183 N.E.3d at 760.

204. McGowan v. Ferro, 859 A.2d 1012, 1038 (Del. Ch. 2004) ("The pursuit of this opportunity was not successful. It does not, therefore, give rise to a claim for misappropriation of corporate opportunity.").

205. Carlson v. Hallinan, 925 A.2d 506, 520 (Del. Ch. 2006) ("[W]hether Axcess successfully exploited the opportunity may be relevant in determining whether CR could have exploited it or if there even was an opportunity to exploit.").

206. *McGowan*, 859 A.2d at 1038.

September 2, 1999 board meeting."[207] Again, after referring to the pursuit of the opportunity not being successful, the court went on "[m]oreover, once the Empress board had rejected a corporate opportunity such as the Flamingo Hilton, its fiduciaries generally could pursue that opportunity in their own interest."[208]

Contrariwise, in *Indeck*, the defendants, even though it was in the scope of the duties assigned to them, never brought the opportunity to partner with Merced Capital and Carson Bay to the attention of Indeck; rather, they distorted Indeck's interest in Merced Capital and Carson Bay and appropriated the opportunity for themselves.

The Delaware decision in *Carlson* is even more unsound as a basis for, in effect, turning the law of corporate opportunity upside down. The case dealt with defendants' post-trial motion to supplement the record by introducing tax record evidence. The Delaware Chancellor stated: "The disputed evidence is not without some probative value. An element of the claim of usurpation of a corporate opportunity is that the corporation be financially able to exploit the opportunity. *Further, such a claim will not lie if the alleged opportunity ultimately proved unsuccessful*."[209]

The italicized language was, in effect, a bare-bones statement with no analysis or indication of its applicability except for the citation to *McGowan* above. Furthermore, the Delaware Chancellor later determined: "Because the corporate opportunity framework is not the appropriate framework through which to review the Director Defendants' actions, it is not necessary to address their alternative defense to the usurpation of a corporate opportunity claim based on *Thorpe v. CERBCO, Inc.*"[210]

Consequently, these Delaware cases by the Delaware Chancellor were indeed a slim reed from which to hang such a fundamental change in Illinois law. The majority opinion in *Indeck* also referenced a law review article analyzing the corporate opportunity doctrine as follows:

> 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 . . . ; (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

207. *Id.*
208. *Id.* at 1039.
209. *Carlson*, 925 A.2d at 520 (emphasis added).
210. *Id.* at 538 n.216.

> permanently shut out; and (3) the fiduciary diverts the deal to himself, whether before or after his resignation.[211]

With respect to the second aspect, this may be the rarest of cases in which *almost* the same opportunity may have been available to both plaintiff and defendant at the same time. It is "almost" because, while initially, both plaintiff and defendant could have had a joint venture with Merced, they both could not have used the Carson Bay turbines at the same time.

It may be that the majority in *Indeck* was influenced by the plaintiff's pleadings and relief sought, namely, that plaintiff apparently never sought a joint venture with Merced nor sought to impose a constructive trust upon DePodesta and Dahlstrom, and HEV, the vehicle they used to appropriate the opportunity. The decision would have been understandable had the determination been that plaintiff either was estopped from challenging the opportunity or had waived the opportunity. But that is not how the majority framed the decision.

Unfathomable.

4. Problems Arising From The Illinois Supreme Court's Failure To Understand What Was The Opportunity Usurped By Defendants

As stated previously, the majority cited an extensive law review article but failed to realize its significance. The author pointed out that there are three tests in determining whether or not there is a corporate opportunity: (1) the interest-or-expectancy test, (2) the fairness test, and (3) the line-of-business and/or asset-misappropriation test reflected in *Kerrigan*.[212] The author opined that the first two tests "are less draconian than the "line-of-business" and "asset-misappropriation" tests and that "[W]hatever 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."[213] He then concluded: "By contrast, the 'line-of-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."[214]

211. *Indeck*, 2021 IL 125733, ¶ 47, 183 N.E.3d at 760 (quoting William Lynch Schaller, *Corporate Opportunities and Corporate Competition in Illinois: A Comparative Discussion of Fiduciary Duties*, 46 J. MARSHALL L. REV. 1, 18 (2012)).

212. William Lynch Schaller, *Corporate Opportunities and Corporate Competition in Illinois: A Comparative Discussion of Fiduciary Duties*, 46 J. MARSHALL L. REV. 1, 23 (2012).

213. *Id.* at 23–24 (referencing Vendo Co. v. Stoner, 321 N.E.2d 1, 10 (Ill. 1974), Mullaney, Wells & Co. v. Savage, 402 N.E.2d 574, 582 (Ill. 1980), and Dowd & Dowd, Ltd. v. Gleason, 693 N.E.2d 358, 366-67 (Ill. 1998)).

214. *Id.*

The *Indeck* court noted that if DePodesta and Dahlstrom's venture had been successful, then the outcome may have been different.[215]

What the court failed to realize, however, was the significance of timing. Business plans take time to unfold. In fact, it took DePodesta and Dahlstrom about six months just to complete the negotiation and contractual phase of their deal, even though they had Indeck's plan as a baseline.[216] Thus, the Illinois Supreme Court's reliance on the availability of the gas turbines at the time of trial was misplaced. It should have focused on the time Indeck lost due to the defendants' stealing of information, lying to both Indeck and Merced/Carson Bay, negotiating a deal for themselves, and doing all of this while working for Indeck.

The Illinois Supreme Court also suggests an incongruous result. If usurping the "opportunity" had been successful, Defendants would have been liable. However, since their venture was not successful, they were not liable for usurping the opportunity, but ultimately were still able to keep the $2.5 million in fees that they had "earned" because of their wrongful conduct. This hardly provides the deterrent to wrongful conduct that the Illinois Supreme Court justices, in *Kerrigan,* believed was necessary to deter unfaithful conduct by corporate fiduciaries.

Indeck not only lost the opportunity to develop its power plants earlier, but it also lost the opportunity to learn from the project to facilitate later projects. The Illinois Supreme Court failed to consider the advantage of being early in the field as opposed to entering the fray later.

Finally, it is unrealistic to assume, especially after the defendants' venture with Merced Capital and Carson Bay failed, that Indeck would entertain the idea of associating with companies that, for around five years, have been in business with and financially compensated Indeck's ex-employees to the extent of $2.5 million.[217] Merced Capital and Carson Bay also ignored the confidentiality agreement with Indeck, which precluded the parties from soliciting or hiring each other's employees. In other words, this potential relationship, upon which the Illinois Supreme Court hung its hat, had probably been irreparably poisoned.

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215. *Indeck*, 2021 IL 125733, ¶ 48, 183 N.E.3d at 760.

216. *Id.*

217. On November 6, 2013, DePodesta and Dahlstrom signed a management agreement with Merced, under which HEV, owned by defendants as an independent contractor, became the general manager of MHV's development, construction, and operation of electric-power-generation projects HEV would receive a $500,000 annual management fee, payable biweekly. The initial two-year term of the agreement was extended to December 31, 2018. As of December 31, 2017, HEV received $2.075 million (and $2.5 million as of November 6, 2018) in fees, which were split equally between DePodesta and Dahlstrom. Indeck Energy Servs., Inc. v. DePodesta, 2019 IL App (2d) 190043, ¶¶ 37–38, 165 N.E.2d 913, 923, *aff'd in part, rev'd in part*, 2021 IL 125733, 183 N.E.3d 746.

5. The Dissenting Opinion

The dissenting opinion in *Indeck* is more aligned with prior Illinois decisions. It disagreed with the majority and contended that the opposite result would prevent wrongdoers from benefiting from their wrongdoing. It concluded that "under the corporate opportunity doctrine, the injury [to Indeck] resulted not only from what was done, i.e., the taking of the opportunity, but also what was not done, failing to tender/disclose [the opportunity] and obtain consent [to pursue it individually]."[218]

This approach reflected a sophisticated and nuanced understanding of the corporate opportunity doctrine.

6. Mischief Arising from the Unfortunate Holding of the Majority

Indeck has and will continue to have wide-ranging implications. In *Signal Financial Holdings LLC v. Looking Glass Financial LLC*, for instance, the court cites *Indeck* to assert that "a misappropriation of a corporate opportunity claim is not only about disloyal conduct, but also requires that the plaintiff corporation show that the usurped opportunity was exclusive or is no longer available—a zero-sum opportunity."[219]

Defendant Jafri, "held several executive positions at plaintiff, Signal Funding, from July 2016 through her September 28, 2017 resignation, including executive vice president of operations, chief operating officer, chief financial officer, chief information security officer, and general counsel."[220] "In those roles, she had access to business records, bookkeeping records, and bank accounts, and she signed documents on behalf of Signal Funding."[221] "She was responsible for overseeing day-to-day operations, including funding, servicing, accounting, [and] technology."[222]

Matthew Eager, who ran a small investment group called OTRA Capital Partners, contacted Signal Funding seeking an investment opportunity. Defendant then solicited OTRA Capital Partners as an investor in her new business that she initially called "NewCo." Jafri then emailed Eager from her personal email account and attached three files, which she copied from her employer's records. She then solicited two more investors, again using the copied files. Only then did she finally resign from

218. *Indeck*, 2021 IL 125733, ¶ 83, 183 N.E.3d at 767.

219. Signal Fin. Holdings v. Looking Glass Fin., No. 17 C 8816, 2022 WL 4272776, at *4 (N.D. Ill. Sept. 15, 2022).

220. *Id.* at *1.

221. *Id.*

222. *Id.*

Signal Financial.[223] Two of the solicited investors committed to investing in Jafri's new venture, ultimately investing $470,000.

In November 2017, Signal Funding learned that Jafri had used some of its marketing materials for her new venture and shortly thereafter filed this action, alleging that Jafri breached her fiduciary duties by usurping opportunities that she should have sought for Signal.[224] Prior to *Indeck*, Jafri most likely would have been found to have breached her fiduciary duties by usurping corporate opportunities. However, after *Indeck*, the *Signal* district court held that since the plaintiff had the ability to obtain similar opportunities, the defendant's disloyal seizure of the corporate opportunity did not constitute a breach of fiduciary duty.[225] The *Signal Financial Holdings* court did not discuss whether the defendant had a duty to disclose the opportunity to the entity, tender the opportunity to the entity, or receive consent from the entity to pursue the opportunity—duties which would have been analyzed prior to *Indeck*.

Thus, *Indeck* signals an alarming disconnect from decades of prior case law.

B. Walworth Investments-LG, LLC v. Mu Sigma, Inc

The Illinois Supreme Court's upending of the corporate opportunity doctrine is not the only example of the court's divergence from its high-fiduciary-standard precedents. In *Walworth Investments-LG, LLC v. Mu Sigma, Inc.*, the Illinois Supreme Court, applying Delaware law, overlooked apparent fraudulent conduct by the corporation and its CEO/shareholder, citing an anti-reliance clause and a convoluted view of the CEO's fiduciary duties.[226] Given that the Illinois Supreme Court was analyzing Delaware law, the decision may seem irrelevant to Illinois' fiduciary duty law; however, the court's reasoning could signal caution in future interpretations.

1. The Facts and Judicial Holdings

Mu Sigma, Inc, and its CEO/director (defendants) were sued by a former stockholder, Walworth Investments-LG, LLC (Walworth), alleging that after receiving Walworth's $1.5 million investment and reputational capital, defendants conducted a fraudulent scheme to rid Walworth of its substantial ownership interest in the company.[227] Walworth alleged that the statements and omissions from Mu Sigma's CEO—including that Mu

223. *Id.* at *4.
224. *Id.*
225. *Signal Fin. Holdings LLC*, 2022 WL 4272776, at *5.
226. 2022 IL 127177; 215 N.E.3d 843, *reh'g denied* (Jan. 23, 2023).
227. *Walworth*, 2022 IL 127177, ¶¶ 5–6, 11, 215 N.E.3d at 850–51.

Sigma was losing its biggest customer and that it was unlikely to replace lost revenue—induced it to enter into a Stock Repurchase Agreement (SRA) and allow Mu Sigma to repurchase around 7.8 million shares of Walworth's shares.[228] Walworth alleges, however, that Mu Sigma's CEO mischaracterized the loss of the client as unfavorable and had, prior to executing the SRA, already planned to take the company public, predicting "huge growth."[229] Mu Sigma met this prediction and Walworth would likely own Mu Sigma shares worth hundreds of millions had they not given up their shares.[230]

Accordingly, Walworth brought claims for fraudulent inducement and breach of fiduciary duty, to which Mu Sigma defended by stating that Walworth signed an SRA containing an anti-reliance clause and general release.[231] The circuit court determined that the anti-reliance language in the SRA barred the causes of action.[232] The appellate court disagreed, and reversed the circuit court's grant of summary judgment for the defendants, holding that there were issues of fact as to whether the plaintiff actually disclaimed reliance.[233]

The Illinois Supreme Court reversed the judgment of the appellate court and affirmed the trial court's ruling in favor of defendants.[234] The Illinois Supreme Court concluded that Delaware law governed the CEO defendant's fiduciary obligations because the defendant corporation was incorporated in Delaware.[235] However, the court also implicitly determined that there was no fraud in the inducement and resolved the case based on the applicability of a non-reliance clause. In so doing, it ignored the ambiguity surrounding such clause that was addressed by the Illinois appellate court.

2. Fiduciary Duty Aspects

According to the Illinois Supreme Court, the plaintiff's claims with respect to fiduciary duties were as follows:

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228. *Id.* ¶ 10, 215 N.E.3d at 851.

229. *Id.* ¶ 16, 215 N.E.3d at 852.

230. *Id.* ¶ 21, 215 N.E.3d at 853.

231. *Id.* ¶ 24, 215 N.E.3d at 853. The court summarized an anti-reliance clause as where a party "state[s] that it had received all the information it considered necessary and that the defendants had not made any representation or warranty, express or implied, except as set forth in the SRA . . . ." *Id.* ¶ 45, 215 N.E.3d at 858.

232. *Id.* ¶ 45, 215 N.E.3d at 858

233. *Id.* ("[T]he appellate court concluded that the SRA's language did not unambiguously disclaim reliance on extracontractual statements or omissions and did not bar plaintiff's fraud and fiduciary duty claims . . . .").

234. *Id.* ¶ 102, 215 N.E.3d at 870.

235. *Id.* ¶ 41, 215 N.E.3d at 857.

> In count IV, plaintiff alleged that Rajaram [the CEO] breached fiduciary duties owed to plaintiff. Plaintiff alleged that Rajaram breached his obligation of loyalty by acting in his own self-interest to the detriment of plaintiff as a stockholder and breached his obligation to fully and fairly disclose information to plaintiff. Plaintiff alleged that Rajaram made false and misleading statements and omissions of material information regarding the company's business prospects and value and the company's plans to conduct an initial public offering or other major strategic transaction.[236]

It is clear from this pleading that Walworth alleged that the CEO personally made misrepresentations to it in order to induce them to sell their shares, the CEO was self-interested in the transaction, arguably because the repurchase of Walworth's shares would increase the proportional holding of the CEO, and that the CEO owed Walworth a fiduciary duty to communicate truthfully with them.

However, applying Delaware law, the Illinois Supreme Court stated that "corporate directors do not owe fiduciary duties to individual stockholders; they owe fiduciary duties to the entity and to the stockholders as a whole."[237] But, the Court also recognized that "where a corporation makes a request for shareholder action," the corporation's directors are under a fiduciary duty "to disclose all material information reasonably available."[238] And, "when a director requests stockholder action but fails to disclose material facts bearing on that request, the beneficiary stockholder need not demonstrate the elements of reliance, causation, or actual quantifiable monetary damages to succeed on a claim for breach of fiduciary duty."[239] In this regard, Delaware law is much more Byzantine than Illinois law.

The Illinois Supreme Court opinion extensively cited Delaware law with respect to fiduciary duties, but the citations were irrelevant to the facts at bar. The question in *Walworth* was not a failure by directors to affirmatively disclose accurate information to the shareholders. Rather, it involved false disclosures, as well as the affirmative withholding of information, by the CEO to a shareholder the CEO solicited to sell shares back to the company. Thus, the Illinois Supreme Court failed to address a critical distinction.

Consequently, the *Walworth* court did not address for whose benefit corporate information is produced and developed. Corporate information

236. *Id.* ¶ 24, 215 N.E.3d at 853.

237. *Id.* ¶ 79, 215 N.E.3d at 866 (quoting Klaassen v. Allegro Dev. Corp., No. 8626, 2013 WL 5967028, at *11 (Del. Ch. Nov. 7, 2013)).

238. *Id.* ¶ 84, 215 N.E.3d at 867 (citing Malone v. Brincat, 722 A.2d 5, 9 (Del. 1998)).

239. *Id.* ¶ 87, 215 N.E.3d at 868 (citing Dohmen v. Goodman, 234 A.3d 1161, 1168 (Del. 2020)).

does not belong to the CEO personally. Corporate officers and employees are entitled to possess corporate information, not for their benefit, but so that this information can be used to fulfill their responsibilities in managing the corporation and reporting to the shareholders. The purpose of creating the information is for the ultimate benefit of the shareholders. When an officer, in dealing with a shareholder, falsifies or hides information from a shareholder, such officer breaches their fiduciary duty to act in good faith in communicating with the shareholder.[240]

What makes the *Walworth* opinion disturbing from a fiduciary duty standpoint is the failure to deal with the responsibilities of an officer who affirmatively misleads a shareholder and induces them to sell its shares. Additionally, this failure to fulfill the CEO's fiduciary duty is inextricably intertwined with the fraud of inducing the shareholder to sell.

But the Illinois Supreme Court bypassed these issues and ignored the evidence, creating doubt as to whether Walworth had assented to the anti-reliance provisions. The Illinois Supreme Court established that because the parties and their counsel negotiated the SRA in an arms-length transaction, the defendants did not have a duty to disclose the material facts of the transaction, notwithstanding the fact that Walworth's counsel had Walworth's anti-reliance language removed from the agreement.[241]

3. Anti-Reliance Aspects Under Delaware Law

Let us also review the approach taken by the Illinois Supreme Court with respect to the anti-reliance clause and the issue of fraud in the inducement, which is related to the issue of the fiduciary duty of an officer and controlling shareholder to a minority shareholder.

The anti-reliance provisions of the SRA provided as follows:

> 3. Representations and Warranties of Stockholder. Stockholder represents and warrants that:
>
> > . . .
> >
> > (e) Disclosure of Information. Stockholder has received all the information it considers necessary or appropriate for deciding whether to sell the Repurchased Stock to the Company pursuant to this Agreement. Stockholder acknowledges (i) that neither the Company, nor any of the Company's Related Parties (as defined below), has made any representation or warranty, express or implied, except as set forth herein, regarding any aspect of the sale

240. *See, e.g.*, Biefeldt v. Wilson, 2022 IL App (1st) 210336, ¶ 27; 201 N.E.3d 182, 192–93 ("A shareholder plaintiff can demonstrate a breach of fiduciary duty by showing that the directors 'deliberately misinform[ed] shareholders about the business of the corporation, either directly or by a public statement.'" (quoting Malone v. Brincat, 722 A.2d 5, 14 (Del. 1998))).

241. *Walworth* ¶ 90, 215 N.E.3d at 869.

> and purchase of the Repurchased Stock, the operation or financial condition of the Company or the value of the Repurchased Stock and (ii) that the Company is relying upon the truth of the representations and warranties in this Section 3 in connection with the purchase of the Repurchased Stock hereunder.[242]

However, the Illinois Supreme Court did not focus on the plaintiff's counsel's removal of the following provision from the above representation and warranty: "Stockholder acknowledges . . . (ii) that Stockholder is not relying upon the Company or any of the Company's Related Parties in making its decision to sell the Repurchased Stock to the Company pursuant to this Agreement."[243]

Consequently, this created the anomalous and ambiguous situation in which Walworth acknowledged both receiving the disclosed information and that Mu Sigma was relying upon Walworth's representations. However, Walworth did not represent that it was not relying upon any representation of the company or the CEO. It is inexplicable why this issue was not dealt with by the Illinois Supreme Court when it determined that the anti-reliance clause barred plaintiff's claims.

a. The Approach of the Appellate Court to Anti-Reliance

Contrariwise, the appellate court found that the removal of Walworth's anti-reliance language was significant in terms of whether Walworth had acceded to the anti-reliance provisions, stating that "[h]ad this language been included in the SRA, it almost certainly would have amounted to a clear disclaimer of reliance from plaintiff's point of view. But plaintiff specifically had it removed."[244]

The appellate court framed Walworth's argument as, "The central theme of plaintiff's case against defendants is that they fraudulently induced it to enter into the SRA, which contains the general release provision. If plaintiff proves that defendant procured the SRA through fraud, however, then the entire agreement, including the general release provision, presumably would be unenforceable."[245]

In reversing summary judgment for Mu Sigma, the appellate court stated as follows:

> Defendants' response to plaintiff's argument that the release is unenforceable as a product of fraud is twofold. First, defendants cite to a

242. *Id.* ¶ 12, 215 N.E.3d at 851.

243. Brief & Supp. App. for Plaintiff-Appellee at 23, Walworth Invs.-LG, LLC v. Mu Sigma, 2022 IL 127177 (No. 127177).

244. Walworth Invs.-LG, LLC v. Mu Sigma, Inc., 2021 IL App (1st) 191937, ¶ 42, 177 N.E.3d 56, 69, *rev'd*, 2022 IL 127177, 215 N.E.3d 843.

245. *Id.* ¶ 63, 177 N.E.3d at 72 (citing PHL Variable Ins. Co. v. Price Dawe 2006 Ins. Tr., 28 A.3d 1059, 1067 (Del. 2011)).

> number of cases addressing when a fraud claim is released under the terms of a general release provision. These cases are inapplicable, however, because the question is not whether plaintiff's fraud claims are barred by the release, but whether the release itself was procured by fraud. Second, defendants argue that the purported antireliance provision in the SRA defeats the reliance element of plaintiff's fraudulent inducement claim. But as we have already concluded, there are genuine issues of material fact regarding whether the SRA even contained effective antireliance language, let alone which party, if any, disclaimed reliance.[246]

The appellate court noted that "under Delaware law, a contract must contain unambiguous anti-reliance language to 'bar a contracting party from asserting claims for fraud based on representations outside the four corners of the agreement,'" requiring "the language employed amount to a clear and unambiguous disclaimer from the aggrieved party's point of view that it did not rely on extracontractual statements in deciding to sign the contract."[247] In the Delaware opinion cited by the *Walworth* appellate court, the Delaware court concluded that the distinction between a disclaimer of reliance from the point of view of parties accused of fraud and the point of view of a counterparty who believes it has been defrauded "is critical . . . because of the strong public policy against fraud."[248] Therefore, "[b]ecause of that policy concern [against fraud], we have not given effect to so-called merger or integration clauses that do not clearly state that the parties disclaim reliance upon extra-contractual statements," and "murky, unclear, or ambiguous provisions, as well as standard integration clauses without specific anti-reliance language, are not effective."[249]

The appellate court then considered the removal of the anti-reliance language discussed above, and opined as follows:

> What is absent from . . . [the anti-reliance clause in the SRA] is an unqualified disclaimer from plaintiff's point of view that it did not rely on the extra-contractual statements allegedly made by defendants. Rather, section 3(e) amounts to a disclaimer by defendants of what they were representing and relying upon: "Stockholder acknowledges *** (ii) that *the Company is relying upon* the truth of the representations and warranties in this Section 3 in connection with the purchase of the Repurchased Stock hereunder." How would plaintiff know what defendants were relying on or whether or not they were relying on their own

246. *Id.* ¶ 64, 177 N.E.3d at 72–73.

247. *Id.* ¶ 32, 177 N.E.3d at 66 (quoting FdG Logistics LLC v. A&R Logistics Holdings, Inc., 131 A.3d 842, 860 (Del. Ch. 2016)).

248. *Id.* (quoting *FdG Logistics*, 131 A.3d at 860).

249. *Id.* (quoting Abry Partners V, L.P. v. F&W Acquisition LLC, 891 A.2d 1032, 1059 (Del. Ch. Ct. 2006)).

> representations (or misrepresentations) contained in the agreement? Even if plaintiff did somehow know what defendants were relying on, it could not disclaim reliance for them.[250]

Consequently, the appellate court concluded that "the SRA's language was ambiguous as to which party, if any, disclaimed reliance, precluding summary judgment."[251]

b. The Misinterpretation Of Delaware Law By The Illinois Supreme Court

The *Walworth* court's decision to reverse the appellate court has significant legal implications. It affirmed the circuit court, citing the anti-reliance language, general release provisions, and an integration clause as grounds for barring the plaintiff's claims.[252] Notably, the Illinois Supreme Court did not address the plaintiff's argument that the anti-reliance provisions were ambiguous, which is the critical issue.

What is inexplicable is why counsel for plaintiff would have removed the anti-reliance language, but permitted the inclusion of clause (i), providing that plaintiff was acknowledging that neither the Company nor the CEO had made any representation regarding the value of the shares or the financial condition of the company, as the opinion facts indicate that representations were made by the CEO upon which plaintiff relied.[253]

A second distressing aspect is that, according to the *Walworth* court, plaintiff's allegations claiming that the CEO had instructed employees not to provide investor reports to plaintiff pursuant to a previously negotiated investor rights agreement were also evidence that plaintiff had negated reliance.[254] According to the court, this demonstrated that the plaintiff had determined that such information was unnecessary as they closed in the absence of such information.[255] But plaintiff did not know of the instruction not to disclose certain information.

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250. *Id.* ¶ 35, 177 N.E.3d at 67.

251. *Id.*

252. *See* Walworth Invs.-LG, LLC v. Mu Sigma, Inc., 2022 IL 127177, ¶ 102, 215 N.E.3d 843, 870 ("[T]he plaintiff's claims, found in its second amended complaint, are barred by the language of the SRA, and the circuit court properly entered judgment in favor of defendants. Accordingly, we reverse the judgment of the appellate court and affirm the circuit court's judgment."), *rev'g* 2021 IL App (1st) 191937, 177 N.E.3d 56.

253. *See id.* ¶ 12, 215 N.E.3d at 851 (containing clause (i) and its provisions).

254. *See id.* ¶¶ 70–73, 215 N.E.3d at 864–65 (providing background information on the CEO and instructions for investor reports).

255. *See id.* ¶ 72, 215 N.E.3d at 864–65 ("[Plaintiff] agreed in the SRA that it had 'received all the information it consider[ed] necessary.'").

As opposed to the Supreme Court's approach in *Walworth*, a more logical explanation is that the plaintiff was misled into selling their shares due to the defendant's failure to disclose material information—aligning with a Delaware case cited by the *Walworth* court that held anti-reliance language ineffective in barring failure to disclose when the company's "negotiation tactics included active concealment of material information."[256] As this is exactly what occurred in the *Walworth* case, it seems the court had the causation aspect of this backward.[257]

The final questionable approach by the Illinois Supreme Court was in relying upon one Delaware case, *Prairie Capital III, L.P. v. Double E Holding Corp.*, while distinguishing another, *TransDigm, Inc. v. Alcoa Global Fasteners, Inc.*, the facts of which were more relevant to the case at bar.[258]

In *Prairie Capital*, the parties negotiated an agreement in which the seller made extensive representations and warranties with respect to the performance of the company, the shares of which were being transferred.[259] Although the *Prairie Capital* court did not recognize omissions as being actionable, it did hold that sellers could be liable based on the falsity of their affirmative representations and warranties.[260]

The *Prairie Capital* court concluded:

> Delaware law permits contracting parties to define in an agreement "those representations of fact that formed the reality upon which the parties premised their decision to bargain." The critical distinction is not between misrepresentations and omissions, but between information identified in the written agreement and information outside of it."
>
> . . .
>
> When parties identify a universe of contractually operative representations in a written agreement, they remain in that universe. A party that is later disappointed with the written agreement cannot escape through a wormhole into an alternative universe of extra-contractual omissions.[261]

256. *Id.* ¶ 69, 215 N.E.3d at 864 (citing TransDigm Inc. v. Alcoa Glob. Fasteners, Inc., C.A. No. 7135-VCP, 2013 WL 2326881, at *13 (Del. Ch. 2013)).

257. *See generally Walworth*, 2022 IL 127177, 215 N.E.3d at 849.

258. *See id.* ¶¶ 63–73, 215 N.E.3d at 862–65 (first citing *TransDigm*, C.A. No. 7135-VCP, 2013 WL 2326881 (introduced by plaintiff to support their position); and then citing Prairie Cap. III, L.P. v. Double E Holding Corp., 132 A.3d 35, 51–52 (Del. Ch. 2015) (introduced by defendant to support their position)).

259. *See Prairie Cap.*, 132 A.3d at 47 (detailing the representations made by the seller regarding the company's financial position).

260. *Id.* at 51–52, 61.

261. *Id.* at 52 (quoting ABRY P'rs V, L.P. v. F & W Acq. LLC, 891 A.2d 1032, 1058 (Del. Ch. 2006)).

Those who have dealt with stock purchase or repurchase agreements know that two universes of representations are relevant to such agreements—one deals with the other party's ability to enter into and consummate the agreement, the other relates to the operational status of the company whose shares are being transferred.[262]

The SRA representations in *Walworth* fall under the first universe as the representations of the company in Section 4 were limited to (a) "the company is a duly organized corporation," has the power to enter into the SRA, the performance by the company of the SRA "has been duly authorized" and the SRA is a "binding obligation"; (b) the execution of the agreement "will not result in any breach" under any other agreement; (c) no consent of any other body is required to consummate the SRA; and (d) "the company is not currently engaged in any discussions . . . with any third party" to issue shares at an implied valuation greater than the implied valuation in the SRA.[263] Thus, there were no representations with respect to the operations and financial status of the company itself. There were no representations with respect to the profitability of the company, its customer base, its loss of customers, or any other data that would relate to the performance of the company or its value.

Significantly, in the company's representations, the company stated that it "acknowledges that Stockholder is relying upon the truth of the representations and warranties in this Section 4 in connection with the sale of the Repurchased Stock."[264] In other words, it is arguable that defendants acknowledged that all that plaintiff was relying upon was the section four warranties that had nothing to do with plaintiff's claims of fraud in the inducement. When these facts are considered in connection with the fact that counsel for plaintiff removed the provision stating that "Stockholder is not relying upon the Company or any of the Company's Related Parties in making its decision to sell" from the SRA,[265] there is certainly an ambiguity with respect to the anti-reliance language. In fact, the more logical reading of the SRA is that plaintiff did not agree to non-reliance.

If there were extensive representations as to the status of the company, as there were in *Prairie Capital*, indicating that counsel had done its due

262. *See* MURDOCK & REED, *supra* note 5, § 10.2 (discussing the representation universes of stock purchase agreements).

263. Brief of Defendants-Appellants Mu Sigma and Dhiraj C. Rajaram at Appendix A060–61, Walworth Investments-LG, LLC v. Mu Sigma, Inc., 2022 IL 127177 (No. 127177) (referencing the 2010 Stock Repurchase Agreement between Mu Sigma and Walworth at A058).

264. *Walworth*, 2022 IL 127177, ¶ 12, 215 N.E.3d at 851 (referring to the language of the SRA).

265. Brief and Supp. App. for Plaintiff-Appellee at 23, Walworth Invs.-LG, LLC v. Mu Sigma, 2022 IL 127177 (No. 127177).

diligence with respect to the factors underlying the value of the shares, then an anti-reliance clause is reasonable. On the other hand, when there are no representations in the agreement about the value of the shares or the operations or finances of the company, it makes no sense for courts to ignore fraud and to determine that the plaintiff agreed that it has relied only on non-existent material in the agreement.

In *Prairie Capital*, the court summarized the fraud as follows:

> According to the Counterclaim, after Prairie Capital decided to sell the Company as a growth story, Company management generated the numbers to support that narrative. Fortin and Vancura falsely inflated the Company's monthly sales results by invoicing and including in the Company's accounts receivable orders that had not yet been manufactured or shipped. In some cases, the Company shipped products to non-existent addresses on the last day of the month so the revenue could be booked, only to have the shipments returned shortly thereafter.[266]

Prairie Capital represented in the Stock Purchase Agreement (SPA) that the relevant financial statements presented fairly the condition of the companies [§ 3.6],[267] that the accounts receivable represent valid obligations of the company incurred in the ordinary course of business [§ 3.22],[268] and that the company has been operated in the ordinary course of business consistent with past custom and practice [§ 3.15].[269] Accordingly, although the *Prairie Capital* court did not find that omissions were actionable, the court denied defendants motions to dismiss that were aimed at the breach of the express representations in the agreement.[270]

On the other hand, in *TransDigm*, as in *Walworth*, the counter-defendants affirmatively hid information from the plaintiff.[271] According to the court, Alcoa pleaded that a TransDigm representative instructed a manager of one of the subsidiaries "not to discuss the potential loss of fifty to fifty-five percent of Airbus's lockbolt business with anyone and not to discuss anything, including Airbus matters, with anyone at Alcoa."[272]

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266. Prairie Cap. III, L.P. v. Double E Holding Corp., 132 A.3d 35, 48 (Del. Ch. 2015).

267. *Id.* at 57 (referencing section 3.6 of the SPA titled, "Financial Statements and Undisclosed Liabilities").

268. *Id.* at 56 (referencing section 3.22 of the SPA titled, "Accounts Receivable").

269. *Id.* at 55 (referencing section 3.15 of the SPA titled, "Absence of Changes").

270. *Id.* at 49 ("Although parts of Count I are dismissed, the claim largely survives at the pleading stage to the extent that Incline relies on representations in the SPA.").

271. TransDigm Inc. v. Alcoa Glob. Fasteners, Inc., C.A. No. 7135-VCP, 2013 WL 2326881, at *2 (Del. Ch. 2013) ("Although TransDigm had information at that time that would have been responsive to Alcoa's questions, TransDigm intentionally did not reveal some of that information in its responses.").

272. *Id.* at *6.

TransDigm also did not disclose that it had agreed with Airbus to a 5 percent across-the-board discount on lockbolt parts.[273]

As previously discussed, in a similar fashion in the *Walworth* case, the CEO approached the plaintiff about reselling its shares because the business had changed and there was "no upside left" to the company.[274] Further, the CEO had instructed the CFO to "stop making monthly investor reports to plaintiff."[275] According to Walworth:

> [T]he March 2010 monthly revenue report that Rajaram withheld from plaintiff demonstrated that, for the first time in the company's history, monthly revenues had exceeded $3 million, every business unit was exceeding projections, and Mu Sigma was experiencing month-on-month growth of 16 percent. The April 2010 report similarly showed that the company had outperformed its first-quarter projections.[276]

Consequently, the CEO did not only lie about the prospects of the company, but affirmatively hid information from the plaintiff so that the plaintiff would not be aware of the very positive prospects for the company.

The *TransDigm* and *Walworth* cases are, in a sense, mirror images of each other as in *TransDigm*, management hid negative information in order that the counter-plaintiff would buy and in *Walworth*, management hid positive information in order that plaintiff would sell. Thus, *TransDigm* is a more relevant precedent for the factual situation in *Walworth* than *Prairie Capital*, which involved a negotiation with extensive express representations about the financial status of the underlying company.

Once again, it is inexplicable that the Illinois Supreme Court would rely on an inappropriate authority and ignore a relevant authority when such action by the Court had the effect of rewarding fraud. This is a second case where the decision of the appellate court appears more legally sound and makes more sense from the standpoint of calling wrongful conduct to account.

4. The General Approach to Anti-Reliance Clauses versus Fraud in the Inducement in Illinois Cases

There is a pattern in Illinois cases to provide deference to anti-reliance clauses even when, arguably, the defendants are guilty of fraud. However, in some of these cases, it is not clear that the plaintiffs have alleged

273. *Id.* ("[A]t no time during the meeting (or at any time prior to the close of the deal) did [TransDigm] reveal that Airbus was seriously considering moving 50–55% of its lockbolt business . . . or that Linread had promised (and Airbus had indicated its acceptance of) a 5% across-the-board discount on all lockbolt parts starting on January 1, 2012.").

274. Walworth Invs.-LG, LLC v. Mu Sigma, Inc., 2022 IL 127177, ¶ 9, 215 N.E.3d 843, 850.

275. *Id.* ¶ 19, 215 N.E.3d at 852.

276. *Id.* ¶ 70, 215 N.E.3d at 864.

fraud in the inducement. In such a latter situation, as the Illinois Appellate Court in *Walworth* stated in rejecting defendants' precedent: "These cases are inapplicable, however, because the question is not whether plaintiff's fraud claims are barred by the release, but whether the release itself was procured by fraud."[277] Without even reaching the fraud in the inducement aspect, a Delaware case relied on by the majority in *Walworth* stated, "[T]he distinction between a disclaimer of reliance from the point of view of parties accused of fraud and the point of view of a counterparty who believes it has been defrauded 'is critical . . . because of the strong public policy against fraud.'"[278]

These cases illustrate the tension between certainty and fairness. General enforcement of anti-reliance clauses provides certainty, but possibly at the expense of fairness. Disregarding anti-reliance provisions on the basis that they were induced by fraud undoubtedly produces more fairness, but at the expense of certainty. Unfortunately, many Illinois cases, and federal cases relying upon them, focus more upon certainty than upon fairness.

One of the leading cases dealing with the enforcement of anti-reliance clause is an early appellate court case, *Adler v. William Blair & Co.*, authored by current Illinois Supreme Court Chief Justice Mary Jane Theis, in which the court considered the four possible causes of action that can arise in a situation such as *Walworth*—common-law and statutory consumer fraud, along with securities law and fiduciary duty violations.[279] The issue in *Adler* was whether the plaintiffs' complaint stated a valid cause of action for fraud, misrepresentation, and breach of fiduciary duty against William Blair & Co. (Blair) following the loss of plaintiff's investment in a real estate syndication.[280] The appellate court found the common-law fraud claim barred by the anti-reliance clause, noting the plaintiff had alleged Blair would financially back any losses, despite the deal's private placement memorandum indicating that Blair was only a limited partner in the venture, and having no indication on responsibility for the venture's failure.[281]

277. Walworth Invs.-LG, LLC v. Mu Sigma, Inc., 2021 IL App (1st) 191937, ¶ 64, 177 N.E.3d at 72.

278. *Id.* ¶ 32, 177 N.E.3d at 66 (quoting FdG Logistics LLC v. A&R Logistics Holdings, Inc., 131 A.3d 842, 860 (Del. Ch. 2016)).

279. *See* Adler v. William Blair & Co., 648 N.E.2d 226, 228 (Ill. App. Ct. 1995) (discussing common-law fraud, statutory consumer fraud, securities law violations, and fiduciary duty violations which are possible causes of action); *see also Walworth*, 2021 Ill. (1st), ¶ 1, 177 N.E.3d at 61 (beginning the opinion being compared to *Adler* on the possible causes of action).

280. *Adler*, 648 N.E.2d at 228.

281. *See id.* at 233–34 (discussing how the Plaintiff claimed that they were told that Blair would provide financial backing, but that these claims were "directly contrary to what was stated").

The venture failed because the investment could not meet its debt service requirements. While a statutory consumer fraud claim does not require reliance, it does require causation which the court held the plaintiffs failed to satisfy because the damages claim lacked specificity.[282] The securities claim failed because an inconsistent oral statement cannot trump a specific written disclosure, and the fiduciary duty claim failed because Blair did not breach its fiduciary duty by engaging in the transaction after federal tax law changed, thereby decreasing the tax shelter benefits of the investment.[283] However, the plaintiff did not allege fraud in the inducement, which in fact did occur, at least with respect to one investor. This investor purchased an interest in the Blair real estate syndication because of a representation by an officer of Blair that, since Blair wanted its entry into real estate syndication to succeed, the investment would be unleveraged, namely that the real estate would be purchased with cash and not be subject to a mortgage. In such a situation, the return to investors is less, but the investment has a very low chance of not being successful.[284] This was a material representation intended by the maker to be relied upon by the investor, and was in fact relied upon by the investor, namely, by investing. Here, the venture failed because of the falsity of the representation. What led to the downfall of the investment was the inability of the venture to generate the cash necessary to service the mortgage. Consequently, the mortgage went into default and the investment was worthless. This investor, in a private resolution, obtained rescission.[285]

In many decisions originating in Illinois courts, plaintiff's claims have been rejected due to anti-reliance clauses, with the courts justifying their holdings by stating that sellers should be protected against possible liars and naive jurors.[286] In these cases, plaintiffs are deemed to be

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282. *See id.* at 234–35 ("These allegations lack specificity. The plaintiffs do not explain how, even if the defendants' misrepresentations had been true, the defendants' actions caused the decline in the value of the real estate investment.").

283. *See id.* at 235–36 ("[I]n the law of securities a written disclosure trumps an inconsistent oral statement" (citing Acme Propane Inc. v. Tenexco, Inc., 844 F.2d 1317 (7th Cir. 1988))); *see also id.* at 236 (explaining that "the plaintiffs were fully informed that the purpose of the partnership was to acquire real estate, that it was not primarily structured to generate tax losses" and the defendants maintaining this structure did not violate a fiduciary duty).

284. *Id.* at 231 (noting the plaintiff's complaint alleged that they invested in Blair because the defendants represented that Blair would provide the capital funds for the real estate investments, without loans); *see also Leveraged*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/leveraged [https://perma.cc/3Y8K-B4R2] (defining leveraged as "having a high proportion of debt relative to equity).

285. E-mail from Charles W. Murdock, Professor of L., Loyola Univ. Chi. Sch. of L., to Editor, Loyola Univ. Chi. L.J. (June 20, 2024, 05:33 CST) (on file with author).

286. Rissman v. Rissman, 213 F.3d 381, 383 (7th Cir. 2000) ("Stock transactions would be impossibly uncertain if federal law precluded parties from agreeing to rely on the written word

knowledgeable investors, therefore, their reliance on oral representations is considered unreasonable.[287] Later cases of this type relied upon the opinion in *Adler*, as well as Judge Easterbrook's opinions, as Judge Easterbrook never met a cause of action he did not like to dismiss.[288]

In *Rissman v. Rissman*, Arnold Rissman, sold his one-third share of the family company, Tiger, to his brother, Randall, who already owned the other two-thirds of Tiger's sales, for $17 million.[289] Thirteen months later, "Tiger sold its assets (including its name and trademarks) for $335 million . . . ."[290] Arnold brought suit against Randall under federal securities laws and state-law fraud to recover the $95 million that he would have made if he had kept his shares until the $335 million sale.[291]

The brothers' sale contract included an anti-reliance clause providing in part that they:

> [H]ave not relied upon any representation of any party concerning the nature or extent of their respective injuries or damages

[A]rnold made these warranties to Randall:

> (a) no promise or inducement for this Agreement has been made to him except as set forth herein; (b) this Agreement is executed by [Arnold] freely and voluntarily, and without reliance upon any statement or representation [anyone] except as set forth herein; (c) he has read and fully understands this Agreement and the meaning of its provisions . . . ."[292]

After extensive pontificating, Judge Easterbrook affirmed the dismissal on the basis that the agreement precluded reliance on oral representations.

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alone. 'Without such a principle, sellers would have no protection against plausible liars and gullible jurors.'" (quoting Carr v. CIGNA Sec., Inc., 95 F.3d 544, 547 (7th Cir. 1996))).

287. *See generally* Tirapelli v. Advanced Equities, Inc., 813 N.E.2d 1138, 1144 (Ill. App. Ct. 2004); *see also* Benson v. Stafford, 941 N.E.2d 386, 410 (Ill. App. Ct. 2010) ("In the case at bar, where there were sophisticated parties to a securities transaction, and in the presence of a nonreliance clause, we will follow *Tirapelli*."); Greer v. Advanced Equities, 2012 IL App (1st) 112458, ¶ 9, 964 N.E.2d 772, 775 (noting that when plaintiffs sign the nonreliance clause they are agreeing not to rely on any oral representations and "it is hardly justifiable for someone to rely on something that they agreed not to rely on").

288. *See* Higginbotham v. Baxter Int'l Inc., 495 F.3d 753, 757 (7th Cir. 2007) (Easterbrook, J.) (asserting that information supplied by confidential sources must be "discounted," usually "steep[ly]"); *see also* Albert W. Alschuler, *How Frank Easterbrook Kept George Ryan in Prison*, 50 VAL. U. L. REV. 7, 9–12 (2015) (describing Judge Easterbrook's negative reputation among practitioners as hostile, deciding the case on issues not raised by the parties, and misstating the record).

289. *Rissman*, 213 F.3d at 382.

290. *Id.*

291. *See id.* (contending that under the federal securities law, with state-law claims under the supplemental jurisdiction, Arnold would not have sold for as little as $17 million, and now wants the extra $95 million he would have received had he retained his stock until the sale to Hasbro).

292. *Id.* at 383.

Arnold contends, "that he would not have sold for as little as $17 million, and perhaps would not have sold at all, had Randall not deceived him into thinking that Randall would never take Tiger public or sell it to a third party."[293] However, "Arnold asked Randall to put in writing, as part of the agreement, a representation that Randall would never sell Tiger. Randall refused to make such a representation[ ], but did include that "if Tiger were sold before Arnold received all installments of the purchase price, then payment of the principal and interest would be accelerated."[294]

Judge Easterbrook properly determined that "[h]aving sought broader assurances, and having been refused, Arnold could not persuade a reasonable trier of fact that he relied on Randall's oral statements[ ]" and that "[h]aving signed an agreement providing for acceleration as a consequence of sale, Arnold is in no position to contend that he relied on the impossibility of sale."[295] According to Judge Easterbrook:

> Securities law does not permit a party to a stock transaction to disavow such representations—to say, in effect, "I lied when I told you I wasn't relying on your prior statements" and then to seek damages for their contents. Stock transactions would be impossibly uncertain if federal law precluded parties from agreeing to rely on the written word alone. "Without such a principle, sellers would have no protection against plausible liars and gullible jurors."[296]

But Judge Easterbrook did not stop there. He discussed the foibles of memory and the certainty that enforcement of anti-reliance clauses provides. He supported boilerplate provisions and enforcement of anti-reliance clauses as supporting market efficiency, and saw oral representations as ineffective in the long run.

Unfortunately, Judge Easterbrook and many other judges do not take into consideration another characteristic of most individuals, namely, that they are trusting persons and, whether by laziness or lack of sophistication, provide greater credence to oral statements made personally. Furthermore, Judge Easterbrook's ruling did not account for the fact that Randall Rissman was a director, controlling shareholder, and manager of the business, and therefore, had a fiduciary duty to minority members and

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293. *Id.* at 382.

294. *Id.* at 383 ("Instead he warranted (accurately) that he was not aware of any offers to purchase Tiger and was not engaged in negotiations for its sale."). *Cf.* Jordan v. Duff & Phelps, Inc., 815 F.2d 429 (7th Cir.1987) ("The parties also agreed that if Tiger were sold before Arnold had received all installments of the purchase price, then payment of the principal and interest would be accelerated.").

295. *Id.* (citing Karazanos v. Madison Two Assocs., 147 F.3d 624, 628–31 (7th Cir. 1998)).

296. *Id.* (quoting Carr v. CIGNA Sec., Inc. 95 F.3d 544, 547 (7th Cir. 1996)).

had access to material information by virtue of such roles.[297] This information can be used to further the interests of the corporation, not to advantage the control person over the minority shareholder. The concurring opinion, in part, dealt with this issue.

Judge Rovner observed:

> [A] written disclaimer may not provide a safe harbor in every case, because "[n]ot all principals of fiduciaries are competent adults; not all disclaimers are clear; and the relationship involved may involve such a degree of trust invited by and reasonably reposed in the fiduciary as to dispel any duty of self-protection by the principal."[298]

She further observed that "[t]he issue of reasonable reliance has always depended upon an analysis of all relevant circumstances,"[299] and concluded: "On the facts in this case, involving extensive negotiations aided by counsel and with numerous rejections of efforts to include the oral representations in the written agreement, the non-reliance clause rendered any reliance on the prior statements unreasonable."[300] This is a sensible approach in analyzing whether to enforce an anti-reliance clause.

Relying upon *Adler* and *Rissman*, the court in *Tirapelli v. Advanced Equities, Inc.* held that "[p]laintiffs' reliance was unreasonable as a matter of law." Therefore, plaintiffs are unable to establish the reliance element required by their Illinois Securities Law and common law fraud claims."[301]

In *Tirapelli*, "Plaintiffs Ronald Tirapelli and Michael Webb brought suit in state court" against companies they invested in along with the companies' founders asserting claims for "violations of sections 12(F), 12(G), and 12(I) of the Illinois Securities Law of 1953," and Illinois common law fraud.[302]

The facts in this case are fairly straightforward. Ronald Stuppy, a broker at one defendant company, approached Plaintiff Tirapelli about investing in Defendant TCG.[303] TCG's plan was to use the funds to invest in "young", "technology-oriented companies" and "purchase and renovate property for use by those companies."[304] Under this model, TCG

297. *See* McGowan v. Ferro, 859 A.2d 1012, 1039 (Del. Ch. 2004) (discussing Judge Easterbrook's failure to consider Randall Rissman's position).

298. *Rissman*, 213 F.3d at 388–89 (quoting *Carr*, 85 F.3d at 548).

299. *Id.* at 389.

300. *Id.*

301. Tirapelli v. Advanced Equities, Inc., 813 N.E.2d 1138, 1145 (Ill. App. Ct. 2004); *see also id.* at 1144 (stating *Rissman* and *Adler* are "more applicable to the instant case and reject[ing] plaintiffs' exculpatory clause argument").

302. *Id.* at 1139 (citing 815 ILL. COMP. STAT. 5/12(F)-(I)).

303. *See id.* at 1140.

304. *Id.*

was already invested in Optimal, which would provide the technology infrastructure of the properties.[305]

Tirapelli ended up meeting with Wiskowski, the founder of TCG, and Pressman, the founder of Optimal.[306] At this meeting, Wiskowski and Pressman allegedly told Tirapelli that they had already purchased a building in Chicago for $8 million, and that they were recently offered $40 million.[307] They even toured the Chicago building.[308] Tirapelli recorded the meeting and presented the deal to Webb, who after meeting with the defendants himself, purchased with Tirapelli $250,000 worth of TCG shares in a private placement deal.[309]

Unfortunately for Plaintiffs, TCG never purchased the Chicago property.[310] Plaintiffs asserted that "Wiskowski said that Pressman "took the money" and purchased other property.[311] "Plaintiffs ultimately lost all of their investment."[312] The parties' subscription agreement did not include any language covering the Chicago property. However, it included both an anti-reliance and an integration clause.

The *Tirapelli* court rejected plaintiffs' arguments that they relied upon the oral statements about the property and the tour of the building, claiming that since the plaintiffs' were "sophistical business people," they should have negotiated for the inclusion of the oral statements in the agreement.[313] However, the plaintiffs were merely owners of Ford dealerships.[314] That does not mean that they were sophisticated in dealing with high-tech start-ups. Nevertheless, the *Tirapelli* court found that the parties were knowledgeable such that it was unreasonable for them to rely on the representations they agreed in writing to not rely on.[315] As contrasted with *Rissman*, this situation is one where it would have been very

305. *Id.* ("Optimal, a company in which TCG invested . . . was created to provide integrated technology infrastructure to commercial residential properties.").

306. *See id.* at 1139–40 (stating Wiskowski founded TCG, Pressman founded Optimal, and both men, along with Ronald Stuppy, met with Tirapelli).

307. *See* Brief of Plaintiffs-Appellants at 6–7, *Tirapelli*, 813 N.E.2d 1138 (Ill. App. 1st Dist. 2004) (No. 03-2463) ("During the meeting, either Wiskowski or Pressman told Webb they had a buyer who wanted to buy the Throop Street property for 'five times what they paid for it,' and that they had paid $8 million.").

308. *Id.* at 6; *see also Tirapelli*, 813 N.E.2d at 1140.

309. *See* Brief of Plaintiffs-Appellants at 6, *Tirapelli*, 813 N.E.2d 1138 (No. 03-2463); *see also Tirapelli*, 813 N.E.2d at 1140 ("[P]laintiffs agreed to purchase 2 1/2 shares of TCG each at $100,000 per share.").

310. *See generally* Brief of Plaintiffs-Appellants, *supra* note 309, at 9.

311. *Id.*

312. *Tirapelli*, 813 N.E.2d at 1141.

313. *Id.* at 1144.

314. *Id.* at 1139. The *Tirapelli* court did explain the plaintiffs "ha[d] experience investing in securities." *Id.*

315. *Id.* at 1144 (discussing the Court's findings as to the knowledgeability of the parties).

appropriate to negate the anti-reliance provision on the basis that the agreement had been subject to fraud in the inducement. The detail about the building and the tour of it should have overcome any judicial concern about plaintiffs fabricating a story.

The next case in this sequence, *Benson v. Stafford*,[316] interpreted *Tirapelli* to establish an automatic rule that the existence of an anti-reliance clause defeats an allegation of justifiable reliance, essentially on the basis that sophisticated business plaintiffs have the ability to include any representation they thought was important.[317] This position by the *Benson* court is both unfortunate and unrealistic, as the ability to include any particular representation is a function of the relative leverage of the parties, their sophistication, and their degree of trust regarding the counterparty. For example, the typical real estate syndication involving a private placement memorandum is essentially a contract of adhesion. Take it or leave it. There is no opportunity for negotiation. Moreover, the fact that one may be a sophisticated businessman in selling cars does not mean that the same person is sophisticated with respect to negotiating for the purchase of stock. And there is always the question of trust, fiduciary disclosure obligations, and the possibility of fraud in the inducement.

The *Benson* court did draw an important distinction between fraudulent misrepresentations and fraudulent concealment:

> As a final matter, we note that the nonreliance clause in the case at bar only applies to a "warranty, representation, opinion, advice or assertion of fact," indicating that it encompasses affirmative fraud and not fraudulent concealment, which concerns silence in the face of a duty to speak. The trial court found that count II of plaintiffs' complaint stated a cause of action, to the extent that it contained a fraudulent concealment claim; defendant does not challenge this finding on appeal.[318]

It is important that attorneys doing business-related work be aware of this distinction.

In the next case, *Greer v. Advanced Equities*, plaintiffs argued that the *Adler* rule does not bar claims that are based on oral misrepresentations that do not contradict written representations in the agreement.[319] But, in *Greer*, the anti-reliance clause covered both written and oral representations.[320] The appellate court did observe that anti-reliance clauses may

316. Benson v. Stafford, 941 N.E.2d 386, 405 (Ill. App. 2010).

317. *See id.* at 406 ("[P]laintiffs could have negotiated for the inclusion of any representations that they thought were important.").

318. *Id.* at 410.

319. Greer v. Advanced Equities, Inc., 2012 IL App (1st) 112458, ¶ 1, 964 N.E.2d 772, 773.

320. *See id.* ¶ 2, 964 N.E.2d at 773 (quoting the anti-reliance clause).

not be dispositive if they only disclaim reliance on written representations but do not mention oral representations.[321]

Once again, the *Greer* court did not appreciate that these clauses are essentially boilerplate. The distinction drawn by the *Greer* court then becomes a function of the sophistication and due diligence of the defendant's attorney in choosing the appropriate boilerplate anti-reliance provision.

More recently, *Marler v. Wulf*,[322] involved both a fiduciary obligation to disclose and fraud in the inducement; here, plaintiff prevailed, notwithstanding an anti-reliance clause. Plaintiff Marler sued defendant Wulf for fraudulently inducing him into winding up their wholly owned and operated propriety trading business, MW Capital, LLC.[323] The dispute began in 2012, where, after a low revenue year, the parties disagreed over whether to change their trading strategy, which led Wulf to propose shutting down the business in October 2013.[324] Marler initially opposed the idea but ultimately began dissolution negotiations with Wulf in November 2013.[325] Marler's fraud claim stemmed from Wulf's representations during the dissolution negotiations, which, according to Marler, induced him to contract with Wulf and shut down the trading company.[326] Marler alleged Wulf falsely told him that "he 'wanted to get out of the proprietary trading industry,' 'did not know what he wanted to do next,' and 'had no idea what he was going to do'."[327] However, in October 2013, Wulf began taking the necessary steps to form his own trading company, including organizing a new LLC, receiving an Employer Identification Number from the IRS, purchasing the necessary equipment, and setting up the new payroll service.[328]

The court reasoned that, since Marler and Wulf had a fiduciary relationship as co-owners when the contract was signed, Wulf had a duty to disclose all material facts that were adverse to Marler's interests or the company's interests.[329] This approach might have changed the results of

321. *See id.* ¶ 12, 964 N.E.2d at 776 ("We can certainly imagine circumstances in which a non-reliance clause might not be dispositive, for example if the clause merely disclaimed reliance on written representations but was silent as to oral representations.").

322. Marler v. Wulf, 2021 IL App (1st) 200200-U, ¶ 28, *appeal denied*, 187 N.E.3d 720 (Ill. 2022).

323. *Id.* ¶ 2.

324. *Id.* ¶ 6. The parties disagreed when Marler proposed the dissolution; Marler claimed he broached the subject in October 2013 while Wulf claimed it was November 1, 2013. *Id.* ¶ 9.

325. *Id.* ¶¶ 6, 9.

326. *Id.* ¶ 49.

327. *Id.* ¶ 12.

328. *Id.* ¶ 10.

329. *Id.* ¶ 55.

the previous cases, which failed to give adequate consideration to fiduciary duties of disclosure and the possibility of fraud in the inducement.

C. Staisz v. Resurrection Physicians Provider Group, Inc

1. The Operative Facts

In *Staisz v. Resurrection Physicians Provider Group, Inc*, an Illinois appellate court took a restrictive view of the ability of a court to curb wrongful conduct, this time in connection with the scope of oppression.[330] Plaintiff Maria Staisz, a licensed physician, was a participating provider with Defendant Resurrection Physician Provider Group, Inc. (RPPG).[331] Pursuant to RPPG's bylaws, upon her employment, Staisz became a shareholder.[332] On April 17, 1985, Staisz purchased 10 shares of RPPG for $250.[333]

Twelve years later, on March 1, 1997, Staisz entered a "Participating Primary Care Physician Agreement" (Agreement) with RPPG.[334] Two years later, RPPG amended the Agreement, adding a section that permitted RPPG to terminate a participating provider without cause.[335] Additionally, around 1999, RPPG purchased all shares of MSO Great Lakes, Inc. (MSOGL), of which Ghilardi, Bello, and Ellingson became directors and officers (individual defendants).[336]

On January 26, 2018, Plaintiff received a letter from RPPG informing her that RPPG was terminating her participating provider status without cause, pursuant to the Agreement, effective May 1, 2018.[337] The letter also explained that under RPPG's bylaws, once a provider's status has been terminated, their shareholder status is also revoked.[338] RPPG offered Staisz $350 for her shares.[339] On May 10, 2018, Staisz filed a complaint against RPPG and the individual defendants for breach of fiduciary duty and for shareholder oppression under section 12.56 of the Business Corporation Act of 1983.[340] Staisz alleged that the individual defendants

330. *See generally* Staisz v. Resurrection Physicians Provider Group, Inc., 2022 IL App (1st) 201316, 209 N.E.3d 361, *appeal denied*, 197 N.E.3d 1088 (Ill. 2022). A portion of the following discussion on *Staisz* is excerpted from one of the author's treatise on business organizations. MURDOCK & REED, *supra* note 5, §§ 10.18, 18.28.

331. *Staisz*, 2022 IL App (1st) 201316, ¶ 4, 209 N.E.3d at 363.

332. *Id.*

333. *Id.* ¶ 6, 209 N.E.3d at 364 n.4.

334. *Id.* ¶ 4, 209 N.E.3d at 363.

335. *Id.*

336. *Id.* ¶ 4, 209 N.E.3d at 363.

337. *Id.* ¶ 6, 209 N.E.3d at 364.

338. *Id.*

339. *Id.* RRPG offered Staisz $35 per share, totaling $350 for her 10 shares. *Id.*

340. 805 ILL. COMP. STAT. 5/12.56.

breached their fiduciary duties by using their control of MSOGL to increase their compensation to unreasonable levels and deny shareholders dividends.[341] Moreover, she claimed the defendants engaged in oppressive behavior by terminating her because she questioned the operations of MSOGL, requested MSOGL to present financial statements to RPPG's board of directors, and threatened to expose the individual defendants' wrongful conduct.[342]

The defendants moved to dismiss Staisz's complaint, arguing, first, that the breach of fiduciary duty claim was derivative and, thus, Staisz did not have standing, and second, since Staisz was not a shareholder at the time she brought her oppression suit, she cannot avail herself of section 12.56's remedies, and thus does not have adequate standing.[343] The trial court agreed and dismissed the complaint.[344]

Staisz appealed, arguing that she was injured personally by the defendants' actions and that section 12.56 does not explicitly require plaintiffs to be shareholders at the time of the complaint's filing.[345] Rather, Staisz contended that section 12.56 merely requires that the plaintiff is a shareholder at the time the oppressive acts occurred.[346]

This was a reasonable argument, although one not compelled by the language of the statute. Section 12.56 of ILBCA begins "[i]n an action by a shareholder . . . ."[347] This could be interpreted to mean that plaintiff must be a shareholder at the time of bringing the action. But it could also be interpreted to mean that the person must have been a shareholder at the time of the alleged wrongful conduct.

2. The Fiduciary Duty Aspect

The appellate court in *Staisz* affirmed the trial court's determination that the gravamen of the plaintiff's fiduciary duty claim was an injury to the company and the shareholders as a whole, noting "mismanagement causing corporate waste is a wrong to the corporation," and stated: "The gravamen and true nature of the alleged breach of fiduciary duty was an injury to RPPG, as MSOGL's sole shareholder, and constituted a 'wrong to the corporate body' but not a direct, individual injury to her."[348]

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341. *Staisz*, 2022 IL App (1st) 201316, ¶ 7, 209 N.E.3d at 364.

342. *Id.*

343. *Id.* ¶ 10, 209 N.E.3d at 365.

344. *Id.*

345. *Id.* ¶¶ 20–21, 209 N.E.3d at 366–67.

346. *Id.* ¶ 19, 209 N.E.3d at 366.

347. 805 ILL. COMP. STAT. 5/12.56(a).

348. *Id.* ¶ 23, 209 N.E.3d at 367 (citing RS Investments Ltd. RSM US, LLP, 2019 IL App (1st) 172410, ¶ 37, 125 N.E.3d 1206, 1223 (Ill. App. Ct. 2019)); *id.* ¶ 24, 209 N.E.3d at 367 (citing Sterling Radio Stations, Inc. v. Weinstine, 756 N.E.2d 56, 60 (Ill. App. Ct. 2002)).

The court was correct on this point. However, firing her when she sought to remedy the harm to the corporation was an injury to her.

The court further determined that, because she was no longer a shareholder, she did not have standing to bring a derivative action. Again, this is a traditional approach in derivative litigation.[349] However, in certain circumstances, the rule, which requires you be a shareholder at the time of suit to bring a derivative suit, enables the defendants to commit the perfect crime. Many closely held corporations have buy/sell agreements with termination of employment as a trigger to acquire the shares of the terminated employee/shareholder. Consequently, when those in control of a corporation take illegal action, if there is a complaining minority shareholder who was also an employee, they can terminate the employee/shareholder and insulate themselves from a derivative suit by acquiring the shares of the terminated employee.

Moreover, as discussed below, the *Staisz* decision would also foreclose an oppression action under MBCA 12.56. This is in contrast to another approach, as reflected in the federal court decision in *Arnett v. Gerber Scientific, Inc.*, that recognizes the general rule but creates an exception when the following three elements are present: "(1) plaintiff's disposition of the stock [is] involuntary; (2) the disposition [is] related to the allegedly illegal acts of defendants; and (3) the remedy sought would result in plaintiff's regaining shareholder status."[350]

This line of reasoning would appear sound in situations, such as existed in *Staisz*, where a shareholder is terminated, by those alleged to have engaged in wrongdoing, to preclude the shareholder from bringing suit. This would be particularly appropriate where the relief requested by the plaintiff is the restoration of their status as a shareholder.

Another potential problem in *Staisz*, was similar to the one in *Brown v. Tenney*.[351] In *Brown*, the defendants had dual roles with a parent company and its subsidiary, and took excessive compensation out of the subsidiary, thereby decreasing the funds available to the parent. This is comparable to the situation in *Staisz*. Thus, arguably, the gravamen of the complaint could have been the subsidiary's injury from paying excessive compensation to its officers and directors. In such a case, the parent, as a shareholder of the subsidiary, should bring the derivative suit. However, the Illinois Supreme Court recognized the improbability that, when defendants control both corporations, they will sue themselves.

349. *Staisz*, 2022 IL App (1st) 201316, ¶ 14, 209 N.E.3d at 367–68.

350. Arnett v. Gerber Scientific, Inc., 566 F.Supp. 1270, 1273 (1983 S.D.N.Y.); *cf.* Lower v. Lanark Mut. Fire Ins. Co., 502 N.E.2d 838, 840 (Ill. App. Ct. 1986).

351. Brown v. Tenney, 532 N.E.2d 230 (Ill. 1988).

Accordingly, the court recognized what is, in effect, a "double derivative suit," which authorizes a suit by a shareholder of the parent company to enforce a right belonging to the subsidiary of the parent company.[352]

3. The ILBCA Oppression Analysis

Section 12.56 of the ILBCA provides:

> (a) In an action by a shareholder in a corporation that has no shares listed on a national securities exchange or regularly traded in a market maintained by one or more members of a national or affiliated securities association, the Circuit Court may order one or more of the remedies listed in subsection (b) if it is established that:
>
> . . .
>
> (3) The directors or those in control of the corporation have acted, are acting, or will act in a manner that is illegal, oppressive, or fraudulent with respect to the petitioning shareholder whether in his or her capacity as a shareholder, director, or officer . . . .[353]

The *Staisz* court interpreted the phrase "in an action by a shareholder" as requiring an individual to be a shareholder when commencing an action seeking shareholder remedies.[354] It relied on the ILBCA's definition of "shareholder" in Section 1.80, which provides that a shareholder is "one who is a holder of record of shares in a corporation."[355] It emphasized the definition's use of "is" and not "is or was" when referring to a holder of record of shares in a corporation.[356] Thus, the court rejected Staisz's interpretation of section 12.56, stating that it makes the phrase "in an action by a shareholder" superfluous.[357]

Staisz's other argument, however, is worth considering. She argued that plaintiffs should not be considered non-shareholders when their shareholder status was revoked due to the defendant's oppressive scheme.[358] This argument makes sense because, as discussed above, if oppressive actors can terminate minority shareholders' status as shareholders, they are essentially protecting themselves from any of the remedies available to shareholders under section 12.56 and committing the "perfect crime."

The *Staisz* court, nevertheless, rejected the plaintiff's arguments, reasoning that the ILBCA's plain and ordinary definition of "shareholder" requires plaintiffs under 12.56 to be shareholders when they file their

352. *Id.* at 231.
353. 805 ILL. COMP. STAT. 5/12.56(a).
354. *Staisz*, 2022 IL App (1st) 201316, ¶ 18, 209 N.E.3d at 366.
355. *Id.* ¶ 16, 209 N.E.3d at 365.
356. *Id.* ¶ 18, 209 N.E.3d at 366.
357. *Id.*
358. *Id.*

claims.[359] The court further provided that nothing in section 12.56 "precludes a former or nonshareholder from pursuing any other available remedy[.]"[360] The court, however, did not indicate what those available remedies might be.

The court failed to recognize that, among the remedies available under ILBCA 12.56 is the power of the court to "prohibit[ion], alter[ation] or set[ting] aside any action of the corporation or of its shareholders, directors, or officers of or any party to the proceedings."[361] Might the trial and appellate courts have taken a different tack if the plaintiff had also sought to have her status as a shareholder restored?

While the decision of the appellate court was another example of a judicial decision that is favorable to wrongdoers and detrimental to minority shareholders, the present construction of ILBCA section 12.56 on its face supports the current decision. This may be a situation in which the best response is to simply amend the introductory language of section 12.56 to provide "[i]n an action by a shareholder, or a former shareholder seeking reinstatement . . . ."[362]

CONCLUSION

Illinois, until a couple of years ago, was clearly a champion of fiduciary duties. The Illinois courts and legislature have consistently sought to protect minority shareholders and punish directors and those in control who engage in unfaithful, abusive, or deceitful behavior. The two Supreme Court decisions highlighted in this Article, *Indeck* and *Walworth* are distressing in that they permit putative wrongdoers to get away with unconscionable conduct because of the inexplicable legal reasoning of these Courts.[363]

What is all the more distressing is that these Supreme Court decisions each reversed a very sound appellate court decision that was consistent with prior Illinois jurisprudence. The appellate court in *Indeck* concluded:

> We hold that the trial court [as did the Supreme Court] erroneously focused on the fact that Merced did not promise HEV (in either the operating or the management agreement) an exclusive development agreement. The proper focus was whether the opportunity DePodesta and

359. *Id.*
360. *Id.*
361. 805 ILL. COMP. STAT. 5/12.56(b)(1).
362. 805 ILL. COMP. STAT.5/12.56(a), as proposed to be amended.
363. *See generally* Indeck Energy Servs., Inc. v. DePodesta, 2021 IL 125733, 183 N.E.3d 746; Walworth Invs.-LG, LLC v. Mu Sigma, Inc., 2022 IL 127177, 215 N.E.3d 843.

> Dahlstrom took was within Indeck's line of business (it was) and whether it was disclosed, tendered, and consented to (it was not).[364]

Similarly, the appellate court in *Walworth*, noting that the plaintiff's lawyer had removed anti-reliance language from the stock repurchase agreement, concluded "the SRA's language was ambiguous as to which party, if any, disclaimed reliance, precluding summary judgment."[365]

In view of the soundness of the appellate court opinions, and prior Illinois jurisprudence, the decisions of the Illinois Supreme Court, discussed herein, are simply unfathomable. It is a shame that the Court used legal legerdemain to reward fraudsters, instead of holding them to account as prior Illinois Supreme Courts have done.

364. *Indeck*, 2019 IL App (2d) 190043, ¶ 69, 165 N.E.3d 913, 930, *aff'd in part, rev'd in part*, 2021 IL 125733, ¶ 69, 183 N.E.3d 746.

365. *Walworth*, 2021 IL App (1st) 191937, ¶ 35, 177 N.E.3d 56, 67, *rev'd*, 2022 IL 127177, ¶ 35, 215 N.E.3d 843.