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James R. Pettway

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Court, or Board of Medical Examiners, under their power to regulate the respective legal or medical professions.⁵³

The chance that these hazards will materialize seems small, and the more aggressive professionals may wish immediate corporate status. Others may assume a wait-and-see approach while taking advantage of a congressionally approved pension plan under H.R. 10.

It would seem desirable for Congress to take the initiative to relieve professionals and other self-employed persons from having to change their organizational form solely to gain a tax advantage now available to others. Nothing in the literature advances any reason why the corporate form should enjoy tax advantage over other forms of business. This anomalous situation creates not only a discriminatory effect on tax liability but also an undue burden on those incorporating purely for tax benefits.

Larry J. Gunn

DUTY OF CORPORATE OFFICERS AND DIRECTORS IN LOUISIANA

"Officers and directors shall be deemed to stand in a fiduciary relation to the corporation and its shareholders, and shall discharge the duties of their respective positions in good faith, and with that diligence, care, judgment and skill which ordinarily prudent men would exercise under similar circumstances in like positions."¹

Thus Section 91 of the new Louisiana Business Corporation Law defines the duty of corporate officers and directors in Louisiana. It is identical with Section 36 of the 1928 Corporation Act² with the notable exception that it specifically extends the fiduciary relationship of officers and directors to shareholders. The 1928 provision was in turn taken almost verbatim from the Model Business Corporation Act.³ The Commissioners' Notes to the Model Act point out it was necessary to specify the standard of care to which officers and directors would be held due to the conflict among decisions.⁴ Prior to 1928, some courts interpreting

53. LA. R.S. 12:814, 914 (Supp. 1969).

1. LA. R.S. 12:91 (Supp. 1968).

2. La. Acts 1928, No. 250, § 36.

3. Model Bus. Corp. Act § 33 (1928). This Model Act is also known as the Uniform Business Corporation Act and was adopted by the National Conference of Commissioners on Uniform State Laws in 1928. It is to be distinguished from the later *ABA-ALI Model Business Corporation Act*.

4. 5 LA. REV. STAT. ANN. 225 Comment (West 1951).

Louisiana law had said directors and officers of a corporation "were the trustees of the stockholders" and held corporate property "in a very legitimate sense as trustees"⁵ while others said they owed a "special contractual duty . . . [a]s fiduciaries"⁶ and still others held them to a standard of ordinary care and indicated they would be liable only for an error "of so gross a kind that a man of common sense, and ordinary attention, would not have fallen into it."⁷ The 1928 Act eliminated these variations in terminology but still left the courts only a nebulous guide.⁸ While in some areas the Business Corporation Law has set out specific duties to be fulfilled⁹ and in other areas similar situations have recurred enough to allow the formulation of more definite guides,¹⁰ the basic duty of corporate officers and directors in Louisiana remains one of due care under the circumstances.¹¹ Now this duty is expressly extended to the shareholders of a corporation as well as to the corporation itself.

THE BASIC DUTY OF DUE CARE

As in tort law, the conduct of an "ordinarily prudent man" and the duty of due care owed by corporation officers and directors is difficult to define and varies with each change in the factual situation.¹² In determining whether a specific act or failure to act amounts to a breach of duty under Louisiana law, courts have considered such factors as the duties imposed by the corporation charter,¹³ the good or bad faith accompanying the conduct,¹⁴ the type of authorization for the conduct,¹⁵ the actual or imputed knowledge of corporation affairs of the officer or director,¹⁶ the residence of the officer,¹⁷ the time of the alleged

5. *Jackson v. Ludeling*, 88 U.S. 616, 624 (1874). *Cf.* *Hibernia Bank & Trust Co. v. Succession of Cancienne*, 140 La. 969, 974, 74 So. 267, 269 (1917): "The directors of a corporation are trustees, and its creditors, like the stockholders, are the *cestui que trust*." *See also* *Crichton v. Webb Press Co.*, 113 La. 167, 36 So. 926 (1904).

6. *LaGrone v. Brown*, 161 La. 784, 788, 109 So. 490, 491 (1926).

7. *Percy v. Millaudon*, 8 Mart. (N.S.) 68, 78 (La. 1829).

8. Bennett, *The Louisiana Business Corporation Act of 1928*, 2 LA. L. REV. 597, 635 (1940).

9. *E.g.*, LA. R.S. 12:84, 12:92 (Supp. 1968).

10. Bennett, *The Louisiana Business Corporation Act of 1928*, 2 LA. L. REV. 597, 635 (1940).

11. *Percy v. Millaudon*, 8 Mart. (N.S.) 68 (La. 1829); *A. M. & J. Solari, Ltd. v. Fitzgerald*, 150 So.2d 896 (La. App. 4th Cir. 1963), *writ refused*, 244 La. 622, 153 So.2d 414 (1963); 3 W. FLETCHER, *CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS* § 1038 (1965 rev. vol.) (hereinafter cited as *FLETCHER*).

12. W. PROSSER, *THE LAW OF TORTS* § 32 (3d ed. 1964).

13. *Pontchartrain R.R. v. Paulding*, 11 La. 41 (1837).

14. *Bourdette v. Seward*, 107 La. 258, 31 So. 630 (1902).

15. *Trisconi v. Winship*, 43 La. Ann. 45, 9 So. 29 (1891).

16. *Percy v. Millaudon*, 8 Mart. (N.S.) 68 (La. 1829).

17. *Semple v. Frisco Land Co.*, 124 La. 663, 50 So. 619 (1909).

breach,¹⁸ and the personal gain or lack of it to the officer or director charged with the breach.¹⁹ Cases from other jurisdictions indicate the size and nature of the corporation,²⁰ whether the director or officer is paid or unpaid,²¹ and his special knowledge or background²² are also factors to be considered. Still other decisions emphasize that officers and directors have a duty to act only *intra vires* and within the scope of their authority.²³ These holdings merely illustrate the application of the ordinarily prudent man standard of Section 91 and the decision in any particular case must depend on the totality of facts and circumstances in that case. While this due care standard fails to provide a quick and definite answer to the question of whether any given conduct is a breach of duty or not, it does allow needed judicial flexibility.

Courts in the exercise of this discretion have generally recognized that liability should not be imposed for mere errors of business judgment where no negligence or bad faith is involved.²⁴ This "business judgment rule" follows naturally from a statute such as Section 91 which requires merely good faith and the care and skill of ordinarily prudent men under like circumstances. The courts recognize that even the most honest and conscientious officer or director will not always decide correctly the often complex corporate issues which come before him. To make errors of business judgment a basis of liability would make officers and directors virtual insurers of a corporation's success and this is a responsibility few would be willing to undertake.

Generally, if an officer or director acts in good faith and in what he honestly believes to be the best interests of the corporation there will be no liability for unfortunate results.²⁵ It is necessary, however, that he have some basis for the exercise of his business judgment and if he negligently fails to keep abreast of

18. *Faurie v. Millaudon*, 3 Mart.(N.S.) 476 (La. 1825); *Marine Forwarding & Shipping Co. v. Barone*, 154 So.2d 528 (La. App. 4th Cir. 1963).

19. *Jackson v. Ludeling*, 88 U.S. 616 (1874); *Commercial Germania Trust & Savings Bank v. Jurgens*, 134 La. 755, 64 So. 703 (1913).

20. *Mann v. Commonwealth Bond Corp.*, 27 F. Supp. 315 (S.D.N.Y. 1938); *Hun v. Cary*, 82 N.Y. 65 (1880).

21. *Medford Trust Co. v. McKnight*, 292 Mass. 1, 197 N.E. 649 (1935).

22. *Barnes v. Andrews*, 298, F. 614 (S.D.N.Y. 1924).

23. *Trisconi v. Winship*, 43 La. Ann. 45, 9 So. 29 (1891); *Pontchartrain R.R. v. Paulding*, 11 La. 41 (1837); H. HENN, *CORPORATIONS* § 234 (1961) (hereinafter cited as HENN).

24. *Reliance Homestead Ass'n v. Nelson*, 179 La. 680, 154 So. 734 (1934); *Commercial Germania Trust & Savings Bank v. Jurgens*, 134 La. 755, 64 So. 703 (1913); *Pool v. Pool*, 16 So.2d 132 (La. App. 1st Cir. 1943); FLETCHER § 1039.

25. *Commercial Germania Trust & Savings Bank v. Jurgens*, 134 La. 755, 64 So. 703 (1913); HENN § 233.

corporation affairs the business judgment rule will not excuse errors that result.²⁶ An ordinarily prudent officer or director is expected to know something of the corporation he directs²⁷ and the extent of his required knowledge is determined by the same factors that affect the overall standard of care required of him.²⁸ It must also be considered, however, that directors often do not have a business background and that officers and directors must sometimes decide matters requiring legal or technical knowledge. Realizing this, courts generally recognize that officers and directors are entitled to place reasonable reliance upon the advice of business and technical experts.²⁹ Thus a Louisiana court held certain directors were not liable for failure to avoid a surtax when they had relied upon the advice of accountants and attorneys.³⁰ Similarly, officers and directors are entitled to rely upon the books and records of the corporation as being accurate in the absence of any fact which should reasonably cause them to suspect otherwise.³¹

These rules have been partially codified as to directors in Section 92 of the Business Corporation Law.³² This provides that a director relying in good faith on reports made by corporation officials, appraisers, or accountants, or on corporation financial statements or records is not liable for certain improper acts. Of course if an officer or director were responsible for some inaccuracy in the reports or records, or had not exercised reasonable care in selecting the persons who prepared them, then he would not be in good faith nor privileged to rely upon them.³³ Generally, however, the business judgment rule and the accompanying right to rely on expert advice and corporation records protect officers and directors from liability for good faith errors of judgment.

In addition to the business judgment rule, there is another broad limitation of liability that may protect an officer or director even if he has breached his duty of due care in supervis-

26. FLETCHER § 1040; *cf.* *Farwell v. Milliken & Farwell, Inc.*, 145 So.2d 644 (La. App. 4th Cir. 1962).

27. *A. M. & J. Solari, Ltd. v. Fitzgerald*, 150 So.2d 896 (La. App. 4th Cir. 1963).

28. *Barnes v. Andrews*, 298 F. 614 (S.D.N.Y. 1924); *Hatch v. City Bank of New Orleans*, 1 Rob. 470 (La. 1842); *Commercial Bank of Menominee v. Wiedman*, 301 Mich. 405, 3 N.W.2d 323 (1942).

29. FLETCHER § 1027.

30. *Pool v. Pool*, 22 So.2d 131 (La. App. 1st Cir. 1945).

31. *Hatch v. City Bank of New Orleans*, 1 Rob. 470 (La. 1842); FLETCHER § 1060.

32. LA. R.S. 12:92(E) (Supp. 1968).

33. *Gallin v. National City Bank*, 155 Misc. 880, 281 N.Y.S. 795 (N.Y. 1935).

ing corporate affairs. An officer or director will only be held accountable to the corporation for specific losses resulting from his managerial neglect.³⁴ The fact that he has been negligent will not render him liable for the corporation's failure if it appears the corporation would have failed anyhow.³⁵ The determination whether a breach of duty causes specific losses is made in accord with the general causation rules of negligence law.³⁶ Apparently the same rules apply to determine the extent to which a corporation official is liable to a shareholder for a breach of fiduciary duty to him.³⁷ This limitation of liability differs from the business judgment rule in that the business judgment rule is a guide in determining if there has been a breach of duty *at all* under Section 91 of the Business Corporation Law while the limitation of liability pertains to the *extent* of liability once a breach of duty has been found.

Section 94 of the Business Corporation Law offers a further protection for a director who does not actually participate in negligent or wrongful acts of the board of directors. He is not liable if he was absent from the meeting of directors at which the action was authorized or if he was present or represented at the meeting but his dissent was either noted in the minutes of the meeting or promptly filed at the registered office of the corporation.³⁸ This provision makes it clear what steps a director must take if he is to escape personal liability for wrongful acts of the board when he is present or represented at the meeting at which the acts are authorized.³⁹ While it seems that unrepresented absence from a meeting may itself create liability for negligence under the general rule of Section 91, it can be argued that the express language of Section 94 precludes this result and that in no case will a director be liable for action authorized at a board meeting unless he is present or represented. The comment to Section 94, however, indicates it was not intended to change the former law; and prior jurisprudence shows a director may be liable for action taken at a board meeting if he is absent due to his own neglect.⁴⁰ This interpretation seems more in accord with the basic duty of due care.

34. *Hawks v. Bright*, 51 La. Ann. 79, 24 So. 615 (1898); *Pontchartrain R.R. v. Paulding*, 11 La. 41 (1837); *Percy v. Millaudon*, 3 La. 568 (1832); FLETCHER § 1063.1.

35. *Hawks v. Bright*, 51 La. Ann. 79, 24 So. 615 (1898); *Barnes v. Andrews*, 298 F. 614 (S.D.N.Y. 1924); HENN § 235.

36. HENN § 235.

37. *Bourdette v. Seward*, 107 La. 258, 31 So. 630 (1902).

38. LA. R.S. 12:94 (Supp. 1968).

39. *Cf. Percy v. Millaudon*, 3 La. 568, 575 (1832).

40. *Id.*

DUTIES SPECIFICALLY IMPOSED BY THE BUSINESS
CORPORATION LAW

Section 91 of the Business Corporation Law sets out in general terms the duties of officers and directors to the corporation and its shareholders. Section 92 elaborates upon the general duties of Section 91 by specifying certain responsibilities of officers and directors and the extent of liability in each case. Its primary thrust is to insure protection for creditors or other third parties who rely on the apparent financing of the corporation.

Section 92A provides that if a corporation transacts any business other than that incidental to its organization before the amount of paid-in capital stated in the articles of incorporation has been paid in full the officers and directors who participate in the transactions are liable for the debts or liabilities of the corporation that result.⁴¹ Although the articles of incorporation need not necessarily state an amount of paid-in capital,⁴² this provision protects creditors and others who may be misled if an amount is stated and not paid. The liability of officers and directors who participate in these premature transactions of the corporation is joint and several with the corporation and each other.⁴³ The Comments to Section 92A indicate that joint and several liability is the equivalent of solidary liability and that the rights of contribution and subrogation should exist among and in favor of directors and officers held liable.

Paragraphs B and C of Section 92 specify the liability of officers and directors who participate in the issuance of "watered stock," *i.e.*, shares issued as fully paid although the corporation has not received full lawful consideration for them.⁴⁴ Section 92B imposes a general liability on any officer or director who knowingly or negligently consents to the issuance of shares in violation of the Business Corporation Law or prior statutes. This liability is joint and several also⁴⁵ and extends "to the corporation and any person who suffers any loss or damage as a result thereof."⁴⁶ It applies to shares issued in violation of any of the mandatory provisions in Sections 51-58⁴⁷ and is particularly applicable to violations of Section 52C which requires that the consideration for shares be paid in cash, property, or services ac-

41. LA. R.S. 12:26, 12:92A (Supp. 1968).

42. *See id.* 12:24, Comment (f).

43. *Id.* 12:92A.

44. *Id.* 12:92B, C.

45. *Cf.* LaGrone v. Brown, 161 La. 784, 109 So. 490 (1926).

46. LA. R.S. 12:92B (Supp. 1968).

47. *E.g.*, LA. R.S. 12:54, 12:56B(2), C, D, 12:57 (Supp. 1968).

tually rendered to the corporation, the fair value of which is not less than the dollar amount of the consideration fixed for the shares, and that such consideration be paid before the shares are issued.⁴⁸ Under Paragraph C of Section 92 there is a similar liability "to the corporation for the benefit of creditors or shareholders"⁴⁹ if property or services taken in payment for shares are grossly overvalued. These provisions are basically the same as the prior law⁵⁰ and accurately reflect the limited Louisiana jurisprudence in this area.⁵¹ They provide a remedy to the corporation because it does not receive full value for "watered shares" and to creditors who suffer damage due to the diluted financial structure of the corporation.⁵²

Other ways in which a corporate financial structure may be weakened are the improper payment of dividends and the unlawful repurchase or redemption of its own stock by the corporation. Both of these return capital invested in the business to the shareholders, thus leaving less security for corporation creditors and the shareholders who do not participate in the capital return. Section 92D⁵³ provides that if any unlawful dividends are paid or any assets are returned to shareholders in violation of the Business Corporation Law,⁵⁴ or if the corporation repurchases or redeems its own shares improperly,⁵⁵ the directors who knowingly or negligently authorize such action shall be liable. Again the liability is joint and several and extends to both the corporation and its creditors. The liability is limited, however, to the amount of the unlawful distribution and by a two-year preemptive period measured from the date on which the distribution was made.⁵⁶

These provisions should be considered in light of Section 93E which gives to directors held liable under Section 92D a right of "indemnity against each of the shareholders for the proportionate amount of the unlawful distribution received by such share-

48. *Id.* 12:52C.

49. *Id.* 12:92C.

50. La. Acts 1928, No. 250, §§ 15, 20, 27.

51. *Rapides Grocery Co. v. Grant*, 165 La. 593, 115 So. 791 (1928); *LaGrone v. Brown*, 161 La. 784, 109 So. 490 (1926).

52. See HENN §§ 169, 170.

53. LA. R.S. 12:92D (Supp. 1968).

54. *Id.* 12:63 specifies when dividends can be paid. For a discussion of this and the Business Corporation Law provisions regulating repurchase and redemption of shares see Miller, *The 1968 Business Corporation Law of Louisiana*, 29 LA. L. REV. 435, 455 (1969).

55. See LA. R.S. 12:55 (Supp. 1968).

56. *Id.* 12:92D.

holder."⁵⁷ This action also must be brought within two years and apparently is not available to corporation officers⁵⁸ or to directors who knowingly authorize an unlawful distribution of assets. This right of indemnification is a valuable protection for a director who might negligently run afoul of the technical provisions of the law dealing with dividends and the repurchase and redemption of shares. It is in accord with the policy of the Business Corporation Law and the business judgment rule which do not unduly penalize directors for good faith errors. Presumably, however, corporation officers should know more about corporation law and corporate affairs so this right of indemnity is denied to them.

DUTIES IMPOSED BY THE JURISPRUDENCE

In determining the duty of corporation officers and directors, courts in Louisiana and elsewhere have encountered some situations often enough to form fairly definite guidelines. While these rules are not as certain as those specifically imposed by the corporation act, they provide some elaboration of the general fiduciary relation and due care standard. Generally these recurring situations can be grouped into cases where officers or directors benefit to the detriment of the corporation and cases where they benefit at the expense of the shareholders.

Corporate Injury

An officer or director is most likely to benefit to the detriment of the corporation when he is in business competition with it. However, a strict rule against engaging in the same or similar business as the corporation would impose a hardship on officers and be particularly harsh on directors.⁵⁹ Thus courts do not forbid such competition entirely, but they do scrutinize it for unfair advantage or profit at the corporation's expense.⁶⁰ Such unfairness has been found when a director or officer utilizes inside information to secure a secret profit for himself,⁶¹ when he lures

57. *Id.* 12:93E.

58. Section 92D is worded so as to apply only to directors and Section 93E would seem to apply only to directors held liable under Section 92D. Also, Section 93E does not speak of officers at all. Presumably, however, an officer could take part in an unlawful distribution or return of assets forbidden by Section 92D.

59. FLETCHER § 856; Ramsey, *Director's Power To Compete with his Corporation*, 18 IND. L.J. 293 (1943).

60. Jackson v. Ludeling, 88 U.S. 616 (1874); House of Campbell, Inc. v. Campbell, 172 So.2d 727 (La. App. 4th Cir. 1965).

61. Louisiana Mortgage Corp. v. Pickens, 167 So. 914 (La. App. 1st Cir. 1936).

away corporation customers or employees to a new firm,⁶² or when he uses corporation funds to set up a competing enterprise.⁶³ Activities such as these, whether done personally or through another corporation, violate the fiduciary relationship and breach the duty of good faith.⁶⁴

Similarly, when a director or officer transacts business with his corporation the opportunity for unfair personal benefit again prompts the courts to examine the circumstances very carefully.⁶⁵ Typical of these transactions are sales and leases to or from the corporation⁶⁶ and the acquisition of corporate notes and mortgages by officers or directors.⁶⁷ Other situations which present similar conflicts of interest should be similarly suspect⁶⁸ and the burden is generally upon the officer or director seeking to uphold such a transaction to show good faith and fairness.⁶⁹ Even if a breach of duty is found, however, the rule in Louisiana seems to be that the transaction is not void but merely voidable at the option of the corporation.⁷⁰

Subject to suspicion also are transactions between a corporation and another corporation in which its directors or officers have financial or other interests.⁷¹ Often the two corporations will have common directors and one will control the other. The danger is that the subsidiary corporation and its minority share-

62. *Marine Forwarding & Shipping Co. v. Barone*, 154 So.2d 528 (La. App. 4th Cir. 1963) (no liability because fiduciary relationship had ended).

63. *Guth v. Loft, Inc.*, 23 Del. Ch. 255, 5 A.2d 503 (Del. 1939).

64. HENN § 237.

65. *Crescent City Brewing Co. v. Flanner*, 44 La. Ann. 22, 26, 10 So. 384, 385 (1891) ("scrutinized by the courts with strictness"); *House of Campbell, Inc. v. Campbell*, 172 So.2d 727 (La. App. 4th Cir. 1965); *General Motors Accept. Corp. v. Hahn*, 190 So. 869 (La. App. 2d Cir. 1939); *Bland v. Paradise Colonization Co.*, 146 So. 778, 779 (La. App. 2d Cir. 1933) ("transactions between them should bear the closest scrutiny"). Courts also examine these transactions for harm to third persons. See *Frellsen v. Strader Cypress Co.*, 110 So. 877, 34 So. 857 (1903).

66. *Ellett v. Morefield*, 159 La. 295, 105 So. 348 (1925) (officer bought corporation property at foreclosure sale); *Parks v. Hughes*, 145 La. 221, 82 So. 202 (1919) (officer sold property to corporation); *Crescent City Brewing Co. v. Flanner*, 44 La. Ann. 22, 10 So. 384 (1891) (corporation sold property to director); *Powell v. Cavanagh*, 6 La. App. 445 (Orl. Cir. 1927) (officer bought corporation property from seizing creditor).

67. *Allardyce v. Abraham*, 178 So. 170 (La. App. 1st Cir. 1938), *rehearing denied*, 179 So. 317 (La. App. 1st Cir. 1938), *affirmed*, 190 La. 686, 182 So. 717 (1938); *Geisenberger & Friedler v. Robert York & Co.*, 262 F. 739 (5th Cir. 1919).

68. *Hancock v. Holbrook*, 40 La. Ann. 53, 3 So. 351 (1888); HENN § 239.

69. *House of Campbell, Inc. v. Campbell*, 172 So.2d 727 (La. App. 4th Cir. 1965).

70. *De Soto Corp. v. Roberts Lumber & Grain Co.*, 174 La. 620, 141 So. 78 (1932); *House of Campbell, Inc. v. Campbell*, 172 So.2d 727 (La. App. 4th Cir. 1965).

71. FLETCHER § 961.

holders may be exploited to benefit the corporation in control. Transactions between the corporations under these circumstances are basically the same as transactions between a corporation and its officers or directors individually, and the same rules apply.⁷² Such dealings are allowed but courts examine them closely and the burden of showing fairness is upon those who would uphold the transaction.⁷³

There is a split of authority in other jurisdictions as to whether corporate transactions authorized by officers or directors subject to a conflict of interests are voidable on that basis alone or whether additional factors of unfairness or bad faith are also needed.⁷⁴ Courts have also split as to whether directors with conflicting interests can count toward a quorum or can vote at board meetings.⁷⁵ In Louisiana these questions are answered by Section 84⁷⁶ of the Business Corporation Law. It provides first that no transaction between a corporation and its directors or officers, or between a corporation and a business in which its directors or officers have an interest, shall be void or voidable solely for that reason, nor shall a transaction be void or voidable solely because the interested officers or directors voted for or authorized the transaction.⁷⁷ To keep the transaction from being void or voidable, however, Section 84 requires that:

- (1) The board of directors be informed of the conflict of interests and they authorize the transaction "by a vote sufficient for such purpose without counting the vote of the interested director or directors";⁷⁸ or
- (2) The shareholders entitled to vote be informed of the conflict of interests and they approve the transaction by a good faith vote;⁷⁹ or

72. *Mullins v. De Soto Sec. Co.*, 56 F. Supp. 907 (W.D. La. 1944), *affirmed*, 149 F.2d 864 (5th Cir. 1945).

73. *Chalmette Petroleum Corp. v. Chalmette Oil Dist. Co.*, 143 F.2d 826 (5th Cir. 1944); *Mullins v. DeSoto Sec. Co.*, 56 F. Supp. 907 (W.D. La. 1944), *affirmed*, 149 F.2d 864 (5th Cir. 1945); *Leathers v. Janney*, 41 La. Ann. 1120, 6 So. 884 (1889); *Fleming v. Sierra*, 14 Orl. App. 168 (La. App. 1917).

74. HENN § 239.

75. FLETCHER §§ 932-938.

76. LA. R.S. 12:84 (Supp. 1968).

77. *Cf.* cases cited in note 73 *supra*.

78. LA. R.S. 12:84A(1) (Supp. 1968); *cf.* *Chalmette Petroleum Corp. v. Chalmette Oil Dist. Co.*, 143 F.2d 826 (5th Cir. 1944); *Geisenberger & Friedler v. Robert York & Co.*, 262 F. 739 (5th Cir. 1919); *De Soto Corp. v. Roberts Lumber & Grain Co.*, 174 La. 620, 141 So. 78 (1932); *Giuffria Realty Co. v. Kathman-Landry, Inc.*, 173 So.2d 329 (La. App. 4th Cir. 1965).

79. *Cf.* *Giuffria Realty Co. v. Kathman-Landry, Inc.*, 173 So.2d 329 (La. App. 4th Cir. 1965); *Alexander v. Lindsay*, 152 So.2d 261 (La. App. 4th Cir. 1963), *cert. denied*, 244 La. 897, 154 So.2d 767 (1963).

(3) The transaction be fair to the corporation at the time it it was entered.⁸⁰

Since only one of these requirements need be met, if a transaction is fair to the corporation it is not void or voidable merely because of a conflict of interests. Finally, Section 84 makes it clear that “[c]ommon or interested directors may be counted in determining the presence of a quorum at a meeting of the board of directors”⁸¹

Related to the problems of competition with the corporation and transactions with it are the situations where a director or officer of a corporation personally usurps an opportunity presented to the corporation.⁸² Again it is necessary to balance the right of officers and directors to engage in business on their own behalf against the fiduciary duties they owe to the corporation. If the opportunity is in fact a corporate opportunity it is a breach of duty for an officer or director to personally take advantage of it.⁸³

Just because an opportunity happens to be of the same nature as the business of the corporation, however, it is not necessarily a corporation opportunity.⁸⁴ The determination whether or not it is must depend on all the circumstances. Factors to be considered include to whom the opportunity was presented,⁸⁵ who developed and financed it,⁸⁶ and the relation between the opportunity and the corporation business.⁸⁷ It is not enough that the opportunity be a desirable one; the circumstances must be such that the corporation has an expectancy in it.⁸⁸ It has been suggested that the test is whether an officer or director is under a specific duty to represent the corporation as to the particular matter involved.⁸⁹ However the test may be stated, it remains a determination that must be made on the facts of each particular case.

Even if an opportunity does appear to be a corporate oppor-

80. *Cf.* cases cited notes 65, 73 *supra*.

81. *Cf.* Geisenberger & Friedler v. Robert York & Co., 262 F. 739 (5th Cir. 1919).

82. HENN §§ 237, 238.

83. Lawrence v. Sutton-Zwolle Oil Co., 193 La. 117, 190 So. 351 (1939).

84. *Id.*; FLETCHER § 862.

85. Johnston v. Greene, 35 Del. Ch. 479, 121 A.2d 919 (Del. 1956).

86. Guth v. Loft, Inc., 23 Del. Ch. 255, 5 A.2d 503 (Del. 1939).

87. Irving Trust Co. v. Deutsch, 73 F.2d 121 (2d Cir. 1934), *cert. denied*, 294 U.S. 708 (1935); Johnston v. Greene, 35 Del. Ch. 479, 121 A.2d 919 (Del. 1956).

88. Lawrence v. Sutton-Zwolle Oil Co., 193 La. 117, 190 So. 351 (1939).

89. *Id.* at 134, 190 So. at 357. *See* FLETCHER § 861.1 at 232.

tunity, an officer or director may be allowed to take advantage of it if the corporation cannot or will not do so.⁹⁰ Thus if an opportunity presented to the corporation is *ultra vires*,⁹¹ or if the board of directors of the corporation acts by a disinterested vote to reject it,⁹² most courts allow officers or directors to act upon it.⁹³ Generally, however, the fact that the corporation is unable to take advantage of an opportunity *solely* because it cannot finance it at that time will not free officers or directors to act.⁹⁴ Most jurisdictions apply this rule strictly as to solvent corporations, the fear being that if such a strict rule is not applied, officers and directors will not use their best efforts to obtain financing on the corporation's behalf.⁹⁵ If the corporation is insolvent, courts generally recognize this as true lack of financial ability to undertake the opportunity and officers or directors are allowed to accept it.⁹⁶ The application of these rules will vary, of course, with the circumstances. The basic criterion is again overall fairness in light of the fiduciary relationship.⁹⁷

Shareholders' Injury

Another recurring situation requires a determination of the duty owed by officers and directors to the corporation's shareholders.⁹⁸ It usually involves officers or directors buying shares in the corporation from shareholders at reduced prices without revealing inside information concerning the true value of the stock.⁹⁹ Section 91 of the Business Corporation Law clarifies the duty in these situations by extending the fiduciary relationship of officers and directors to the shareholders. Prior to the enactment of Section 91, however, unless such a transaction amounted to fraud,¹⁰⁰ Louisiana courts disagreed over the stand-

90. HENN § 238.

91. *Alger v. Brighter Days Mining Corp.*, 63 Ariz. 135, 160 P.2d 346 (1945).

92. *American Inv. Co. v. Lichtenstein*, 134 F. Supp. 857 (E.D. Mo. 1955).

93. FLETCHER § 862.1. Some cases, however, indicate the officer or director must share the opportunity with all shareholders. *Young v. Columbia Oil Co.*, 110 W. Va. 364, 58 S.E. 678 (1931); cf. *Louisiana Mortgage Corp. v. Pickens*, 167 So. 914, 915 (La. App. 1st Cir. 1936) (dictum).

94. *W. H. Elliott & Sons Co. v. Gotthardt*, 305 F.2d 544 (1st Cir. 1962); *Electronic Development Co. v. Robson*, 148 Neb. 526, 28 N.W.2d 130 (1947); FLETCHER § 862.1; HENN § 238.

95. FLETCHER § 862.1; HENN § 238.

96. *Electronic Development Co. v. Robson*, 148 Neb. 526, 28 N.W.2d 130 (1947).

97. *Lawrence v. Sutton-Zwolle Oil Co.*, 193 La. 117, 190 So. 351 (1939).

98. FLETCHER § 1167; HENN § 240.

99. *Mansfield Hardwood Lumber Co. v. Johnson*, 263 F.2d 748 (5th Cir. 1959), *rehearing denied*, 268 F.2d 317 (5th Cir. 1959), *cert. denied*, 361 U.S. 885 (1959), *rehearing denied*, 361 U.S. 926 (1959); Conant, *Duties of Disclosure of Corporate Insiders Who Purchase Shares*, 46 CORNELL L.Q. 53 (1960).

100. Cf. LA. R.S. 12:95 (Supp. 1963); *Mansfield Hardwood Lumber Co. v. Johnson*, 263 F.2d 748 (5th Cir. 1959), *rehearing denied*, 268 F.2d 317 (5th Cir. 1959), *cert. denied*, 361 U.S. 885 (1959), *rehearing denied*, 361 U.S. 926 (1959).

ard by which officers and directors were bound.¹⁰¹ Throughout the United States the so-called "majority rule" was that officers and directors dealt with shareholders at arms-length and owed no special duty to reveal to them inside information concerning the true worth of their stock.¹⁰² The label "majority rule" applied to this maxim was, in actual operation, somewhat of a misnomer.¹⁰³ The United States Supreme Court created a broad exception to it in *Strong v. Repide*¹⁰⁴ when it announced the "special facts doctrine." This doctrine recognized that officers and directors have a duty to disclose inside information to shareholders when special circumstances place an obligation on them to do so.¹⁰⁵ The special circumstances in *Strong* were that the corporation was about to complete a large sale of property on very favorable terms. Other courts later found special circumstances precluding application of the "majority rule" if dividends were pending,¹⁰⁶ if the market value of the shares was difficult to ascertain,¹⁰⁷ if the shareholders had little business knowledge,¹⁰⁸ or if the officer or director had instigated the negotiations to buy the stock.¹⁰⁹ As more and more cases came within the "special facts doctrine" some courts discarded the "majority rule" entirely and recognized that officers and directors were under a fiduciary duty when dealing with shareholders.¹¹⁰ This became known as the "minority rule" and is the view adopted in Section 91. Actually today there is little difference in result whether the "minority rule" or the "special facts doctrine" is applied. Both prevent profiting from inside information at the expense of shareholders.

Even under the rule of Section 91 a corporate officer or director is not required to reveal his opinions, as distinguished from matters of fact, nor is he liable if there is no reliance on

101. *Cf. Williams v. Fredericks*, 187 La. 987, 175 So. 642 (1937); *In re Liquidation of Shreveport Nat'l Bank*, 118 La. 664, 43 So. 270 (1907); *Markey v. Hibernia Homestead Ass'n*, 186 So. 757 (La. App. Or. Cir. 1939).

102. *In re Liquidation of Shreveport Nat'l Bank*, 118 La. 664, 43 So. 270 (1907); FLETCHER § 1168.1; HENN § 240.

103. HENN § 240.

104. 213 U.S. 419 (1909).

105. *Markey v. Hibernia Homestead Ass'n*, 186 So. 757 (La. App. Or. Cir. 1939).

106. *Gammon v. Dain*, 238 Mich. 30, 212 N.W. 957 (1927).

107. *Hobart v. Hobart Estate Co.*, 26 Cal.2d 412, 159 P.2d 958 (1945).

108. *Cf. In re Parker's Estate*, 189 Iowa 1131, 179 N.W. 525 (1920).

109. *Goodwin v. Agassiz*, 283 Mass. 358, 186 N.E. 659 (1933).

110. *Mansfield Hardwood Lumber Co. v. Johnson*, 263 F.2d 748 (5th Cir. 1959), *rehearing denied*, 268 F.2d 317 (5th Cir. 1959), *cert. denied*, 361 U.S. 835 (1959), *rehearing denied*, 361 U.S. 926 (1959).

his disclosure or non-disclosure.¹¹¹ Federal regulations play an important part in this area of law, however, and they may impose liability in situations where Section 91 and the general rules of corporation law would not apply.¹¹²

REMEDIES

A full discussion of the remedies for breach of duty by corporation officers and directors is beyond the scope of this Comment. Briefly, however, if the duty breached is owed to the corporation or the corporation suffers harm due to the breach, the normal remedy is for the corporation to sue in its own behalf.¹¹³ Only in an extreme situation is receivership or dissolution of the corporation a proper remedy,¹¹⁴ and if the harm is to the corporation exclusively, an individual shareholder does not have a personal right of action because of it.¹¹⁵ If the corporation will not sue in its own behalf a derivative or secondary action may be brought by shareholders if they meet the procedural requirements.¹¹⁶

If the breach of duty caused loss to shareholders personally they may either sue individually or join together in a class action if circumstances merit it.¹¹⁷ Likewise the Business Corporation Law specifically gives creditors a right of action against officers and directors in certain circumstances.¹¹⁸ In any of these cases the liability of officers and directors for breach of duty is founded in contract, not tort,¹¹⁹ and the applicable prescriptive period is ten years unless otherwise provided.¹²⁰

111. *Hobart v. Hobart Estate Co.*, 26 Cal.2d 412, 159 P.2d 958 (1945); HENN § 240.

112. For a discussion of the federal regulations in this area see Miller, *The 1968 Business Corporation Law of Louisiana*, 29 LA. L. REV. 435, 470 (1969); FLETCHER § 900.2; HENN § 298.

113. *Dawkins v. Mitchell*, 149 La. 1038, 90 So. 396 (1922).

114. *Carey v. Dalgarn Constr. Co.*, 171 La. 246, 130 So. 344 (1930); *Semple v. Frisco Land Co.*, 124 La. 663, 50 So. 619 (1909); *Farwell v. Milliken & Farwell, Inc.*, 145 So.2d 644 (La. App. 4th Cir. 1962).

115. *Patterson v. Cotsoradis*, 187 So.2d 544 (La. App. 4th Cir. 1966).

116. See LA. CODE CIV. P. arts. 591-611; FED. R. CIV. P. 23.1. For a general discussion of derivative actions and references to the many authorities who have written upon them, see HENN §§ 352-383; N. LATTIN, *CORPORATIONS* ch. 8 (1959).

117. See LA. CODE CIV. P. arts. 591-597; FED. R. CIV. P. 23. On distinguishing class actions from derivative actions, see HENN § 354.

118. LA. R.S. 12:92 (Supp. 1968).

119. *LaGrone v. Brown*, 161 La. 784, 109 So. 490 (1926); *Dawkins v. Mitchell*, 149 La. 1038, 90 So. 396 (1922); *Roussel Pump & Elec. Co. v. Sanderson*, 216 So.2d 650 (La. App. 4th Cir. 1969).

120. LA. CIV. CODE art. 3554; LA. R.S. 12:92D (Supp. 1968); *Dawkins v. Mitchell*, 149 La. 1038, 90 So. 396 (1922); *Pool v. Pool*, 16 So.2d 132 (La. App. 1st Cir. 1943).

Section 95 of the Business Corporation Law specifies that provisions of the law elaborating the duties of officers and directors do not derogate in any way from the right of the corporation or other persons to bring an action because of fraud practiced upon them.¹²¹ Similarly, comments to the 1968 Business Corporation Law indicate creditors and third persons retain all the rights and remedies they previously had.¹²²

CONCLUSION

The Business Corporation Law and judicial decisions provide corporate officers and directors a general guide for all their actions and specific standards for some of them. This legislation and jurisprudence make it clear that officers and directors stand in a fiduciary relation to their corporation and its shareholders and are bound to act toward them with the due care of reasonable men in similar circumstances. Some types of conduct, such as complete neglect of corporate affairs, clearly fall short of this standard while other types, exemplified by the business judgment rule, are definitely permissible. Between the two extremes, however, are the many cases that can be determined only by considering all the facts and circumstances. In these situations the statute and judicial decisions do not offer definite answers but allow courts the discretion needed to apply the due care standard. This seems the proper way to protect a corporation and its shareholders from unreasonable conduct by officers and directors without subjecting corporate officials to unbearable standards and rules.

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121. LA. R.S. 12:95 (Supp. 1968); *cf.* Parks v. Hughes, 145 La. 221, 82 So. 202 (1919).

122. *See* LA. R.S. 12:92 Comment (Supp. 1968). *See also* LaGrone v. Brown, 161 La. 784, 109 So. 490 (1926) (suit against subscribers for unpaid portion of subscription); Ditzell Engineering & Constr. Co. v. Lehmann, 120 La. 273, 45 So. 138 (1907) (suit against corporate receiver).