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THE JOHN MARSHALL LAW REVIEW

The Origin and Evolution of the Third Party “Refusal to Deal”
Defense in Illinois Corporate Opportunity Cases

William Lynch Schaller

THE ORIGIN AND EVOLUTION OF THE THIRD PARTY “REFUSAL TO DEAL” DEFENSE IN ILLINOIS CORPORATE OPPORTUNITY CASES

WILLIAM LYNCH SCHALLER*

*“Thou subtle, perjur’d, false, disloyal man!”*¹

I. INTRODUCTION

As a practicing lawyer, I’ve found the discipline of reading new cases reported in advance sheets crucial to success. Even more crucial at times has been my practice of reading cases cited within cases in an effort to understand the origin and evolution of a doctrine.² Sometimes studying this progression reveals there is less than meets the eye with judicial decisions: they severely bend existing precedent to reach a result,³ or in some ways worse, they

* Partner, Baker & McKenzie, Chicago, Illinois. This article is dedicated to my beautiful wife, Jane Reynolds Schaller, and my beautiful children, Alexandra, William, George, and Samantha Schaller, for their love and patience during my lifelong disquisition on the fiduciary duty of loyalty. Thanks, too, to my brother Robert V. Schaller; my brother-in-law Louis P. Vitullo; my cousin John J. Cummins; my Baker & McKenzie partners Andrew J. Boling, Lisa S. Brogan, J. Patrick Herald, Sidney M. Kaplan, Mark L. Karasik, William J. Linklater, John M. Murphy, Michael A. Pollard, Shima S. Roy, Peter P. Tomczak, Robert W. Tarun, Michael J. Wagner, and Edward J. Zulkey; my former Baker & McKenzie colleagues Gerald L. Maatman, Jr., Craig R. Annunziata, Martin R. Castro, Paige Wright Olson, Amalia S. Rioja, and Kenneth J. Vanko; my former DePaul Law Review co-editors Peter A. Monahan and Gail B. Rago; and my mentors Judge George J. Schaller, Judge William J. Lynch, Justice John B. Simon, and Judge William J. Bauer—all courageous Illinois lawyers from whom I’ve learned so much, not least of which is loyalty itself.

1. WILLIAM SHAKESPEARE, *THE TWO GENTLEMEN OF VERONA* act 4, sc. 2.

2. *E.g.*, William Lynch Schaller, *Disloyalty and Distrust: The Eroding Fiduciary Duties of Illinois Employees*, 3 DEPAUL BUS. L.J. 1 (1991) (providing case-by-case study of the “preparing to compete” defense in Illinois fiduciary duty opinions).

3. *See* Ruggero J. Aldisert, *Precedent: What It Is and What It Isn’t; When Do We Kiss It and When Do We Kill It?*, 17 PEPP. L. REV. 605, 608-12 (1989-90) (offering textbook discussion of relationship between precedent and principle and the avenues courts use to escape precedent); Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *Blinking on the Bench: How Judges Decide Cases*, 93 CORNELL L. REV. 1, 3 (2007) (arguing that judges use intuition to

unwittingly misstate the law in attempting to restate it.⁴ But more often case law honestly and accurately displays rules in action and thereby exposes the strengths and weaknesses of doctrine against cold, hard facts,⁵ a reality memorably captured in Holmes' maxim.⁶ Learning law, then, is not just counting cases;⁷ it's seeing shortcomings and demanding doctrinal change.⁸

Illinois corporate opportunity law provides a prime example of theory colliding with reality: the third party "refusal to deal" defense. In *Kerrigan v. Unity Savings Ass'n*,⁹ the Illinois Supreme Court adopted the "line of business" test foreclosing fiduciaries from seizing corporate opportunities unless they first disclose and tender those opportunities to their principals. Since disclosure is rare and tender rarer still, one would think these strict standards would lead to summary dispositions favoring principals almost as a matter of course. While at times this happens, more often fiduciary defendants inject extraordinary expense, delay and uncertainty by arguing that the person or firm offering the opportunity—the third party—would never have dealt with plaintiff, regardless of the fiduciary's wrongdoing. Is this third

decide cases but "sometimes override their intuition with deliberation").

4. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 265 (1986) (Brennan, J., dissenting) ("In my view, the Court's result is the product of an exercise akin to the child's game of 'telephone,' in which a message is repeated from one person to another and then another; after some time, the message bears little resemblance to what was originally spoken.").

5. Jeffrey C. Dobbins, *Structure and Precedent*, 108 MICH. L. REV. 1453, 1455 (2010) ("The rules that govern the binding precedential effect of judicial decisions are a part of the deep structure of our legal system.").

6. OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 1 (Boston, Little, Brown & Co. 1881) ("The life of the law has not been logic; it has been experience.").

7. Paul Caron, *Empiricism Divides the Academy: Upstart Number-Crunchers Attract Praise and Derision*, NAT'L L.J., Mar. 1, 2011, at 1 (discussing debate about the extent to which empiricism should supplement doctrinal teaching in law school); Jonathan Macey, *Uncle Sam and the Hostile Takeover*, WALL ST. J., Mar. 21, 2011, at A17 (citing "dozens of empirical studies" showing returns to shareholders of public company takeover targets significantly exceed returns to shareholders of public companies that make takeover bids); L. Gordon Crovitz, *Tsunamis of Information*, WALL ST. J., Mar. 21, 2011, at A15 (quoting Friedrich Hayek's 1974 Nobel Prize speech, "The Pretense of Knowledge": "Unlike the position that exists in the physical sciences, in economics and other disciplines that deal with essentially complex phenomena, the aspects of events to be accounted for about which we can get quantitative data are necessarily limited and may not include the important ones.").

8. Walter V. Schaefer, *Precedent and Policy*, 34 U. CHI. L. REV. 3, 24 (1966) ("Precedent speaks for the past; policy for the present and the future. The goal which we seek is a blend which takes into account in due proportion the wisdom of the past and the needs of the present.").

9. 58 Ill. 2d 20, 317 N.E.2d 39 (1974).

party “refusal to deal” a defense, and more important, should it be?

In this article I focus upon the role of third parties in Illinois corporate opportunity litigation, first with a turn through Illinois Supreme Court decisions, followed by a study of Illinois Appellate Court and Illinois federal court cases that have wrestled with this third-party defense. Recounting these stories from the perspective of the third party adds the clarity of experience to inform policy and highlights some surprising dimensions of the Illinois Supreme Court’s corporate opportunity jurisprudence, not least of which is that the high court has never shown the slightest concern for third parties in these cases. So that nothing is lost in translation, I generally quote key passages bearing upon the third party’s conduct and the court’s reaction, if any, to it. I also offer extended critiques of cases that have compounded the third party refusal to deal problem by injecting additional errors, such as using the wrong corporate opportunity liability standards or no corporate opportunity standards at all. In a few instances I even examine the parties’ appellate briefs to help explain how undeveloped or simply erroneous arguments led courts astray, creating bad law inconsistent with Illinois Supreme Court policy and precedent.

This is the second of three articles analyzing aspects of the third party refusal to deal defense in Illinois corporate opportunity cases. In the first, I primarily provided a descriptive study of the unforgiving, pro-plaintiff standards that back the deterrence rationale behind Illinois corporate opportunity law.¹⁰ These strict standards explain why these cases are, or at least should be, so tough to win for defendants, and they would be but for the third party to refusal to deal defense. This second article shows these standards in practice and, I think, overwhelmingly demonstrates the need for a rule barring the refusal to deal defense as inconsistent with the deterrence policy animating Illinois fiduciary duty law in general and Illinois corporate opportunity law in particular. My third and final article will argue this issue from a policy standpoint and will attempt to fit this proposed rule within the framework of Illinois corporate opportunity law.¹¹

II. INTO THE ABYSS: COURT AFTER COURT, CASE AFTER CASE

Third-party refusal to deal fact patterns did not emerge, with

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

11. William Lynch Schaller, *Corporate Opportunities and the Third Party “Refusal to Deal” Defense: Policy and Practice Lessons from Illinois*, 47 J. MARSHALL L. REV. (forthcoming Fall 2013).

two minor exceptions,¹² until after the corporate opportunity “line of business” test had been formally recognized by the Illinois Supreme Court in 1974 in *Kerrigan*. It is helpful to understand how fiduciary duty law evolved in the corporate context in Illinois, so I begin there and move chronologically through early Illinois Supreme Court fiduciary duty cases as they encountered corporate opportunities, all of which involved third parties playing some role, whether major or minor. I then turn to the Illinois Supreme Court’s five modern corporate opportunity and corporate competition decisions starting with *Kerrigan*, focusing again upon the role third parties played in those cases. The same third party emphasis is thereafter used in examining Illinois Appellate Court corporate opportunity opinions. Finally, I track Illinois federal court treatment of the third party issue in diversity litigation, first through Seventh Circuit Court of Appeals decisions and then through select Illinois federal district court opinions.

A. *Early Illinois Supreme Court Corporate Fiduciary Duty Cases*

1. *Agents Standing on Both Sides of Transactions*

Species of fiduciary fraud claims can be found in some of the earliest reported Illinois Supreme Court opinions.¹³ It was not until the 1860s, however, that the Illinois Supreme Court began recognizing corporate claims against fiduciaries, starting with real estate¹⁴ and railroad cases¹⁵ and continuing on thereafter in almost every imaginable scenario.¹⁶ For the most part these early

12. *Glasser v. Essaness Theatres Corp.*, 414 Ill. 180, 111 N.E.2d 124 (1953) (landlord refused to renew plaintiff-principal’s lease and instead decided to sell building to plaintiff’s fiduciary); *Consumers Co. v. Parker*, 227 Ill. App. 552 (2d Dist. 1923) (landlord refused to renew plaintiff-principal’s lease after deadline passed and instead entered into new lease with fiduciary).

13. *McDonald v. Fithian*, 6 Ill. (1 Gilm.) 269, 290 (1844) (defendant purchased Wisconsin lots for himself and others on the same terms; agent’s failure to reveal his pre-existing financial relationship with seller was irrelevant since he paid the same price as the other purchasers); *Thorp v. McCullum*, 6 Ill. (1 Gilm.) 614, 626 (1844) (“Between two conflicting interests, it is easy to foresee, and all experience has shown, whose interests will be neglected and sacrificed.”); *Casey v. Casey*, 14 Ill. 112, 113-14 (1852) (agent for heirs purchased their interests in estate for nominal price without revealing his knowledge that estate was worth far more than heirs realized).

14. See generally *Fairman v. Bavin*, 29 Ill. 75, (1862) (even though he had entire control and management of the internal affairs of plaintiff’s store, plaintiff’s clerk was not employed to procure or assist in procuring plaintiff’s lease; he was therefore free to acquire that lease for himself once plaintiff finally advised her landlord she no longer wanted the premises).

15. *Gilman, Clinton and Springfield R.R. Co. v. Kelly*, 77 Ill. 426, 429 (1875) (after contract was signed, railroad directors joined contractor and thus stood on both sides of the contract between railroad and contractor).

16. See generally *Chicago Hansom Cab Co. v. Yerkes*, 141 Ill. 320, 30 N.E.

cases concerned traditional fiduciary fare: conflict-of-interest battles over agents directly or indirectly standing on both sides of a transaction—agents to sell selling to themselves or agents to buy buying from themselves.¹⁷ Other self-dealing cases involved directors doing business with their corporations, including directors as creditors,¹⁸ directors purchasing corporate assets when no other buyers emerged,¹⁹ directors acquiring stock from shareholders,²⁰ and transactions between corporations with interlocking directorates,²¹ all of which prompted “fairness”

667 (1892) (Springer, majority shareholder of seller, controlled seller's directors who approved sale of corporation's property to a buyer controlled by Springer, thereby placing Springer on both sides of the transaction); *Higgins v. Lansingh*, 154 Ill. 301, 40 N.E. 362 (1895) (sale of property by cemetery board of managers set aside on grounds of self-dealing); *Perry v. Engel*, 296 Ill. 549, 130 N.E. 340 (1921) (real estate agent was required to convey property acquired during the agency at the price he secretly paid for it, not at a mark up); *Dixmoor Country Club, Inc. v. Evans*, 325 Ill. 612, 617, 156 N.E. 785, 787 (1927) (corporate directors improperly caused their corporation to buy land from directors themselves at an inflated and hence unfair price); *Reiger v. Brandt*, 329 Ill. 21, 160 N.E. 130 (1928) (agent may not purchase his principal's property except upon the fullest disclosure; agent's failure to disclose pending offer to him at a price far higher than price he was offering his principal voided agent's real estate contract with his principal); *Winger v. Chicago City Bank & Trust Co.*, 394 Ill. 94, 67 N.E.2d 265 (1946) (directors improperly purchased assets and property of assessment life insurance company for their own benefit and transferred them to a legal reserve company in which they owned all of the stock); *Ditis v. Ahlvin Constr. Co.*, 408 Ill. 416, 97 N.E.2d 244 (1951) (real estate venturers breached their fiduciary duties to plaintiff co-venturer by diverting venture property and profits to a separate trust that did not include plaintiff); *Moehling v. W.E. O'Neil Constr. Co.*, 20 Ill. 2d 255, 170 N.E.2d 100 (1960) (agent-broker breached her fiduciary duty to buyer by failing to disclose terms of an option, highly unfavorable to her principal, that she held on land her principal was seeking to acquire).

17. *Dixmoor Country Club*, 325 Ill. at 616, 156 N.E. at 787 (corporate director “is subject to the ordinary rule that an agent to sell cannot sell to himself, and an agent to buy cannot buy of himself”).

18. *Harts v. Brown*, 77 Ill. 226, 228-29 (1875) (after giving notice to fellow stockholders of proposed sale, directors rightfully and fairly purchased assets of failing corporation for the use of all stockholders willing to join in forming a new company on the same terms as the failing corporation); *Beach v. Miller*, 130 Ill. 162, 173-74, 22 N.E. 464, 467 (1889) (director could not lawfully purchase corporate property in satisfaction of his own debt to the exclusion of other corporate creditors; director was a trustee charged with the duty to act for the benefit of all creditors once corporation became insolvent).

19. *Nowak v. Nat'l Car Coupler Co.*, 260 Ill. 260, 265-66, 103 N.E. 222, 224 (1913) (sale of corporate assets to director was fair where no other buyers emerged after multiple sale notices).

20. *Hooker v. Midland Steel Co.*, 215 Ill. 444, 74 N.E. 445 (1905) (director was fiduciary for corporation but not for plaintiff stockholder; director therefore was free to acquire plaintiff's stock without full disclosure).

21. *White v. Stevens*, 326 Ill. 528, 533-34, 158 N.E. 101, 103 (1927) (corporations having directors in common may contract with each other if the contracts are “fair and reasonable”; careful scrutiny showed allegedly

inquiries.²² Some even involved famous Illinoisans from years past such as Abraham Lincoln,²³ Lincoln confidant Leonard Swett,²⁴ Chicago traction magnate Charles T. Yerkes,²⁵ Chicago Stock Exchange President Granger Farwell,²⁶ Chicago Federal Judge Henry W. Blodgett,²⁷ and the forebears of recently retired United States Supreme Court Associate Justice John Paul Stevens.²⁸ Not surprisingly, the Illinois Supreme Court borrowed

offending corporation had purchased the furniture in question for the hotel company at the same price charged by manufacturers and wholesalers); *see generally* *Shlensky v. S. Parkway Bldg. Corp.*, 19 Ill. 2d 268, 166 N.E.2d 793 (1960) (closely scrutinizing fairness of five challenged transactions between corporations with interlocking directorates).

22. *Shlensky*, 19 Ill. 2d at 280-81, 166 N.E.2d at 800 (clarifying its earlier opinion in *Winger*, 394 Ill. 94, 67 N.E.2d 265, and holding that fairness inquiry, rather than total ban, is the appropriate approach for questioned transactions between directors and their corporations, with the burden of proof resting on directors).

23. *Casey*, 14 Ill. at 113 (listing A. Lincoln as counsel for appellants).

24. *Davis v. Hamlin*, 108 Ill. 39, 44 (1883) (listing Swett as counsel for the appellee). Swett later found himself mired in controversy over his role in the institutionalization of Lincoln's widow, Mary Todd Lincoln. *See generally* MARK E. NEELY, JR. & R. GERALD MCMURTRY, *THE INSANITY FILE: THE CASE OF MARY TODD LINCOLN* (S. Ill. U. Press 1993).

25. *Chicago Hansom Cab*, 141 Ill. at 332, 30 N.E. at 667. Yerkes sued as the victimized minority shareholder in Chicago Hansom Cab, prevailed at trial, and ended up as the appellee before the Illinois Supreme Court. *Id.* Yerkes famously merged Chicago's traction companies through widespread bribery and fraud. *See generally* JOHN FRANCH, *ROBBER BARON: THE LIFE OF CHARLES TYSON YERKES* (U. Ill. Press 2006).

26. *Farwell v. Pyle-National Electric Headlight Co.*, 289 Ill. 157, 157, 124 N.E. 449, 449 (1919) (Granger Farwell as plaintiff). Farwell twice served as head of the Chicago Stock Exchange, among other business ventures. *See Granger Farwell Dead: Retired Banker Was Twice President of Chicago Stock Exchange*, N.Y. TIMES, May 17, 1919.

27. *Higgins*, 154 Ill. at 304, 40 N.E. at 362 (identifying Blodgett as a defendant in connection with a dispute over organizing Rosehill Cemetery in Chicago). Blodgett's extraordinary career as a prominent lawyer, anti-slavery politician and federal judge is recounted in HENRY BLODGETT, *AUTOBIOGRAPHY* (Waukegan 1906).

28. *White*, 326 Ill. at 529, 158 N.E. at 101 (action against Stevens & Company hotel operators). The Stevens family hotel business was famous in its day, as were the travails of its owners. *See* *People v. Stevens*, 358 Ill. 391, 407, 193 N.E. 154, 160 (1934) (overturning criminal conviction of Ernest Stevens for embezzlement); WILLIAM E. BARNHART & EUGENE F. SCHLICKMAN, *JOHN PAUL STEVENS: AN INDEPENDENT LIFE 22-35* (N. Ill. U. Press 2010) (discussing in detail the business break up between Justice Stevens' grandfather James and great uncle Charles over the Chas. A. Stevens department store, followed years later by his father Ernest's conviction and its reversal, all ending with his father heavily in debt at death); Charles Lane, *Heartbreak Hotel*, CHICAGO MAGAZINE, Aug. 2006, at 132-35 (describing rise and fall of Justice Stevens' family in the Chicago hotel business); Stephanie Francis Ward, *A Man of Moderation: The Last Justice of the "Greatest Generation,"* *Gentlemanly John Paul Stevens Says Farewell*, ABA J., Vol. 95,

from agency and trust law principles to resolve these cases in every instance.²⁹

2. *Fairman v. Bavin*

Although some early Illinois Supreme Court cases presented fact patterns that today would be called corporate opportunities or corporate competition, none turned on third party refusals to deal. *Fairman v Bavin*,³⁰ for example, paid homage to time-honored fiduciary duty principles governing agents but rejected the equivalent of a corporate opportunity claim on the facts, holding plaintiff Fairman knowingly chose to waive the opportunity to renew her store lease without interference by defendant Bavin, her trusted store clerk.³¹ This left Bavin free to acquire the lease for himself—and once he did, he immediately excluded plaintiff from the premises, thereby compelling her to sell her stock and fixtures to him at a fire-sale price.³² There was no suggestion, however, that the third party landlord was in on this scheme or otherwise did anything untoward: “As between her and the landlord, the negotiation was ended, and neither the landlord nor the defendant had any reason to suppose that she still desired to procure these premises.”³³ To be sure, the court did not state or imply that the third party landlord in *Fairman* was unwilling to renew plaintiff’s lease; it was Fairman herself who unilaterally broke off the negotiations.

3. *Davis v. Hamlin*

A very different outcome followed two decades later on nearly identical lease renewal facts in *Davis v. Hamlin*.³⁴ Plaintiff Hamlin (the parties’ names were later reversed on appeal) ran a successful opera house out of premises he initially owned for 10

at 49 (May 2010) (describing tumultuous circumstances that engulfed Stevens’ family as a result of his father’s embezzlement conviction that was subsequently overturned).

29. *E.g.*, *Gilman, Clinton and Springfield R.R.*, 77 Ill. at 434 (“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*”); John H. Langbein, *Questioning the Trust Law Duty of Loyalty: Sole Interest or Best Interest?*, 114 YALE L.J. 929, 944-47 (2005) (discussing the origin and history of the “sole interest” rule and the related “no further inquiry” rule in trustee duty of loyalty law).

30. 29 Ill. 75 (1862).

31. The Illinois Supreme Court also stressed that, even though he had entire control and management of the internal affairs of plaintiff’s store, plaintiff’s clerk was not employed to procure or assist in procuring plaintiff’s lease. *Id.*

32. *Id.*

33. *Id.* at 76-77.

34. 108 Ill. 39 (1883).

years, lost through foreclosure, and then leased thereafter from third party landlord Borden, who had re-fitted the premises at plaintiff's request for a grand opening in 1880. Just before the opening Hamlin hired a manager for the opera business, defendant Davis, who quickly came to know how profitable Hamlin's operation was. Hamlin knew there was no chance of securing a comparable venue in Chicago, so in 1880 he began negotiating with Borden to extend his lease for 20 years beyond its 1883 expiration date. The Hamlin/Borden negotiations continued through December 1880 and into January 1881, when Borden gave Hamlin a big surprise: Borden had offers from two other Chicago men—one of whom, Hamlin later learned, was Hamlin's own business manager, Davis.

Hamlin immediately confronted Davis, who falsely claimed he was not attempting to gain the lease for himself and urged Hamlin not "to give an extravagant price for it."³⁵ Davis did not reveal that he had already told landlord Borden he would "pay as much rent as anybody,"³⁶ nor did Davis reveal that he had in fact offered a premium over the rent Hamlin was then paying, based upon Davis' inside knowledge of Hamlin's financial affairs.³⁷ Davis, of course, thereafter landed the lease for himself—no doubt at a pretty premium—and the trial and appellate courts both ruled against him, declaring him the constructive trustee of the property for the benefit of Hamlin.³⁸

The Illinois Supreme Court was appropriately appalled by Davis' "competition for the lease."³⁹ Davis knew the lease "was of vital importance to the interest of Hamlin,"⁴⁰ and Davis also knew with the end of the original lease Hamlin's "business would come to an end, and pass, good will and all, from Hamlin, the employer, into the hands of Davis, the employe[e]."⁴¹ And this would have been accomplished, the court emphasized, "because of his peculiar means of knowledge of the profitableness of the business, afforded him by the confidential position in which he was employed."⁴² In holding Davis was a constructive trustee for Hamlin, the Illinois Supreme Court condemned Davis' secret competition for the lease:

Public policy, we think, must condemn such a transaction as that in question. To sanction it would hold out a temptation to the agent to speculate off from his principal to the latter's detriment. Davis very

35. *Id.* at 43.

36. *Id.* at 42.

37. *Id.* at 46.

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.* at 47.

42. *Id.*

well knew that his employer would be willing to pay a much higher rent than that at which he obtained the lease, and that he could dispose of the lease to Hamlin at a large profit to himself, and such means of knowledge was derived from his position as agent. If a manager of a business were allowed to obtain such a lease for himself, there would be laid before him the inducement to produce in the mind of his principal an under-estimate of the value of the lease, and to that end, may be, to mismanage so as to reduce profits, in order that he might more easily acquire that lease for himself.

It is considered by appellant's counsel that the rule we apply, which holds an agent to be a trustee for his principal, has no application to the case at bar, because Davis was not an agent to obtain a renewal of the lease, and was not charged with any duty in regard thereto; that his was but the specific employment to engage amusements for the theatre, and that he was an agent only within the scope of that employment; that Hamlin having a lease which would expire April 16, 1883, had no right or interest in the property thereafter, and that Davis, in negotiating for the lease, did not deal with any property wherein Hamlin had any interest, and that such property was not the subject matter of any trust between them. Although there was here no right of renewal of the lease in the tenant, he had a reasonable expectation of its renewal, which courts of equity have recognized as an interest of value, secretly to interfere with which, and disappoint, by an agent in the management of the lessee's business, we regard as inconsistent with the fidelity which the agent owes to the business of his principal. There was the good will of the business, which belonged to the business as a portion of it, and this the agent got for himself.⁴³

It is easy to see precursors to the "interest or expectancy" (lease renewal) and "asset misappropriation" (confidential information) tests at work in *Davis*, although the court's emphasis on Davis' lack of disclosure and his interference with Hamlin's line of business fits just as comfortably within modern Illinois corporate opportunity jurisprudence under *Kerrigan*. But for our purposes, the most interesting aspect of *Davis* was the role ascribed to landlord Borden, who did not testify.⁴⁴ Borden did not refuse to deal with plaintiff Hamlin, as defendants in these cases routinely assert. He instead tried to play both bidders off against one another in an effort to extract the highest price, as one would expect.⁴⁵

43. *Id.* at 48.

44. *Davis*, 108 Ill. at 41 ("Respecting the renewal of the lease there is but the uncontradicted testimony of Davis and Hamlin themselves.").

45. *Id.* at 42 ("At the second [meeting between Hamlin and Borden, Hamlin] offered \$20,000 per year rent, but Borden declined to take it, saying he must see the other parties first; that they were two persons he had offers from; that they were managers, and Chicago men.").

4. *Farwell v. Pyle-National Electric Headlight Co.*

*Farwell v. Pyle-National Electric Headlight Co.*⁴⁶ presented a variation on *Davis*, with the fight concerning a director's personal purchase of intellectual property his corporation needed and in fact was using. Somewhat simplified, Pyle and Ewers owned four patents that they licensed to Pyle-National Electric Headlight Company.⁴⁷ That exclusive license was extended to January 1, 1900, at which time director Farwell personally purchased the license, the underlying patents, and certain pending patents from Pyle and Ewers.⁴⁸ The net effect of this transaction was to place Farwell on the other side of his own corporation's license contract and in possession of key intellectual property his corporation needed.

The Illinois Supreme Court found that Farwell, in becoming the owner of the contract with Pyle and Ewers, had "placed himself in a position where his individual interest was in conflict of his duty to the corporation of which he was a director."⁴⁹ The court stressed that it was Farwell's duty as a director to protect the corporation and that there was "nothing to indicate that [the corporation] was unable to purchase the contract."⁵⁰ The court therefore refused to permit Farwell to enforce his royalty contract against the corporation and held that Farwell was not entitled to an accounting.⁵¹ Though the court did not say it, this result was simply an application of the doctrine that one seeking the aid of a court of equity is prohibited from taking advantage of his own wrong.⁵² At all events, there was no suggestion that Pyle and Ewers were unwilling to deal with Pyle-National Electric Headlight Company, and so the third party refusal to deal defense was not in issue.

5. *Glasser v. Essaness Theatres Corp.*

The Illinois Supreme Court seemed to be following a "good faith" approach in *Fairman*, *Hamlin*, and *Farwell*, although a version of the "interest or expectancy" test also appeared in

46. 289 Ill. 157, 124 N.E. 449 (1919).

47. *Id.* at 158, 124 N.E. at 450.

48. *Id.* at 161, 124 N.E. at 451.

49. *Id.* at 167, 124 N.E. at 453.

50. *Id.*

51. *Id.* at 168, 124 N.E. at 454 ("This suit is against the corporation and is brought by the unfaithful director, who comes into equity to obtain the benefit of a contract which it is apparently a violation of his trust to enforce for his own benefit.").

52. *Gunn v. Sobucki*, 216 Ill. 2d 602, 618-19, 837 N.E.2d 865, 874 (2005) ("Few principles of equity are more basic than the doctrine that one seeking the aid of the courts is prohibited from taking advantage of his own wrongdoing.").

Hamlin. The high court's failure to articulate a controlling test in these earlier cases contributed to the mass confusion that subsequently broke out in the lower courts in *Glasser v. Essaness Theatres Corp.*,⁵³ a case that reached the Illinois Supreme Court for decision in January of 1953—and a case that turned decisively upon a third party's refusal to deal.

Still in operation today, the famous Essaness Theatres chain managed the Woods Theatre that found itself at the heart of the dispute in *Glasser*.⁵⁴ Silverman, Speigel and Stern organized Essaness (the corporate name presumably a play on the first letter of their surnames) in 1930 to manage Chicago area theaters, and it apparently did a good job with the one in question: the Woods Theatre was very profitable for the seven-year period that preceded the alleged usurpation in 1949.⁵⁵ Silverman and Speigel acquired the building housing the Woods Theatre in 1938 from the Marshall Field estate under a 99 year lease; Stern chose not to participate in the deal.⁵⁶ In 1942, as part of a complex transaction, the Franciscan Fathers acquired from the Marshall Field estate both the building and the lessor's interest in the 99 year lease, and then the next day acquired from Silverman and Speigel the lessee's interest in the Woods Theatre lease.⁵⁷ The Franciscan Fathers then re-let the property back to Silverman and Speigel, operating through their Woods Theatre Corporation, for a fourteen-month period expiring in 1943, subject to termination on sixty days notice.⁵⁸ Silverman and Speigel thereafter assigned their interests to a partnership that included Stern, and later, plaintiffs Glasser, Altschuler and Melvoin, the spouses of the principals behind well-known Chicago accounting firm Altschuler Melvoin & Glasser.⁵⁹ Importantly, the initial investment of Glasser, Altschuler and Melvoin was conditioned on a rebate agreement with Speigel, requiring Speigel to partially repurchase their interests in the event the Franciscan Fathers were to cancel the Woods Theatre lease, so they knew from the start that lease cancellation was a risk.⁶⁰

And that, of course, is precisely what happened—the Franciscan Fathers announced they were canceling the lease in

53. 414 Ill. 180, 181, 111 N.E.2d 124, 125 (1953) (“Thus, the score at present is one trial judge and two Appellate Justices have held the plaintiffs’ cause of action to be without merit and three Appellate Justices have held the reverse.”).

54. *Id.* at 182, 111 N.E.2d at 125.

55. *Id.* at 186, 111 N.E.2d at 127.

56. *Id.* at 184, 111 N.E.2d at 126.

57. *Id.* at 184-85, 111 N.E.2d at 126.

58. *Id.* at 185, 111 N.E.2d at 126.

59. *Id.* at 185, 111 N.E.2d at 126-27.

60. *Id.* at 185-86, 111 N.E.2d at 127.

1949 as part of their independent decision to sell the Woods Theatre building for ecclesiastical reasons.⁶¹ Silverman promptly communicated this development to Stern as agent for the Woods Theatre partnership.⁶² Stern sought without success to have the lease renewed, as did Silverman, and then all concerned were confronted with a choice: buy the property or lose the lease.⁶³ Stern, Glasser and the other Woods Theatre partners tried to recruit Henry Crown, Arthur Rubloff and other prominent Chicagoans to purchase the building and lease it to the Woods Theatre partnership—all with Silverman's knowledge and assistance—but to no avail.⁶⁴ The pressure was on because the Franciscan Fathers had an offer from an independent party, so Silverman finally stepped in and acquired the property for Essaness.⁶⁵ Silverman then offered Stern, Glasser and the other Woods Theatre partners the opportunity to participate in the deal, but Stern, Glasser and the other "plaintiffs were making unreasonable demands upon the defendants, that they wanted to participate in the deal if it did not entail a risk of their credit or capital."⁶⁶

From a certain point of view the equities were strongly with Silverman. He kept plaintiffs fully informed, tried to get the lease renewed in their favor, and assisted them in seeking a friendly buyer for the property in approaching Crown, Rubloff and others. When these efforts failed, he bought the property and then invited plaintiffs to participate in the deal. Most important, there was no suggestion that Silverman induced or influenced the underlying refusal of the third party, the Franciscan Fathers, to cancel rather than renew the partnership's lease:

The expectancy of the renewal of its lease had vanished, and it is furthermore evident that there was not anything that Silverman did that caused it to disappear. It was the decision of the Franciscan Fathers to use the property in question for purposes for which it was obtained, and not hold it any further in violation of the rules of the Order, that destroyed the expectancy of renewal.⁶⁷

Under these circumstances, the court found the case distinguishable from both *Fairman* and *Hamlin*. The court viewed *Fairman* as a case in which the tenant-principal "refused to take a further lease on the premises and after such definite refusal the

61. *Id.* at 189, 111 N.E.2d at 129.

62. *Id.*

63. *Id.*

64. *Id.* at 193, 111 N.E.2d at 130.

65. *Id.*

66. *Id.* at 194, 111 N.E.2d at 131.

67. *Id.* at 191-92, 111 N.E.2d at 129-30.

clerk rented the premises.”⁶⁸ The court then distinguished *Hamlin* primarily on third party refusal to deal grounds:

We do not consider this [*Hamlin*] case as determinative of the problem before us. We do not find in the conduct of Silverman the duplicity, faithlessness, and treachery exhibited by Davis [in *Hamlin*]. Another important distinction lies in the fact that in the instant case there was no expectancy of renewal. As we have heretofore pointed out, this had been completely destroyed before Silverman commenced his negotiations for the fee [simple]. . . . The evidence is overwhelming and without contradiction that the Franciscan Fathers would not renew the lease in question but were determined with finality to either convert the property into a church or sell it for cash and buy a more suitable site. Neither Silverman nor any of the defendants had anything to do with this decision. To hold the property longer for other than church purposes was a distinct violation of the rules of the Order. Although the plaintiffs were fully advised of this step about to be taken by the Franciscan Fathers, they did nothing about it. The trial court and the Appellate Court found the defendants acted in good faith throughout.⁶⁹

Obviously, *Glasser* explicitly employed versions of the “interest or expectancy” and “good faith” tests. The court, however, did not officially pronounce these as the governing tests for future cases, implying instead a generalized equitable approach to corporate opportunity cases. The court clearly viewed the third party Franciscan Fathers’ refusal to deal as an important equitable consideration in *Glasser*, emphasizing there was no evidence that Silverman induced their refusal. That being said, the Franciscan Fathers’ decision not to renew the Woods Theatre lease did not present a true “refusal to deal,” as they were perfectly willing to entertain purchase proposals from the Woods Theatre partners. Indeed, this is precisely why the Woods Theatre partners attempted to recruit Crown, Rubloff and others as financiers. Thus, although a refusal to deal played an important part in *Glasser*, that opinion is better understood as a “first party” financial disability case rather than a “third party” refusal to deal case.

6. *Bakalis v. Bressler*

Yet another real estate diversion case confronted the Illinois Supreme Court in September of 1953 in *Bakalis v. Bressler*.⁷⁰ And once again, the Illinois Supreme Court offered no definitive corporate opportunity test, probably because the third party’s role was more muted in *Bakalis* than in *Glasser*.

68. *Id.* at 201, 111 N.E.2d at 134.

69. *Id.* at 203-04, 111 N.E.2d at 135.

70. 1 Ill. 2d 72, 115 N.E.2d 323 (1953).

Bakalis and Bressler formed a partnership to acquire a bakery from Midland that operated out of premises leased from Midland.⁷¹ Key terms of the Midland transaction included a 12-year, \$25,000 note given to Midland and a 10-year lease that gave Midland the right to take over the Bakalis/Bressler partnership business in the event of a default or a failure to renew.⁷² The partnership agreement provided, as one would expect, that neither partner would “knowingly do any act by which the interests of the partnership shall be imperiled or prejudiced.”⁷³ Bressler later convinced Bakalis to pay off the balance of the Midland note early with partnership funds, while simultaneously telling Bakalis that Midland did not want to sell them the building they were leasing from Midland.⁷⁴ In fact, the early payoff was Bressler’s secret inducement to get Midland to sell the leased premises to Bressler, who then gave the property to his wife as a “gift”⁷⁵—no doubt to cover up the true identity of the landlord that thereafter received partnership rental payments. Bakalis eventually discovered this arrangement and sued to recover the property.⁷⁶

The Illinois Supreme Court ordered the property transferred back to the Bakalis/Bressler partnership, holding that Bressler breached his fiduciary duty as managing partner in acquiring the lease for himself.⁷⁷ The court rejected Bressler’s argument that his fiduciary duties were limited to the “bakery business” and did not include the real estate which was necessary to the operation of that business⁷⁸—a “line of business” holding in all but name. Bressler was under an obligation, the court stressed, to advise his partner fully of negotiations Bressler contemplated and carried on with Midland concerning the building, and Bakalis was entitled to join Bressler in the purchase if Bakalis so desired.⁷⁹ Bressler’s secret transaction not only allowed him to “immediately acquire the entire goodwill of the partnership business, because the lease so provided[,]”⁸⁰ but also directly contravened settled Illinois

71. *Id.* at 73, 115 N.E.2d at 324.

72. *Id.* at 74, 115 N.E.2d at 324-25. Specifically, the lease provided that on termination of the lease by the lessor for any breach, or upon the failure of the lessee to renew the lease at the end of the 10-year period, “the lessor shall have the right to the goodwill of the business of lessee conducted by it on said premises, with the names and addresses of its customers, and the right to contact such customers for the purchase and sale of bakery products of all kinds.” *Id.* at 78, 115 N.E.2d at 326.

73. *Id.* at 74, 115 N.E.2d at 324-25.

74. *Id.* at 74-75, 115 N.E.2d at 325.

75. *Id.* at 75, 115 N.E.2d at 325.

76. *Id.* at 76, 115 N.E.2d at 325.

77. *Id.* at 82, 115 N.E.2d at 328.

78. *Id.* at 79, 115 N.E.2d at 327.

79. *Id.* at 78-79, 115 N.E.2d at 327.

80. *Id.* at 78, 115 N.E.2d at 326.

partnership law.⁸¹ Not surprisingly, the court during the course of its opinion stressed Bressler's heightened fiduciary duties as managing partner and relied upon Judge Cardozo's famous opinion on almost identical facts in *Meinhard v. Salmon*.⁸²

Bressler's effort at the third party refusal to deal defense was tepid, taking the form of a lie to Bakalis during the underlying events: "After Bressler had paid the note with partnership funds plaintiff asserts he told him that Midland did not want to sell the building."⁸³ But this was just one of Bressler's many lies, as he also claimed (i) that he told Bakalis he was making a deal for himself and would trade his Midland stock in on it, (ii) that he told Bakalis a week after the purchase that he had bought the property for himself, and (iii) that Bakalis had knowingly paid rent to him thereafter.⁸⁴ The court found all of these assertions uncorroborated and unpersuasive.⁸⁵ The court therefore affirmed the trial court's order directing the building title to be transferred to Bressler and Bakalis as tenants in common, with Bressler and Bakalis assuming the mortgage and Bakalis reimbursing Bressler for one-half of the payment Bressler made at the time Bressler acquired the property from Midland.⁸⁶ Bressler also was ordered to account to Bakalis for Bakalis' one-half of the rents Bressler began collecting after his purchase of the property.⁸⁷

Bakalis was decided a mere nine months after *Glasser*, yet the Illinois Supreme Court felt no need to establish a clear rule governing corporate opportunity cases. The court found it sufficient to offer the bald conclusion that its holding in *Bakalis* followed the "same principle" as its earlier opinions in *Farwell*, *Dixmoor Golf Club v. Evans*,⁸⁸ and *Winger v. Chicago City Bank & Trust Co.*⁸⁹—even though no common "principle" beyond generalized fiduciary loyalty was at play in those cases.⁹⁰ As to *Glasser*, the court was content to assert an *ipse dixit*: "No conflict

81. *Id.* at 79, 115 N.E.2d at 327 ("The fiduciary relationship between co-adventurers ordinarily precludes one of them from purchasing or leasing property relating to the enterprise, either for himself or another, in the absence of full disclosure to his associates.") (quoting *Ahlvin Construction Co.*, 408 Ill. at 428, 97 N.E.2d at 250).

82. *Id.* at 78, 81, 115 N.E.2d at 326, 328 (citing and quoting *Meinhard v. Salmon*, 164 N.E.2d 545, 546 (N.Y. 1928)).

83. *Id.* at 75, 115 N.E.2d at 325 ("After Bressler had paid the note with partnership funds plaintiff asserts he told him that Midland did not want to sell the building.")

84. *Id.* at 75-76, 115 N.E.2d at 325.

85. *Id.*

86. *Id.* at 82, 115 N.E.2d at 328.

87. *Id.*

88. 325 Ill. 612, 156 N.E. 785 (1927).

89. 394 Ill. 94, 67 N.E.2d 265 (1946).

90. *Id.*

exists between the legal principles enunciated in this case and those in the case of *Glasser v. Essaness Theatres Corp.*, 414 Ill. 180. Different determinations are reached in the two cases because of an extreme difference in facts and the evidence presented.”⁹¹

7. *Paulman v. Kritzer*

The Illinois Supreme Court’s next corporate opportunity case, *Paulman v. Kritzer*,⁹² was also the first in which it employed the “corporate opportunity” label, no doubt because the case involved a Delaware corporation and therefore triggered settled Delaware corporate opportunity law under the internal affairs doctrine.⁹³ In that case Kritzer, an officer, director and 50% shareholder of Kritzer Radiant Coils, used company funds to acquire in his own name two parcels of property.⁹⁴ One, the Ebert Tract, he sold at a profit; he defended this transaction on the ground that the company funds he used “were advances to him personally.”⁹⁵ For the other, the Bulaw Tract, he used company funds to make the down payment and the first two installments, and he kept this property for himself.⁹⁶ As if these self-dealing transactions were not enough, Kritzer and other company officers then used company funds to purchase in their own name assets sold to them by United Asbestos and Rubber Company.⁹⁷

In impressing the diverted property with a constructive trust, the Illinois Supreme Court adopted the appellate court’s corporate opportunity legal analysis,⁹⁸ which in turn followed the Delaware Supreme Court’s decision in *Guth v. Loft, Inc.*,⁹⁹ the Second Circuit’s decision in *Irving Trust Co. v. Deutsch*,¹⁰⁰ and Judge Cardozo’s opinion for the New York Court of Appeals in *Meinhard*.¹⁰¹ Once again, as with its corporate opportunity predecessors in *Farwell*, *Davis*, *Fairman*, and *Bakalis*, there was no suggestion in *Paulman* that the third party property and asset sellers were unwilling to deal with the plaintiff-principal, Kritzer Radiant Coils.

91. *Id.*

92. 38 Ill. 2d 101, 230 N.E.2d 262 (1967).

93. *Paulman v. Kritzer*, 74 Ill. App. 2d 284, 289, 219 N.E.2d 541, 543 (2d Dist. 1966) (applying Delaware substantive law).

94. *Paulman*, 38 Ill. 2d at 102-03, 230 N.E.2d at 262-63.

95. *Id.* at 103, 230 N.E.2d at 263.

96. *Id.*

97. *Id.*

98. 74 Ill. App. 2d at 291-95, 219 N.E.2d at 544-47.

99. 5 A.2d 503 (Del. 1939).

100. 73 F.2d 121 (2d Cir. 1934).

101. 164 N.E. 545 (N.Y. 1928).

B. Modern Illinois Supreme Court “Refusal to Deal” Cases

*Kerrigan v. Unity Savings Ass’n*¹⁰² casts a long shadow over the refusal to deal debate. By defining corporate opportunities purely in terms of the employer’s interests as a matter of first principle, *Kerrigan* necessarily eliminated the third party refusal to deal defense. *Vendo Co. v. Stoner*¹⁰³ and *Mullaney, Wells & Co. v. Savage*¹⁰⁴ carefully followed suit but with the added twist of explicitly ignoring the interests of third parties. Indeed, as a mixed corporate opportunity / corporate competition case, *Vendo* should be understood as extending *Kerrigan* to ban the third party refusal to deal defense in corporate competition cases, not just corporate opportunity cases. *Dowd & Dowd, Ltd. v. Gleason*¹⁰⁵ did nothing to undermine this unambiguous and absolute view against third party interests, nor did *Lawlor v. North American Corp.*¹⁰⁶

1. *Kerrigan v. Unity Savings Ass’n*

Kerrigan, on its facts, did not involve a refusal to deal defense. The third party customers were not said to have expressed doubts about or dissatisfaction with Unity’s real estate lending services; they were simply referred to Plaza by Unity’s own fiduciaries for mortgage insurance Unity itself could have provided.¹⁰⁷ Nevertheless, the Illinois Supreme Court’s *Kerrigan* decision stands out for its uncompromising attitude. The *Kerrigan* court’s categorical approach—an opportunity within the employer’s line of business belongs to the employer absent full disclosure and tender of the opportunity by the fiduciary¹⁰⁸—can hardly be understood as an invitation to reframe the debate in terms of someone else’s interests. The court’s explicit emphases on the “prophylactic purpose”¹⁰⁹ of the line of business test and the need to deter fiduciary misconduct reinforce this self-evident proposition. And the fact that the supreme court instructed the trial court on remand to “ascertain the amounts to which the plaintiff is entitled and to determine what other relief should be granted,”¹¹⁰ rather than directing the trial court to determine whether the customers were willing to deal with Unity for their insurance needs, leaves little room for the “refusal to deal” defense

102. 58 Ill. 2d 20, 317 N.E.2d 39 (1974).

103. 58 Ill. 2d 289, 321 N.E.2d 1 (1974).

104. 78 Ill. 2d 534, 402 N.E.2d 574 (1980).

105. 181 Ill. 2d 460, 693 N.E.2d 358 (1998).

106. 2012 IL 112530, 983 N.E.2d 414 (2012).

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

108. *Id.* at 28, 317 N.E.2d at 43-44.

109. *Id.*

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

to co-exist with *Kerrigan*.¹¹¹

If *Kerrigan* can be faulted, its sole shortcoming was the Illinois Supreme Court's failure to explicitly overrule its earlier decisions in *Fairman*, *Hamlin*, *Farwell*, *Bakalis*, and especially *Glasser*. The *Kerrigan* court's express endorsement of the "line of business" test necessarily laid to rest the "interest or expectancy" test deployed in *Hamlin* and *Glasser* and the "good faith" test implicitly used in *Farwell*, *Glasser*, and *Bakalis*. This was a conscious choice on the *Kerrigan* court's part, as suggested by its citation to a Harvard Law Review corporate opportunity article that surveyed the various tests other courts were following in that era.¹¹² But because the *Kerrigan* court apparently saw no need to state the obvious—that its "line of business" holding was controlling in future corporate opportunity cases—later Illinois Appellate Court decisions would fall prey to misdirected arguments under other tests found in earlier Illinois precedents.¹¹³

2. *Vendo Co. v. Stoner*

Unlike *Kerrigan*, *Vendo Co. v. Stoner*¹¹⁴ placed the third party refusal to deal defense front and center. This point is easily grasped if one first reads the two Second District Appellate Court decisions that preceded the Illinois Supreme Court's opinion in *Vendo*.

After *Vendo* heard about the revolutionary Lektro-Vend vending machine, it directed its fiduciary Stoner to talk to the

111. Eric Talley, *Turning Servile Opportunities to Gold: A Strategic Analysis of the Corporate Opportunities Doctrine*, 108 YALE L.J. 277, 291 n.37 (1998) ("In fact, in some jurisdictions courts have been sufficiently troubled by verifiability problems to disallow the [third party refusal to deal] incapacity defense *altogether*, effectively requiring the insider to tender any opportunity about which she learns as a result of her affiliation with the corporation. *See, e.g., Irving Trust Co.*, 73 F.2d 121 (2d Cir. 1934); *Kerrigan*, 317 N.E. 2d 39 (Ill. 1974).") (emphasis in original).

112. 58 Ill. 2d at 29, 317 N.E. 2d at 44 (citing Note, *Corporate Opportunity*, 74 HARV. L. REV. 765 (1961)). The *Corporate Opportunity* article specifically contrasted the "line of business" with the "interest or expectancy" and "fairness" tests. *Id.* at 765-69.

113. *E.g., Dremco, Inc. v. S. Chapel Gardens, Inc.*, 274 Ill. App. 3d 534, 654 N.E.2d 501 (1st Dist. 1995) (reciting multiple tests); *Lindenhurst Drugs, Inc. v. Becker*, 154 Ill. App. 3d 61, 506 N.E.2d 645 (2d Dist. 1987) (reciting multiple tests); *Comedy Cottage, Inc. v. Berk*, 145 Ill. App. 3d 355, 495 N.E.2d 1006 (1st Dist. 1986) (reciting multiple tests); *Peterson Welding Supply Co. v. Cryogas Prods., Inc.*, 126 Ill. App. 3d 759, 467 N.E.2d 1068 (1st Dist. 1984) (reciting multiple tests); *Graham v. Mimms*, 111 Ill. App. 3d 751, 444 N.E.2d 549 (1st Dist. 1982) (reciting multiple tests); *Patient Care Services, S.C. v. Segal*, 32 Ill. App. 3d 1021, 337 N.E.2d 471 (1st Dist. 1975) (reciting multiple tests). *See also* Schaller, *supra* note 10, at 23-25 (criticizing inconsistent Illinois Appellate Court corporate opportunity decisions).

114. 58 Ill. 2d 289, 321 N.E.2d 1 (1974).

Lektro-Vend's owner—Phillips—about selling the invention to Vendo.¹¹⁵ No deal with third party Phillips was ever reached because Stoner was secretly behind Phillips' operation, and of course Stoner never disclosed his role in financing Phillips' venture (assuming the venture really belonged to Phillips rather than Stoner himself—an assumption the supreme court seriously doubted).¹¹⁶ In view of these circumstances, Vendo framed its lower court noncompete damages claim in terms of the value to Vendo of the missing Lektro-Vend machine:

Perhaps the nature of Vendo's evidence as to damages on remand can be succinctly indicated by Vendo's counsel's own words in his opening statement as being: (a) "What Vendo lost by way of sales by not having this (Lektro-Vend [FIFO]) machine, if that resulted from the conduct of Mr. Stoner," and (b) "the depreciation—or the diminution of the value of the company as of 1969 as a result of Mr. Stoner's activity in the failure to have the Lektro-Vend machine if that resulted from Mr. Stoner's activity."¹¹⁷

Rejecting these arguments, the appellate court reversed the huge \$7.3 million damages award because, it felt, Vendo's losses under its noncompete theory were attributable to Vendo's failure to develop its own FIFO (first in first out) vending machine rather than to Stoner's competition after leaving Vendo.¹¹⁸ The appellate court then criticized Vendo's damage experts for overlooking this failure on Vendo's part.¹¹⁹ The appellate court completed its analysis by assuming that third party Phillips' failure to do an acquisition with Vendo was determinative:

Neither the evidence in the first trial nor in the trial on remand establishes that Stoner was responsible for Vendo's failure to have FIFO. Our prior opinion describes Vendo's unsuccessful efforts to build a FIFO in 1959-60 (*Vendo Co. v. Stoner*, [105 Ill. App. 2d 261, 271-73], and, at page 274, Stoner's recommendation in March 1963 for Vendo's purchase of Lektro-Vend's FIFO machine. When Stoner's recommendation was rejected, he told Vendo that the future will show that Vendo's failure to acquire it was "a serious mistake." Vendo had decided against developing a FIFO twice before that occasion.

115. *Id.* at 298-99, 321 N.E.2d at 6.

116. *Id.* at 298, 321 N.E.2d at 6 ("Stoner testified that the understanding was that Phillips would own the [Lektro-Vend] machine, if it were developed, and would be entitled to any profits earned from it. There is no confirmation of Stoner's testimony in this regard. . . . [T]he stipulated testimony [of Phillips] did not refer to the prospective ownership of the machine.").

117. *Vendo Co. v. Stoner*, 13 Ill. App. 3d 291, 292-93, 300 N.E.2d 632, 634 (2d Dist. 1973).

118. *Id.* at 293-94, 300 N.E.2d at 634.

119. *Id.* at 294, 300 N.E.2d at 635 ("The computation of damages . . . did not conform to the decision and mandate of this court.").

After 1963 Vendo continued to reject the development of a FIFO machine, even after repeated urging by its salesmen. At the time of the trial on remand, April-May, 1971, Vendo was finally almost ready to begin production with a FIFO snack vender. This development resulted as a spin-off from its contract with Lance Company, a large buyer of vending machines on a bid contract basis.

Vendo's failure to have a FIFO vending machine is not attributable to defendants. The computation of damages for a loss of profits during defendants' breach and the diminution in the value of its business was not based on defendants' "wrongful competition" and therefore did not conform to the decision and mandate of this court.¹²⁰

The Illinois Supreme Court took precisely the opposite view of the situation, holding that the Lektro-Vend FIFO machine was a corporate opportunity and that it was Stoner's fault Vendo did not acquire it from Phillips—because Stoner was a secret competitor who "had a foot in each camp."¹²¹ In affirming the \$7.3 million judgment against Stoner for corporate opportunity usurpation and corporate competition, the Illinois Supreme Court did *not* hold that Vendo had to prove it would have persuaded Phillips to sell to Vendo. To the contrary, the Illinois Supreme Court repeatedly made it clear that third party Phillips' willingness or unwillingness to deal with Vendo was irrelevant:

Pierson went on to say that plaintiff itself had an interest in buying the Lektro-Vend. He asked Stoner to ascertain if Phillips had any interest in selling it, and if so, to set up a meeting between Phillips and representatives of plaintiff. Stoner then wrote one of plaintiff's vice-presidents, Spencer Childers, that Phillips would be willing to sell if the price were high enough. Stoner told plaintiff that Phillips wanted \$1,500,000, and that a third company had expressed a willingness to pay that amount.

A meeting did take place between Phillips and representatives of plaintiff in the latter part of January, 1963. The purpose of the meeting was to show plaintiff's representatives how the Lektro-Vend worked, and the record does not indicate that price was discussed. In March, Stoner informed plaintiff that he had told Phillips that he assumed, in the absence of further word from Childers, that plaintiff no longer had an interest in making the purchase. Childers wrote back on April 9 stating that plaintiff did still have such an interest, but that the asking price of \$1,500,000 was too high. Plaintiff stated that it was, however, prepared to pay a lower price which would be enough to cover development costs and return a fair profit to Phillips and his associates. The record does not indicate whether this counteroffer was transmitted to Phillips. In any event Stoner testified that the "negotiations" between

120. *Id.* at 293-94, 300 N.E.2d at 634-35.

121. 58 Ill. 2d at 304, 321 N.E.2d at 9.

Phillips and plaintiff terminated at this time.

It must be added that the record casts some doubt on whether at this time Phillips seriously entertained any intention of selling the Lektro-Vend design at all, rather than going into the manufacture and sale of these machines himself. . . .

In addition to his prior and subsequent support of Phillips' development of Lektro-Vend, Stoner's actions in respect to plaintiff's unsuccessful attempts in late 1962 and early 1963 to purchase the design violated his fiduciary obligations. In view of Stoner's prior expression of a desire to leave plaintiff's employment so that he could become associated with Phillips, it was perhaps naïve of plaintiff to assign Stoner himself as its intermediary. Had he disclosed the extent of his financial involvement in the Lektro-Vend, it may be doubted whether plaintiff would have done so, rather than dealing with Phillips directly or through some other agent.

Stoner had a foot in each camp. Not only did his undisclosed individual interest in controlling the further development and ultimately the manufacture and sale of the Lektro-Vend create the possibility of his taking an unfair advantage of plaintiff, but the evidence gives strong indication that he actually misled plaintiff while he was purportedly acting as plaintiff's agent with regard to plaintiff's possible acquisition of the Lektro-Vend. The information given plaintiff that Phillips wanted a price of \$1,500,000 for the Lektro-Vend came only from Stoner. Whether Phillips might have been willing to sell at a lower figure acceptable to plaintiff is unknown.¹²²

As these passages show, the Illinois Supreme Court affirmed the massive damage award in plaintiff Vendo's favor, despite the absence of proof concerning third-party Phillips' willingness to deal with Vendo. Indeed, it was precisely on this central point that the Illinois Supreme Court parted company with the appellate court, recasting the question as breach of fiduciary duty rather than merely breach of noncompete.¹²³ In doing so, the Illinois Supreme Court acted entirely in accord with its categorical decision in *Kerrigan*, issued just ten days before *Vendo*, that failure to disclose and tender an opportunity triggers corporate opportunity liability. Plainly, the Illinois Supreme Court would not have repeatedly highlighted the absence of proof as to third-party Phillips' willingness to deal, and then affirmed what was then the largest money judgment in Illinois history, if the court thought a third-party's "refusal to deal" constituted a defense to

122. *Id.* at 298-99, 304, 321 N.E.2d at 6-7, 9.

123. *Id.* at 303, 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 the employment contract, it is clear that Stoner violated his fiduciary duties to plaintiff during the period when he was a director and an officer of plaintiff.").

breach of fiduciary duty.¹²⁴

3. *Mullaney, Wells & Co. v. Savage*

If the history and holding of *Vendo* were not clear enough, the Illinois Supreme Court's subsequent ruling in *Mullaney, Wells & Co. v. Savage*¹²⁵ was plain: a third-party's refusal to deal is irrelevant as a matter of law. Savage served as an employee, but not an officer or director, of investment bank Mullaney, Wells & Co., and his job "was to go out and find deals."¹²⁶ Savage approached third-party Blossman on behalf of Mullaney, Wells & Co. and initially proposed to finance Blossman's firm through a private placement of new bonds with a firm client, Weiss.¹²⁷ Savage later testified that the Blossman firm's large, existing indebtedness made additional indebtedness "unfeasible unless buyers were also offered an option to purchase stock in the [Blossman] company at its then market price."¹²⁸ According to Savage, "Blossman was not prepared to offer options to purchase [Blossman] stock at any price less than \$9 or \$10 a share, however."¹²⁹ Savage never told Mullaney, Wells & Co. about Blossman's purported unwillingness to deal at any price below \$9 or \$10 per share; in fact, Savage never told Mullaney, Wells & Co. any details about the Blossman opportunity.¹³⁰

Recognizing the Blossman stock option transaction was potentially lucrative, Savage thereafter proposed an option transaction with Blossman in which Savage and a friend, Williams, would be the players in lieu of Mullaney, Wells & Co.¹³¹ As the value of the underlying Blossman stock quickly rose from \$3 to \$10 per share,¹³² the Savage/Williams \$8 options grew more valuable,¹³³ prompting Blossman to come to Chicago to seek a release from the option agreement—a request that was refused.¹³⁴ About a month later Mullaney, Wells & Co. learned about the Savage/Williams transaction not from Savage, but from a

124. *Cf. Prodomos v. Everen Sec., Inc.*, 389 Ill. App. 3d 157, 169, 906 N.E.2d 599, 609 (1st Dist. 2009) (trial court made directed finding in favor of defendant fiduciary, finding proximate cause was not proven, in part because "there was no evidence 'whatsoever' that [third party] Home Federal would have accepted plaintiff's offer").

125. 78 Ill. 2d 534, 402 N.E.2d 574 (1980).

126. *Mullaney, Wells & Co. v. Savage*, 66 Ill. App. 3d 853, 857, 383 N.E.2d 1270, 1274 (1st Dist. 1978) (internal quotation marks omitted).

127. *Id.* at 860, 383 N.E.2d at 1276.

128. 78 Ill. 2d at 542, 402 N.E.2d at 578.

129. *Id.*

130. *Id.*

131. *Id.* at 541-41, 402 N.E.2d at 578.

132. *Id.* at 543, 402 N.E.2d at 578.

133. *Id.* at 542, 402 N.E.2d at 578.

134. *Id.* at 543, 402 N.E.2d at 579.

Blossman director and from Blossman himself, ratting out Savage no doubt as part of their effort to escape the Savage/Williams transaction.¹³⁵ In fact, Blossman was so eager to escape the Savage/Williams option transaction that he told Mullaney, Wells & Co. during these calls “that the Blossman Company would reorganize in an effort to thwart the optionees and that Mullaney, Wells[& Co.]’s name was not on the option.”¹³⁶ Blossman also promised to send Mullaney, Wells & Co. a copy of the Savage/Williams option contract but never did—because Blossman wanted out of the option, not to honor it with the rightful party, Savage’s employer.¹³⁷ Blossman later even went so far as to contend that the Savage/Williams option contract was illegal.¹³⁸

When litigation ensued with his employer over the diverted Blossman transaction, Savage attempted to defend on the ground that further negotiations with Blossman on behalf of Mullaney, Wells & Co. would have been fruitless.¹³⁹ The Illinois Supreme Court rejected Savage’s refusal to deal argument as a matter of first principle, stressing Savage’s failure to disclose the Blossman opportunity to Mullaney, Wells & Co.:

A second difficulty with the theory used by the appellate court is that when an agent begins his exploration of an investment

135. *Id.*

136. 66 Ill. App. 3d at 861, 383 N.E.2d at 1277.

137. *Id.*

138. 78 Ill. 2d at 545, 402 N.E.2d at 580. According to the appellate court, Blossman sought to escape the Savage/Williams option contract on the ground that Savage had not provided the requisite three to five million dollars capital or long term financing Blossman needed for expansion, the quid pro quo Blossman had earlier discussed with Savage and Williams. 66 Ill. App. 3d at 860-61, 383 N.E.2d at 1277. Savage, however, denied making any such promise to secure such capital or long term financing for Blossman. *See* Illinois Supreme Court Brief of Defendant-Appellee/Cross-Appellant Savage, at 81 (“Blossman attempted to bow out of the option agreement purely and simply because ‘[b]y January, 1961, the price of the Blossman Hydratane stock had increased and that was during the period of the option”).

139. Supreme Court Brief of Defendant-Appellee/Cross-Appellant Savage, at 121-22:

The fact remains that the securing of the Blossman option (not exercised until after Savage’s severance with plaintiff) was merely an act in anticipation of Williams’ and Savage’s new career adventure. And this fact was clearly understood by the Blossman family and is the reason why they were willing to give Savage and Williams an option on a portion of their stock – so that through the individual efforts and abilities of Savage and Williams the balance of the stock retained by the Blossman family would appreciate in value while at the same time permitting a large profit on the stock to be sold as a result of the very high and inflated option price. This was not an “opportunity” that the Blossmans would have extended to Mullaney, Wells or that was ever open to Mullaney, Wells or that Mullaney, Wells could have undertaken, as such was predicated on Savage and Williams’ future performance.

possibility it may not be possible to determine what form it will ultimately assume. The Blossman negotiations furnish an illustration of the problem. Savage's initial letter to Blossman was written in the belief that the Blossman company or its controlling stockholders might desire funds and that a client of the plaintiff's, Weiss, might be in a position to advance them. Had this expectation been fulfilled the plaintiff and Savage would each have received their share of the brokerage fee. On the other hand, if the Blossmans and Weiss were unable to reach an agreement, Savage could have sought, and perhaps found, a new investor, which might have been another third party or possibly the plaintiff itself.

We may assume with the appellate court that Savage had no affirmative contractual duty to seek out investment opportunities for the plaintiff as opposed to brokerage opportunities. We may also assume that Savage might have concluded in good faith that further attempts to develop a loan or stock-purchase plan suitable for the Blossmans were fruitless, and that he might then have abandoned those attempts consistently with his contractual duties. It does not follow, however, 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 position where his personal interests will conflict with his duties to his principal. The situation is in principle indistinguishable from that of a real estate broker engaged to sell property owned by his principal who, without full disclosure of all material facts, acquires an interest in the property himself.¹⁴⁰

As in *Kerrigan* and *Vendo*, upon which the Illinois Supreme Court expressly relied in *Mullaney*,¹⁴¹ Savage's failure to disclose the Blossman opportunity ended the inquiry. Whether Blossman was willing to deal with Mullaney, Wells & Co. was beside the point: the focus was on what Mullaney, Wells & Co. wanted to do, not on what Blossman wanted to do. Even if Savage believed in good faith further discussions with Blossman for the benefit of Mullaney, Wells & Co. would have been "fruitless," the supreme court held, Savage was not then free to "begin to act on his own."¹⁴²

Nor did the Illinois Supreme Court leave any doubt about the effect of its categorical approach to nondisclosure of the Blossman opportunity: the high court reversed the trial and appellate courts' judgments in favor of Savage and entered judgment in favor of Mullaney, Wells & Co. as a matter of law.¹⁴³ If Blossman's refusal to deal were controlling, judgment should have been affirmed in

140. *Mullaney*, 78 Ill. 2d at 548-49, 402 N.E.2d at 581.

141. *Id.* at 549, 402 N.E.2d at 582.

142. *Id.*, 402 N.E.2d at 581.

143. *Id.* at 554-55, 402 N.E.2d at 584.

favor of Savage based upon Blossman's unmistakable desire not to deal with *either* Savage or Mullaney, Wells & Co. At the very least a remand for fact finding concerning Blossman's intentions surely would have been necessary if Blossman's refusal to deal were a defense.

4. *Dowd & Dowd, Ltd. v. Gleason*

The Illinois Supreme Court revisited its corporate opportunity and corporate competition jurisprudence in *Dowd & Dowd, Ltd. v. Gleason*,¹⁴⁴ a case in which lawyers were accused of competing before quitting their law firm. Unfortunately, *Dowd & Dowd* came to the court in a peculiar procedural posture, in that the fiduciary duty questions were certified for interlocutory appellate review and the rest of the case was decided on summary judgment.¹⁴⁵ While the Illinois Supreme Court definitively held that lawyer noncompetes are void as a matter of public policy,¹⁴⁶ the court's corporate opportunity and corporate competition discussions were noncommittal and specifically limited to attorneys.

Still, several observations in *Dowd & Dowd* are of interest here. First, the court commented that it did not believe "that lawyers are necessarily bound by the same fiduciary constraints that apply to nonlawyer officers and directors who are seeking to leave positions in commercial entities,"¹⁴⁷ implying that corporate officers and directors should be on their guard in relying upon the "preparing to compete" defense. Second, although the court for the first time cited the RESTATEMENT (SECOND) OF AGENCY Section 393, Comment e¹⁴⁸—the source of the "preparing to compete" defense—the court did so in the context of recognizing lawyers must be allowed some leeway in preparing to compete in light of their dual loyalties to their clients and their firms, dual loyalties that seldom exist in ordinary commercial relationships.¹⁴⁹ Third and finally, the court stated that if the defendants had diverted to themselves employment candidates their old firm had been interviewing, the defendants had usurped a corporate opportunity.¹⁵⁰

144. 181 Ill. 2d 460, 693 N.E.2d 358 (1998).

145. *Id.* at 467, 693 N.E.2d at 362-63.

146. *Id.* at 481, 693 N.E.2d at 369.

147. *Id.* at 471, 693 N.E.2d at 364-65.

148. *Id.* at 470-71, 693 N.E.2d at 364.

149. *Id.* at 470, 693 N.E.2d 364 ("Lawyers who are preparing to leave a law firm face a dilemma, caught between the fiduciary obligations they owe the other members of their firm, on the one hand, and the duty of being able to adequately represent clients who choose to follow them to their new place of employment, on the other hand.")

150. Specifically, the court offered the following telling observation:

Of greatest interest for our purposes, however, was the court's treatment of the "client choice" defense, namely third party Allstate's desire to go with the fiduciaries breaking away. Although the Illinois Supreme Court did not decide the fiduciary duty question of whether improper pre-termination client solicitation had taken place, the court was well aware a client had induced the fiduciary misconduct, as the court quoted a bank memo indicating "Allstate has been urging the Gleasons to break away from Dowd & Dowd and start their own firm."¹⁵¹ And in acknowledging that other courts had found fiduciary breaches in pre-termination client solicitations, the Illinois Supreme Court quoted a respected expert's law review article: "The principle of client choice is not, or at least should not be, so overpowering that it shields all pre-termination competition by members of a firm."¹⁵² Finally, later in its tortious interference analysis, the court reinforced this anti-"client choice" theme even more explicitly: "The focus here is not on the conduct of the client in terminating the relationship, but on the conduct of the party inducing the breach or interfering with the expectancy."¹⁵³

On any view these comments in *Dowd & Dowd* provide little comfort to those relying upon the third party refusal to deal defense. Faced with claims between employer and employee, the *Dowd & Dowd* court, consistent with longstanding Illinois Supreme Court fiduciary duty and tortious interference jurisprudence, rightly showed no concern for what third parties did or did not want to do. The "focus" was instead right where it should have been—"on the conduct of the party inducing the breach or interfering with the expectancy"—namely, the

Although much of the focus in the briefs is on the question of pretermination solicitation, the plaintiff points to other acts as also supporting its argument that the defendants breached their fiduciary duty. We note in passing some of the other allegations in the complaint, which might or might not be true. For example, the plaintiff alleges that the departing members improperly decided to pay off the existing firm's line of credit, in an effort to reduce their own potential liabilities and to improve their positions as borrowers for their new firm. The plaintiff believes that this decision by the departing members was a breach of the fiduciary duty they owed to the existing firm. In addition, the plaintiff alleges that the departing members usurped a corporate opportunity by hiring for the new firm persons who had been interviewed for positions at the Dowd firm. If established, this allegation could also support a claim for breach of fiduciary duty.

Id. at 475-76, 693 N.E.2d at 366-67.

151. *Id.* at 473, 693 N.E.2d at 365.

152. *Id.* at 475, 693 N.E.2d at 366 (quoting Ronald Hillman, *Law Firms and Their Partners: The Law and Ethics of Grabbing and Leaving*, 67 TEX. L. REV. 1, 27 (1988)).

153. *Dowd & Dowd*, 181 Ill. 2d at 484, 693 N.E.2d at 371.

fiduciaries.¹⁵⁴

5. *Lawlor v. North American Corp.*

The Illinois Supreme Court's most recent foray into the corporate opportunity / corporate competition field can be found in *Lawlor v. North American Corp.*,¹⁵⁵ a case which turned primarily on inadmissible third-party testimony. The employer, North American, accused its employee, Lawlor, of sharing confidential customer information with a competitor and diverting a corporate opportunity, resulting in the trial court awarding approximately \$71,000 in compensatory damages and \$551,000 in punitive damages against Lawlor, even though the employer had suffered no losses.¹⁵⁶ Although the supreme court reaffirmed that "[e]mployees . . . owe a duty of loyalty to their employer"¹⁵⁷ and that "a fiduciary cannot act inconsistently with his agency or trust and cannot solicit his employer's customers for himself,"¹⁵⁸ the court rejected the employer's fiduciary duty claims on procedural and evidentiary grounds.¹⁵⁹ At oral argument before both the

154. At trial on remand, plaintiff abandoned its "interviewee" corporate opportunity claim, and thus the case was not decided on corporate opportunity grounds in later proceedings. *Dowd & Dowd, Ltd. v. Gleason*, 352 Ill. App. 3d 365, 388, 816 N.E.2d 754, 774 (1st Dist. 2004). The remaining portions of the case were tried on corporate competition and tortious interference grounds, with the Illinois Appellate Court subsequently upholding the trial court's determination that defendants' breach of fiduciary duty and tortious interference "precluded [third-party customer] Allstate from having a free and unfettered choice regarding keeping its business with [plaintiff] Dowd." *Id.* at 382, 816 N.E.2d at 769. The trial and appellate courts so held based upon Allstate's 15-year relationship with plaintiff and the fact that there "was also no indication that Allstate was in any way dissatisfied with the services received from Dowd." *Id.* at 382, 816 N.E.2d at 769. Interestingly, both the trial and appellate courts made these rulings in the face of Allstate's assertion that it would have dropped all of its business with plaintiff and followed defendant Gleason had she simply resigned without soliciting Allstate before her termination. *Id.* at 383, 816 N.E.2d at 769. The fact that plaintiff's relationship with Allstate was terminable "at will" was also deemed no bar to the \$2.5 million judgment: "[U]ntil terminated, the relationship created by an at-will contract will presumptively continue in effect so long as the parties are satisfied, and, therefore, such a relationship is sufficient to support an action for tortious interference." *Id.* at 381, 816 N.E.2d at 767-68.

155. 2012 IL 112530, 983 N.E.2d 414 (2012). The Illinois Supreme Court offered no substantive fiduciary duty discussion in *Center Partners, Ltd. v. Growth Head GP, LLC*, 2012 IL 113107, 981 N.E.2d 345 (2012), holding that the attorney-client privilege was not waived and therefore shielded "extrajudicial" communications with transaction lawyers who negotiated a "synthetic partnership" that allegedly diverted corporate opportunities from an Illinois limited partnership.

156. 2012 IL 112530, at ¶24, 983 N.E.2d at 422.

157. *Id.* at ¶69, 983 N.E.2d at 433.

158. *Id.*

159. *Id.* at ¶¶ 68-76, 983 N.E.2d at 433-35.

Illinois Appellate Court and the Illinois Supreme Court, North American chose to waive its fiduciary duty competition claim that Lawlor had revealed to competitor Shamrock confidential North American gross profit margin information concerning key North American customers,¹⁶⁰ including MapQuest.¹⁶¹ This left only North American's corporate opportunity usurpation claim to support the trial court's significant monetary awards against Lawlor, and this claim rested almost entirely on the affidavit testimony of third party Kevin Bristow—an affidavit Bristow renounced at trial.¹⁶² Given Bristow's status as a third party, the circumstances leading up to his about-face at trial deserve a closer look.

Bristow, an outside consultant for MapQuest, had previously placed a substantial MapQuest order with North American through Lawlor, and in December 2004—the very month Lawlor wrote her controversial gross profit margin letter to Shamrock in connection with a job opportunity—Bristow advised Lawlor of a “significant”¹⁶³ opportunity with MapQuest regarding formation of a publishing division.¹⁶⁴ Bristow and Lawlor continued to talk in January and February 2005, but in March 2005 Lawlor was removed from the North American team making the MapQuest opportunity pitch and in May 2005 she was removed from the MapQuest account altogether.¹⁶⁵ In June 2005, Lawlor was told her compensation agreement would be changed just days before MapQuest placed a major order with North American that would have generated a substantial commission for her,¹⁶⁶ so she chose to resign that month and take the summer off, joining Shamrock in August or September 2005.¹⁶⁷ Lawlor denied mentioning Shamrock to MapQuest or any other customer while still in North American's employ.¹⁶⁸ “Not a single client followed” her to Shamrock.¹⁶⁹

160. *Id.* at ¶73, 983 N.E.2d at 434.

161. *Id.* at ¶17, 983 N.E.2d at 420 (quoting Lawlor's December 2004 letter to Shamrock referencing her \$2 million in collective billings for North American customers including “FTD, Mobil Travel Guide, MapQuest, Vista Management and Pilant as majors.”).

162. *Id.* at ¶19, 983 N.E.2d at 420.

163. *Id.* at ¶18, 983 N.E.2d at 420.

164. *Lawlor v. North American Corp.*, 409 Ill. App. 3d 149, 154-55, 949 N.E.2d 155, 165 (1st Dist. 2011).

165. *Lawlor*, 2012 IL 112530, at ¶18, 983 N.E.2d at 420-21.

166. *Lawlor*, 409 Ill. App. 3d at 153-54, 949 N.E.2d at 164.

167. *Lawlor*, 2012 IL 112530, at ¶4, 983 N.E.2d at 418 (stating “In August 2005, Lawlor began working for Shamrock”); 2012 IL 112530, at ¶18, 983 N.E.2d at 421 (stating Lawlor “began working at Shamrock in September 2005”).

168. *Id.*

169. *Lawlor*, 409 Ill. App. 3d at 154, 949 N.E.2d at 165.

On these sympathetic facts, all eyes were on Bristow. Bristow testified at trial that Lawlor promoted North American's interests at all times and that Lawlor "never recommended, nor did he consider, involving Shamrock with the MapQuest business."¹⁷⁰ Bristow disavowed his pretrial affidavit to the contrary, testifying at trial that he was pressured by North American into signing it. In particular, Bristow recounted how North American met him just outside O'Hare Airport with the affidavit and a notary shortly before Bristow was scheduled to fly to London to visit his elderly and gravely ill aunt and how North American "threatened to prevent him from leaving the country if he did not sign the affidavit about the MapQuest deal."¹⁷¹ Importantly, "Bristow testified that he signed the affidavit despite the fact that the statements contained therein were untrue because he was only concerned about seeing his aunt who died two days later."¹⁷² Finally, Lawlor at trial objected to Bristow's affidavit as hearsay,¹⁷³ the trial court stated that it did not rely upon Bristow's affidavit, and North American did not contend on appeal that Bristow's affidavit constituted substantive evidence.¹⁷⁴

Faced with these peculiar circumstances, the Illinois Supreme Court was unwilling to infer corporate opportunity usurpation by Lawlor based solely upon the sequence of events—namely, Lawlor talking with Bristow while she was talking with Shamrock, followed by Bristow contacting North American after Lawlor left, followed by Lawlor joining Shamrock without receiving or even soliciting MapQuest's business for Shamrock.¹⁷⁵ Unlike the fiduciaries in *Kerrigan*, *Vendo*, *Mullaney*, and *Dowd*, Lawlor was loyal at every turn; indeed, she remained loyal to the bitter end, despite North American's shabby treatment of her. In addition, unlike *Kerrigan*, *Vendo*, *Mullaney* and *Dowd*, the evidence in *Lawlor* revealed a third party willing to deal with the principal at all times. Thus, *Lawlor* sits at the opposite end of the modern Illinois Supreme Court fiduciary duty spectrum. Even so, *Lawlor* teaches a tough lesson: despite "four years of bruising discovery"¹⁷⁶ followed by a jury trial and two appeals, determining third party Bristow's true intentions was no mean feat, as Bristow's 180-degree turn frightfully underscored.

170. *Lawlor*, 2012 IL 112530, at ¶19, 983 N.E.2d at 421.

171. *Lawlor*, 409 Ill. App. 3d at 155, 949 N.E.2d at 165.

172. *Lawlor*, 2012 IL 112530, at ¶19, 983 N.E.2d at 421.

173. See John H. Langbein, *Historical Foundations of the Law of Evidence: A View from the Ryder Sources*, 96 COLUM. L. REV. 1168, 1174-76 (1996) (describing evolution of hearsay from oath-based concerns in the 18th century to cross-examination concerns in the 19th century to the present).

174. *Id.* at ¶71, 983 N.E.2d at 434.

175. *Id.* at ¶72, 983 N.E.2d at 434.

176. *Lawlor*, 409 Ill. App. 3d at 151, 949 N.E.2d at 162.

6. Summary of Illinois Supreme Court Refusal to Deal Jurisprudence

This extended review of the Illinois Supreme Court's leading corporate opportunity / corporate competition decisions shows that the third party "refusal to deal" defense was very much on the court's mind at the very moment the court was adopting these theories in its modern jurisprudence. Indeed, given that Justice Schaefer authored *Vendo* only ten days after *Kerrigan*, it is likely that he not only had *Vendo* in mind as he wrote *Kerrigan*, but that he wrote the categorical opinion in *Kerrigan*—requiring full disclosure and timely tender—to blunt the relevance in *Vendo* of third party Phillips' willingness or unwillingness to deal with *Vendo*. This is the simplest reading of the Illinois Supreme Court's approach in *Kerrigan* and *Vendo* once one takes into account the high court's pointed rejection of the appellate court's second opinion in *Vendo*, where the appellate court reversed the giant judgment solely on the ground that there was no proof *Vendo* wanted a FIFO machine of its own.

This categorical approach, which by definition excludes the third party refusal to deal defense, also explains the holding and outcome in *Mullaney*, where the Illinois Supreme Court ignored third party Blossman's testimony that he did not want to give the challenged option to *either* Savage or Mullaney, Wells & Co. If there were still any doubt, the Illinois Supreme Court's tortious interference holding in *Dowd & Dowd*, following on the heels of its extended fiduciary duty discussion in that case, explicitly turned aside the third party client's interests as a matter of first principle: "The focus here is not on the conduct of the client in terminating the relationship, but on the conduct of the party inducing the breach or interfering with the expectancy."¹⁷⁷ It hardly seems likely the court would reject a "client choice" focus in tortious interference cases without doing the same in fiduciary duty cases, given the preeminent status of fiduciary duty law.¹⁷⁸

177. *Id.* at 484, 693 N.E. 2d at 371.

178. That "client choice" should be irrelevant in fiduciary duty cases is also reinforced by the Illinois Supreme Court's repeated refusal to void physician restrictive covenants on "client choice" grounds, despite the general importance of the physician-patient relationship. *See, e.g.,* Mohanty v. St. John Heart Clinic, S.C., 225 Ill. 2d 52, 67, 866 N.E.2d 85, 94 (2006) (rejecting American Medical Association Opinion 9.02 "patient's choice of physician" position in reaffirming Illinois common law restrictive covenant rules applicable to physicians); *Canfield v. Spear*, 44 Ill.2d 49, 52, 254 N.E.2d 433, 435 (1969) ("Nor is the contract injurious to any legitimate interest of the public. Defendant can be as useful to the public at some other place in the State as he can in Rockford, and the health of persons elsewhere is just as important. It cannot be said that the public interest is adversely affected if a physician decides to move from one community to another, nor does it become

Lawlor is not contrary to any of these decisions; the employer in that case offered no admissible evidence in support of its main fiduciary duty claim concerning the MapQuest opportunity and conceded its remaining “confidential information” claim was not viable, and more important for our purposes, the third party there apparently was willing to deal with the employer at all times.¹⁷⁹

In short, the Illinois Supreme Court has clearly contemplated the refusal to deal defense on many occasions and has treated it as irrelevant in every instance. The supreme court has never once held that the plaintiff principal must plead and prove it would have landed the deal but for the fiduciary’s failure to disclose or tender the opportunity. Loss of the opportunity, not loss of the deal, is what is important under *Kerrigan*.

C. Early Illinois Appellate Court “Refusal to Deal” Cases

Illinois Appellate Court cases decided before *Kerrigan* lacked a definitive statement of Illinois corporate opportunity law from the Illinois Supreme Court, and as a result different appellate court cases used different formulations. This mattered because the “interest or expectancy” test, in circular fashion, invited courts to inquire into what the third party might have done as a component of defining the “interest or expectancy.” The “good faith” test did the same, to the extent it focused the courts’ attention on the reasonableness of the defendant-fiduciary’s belief that the third party simply did not want to deal with plaintiff. Nevertheless, the early Illinois Appellate Court cases are worth reviewing to underscore the policy problems embedded in inviting third-party testimony—namely, unnecessary complexity and confusion.

1. *Consumers Co. v. Parker*

Consumers Co. v. Parker,¹⁸⁰ the Illinois Appellate Court’s earliest adventure with a corporate opportunity, involved a manager’s lease renewal diversion much like the Illinois Supreme Court decisions in *Fairman* and *Davis*. But unlike those earlier Illinois opinions, the defendant-fiduciary in *Consumers* presented a series of intricate fallback defenses, including the third party

so if the move results from some agreement made in advance. If a severe shortage exists in any particular place young doctors will tend to move there, thus alleviating the shortage.”); *Bauer v. Sawyer*, 8 Ill.2d 351, 355, 134 N.E.2d 329, 331 (1956) (“We are unable to say that the reduction of this number [of 70 physicians] by one will cause such injury to the public as to justify us in refusing to enforce this contract. In any case, there is no reason why Dr. Sawyer cannot serve the public interest equally well by practicing in another community.”).

179. *Lawlor*, 2012 IL 112530, at ¶¶71-76, 983 N.E.2d at 433-35.

180. 227 Ill. App. 552 (2d Dist. 1923).

landlord's refusal to deal with the plaintiff-principal. As a result, the appellate court was required to sort through conflicting versions of the same story told from four different perspectives: plaintiff Consumers, defendant Parker, defendant Mitchell, and the defendant landlord.

According to the employer, Consumers, it sought to renew its Elgin ice house lease through its real estate agent, Kaine, who was assisted by its Elgin general manager, defendant Parker.¹⁸¹ After Kaine dickered with the landlord over price on two occasions in September 1921, Kaine instructed Parker on October 31, 1921, to arrange another negotiating session with the landlord, and on November 1 Parker confirmed he had scheduled such a meeting for November 4.¹⁸² On November 3, however, the landlord notified Consumers that the property had been leased to "someone else," and of course that "someone else" turned out to be none other than Parker and his secret partner Mitchell, who together had opened a rival ice house at Consumers' former location.¹⁸³

Parker's first line of defense was to call himself an "errand boy" whose fiduciary duties were limited to managing the Elgin facility, in an effort to minimize his role in Kaine's lease negotiations on behalf of Consumers.¹⁸⁴ The court quickly dispatched Parker's duty defense: Parker, as the top manager of the Elgin facility, was a fiduciary charged with knowing that the Elgin lease was up for renewal, even if it was not his job to secure that lease renewal.¹⁸⁵ As a fiduciary, the court held, he was prohibited "from dealing in any manner with the subject-matter of the relation."¹⁸⁶ This holding was predictable given the *Consumers* Court's extended analysis of *Davis*.¹⁸⁷

Perhaps realizing that *Davis* spelled trouble for his "errand boy" argument, Parker attempted to shift the court's focus from himself to his secret partner Mitchell, then to his employer Consumers, and finally to the compliant landlord itself. Mitchell, Parker claimed, had learned of the lease opportunity through a former Consumers employee named Streator, not through Parker; the court thought otherwise since Mitchell was a relative of Parker

181. *Id.* at 555-56.

182. *Id.* at 556.

183. *Id.* at 556-57.

184. *Id.* at 567.

185. *Id.* at 567-68.

186. *Id.* at 568.

187. *Id.* at 564-65. The *Consumers* duty holding remains a correct statement of law to this day in light of the identical duty formulation in *Mullaney*, 78 Ill. 2d at 546, 402 N.E. 2d at 580 ("Under standard agency doctrine [an agent] is obligated to act solely for the benefit of [his principal] in all matters connected with his agency, and to refrain from competing with [his principal].").

through marriage.¹⁸⁸ The court viewed the source of Mitchell's lease knowledge as irrelevant in any event, given Parker's fiduciary duty not to deal against his employer with respect to the subject matter of his agency.¹⁸⁹

As to his employer, Parker argued that the landlord told Consumers' agent, Raine, the property would not be leased to anyone else before October 31; that Consumers delayed unreasonably in allowing the October 31 lease renewal deadline to lapse despite Parker's warning that "certain parties" were after the lease; and that "when informed by the [landlord] on November 1" that "they would have no further dealings with [Consumers],"¹⁹⁰ Parker "felt at liberty to enter into partnership with Mitchell" to acquire the lease.¹⁹¹ The court was utterly unimpressed with Parker's disclosures and disclaimers: "Parker's lips were sealed" as to the one fact that mattered—he and Mitchell were secretly working to get the lease for themselves even as Consumers was working to renew it.¹⁹²

The third party refusal to deal argument—centering on the landlord's decision to deal with Mitchell and Parker rather than Consumers once the October 31 renewal date passed—deserves close scrutiny as the first serious effort at this defense in Illinois. Consumers, the landlord argued, was given until October 31 to secure a new lease of the premises but insisted on paying less rent.¹⁹³ When Consumers failed to respond by October 31, the landlord told Parker that "they were through with [Consumers], as Mitchell had, during October, opened negotiations for a lease, and they were about to close with him."¹⁹⁴ The landlord also conveniently claimed they dealt only with Mitchell and "that they had no conversations or dealings with Parker concerning [the lease] and did not know he was to be a party until the lease was being prepared on November 3."¹⁹⁵

The factual picture painted by the landlord was a combination of avarice and ignorance—avarice as to who would pay the most and ignorance as to Parker's role. Avarice was easy to defend: Consumers held out for a rent reduction while Parker and Mitchell offered better terms; a close call this was not.¹⁹⁶ But ignorance as to Parker's agency status was a tougher sell and the

188. *Id.* at 561.

189. *Id.* at 568.

190. *Id.* at 558.

191. *Id.*

192. *Id.* at 569.

193. *Id.* at 550.

194. *Id.*

195. *Id.* at 559.

196. *Id.* (Consumers "would not pay rent at the same rate"; the landlord "would not rent for any less").

Illinois Appellate Court would have none of it: “As to the lessors, the record discloses they knew that Parker was an employee of appellant; they had known it for a number of years, and this rule can be invoked relative to them; ‘that the laws in force at the time of the making of contracts, form a portion of their essence, and must be considered as entered into with reference to such laws and be so construed.’”¹⁹⁷ Accordingly, the appellate court reversed the trial court’s dismissal of Consumer’s complaint and remanded with instructions that the trial court enter the decree Consumers prayed for—an order directing Parker and Mitchell to assign their new lease to Consumers, the landlord’s protestations notwithstanding.¹⁹⁸

In many respects, this first Illinois analysis of the third party refusal to deal defense remains the best. The defendants offered every imaginable bob and weave to distance Parker from the deal: Kaine spoke, not Parker; Streator disclosed, not Parker; Mitchell negotiated, not Parker; Consumers delayed, not Parker; the landlord decided, not Parker. Yet the appellate court, focusing on first principles, was not confused in the least by these defense red herrings. What mattered, the court held, was that Parker and Mitchell began their secret talks in October¹⁹⁹ and that the landlord learned of Parker’s secret partnership with Mitchell as “the lease was being prepared on November 3.”²⁰⁰ In other words, the landlord’s supposed refusal to deal with Consumers was irrelevant; its knowledge of Parker’s involvement in the diversion was the legally controlling fact, and this fact permitted the court to unwind the landlord’s lease with Mitchell and Parker in favor of Consumers. And, of course, the landlord’s refusal to deal was plainly not hard and fast: it actively negotiated with Consumers until Parker and his pal Mitchell secretly appeared on the scene.

2. *Henry’s Drive-In, Inc. v. Anderson*

The first Illinois Appellate Court opinion to employ the “corporate opportunity” label, *Henry’s Drive-In, Inc. v. Anderson*,²⁰¹ was also the first in which the defendant asserted that plaintiff had to prove plaintiff would have landed the diverted deal but for the defendant’s fiduciary wrongdoing. Lacking any true corporate

197. *Id.* at 572.

198. *Id.* at 557, 572.

199. *Id.* at 562 (“Mitchell called on the [landlord] and learned from them that [Consumers] was negotiating for a new lease, and that the [landlord] would not lease to him if [Consumers] completed its arrangements during the month of October. Mitchell proposed to Parker that they form a partnership and go into the coal and ice business on the [landlord’s] property, if they could get the lease thereof.”).

200. *Id.* at 559.

201. 37 Ill. App. 2d 113, 185 N.E. 2d 103 (1st Dist. 1962).

opportunity precedent from the Illinois Supreme Court, the appellate court followed the Delaware “line of business” decision in *Guth v. Loft, Inc.*²⁰² and held that Anderson, the president of Henry’s Drive-In, wrongfully diverted three franchisees (Carrerras, Nicksic, and Busse) to his new company before resigning from Henry’s.²⁰³

As to the third parties, Anderson argued judgment against him “should not have been entered because there [was] no showing that Carrerras, Nicksic and Busse would have become franchisers for plaintiff if there had been no intervention by defendant.”²⁰⁴ The opinion revealed no specific testimony by these third parties that they were unwilling to deal with plaintiff, so *Henry’s Drive-In* was not a true third party refusal to deal scenario. In fact, the evidence implied the opposite: Carrerras, Nicksic and Busse all had franchise deposits on file with Henry’s Drive-In that Anderson refunded to them just before resigning,²⁰⁵ suggesting all three were perfectly pleased to work with Henry’s Drive-In until Anderson intervened. The opinion was telling, however, to the extent the appellate court felt no need to specifically require a finding that Carrerras, Nicksic, and Busse were willing to deal with Henry’s Drive-In.²⁰⁶ In this respect *Henry’s Drive-In* foreshadowed the Illinois Supreme Court’s opinion in *Vendo*, where the high court 12 years later upheld a significant damages award without evidence that third-party Phillips was willing to deal with *Vendo*.

3. *Mile-O-Mo Fishing Club, Inc. v. Noble*

Even though it did not involve a third party refusal to deal defense, one early Illinois corporate opportunity case is enlightening on a threshold question: Did the third party have reason to know something was amiss? In *Mile-O-Mo Fishing Club, Inc. v. Noble*,²⁰⁷ the third party’s reaction was what one would expect from a truly innocent third party: it thought the fiduciary was acting on behalf of his principal at all times.

Mile-O-Mo, a nonprofit fishing club, had erected a building on a parcel of land it rented for about 12 years from the property owner, Owens-Illinois. During the years 1961, 1962, and 1963, the club negotiated with Owens-Illinois about purchasing the real

202. 5 A.2d 503 (Del. 1939).

203. *Henry’s Drive-In*, 37 Ill. App. 2d 113 at 122-23, 185 N.E.2d at 107-08.

204. *Id.* at 121, 185 N.E.2d at 106.

205. *Id.*

206. *Id.* at 121, 185 N.E.2d at 106-07 (“However, it is unreasonable to take the view that the negotiations between the three [Carrerras, Nicksic, and Busse] and plaintiff was a merely casual relationship, and such a view would disregard the reality of the situation.”).

207. 62 Ill App. 2d 50, 210 N.E.2d 12 (5th Dist. 1965).

estate.²⁰⁸ Defendant Noble, while president of the club, concocted a scheme to buy the property in his own name, claiming it was for the benefit of the club, and approached Owens-Illinois with his proposal in September 1962.²⁰⁹ Owens-Illinois' business representative, Laird, had talked with the club's members about the club buying the land in the past, Laird was always willing to sell to the club,²¹⁰ and "Laird thought defendant [Noble] was dealing as president of plaintiff, and for plaintiff" when Laird negotiated with Noble in September.²¹¹ But Noble later told Owens-Illinois' counsel he was buying the property for himself at the time the deal closed in February 1963.²¹² Why the change of story? Because Noble had been removed as president of the club in December 1962 and thereafter "did not attend meetings and took no part in club activities."²¹³ The club was shocked, then, when its representative approached Laird to buy the property in March 1963, only to have Laird tell them the property "had had been practically sold to the club, that Noble is buying it in his name for you."²¹⁴ The club responded with litigation, of course, and the appellate court imposed a constructive trust on the property for the benefit of the club, ordering Noble and his wife to transfer title and ordering the club to reimburse Noble.²¹⁵ But *Mile-O-Mo* stands out as the only Illinois corporate opportunity opinion—before or after *Kerrigan*—in which a third party testified that it did not realize the fiduciary was acting against his principal's interests. The absence of this crucial fact in every case is inherently suspect, and *Mile-O-Mo* shows why it is always missing: the fiduciary has to defraud *both* his principal *and* the third party for this to occur.

4. *Northwestern Terra Cotta Corp. v. Wilson*

The third party refusal to deal defense also did not appear in the Illinois Appellate Court's 1966 corporate opportunity opinion in *Northwestern Terra Cotta Corp. v. Wilson*.²¹⁶ This decision is nonetheless of keen interest because it was later miscited as authority for the third party refusal to defense in a key case,

208. *Id.* at 53, 210 N.E.2d at 13.

209. *Id.* at 54, 210 N.E.2d at 14.

210. *Id.* at 56, 210 N.E.2d at 15 ("[Owens-Illinois] had no restrictions as to who could buy. It was primarily concerned with selling to plaintiff because plaintiff had leased the property for some time.")

211. *Id.*

212. *Id.* at 55, 210 N.E.2d at 15.

213. *Id.* at 54, 210 N.E.2d at 14.

214. *Id.* at 55, 210 N.E.2d at 14.

215. *Id.* at 58-59, 210 N.E.2d at 16.

216. 74 Ill. App. 2d 38, 219 N.E.2d 860 (1st Dist. 1966).

*Peterson Welding Supply Co., Inc. v. Cryogas Product., Inc.*²¹⁷ *Northwestern Terra Cotta* is also of special interest because it is frequently cited as authority for the closely related defense that a fiduciary may seize an opportunity “if the corporation has tried without success to obtain it.”²¹⁸

Northwestern Terra Cotta dealt with a corporation’s claimed right to repurchase its stock ahead of its directors. A Chicago bank sought to sell shares it held in *Northwestern Terra Cotta Corp.* at \$7 per share, and *Northwestern* began negotiating. At first *Northwestern*, through its president Hudson and its director Johnson, offered \$4 per share for the bank’s *Northwestern* shares, and then \$4.50, and finally \$5. But the bank stood firm at \$7 and *Northwestern*’s board of directors never authorized it to raise its offer to \$7—apparently because *Northwestern* lacked the cash to finance the purchase—so no sale took place. At that point, another *Northwestern* director, defendant Wilson, stepped up and bought a large block of the bank’s *Northwestern* stock at \$7. *Northwestern* responded with a corporate opportunity action against Wilson, but the appellate court sided with Wilson on the grounds that Wilson was not involved in *Northwestern*’s negotiations with the bank, and perhaps more important, that *Northwestern* never seriously entertained the notion of paying \$7 for the stock before Wilson acquired it for himself.²¹⁹ The appellate court also suggested, at the end of its opinion, that the stock could not be considered a corporate opportunity since *Northwestern* never passed a corporate resolution authorizing the purchase at \$7.²²⁰

To be sure, *Northwestern Terra Cotta* can be criticized: the appellate court adopted the “interest or expectancy” test based upon New York and Minnesota precedents while ignoring the appellate court’s own “line of business” holding just four years earlier in *Henry’s Drive-In*²²¹—even though Justice McCormick authored *Northwestern Terra Cotta* and sat on the panel that wrote *Henry’s Drive-In*. The choice of test plainly mattered, too; while it was and remains far from clear that repurchasing its own stock is ordinarily an “opportunity” from a corporation’s perspective under the “interest or expectancy test,” it surely should be treated as one under the “line of business” test when the corporation actively pursues such a transaction, as the corporation did repeatedly in *Northwestern Terra Cotta*. In any event,

217. 126 Ill. App. 3d 759, 467 N.E.2d 1068 (1st Dist. 1984).

218. *Northwestern Terra Cotta*, 74 Ill. App. 2d at 47, 219 N.E.2d at 864.

219. *Id.* at 48, 219 N.E.2d at 865.

220. *Id.* at 48-49, 219 N.E.2d at 865.

221. 37 Ill. App. 2d at 122-23, 185 N.E.2d at 107-08 (invoking “line of business” test under Delaware Supreme Court’s *Guth v. Loft* opinion in holding that corporate president usurped opportunities in diverting franchise fees to his new company).

Northwestern Terra Cotta was effectively overruled in 1974 when the Illinois Supreme Court embraced the “line of business” test in *Kerrigan*, as the Illinois Appellate Court itself later held in *Levy v. Markal Sales Corp.*²²²

But on the larger point of interest to us here—the third party refusal to deal defense—a close reading of *Northwestern Terra Cotta* reveals no suggestion that the bank was unwilling to deal with Northwestern; in fact, the entire dispute began and ended with the bank offering to sell to Northwestern at all times—at \$7 per share. The issue instead was Northwestern’s own refusal to deal on the bank’s terms, without interference by the defendant director. In my view, then, *Northwestern Terra Cotta* is more accurately termed a “first party” refusal case, as the problem there was plaintiff’s refusal, not a third party’s refusal.²²³ Thus, *Northwestern Terra Cotta* sheds little light on the third party refusal to deal dilemma and in no way supports the assertion, offered later in *Peterson Welding Supply*, that Illinois “courts [have] found no breach of a fiduciary duty by corporation officers and directors accused of usurping a corporate opportunity where the alleged opportunity did not exist for the corporation to obtain and utilize.”²²⁴

Northwestern Terra Cotta is also important as the progenitor of another distorted version of the “incapacity” defense in Illinois. In the course of its analysis *Northwestern Terra Cotta* quoted the *American Jurisprudence* legal encyclopedia for the following statement: “An opportunity may be embraced by a director as his own without accountability to the corporation if the corporation sought without success to obtain it.”²²⁵ This statement, in context, was a reference to the circumstance where a corporation chooses to abandon an opportunity. As a later Illinois Appellate Court decision clarified, the *American Jurisprudence* section in question was amended to state “that the corporation’s unwillingness to take advantage of the opportunity in question must be clearly manifested.”²²⁶ Hence, just because a third party initially rejects the corporation as a suitor, it does not follow that a corporate

222. 268 Ill. App. 3d 355, 368, 643 N.E.2d 1206, 1215-16 (1st Dist. 1994).

223. See *Comedy Cottage, Inc. v. Berk*, 145 Ill. App. 3d 355, 361, 495 N.E.2d 1006, 1012 (1st Dist. 1986) (“No breach of fiduciary duty occurred [in *Northwestern Terra Cotta*] because the court found no support for the claim that the corporation was interested in acquiring the stock for the higher price paid by the director”).

224. 126 Ill. App. 3d at 763-64, 467 N.E.2d at 1072 (citing *Northwestern Terra Cotta* and *Paulman*, both pre-*Kerrigan* cases).

225. 74 Ill. App. at 47, 219 N.E.2d at 864 (citing 19 AM. JUR. 2D, *Corporations*, § 1313).

226. *Lindenhurst Drugs, Inc. v. Becker*, 154 Ill. App. 3d 61, 70, 506 N.E.2d 645, 651 (2d Dist. 1987) (citing 18B AM. JUR. 2D, *Corporations*, § 1788 (1985)).

fiduciary is automatically free to pursue the opportunity for himself. His principal's consent is still needed, as the supreme court later held in *Mullaney*.²²⁷

D. Modern Illinois Appellate Court "Refusal to Deal" Cases

The Illinois Appellate Court's response to *Kerrigan* and *Vendo* has been oddly muted.²²⁸ Many appellate court corporate opportunity cases have not appreciated that *Kerrigan* and *Vendo* displaced earlier decisions like *Paulman* and *Northwestern Terra Cotta*,²²⁹ and no appellate court opportunity opinion has grasped the significance of the supreme court's consent holding in *Mullaney*. Most surprisingly, even though the third party refusal to deal defense has surfaced repeatedly in the aftermath of *Kerrigan*, *Vendo*, and *Mullaney*, the Illinois Appellate Court has never once noticed the weight the supreme court accorded the interests of the third parties in those cases—namely, none.

1. *Patient Care Services v. Segal*

The Illinois Appellate Court's 1975 opinion in *Patient Care Services v. Segal*,²³⁰ issued in the immediate wake of the Illinois Supreme Court's landmark 1974 decisions in *Kerrigan* and *Vendo*, is arguably the most important third party refusal to deal decision of the appellate court. Much like *Vendo*, and much like *Davis* and *Consumers* many years before, *Patient Care Services* involved the ultimate sin, competition for a corporate opportunity. Indeed, unlike in any previous Illinois opportunity case, the fiduciary there openly competed for the opportunity in question, apparently believing disclosure somehow immunized him from liability.²³¹

As in *Consumers*, the contract at issue in *Patient Care Services* came up for renewal and hence the contract

227. 78 Ill. 2d at 549, 402 N.E.2d at 581.

228. *E.g.*, Allstate Amusement Co. of Illinois, Inc. v. Pasinato, 96 Ill. App. 3d 306, 421 N.E.2d 374 (1st Dist. 1981) (denying injunctive relief as to usurped theater lease without citing *Kerrigan*, *Vendo*, *Mullaney*, or even *Davis* and *Consumers*—despite presenting the identical lease renewal fact scenario addressed in *Davis* and *Consumers*).

229. *E.g.*, Forkin v. Cole, 192 Ill. App. 3d 409, 429-30, 548 N.E.2d 795, 808 (4th Dist. 1989) (correctly citing *Kerrigan* for the "line of business" test but then citing *Northwestern Terra Cotta* for the proposition that no fiduciary duty is breached "[i]f the corporation has rejected the opportunity or is not in a position to take it," before finding case was not decided on corporate opportunity grounds in the trial court); Graham v. Mimms, 111 Ill. App. 3d 751, 763, 765-66, 444 N.E.2d 549, 557, 559 (1st Dist. 1982) (commenting, early in its opinion, that "[c]orporations usually do not have a property interest in mere business opportunities," yet later correctly describing the "line of business" test and citing *Kerrigan* as authority).

230. 32 Ill. App. 3d 1021, 337 N.E.2d 471 (1st Dist. 1975).

231. *Patient Care Servs.*, 32 Ill. App. 3d at 1031, 337 N.E.2d at 480.

counterparty—third party Little Company of Mary Hospital—assumed a pivotal role in *Patient Care Services*. In essence, Martinez and defendant Segal formed Patient Care Services to hold the emergency room services contract with the hospital.²³² Martinez and Segal began fighting one another over compensation and other matters, and Segal thereafter embarked on a plan to wrest the hospital contract from Patient Care Services and to divert it to his new firm, Medical Services—even though Segal at all times was a 50% shareholder, director and president of Patient Care Services.²³³ So far as the opinion reveals, the hospital did not foment this dispute, though it certainly found itself in the middle of it.

The appellate court, interpreting *Kerrigan* and *Vendo*, rightly realized that those cases teach nothing if not that competition for a corporate opportunity is automatically a losing hand for a fiduciary. The *Patient Care Services* court therefore quickly turned aside Segal's defenses that Patient Care Services knew of the opportunity and knew of his competition: “[C]ase authority holding that a corporate officer or director violates his fiduciary duty to his corporation by failing to inform the corporation of a business opportunity he seized as his own cannot be inverted to hold that once he gives notice he is *ipso facto* free to contest with the corporation the business opportunity.”²³⁴

The court's forceful condemnation of Segal's open competition obscured the court's uncertainty over how the case fit within existing Illinois precedent. The appellate court properly relied upon *Kerrigan* for the proposition that “the very nature of [Patient Care Service's] business necessitated a continuation and development of this [hospital] relationship,”²³⁵ an apparent reference to the “line of business” test. But in the immediately

232. *Id.* at 1023-24, 337 N.E.2d at 474.

233. *Id.* at 1024-25, 337 N.E.2d at 474-75.

234. *Patient Care Servs.*, 32 Ill. App. 3d at 1031, 331 N.E.2d at 480. The court repeated this holding in similar terms later in the opinion. *Id.* at 1032, 331 N.E.2d at 481 (“[T]he mere fact that such officer and director has announced his intention in advance to throw down the gauntlet and do battle with his corporation over the opportunity will not constitute good faith.”). This holding was consistent with the Illinois rule that fiduciary obligations do not end merely because a fiduciary gives notice of his intent to terminate the relationship at a future point. *See Kurti v. Fox Valley Radiologists, Ltd.*, 124 Ill. App. 3d 933, 938-39, 464 N.E. 2d 1219, 1224 (2d Dist. 1984) (“The existence of a confidential relationship is not precluded by the fact that the plaintiff had been notified of his impending termination. . . . Indeed, the need to prevent a fiduciary from taking improper advantage of the dislocation attendant upon the ending of a confidential relationship requires that fiduciary principles be observed so long as the relationship continues.”).

235. *Patient Care Servs.*, 32 Ill. App. 3d at 1028, 337 N.E.2d at 478.

following sentences²³⁶ the court invoked the “interest or expectancy” test under *Northwestern Terra Cotta*, and later the court relied upon the “good faith” test found in *Paulman*.²³⁷ The court’s failure to note the differences among these three tests perhaps was attributable to the fact that Segal’s conduct flunked all of them, making a careful rendering of Illinois precedent unnecessary there.

Nevertheless, this conceptual confusion invited the third party refusal defense, and Segal played it to the hilt by focusing the court’s attention on the third party hospital’s actions rather than his own:

Defendants next argue that a letter sent by Timothy Toomey, the hospital’s lawyer, dated May 2, 1972, to Paul Wozniak, the hospital’s vice-president, gives clear indication that Patient Care would no longer be wanted at the hospital after June 30, 1972. In this letter Toomey stated essentially that the hospital would be better served by the presence of a corporation whose principals were not antagonistic toward one another.

Toomey did not possess the ultimate authority at the hospital. He was merely one source of recommendations, which would be fed to Wozniak and ultimately the board of directors. According to Wozniak, a man who was obviously in a position to know, the hospital did not determine the fate of Patient Care until the telephonic board meeting on June 29, 1972. Moreover, by Wozniak’s own testimony, he was satisfied with the services of Patient Care even as of the middle of June, 1972. We further must note that this letter from Toomey came many weeks after Segal had ceased any efforts on his part to maintain Patient Care’s presence at the hospital. *We finally are dubious over the legal conclusion defendants seek to draw from the May 2 letter, namely that the hospital, a third party, was in a position to effect a change in the time-honored obligations a fiduciary owes his corporation.*²³⁸

The appellate court in *Patient Care Services*, as this passage shows, immediately understood the implications of Segal’s attempt to shift attention from his wrongdoing to the hospital’s choice. Although it did not notice the third party refusal to deal fact pattern in *Vendo*,²³⁹ the *Patient Care Services* court correctly framed the issue as whether a “third party,” such as the hospital, could somehow change another’s fiduciary duties, and the court properly turned aside the argument as a matter of very first principle.²⁴⁰ Indeed, the appellate court left no doubt as to its position, as it reversed the trial court’s judgment for the defense,

236. *Id.*

237. *Id.* at 1032, 337 N.E.2d at 478.

238. *Id.* at 1031, 337 N.E.2d at 479-80 (emphasis added).

239. 58 Ill. 2d at 298-99, 304, 321 N.E. 2d at 6-7, 9.

240. *Id.*

entered judgment on liability for plaintiff on appeal, and ordered imposition of a constructive trust on remand.²⁴¹ If the appellate court had believed the hospital's choice merely presented a fact question, the court would have ordered a new trial to determine the hospital's willingness to deal with plaintiff therein.

2. *Peterson Welding Supply Co., Inc. v. Cryogas Products*

While *Patient Care Services* treated the third party refusal to deal as a non-starter, *Peterson Welding Supply Co., Inc. v. Cryogas Products, Inc.*²⁴² treated it as a complete defense. *Peterson Welding Supply* is thus of particular interest to us here.

Plaintiff was a retail distributor of industrial gasses for third party Chemetron.²⁴³ Chemetron announced its intention to divest itself of its wholesale master distributorship in the gas field, and plaintiff immediately authorized its corporate representatives to take steps towards the acquisition of Chemetron's master distributorship.²⁴⁴ Plaintiff's officer, agent, and attorney—Savant, McGuinn, and Tobin, respectively—had different ideas, however. They set up a new corporation, Cryogas, and it ultimately was selected by Chemetron as the company to acquire Chemetron's wholesale master distributorship.²⁴⁵

Framing the question as whether plaintiff had the "capacity" to acquire the master distributorship, the court focused its entire attention on third party Chemetron's views:

The trial court had the opportunity to hear the testimony of six disinterested Chemetron employees along with the testimony of 15 other witnesses as well as to examine the extensive documentation presented at trial. Based on this evidence, the court found that in the Chicago area a wholesaler and a retailer could not be the same entity due to the resistance of dealers in the market to do business with a combined entity. The court also found that it would have been contrary to Chemetron's marketing plan to allow plaintiff to operate the wholesale distributorship. Finally, the court found that plaintiff could not have taken advantage of the alleged corporate opportunity in light of market conditions and therefore defendants did not breach their fiduciary duty in forming Cryogas Products, Inc. and acquiring the wholesale distributorship. It should also be noted that the record reveals that plaintiff had access to all the business records of Cryogas Products and that defendants demonstrated a strong desire to disclose any and all facts to

241. *Id.* at 1034, 337 N.E.2d at 482.

242. 126 Ill. App. 3d 759, 467 N.E.2d 1068 (1st Dist. 1984).

243. *Id.* at 761, 467 N.E.2d at 1071.

244. *Id.* at 761, 467 N.E.2d at 1070 ("Plaintiff, by its board of directors, contemplated an expansion of plaintiff's business and authorized its corporate officers to take steps towards the acquisition of Chemetron's distributorship.")

245. *Id.* at 762, 467 N.E.2d at 1071.

plaintiff. Therefore, based on this record, we are not convinced that the trial court's findings [for defendants] were against the manifest weight of the evidence.²⁴⁶

The *Peterson Welding Supply* court's error is easily explained: it used the wrong corporate opportunity test. The court relied upon the "interest or expectancy" decision in *Northwestern Terra Cotta* for the proposition that there is "no breach of a fiduciary duty by corporation officers and directors accused of usurping a corporate opportunity where the alleged opportunity did not exist for the corporation to obtain and utilize."²⁴⁷ The *Peterson Welding Supply* court then turned *Kerrigan* on its head by treating the "capacity" discussion in *Kerrigan* as inviting an analysis of whether the third party wished to deal with the corporation, rather than whether the corporation had the legal and financial ability to pursue the opportunity after disclosure and tender had occurred.²⁴⁸

This subtle mistreatment of "capacity" opened the door for the *Peterson Welding Supply* court to decide the case based upon third party Chemetron's testimony. In doing so, the court missed the entire point of *Kerrigan*: it is up to the plaintiff corporation to decide how to proceed, especially when the corporation has decided to pursue the opportunity (through the defendant fiduciaries, no less), as the plaintiff corporation did in *Peterson Welding Supply*. For example, Peterson Welding Supply could easily have decided—indeed, judging by the lawsuit, probably did decide—that it could exit the retail business in order to be the master wholesaler or that it could make some other adjustment to cure the purported problem. Thus, apart from illustrating the sheer complexity of undertaking a third party refusal to deal inquiry—twenty one witnesses and "extensive documentation" were presented at trial on this issue alone²⁴⁹—*Peterson Welding Supply* shows that this defense guts the pro-plaintiff stance in *Kerrigan* and replaces it with a pro-third party focus, and a determinative one at that.

3. *Comedy Cottage, Inc. v. Berk*

The tension between *Patient Care Services* and *Peterson Welding Supply* was ignored rather than resolved in *Comedy Cottage, Inc. v. Berk*.²⁵⁰ This was yet another lease renewal diversion case that was factually indistinguishable from *Davis* and *Consumers*.

The nasty surprise in this case had a bit more edge than its

246. *Id.* at 764, 467 N.E.2d at 1072-73.

247. *Id.* at 763-64, 467 N.E. 2d at 1072.

248. *Id.* at 764, 467 N.E.2d at 1072.

249. *Id.*

250. 145 Ill. App. 3d 355, 495 N.E. 2d 1006 (1st Dist. 1986).

counterparts in *Davis* and *Consumers*. Unlike the secret competition of the managers in *Davis* and *Consumers*, the comedy club manager / vice president in *Comedy Cottage*—Berk—affirmatively sabotaged his employer’s interest in the lease renewal at issue by obtaining his employer’s original month-to-month lease in Berk’s name.²⁵¹ Berk’s principal, Hellenbrand, discovered this stunt and immediately complained to the third-party landlord, Swanson.²⁵² Although the month-to-month lease was changed to reflect the correct lessee, the incident apparently upset Swanson, as Swanson shortly thereafter decided not to renew Comedy Cottage’s lease.²⁵³ As night follows day, Berk resigned from Comedy Cottage and, of course, Berk emerged as the new lessee operating a new comedy club where Comedy Cottage once stood.²⁵⁴

Needless to say, Hellenbrand sued both Berk and Swanson over this turn of events, Berk for breach of fiduciary duty and Swanson for civil conspiracy with Berk.²⁵⁵ Swanson extricated himself by agreeing to take a “neutral position” in the litigation and to be bound by the court’s decision regarding the right to lease and possess the premises.²⁵⁶ The trial and appellate courts had no difficulty in finding Berk breached his fiduciary duty to Comedy Cottage and usurped a corporate opportunity by misusing inside information—the lease renewal details—to obtain the lease for himself.²⁵⁷ As to third party Swanson, the court noted the following:

Defendant claims that any opportunity for the corporation to obtain a renewal of the lease was eliminated when the owner of the premises terminated the prior month-to-month lease and announced that he would no longer deal with Hellenbrand. However, Hellenbrand entered the negotiations only after Berk forwarded without explanation a proposed lease that listed Berk as lessee and president of Comedy Cottage, Inc. It appears from the record, therefore, that the personality conflict between Hellenbrand and the owner arose, in part, because Berk failed to clarify his actions to his employer or the owner of the premises. Moreover, once Berk learned of the termination of the corporation’s lease, he did little or nothing to rectify the situation despite his special responsibilities in this matter. Under these circumstances, we cannot say that the trial

251. *Id.* at 357, 495 N.E.2d at 1009.

252. *Id.*

253. *Id.*

254. *Id.* at 358, 495 N.E.2d at 1009-10.

255. *Id.* at 358, 495 N.E.2d at 1010.

256. *Id.*

257. *Id.* at 358-59, 495 N.E.2d at 1010 (trial court); *Id.* at 361, 495 N.E.2d at 1012 (appellate court).

court erred in finding that Berk breached his fiduciary duty.²⁵⁸

One cannot fault the *Comedy Cottage* court for its rejection of Berk's defense that Swanson "would no longer deal with Hellenbrand," nor can one fault the court's injunction order against Berk; both were clearly correct outcomes.²⁵⁹ And the court was right to cite *Consumers*, given its close parallels to the case at hand. The court was also right—and the first in Illinois—to extend the corporate opportunity doctrine to misuse of confidential information after a fiduciary's resignation. But the *Comedy Cottage* court clearly erred in relying upon the defunct "interest or expectancy" test and its sire *Northwestern Terra Cotta*, and then compounded that error by failing to cite *Kerrigan, Vendo*, or *Mullaney*.

Unfortunately, the *Comedy Cottage* court also failed to reconcile its rejection of Swanson's refusal to deal with the treatment of this defense in *Peterson Welding Supply* only two years earlier, perhaps because landlord Swanson's anger at Hellenbrand and Comedy Cottage was spawned by Berk's misconduct—a fact having no equivalent in *Peterson Welding Supply*. Yet, as in *Peterson Welding Supply*, the court's use of the wrong test in *Comedy Cottage* invited the third party refusal to deal defense, thereby wasting the time and resources of all involved.

4. *Lindenhurst Drugs, Inc. v. Becker*

The lease renewal diversion drumbeat continued with the Illinois Appellate Court's very next corporate opportunity opinion, *Lindenhurst Drugs, Inc. v. Becker*.²⁶⁰ As with *Patient Care Services*, *Peterson Welding Supply*, and *Comedy Cottage*, once again the third party refusal to deal defense featured prominently. In fact, *Lindenhurst Drugs* involved a "double" third-party refusal to deal scenario, in the sense that two third-party approvals were at issue.

Lindenhurst Drugs was owned in equal percentages by Burton and Marvin Steinberg and defendant Becker, each of whom was also an officer and director of the corporation, with

258. *Id.* at 361, 495 N.E.2d at 1012.

259. Comedy Cottage apparently believed it was better served by an injunction against Berk, leaving it open to negotiate over the lease with Swanson thereafter, or perhaps Comedy Cottage had already reached a separate lease deal—contingent on the outcome of the litigation against Berk—as part of its settlement with the landlord. The appellate court was careful to note, in this regard, that the trial court's "order did not dictate the terms of any proposed lease or provide that plaintiffs should have the same lease as the one previously negotiated between defendant [Berk] and the landlord." *Id.* at 362, 495 N.E.2d at 1012.

260. 154 Ill. App. 3d 61, 506 N.E.2d 645 (2d Dist. 1987).

Becker also serving as the store manager.²⁶¹ Lindenhurst Drugs held a ten-year lease at the Linden Plaza Shopping Center with a landlord entity owned by Morton Engel.²⁶² The lease gave Lindenhurst Drugs “the exclusive right to operate a pharmacy in the shopping center” until 1981.²⁶³ In mid-1979, the Steinbergs and Becker learned that the Ben Franklin store in the same shopping mall was for sale, and they decided to pursue its purchase because it was a larger space.²⁶⁴ Landlord Engel told the three of them he was willing to give them an exclusive right to operate a pharmacy at the Ben Franklin site.²⁶⁵ Negotiations ensued with City Products, which was in charge of granting Ben Franklin store franchises, but Lindenhurst Drugs’ offer was rejected.²⁶⁶ Lindenhurst Drugs remained interested in acquiring the Ben Franklin store lease, however, and discussions with City Products continued on and off in 1980 and into early 1981, with the Steinbergs thinking they could get a bargain and believing no one else was interested.²⁶⁷

Things took a turn for the worse in June 1981, when landlord Engel informed Becker that Lindenhurst Drugs’ lease would not be renewed.²⁶⁸ Instead of revealing this critical news to the Steinbergs, Becker secretly began negotiations with City Products on his own with the intent to capture the Ben Franklin franchise and lease for himself.²⁶⁹ The Steinbergs confronted Becker in November 1981, but Becker claimed not to know whether he was buying the Ben Franklin store.²⁷⁰ As one would expect in light of his other conduct, Becker also did nothing to find new space for Lindenhurst Drugs, even though its lease was expiring on December 31, 1981.²⁷¹ Becker subsequently cleaned out the Lindenhurst Drugs store, fixtures and all, taking key assets and employees to his new drug store at the Ben Franklin site.²⁷² Lindenhurst Drugs was not amused and sued Becker for breach of fiduciary duty and Engel for civil conspiracy.²⁷³

Becker’s “double” refusal to deal defense focused on the two approvals Lindenhurst Drugs needed: City Product’s franchise and

261. *Id.* at 62-63, 506 N.E.2d at 646-47.

262. *Id.* at 63, 506 N.E.2d at 647.

263. *Id.*

264. *Id.*

265. *Id.* at 64, 506 N.E.2d at 648.

266. *Id.*

267. *Id.* at 66, 506 N.E.2d at 649.

268. *Id.* at 64, 506 N.E.2d at 647.

269. *Id.*, 506 N.E.2d at 647-48.

270. *Id.* at 65, 506 N.E.2d at 649.

271. *Id.* at 65, 506 N.E.2d at 648.

272. *Id.*

273. *Id.* at 62, 506 N.E.2d at 646.

landlord Engel's lease. As to the first, Becker boldly asserted that he "disclose[d] the [Ben Franklin franchise] opportunity to plaintiff, and that plaintiff attempted to obtain the opportunity but failed by making a low initial offer and no further offers so that he was free to obtain the opportunity for himself."²⁷⁴ The appellate court rejected this argument out of hand, stressing there was no evidence indicating Lindenhurst was unwilling to raise its offer to satisfy City Products.²⁷⁵ So Becker predictably retreated to his second third-party refusal to deal defense, arguing it was the Steinberg's "dealings with Engel which caused [Engel] to decide not to renew the lease."²⁷⁶ Specifically, Becker relied upon the following testimony from his co-conspirator Engel:

Morton Engel was unable to testify at trial because he had suffered a stroke in August 1985 and his memory was impaired. However, pursuant to a motion, his March 8, 1982, deposition was read into the record at trial. In his deposition, Engel stated that Lindenhurst Drugs was a rundown, sloppy looking store, that no capital improvements were made on the store, and that it was inadequate in size for a present-day drugstore. He stated that he had discussed with Burton and Marvin the possibility of a larger space for the drugstore in the shopping center, but could not get a definitive answer from them. He further stated that he told either Burton or Marvin around November 1981 that he would not be renewing the lease on the store because he was giving the pharmacy exclusive right to the Ben Franklin store and the person he spoke to acted surprised.²⁷⁷

City Product's franchise negotiations, from any perspective, reflected a third party perfectly willing to deal with Lindenhurst Drugs (or Becker, or both) if the price was right. Engel's testimony reflected the same willingness to deal with Lindenhurst Drugs, at least initially, although at some point—presumably after talking with disloyal Becker—Engel stopped dealing, which undoubtedly did cause the Steinbergs "to act surprised."²⁷⁸

Engel's negative testimony offered a prime opportunity for the appellate court to consider the policy implications of the third party refusal to deal defense, but the court passed, focusing its attention instead on Becker's failure to press for the lease in favor of Lindenhurst Drugs.²⁷⁹ Had the court appreciated the true force of *Kerrigan* and *Vendo*, it would have realized that Lindenhurst Drugs' continued interest in and pursuit of the Ben Franklin franchise and the Engel lease were the only facts that mattered.

274. *Id.* at 69, 506 N.E.2d at 650.

275. *Id.* at 70, 506 N.E.2d at 651.

276. *Id.* at 71, 506 N.E.2d at 652.

277. *Id.* at 65-66, 506 N.E.2d at 648-49.

278. *Id.* at 66, 506 N.E.2d at 648-49.

279. *Id.* at 70, 506 N.E.2d at 652-53.

The appellate court in *Lindenhurst Drugs* court was led astray, however, by its interchangeable use of the *Kerrigan* “line of business” rule, the *Northwestern Terra Cotta* “interest or expectancy” test, and the *Paulman* “good faith” standard, a confused approach that invited consideration of a far wider range of facts than the “line of business” test alone.

5. *Levy v. Markal Sales Corp.*

If *Patient Care Services* rates as the most important appellate court third party refusal to deal opinion for its fidelity to principle, *Levy v. Markal Sales Corp.*²⁸⁰ surely comes in a close second. *Levy* offered a comprehensive and correct view of Illinois corporate opportunity law and even took the time to reconcile *Northwestern Terra Cotta* and *Peterson Welding Supply* with *Kerrigan*, *Vendo*, and *Mullaney*, something no other Illinois court has done before or since. *Levy*, unfortunately, missed its chance to lay the third party refusal to deal defense to rest.

The appellate court’s opinion in *Levy* richly detailed the fiduciary wrongdoing of defendants Gust and Bakal, much of which is unnecessary to recite here. Suffice to say their greed got the better of them, as did their victim Levy through litigation that ended in a \$5.2 million judgment against them.²⁸¹ The three owned and operated Markal Sales Corporation, a consumer electronics sales representative firm whose customers included Pioneer and Sony.²⁸² In late 1980, Gust and Bakal fired Levy as an employee, although Levy still remained a director and 40% shareholder of Markal Sales.²⁸³ Then, in 1981, Gust and Bakal decided to have Markal Sales start representing computer hardware manufacturers.²⁸⁴ Apple Computers entered the picture at that point, and most of the case concerned whether Markal Sales was able to represent Apple without angering Pioneer and Sony and vice versa—yet another “double” third party refusal to deal scenario ala *Lindenhurst Drugs*.

To handle the Apple account Gust and Bakal set up a new corporation, G/B Sales, and of course, Levy was left out of the G/B Sales ownership picture.²⁸⁵ Since Gust and Bakal as officers and directors of Markal Sales were its fiduciaries by any measure, their principal defense became incapacity: Apple refused to deal with Markal Sales so long as Markal Sales continued representing Pioneer and Sony, and Pioneer and Sony in turn refused to deal

280. 268 Ill. App. 3d 355, 643 N.E.2d 1206 (1st Dist. 1994).

281. *Id.* at 382, 643 N.E.2d at 1226.

282. *Id.* at 358, 643 N.E.2d at 1210.

283. *Id.* at 359, 643 N.E.2d at 1211.

284. *Id.*

285. *Id.* at 360, 643 N.E.2d at 1211.

with Markal Sales so long as Markal Sales continued representing Apple.²⁸⁶ But the actual testimony of third parties Apple, Pioneer and Sony came nowhere near supporting these absolutist positions, as the trial court found.²⁸⁷ The appellate court responded forcefully, summoning *Kerrigan*, *Vendo*, and *Mullaney*:

We find both cases [*Northwestern Terra Cotta* and *Peterson Welding Supply*] inapplicable here, and we will apply the law of *Kerrigan* as explained in *Vendo* and *Mullaney*. Applying the language in *Kerrigan* stating that the fiduciary must only disclose opportunities “reasonably incident to [the corporation’s] present or prospective operations,” we must first determine whether Apple was reasonably incident to Markal’s present or future business.

The trial judge was presented with conflicting testimony on this point and made credibility and factual determinations which we will not disturb. For example, although [Apple regional sales manager] Folley and [Folley’s superior] Pape testified that they wanted a separate entity to sell Apple products, they also explained that the previous experience of the sales force was irrelevant as long as the Apple salespeople sold only Apple products. [Apple National Sales Manager] Bowman testified that at least five Apple representatives maintained their other electronics clients; and another representative chosen by Apple sold Apple and Pioneer products at the same time.

Moreover, there is no question that Markal was interested in entering the computer field in 1981, making the sale of computers part of its prospective business. The parties agree that the original negotiations with Apple were conducted by Gust and Bakal when they were solely employees of Markal. Folley admitted that he based his decision about G/B on his favorable research into Markal, and the memos he wrote indicate that Markal was, at least at one time, being considered as an Apple representative. Finally, while [Pioneer regional sales manager] McManus’s testimony about Pioneer’s unhappiness with any Markal plans to represent Apple was not rebutted, Gust and Bakal took no steps to persuade Pioneer to change its position and did not even attempt to follow the course Bakal suggested to Sony by establishing a separate Markal-owned company to sell Apple products. . . .

Therefore, Gust and Bakal could not take advantage of the Apple opportunity without first offering it to Markal and having Markal reject it. As noted in *Kerrigan*, perhaps Markal would have chosen not to risk any present clients on the possibility of future Apple earnings. Nonetheless, Markal, as an electronics dealer with an interest in computers, might have decided to create a separate entity to pursue this opportunity or might have persuaded Pioneer

286. *Id.* at 366, 643 N.E.2d at 1215 (“Gust and Bakal argue that Apple would now allow Markal to represent it.”).

287. *Id.* at 359-61, 643 N.E.2d at 1211-12.

to remain a client like the other Apple representative was able to do. In any event, Markal should have been “given the opportunity to decide that question for itself.” [*Vendo*.] The trial judge properly determined that Gust and Bakal breached their fiduciary duties to Markal by failing to give Markal that opportunity.²⁸⁸

This snippet hardly does justice to the war Levy fought to get past this third-party “testimony.” Aside from recruiting these witnesses to practically perjure themselves, Gust and Bakal also destroyed all correspondence with Apple, and then Gust pretended not to remember most aspects of G/B Sales’ negotiations and dealings with Apple.²⁸⁹ To add insult to injury, the trial itself spanned fourteen months,²⁹⁰ and Levy also had to overcome an absurd “advice of counsel” defense against his punitive damages claim,²⁹¹ as if anyone could possibly have thought Gust and Bakal were legally free to divert Markal Sales opportunities and assets to G/B Sales (a sentiment their corporate lawyer certainly did not share).²⁹² And then came the merits appeal followed by difficult collection proceedings.²⁹³

The *Levy* court deserves high praise for burying *Northwestern Terra Cotta* and *Peterson Welding Supply* under the weight of *Kerrigan*, *Vendo* and *Mullaney*. But the appellate court, by its silence on the *legal* question of whether the third party testimony was relevant *at all*, inadvertently implied that such third party evidence presents a question of fact warranting a trial for resolution, an outcome contrary to *Kerrigan*, *Vendo* and *Mullaney*. Compounding this error, the *Levy* court also erroneously suggested, by the way it framed the question, that whether an opportunity is “reasonably incident” to the employer’s business depends in part upon what third parties want to do rather than what the employer wants to do. This reformulation was just a variation on the third-party refusal mistake in *Peterson Welding*

288. *Id.* at 367-68, 643 N.E.2d at 1216-17 (internal citations omitted).

289. *Id.* at 365-66, 643 N.E.2d at 1214-15.

290. *Id.* at 358, 643 N.E.2d at 1210.

291. *Id.* at 380, 643 N.E.2d at 1224.

292. *Id.* at 380-81, 643 N.E.2d at 1224-25. *Cf.* *Mueller Industries, Inc. v. Berkman*, 399 Ill. App. 3d 456, 927 N.E.2d 794 (2d Dist. 2010) (examining a corporate opportunity and corporate competition case in which advice of counsel was the subject of discovery); Form 8-K for *Mueller Industries, Inc.*, Dec. 15, 2010, YAHOO! FINANCE, <http://biz.yahoo.com/e/101215/mli8-k.html> (reporting settlement of *Berkman* litigation, after *Berkman* asserted his Fifth Amendment rights, for \$7.5 million in cash, a \$3 million note, plus “additional future compensation,” in return for mutual releases and no payment by *Mueller Industries*).

293. *Levy v. Markal Sales Corp.*, 311 Ill. App. 3d 552, 555-60, 724 N.E.2d 1008, 1014 (1st Dist. 2000) (holding fraudulent conveyance statute of limitations expired in relation to Levy’s challenge to Gust’s transfer of his house to his wife during the underlying litigation).

Supply that *Levy* was at pains to criticize. Properly understood, the choice under *Kerrigan* and its progeny always belonged to Markal Sales alone, not to Gust and Bakal, much less to third parties like Apple, Pioneer, and Sony.

6. *Anest v. Audino*

The central, even combative role the third parties played in *Levy* was not replicated in *Anest v. Audino*,²⁹⁴ but the third party did play an indirect role in *Anest* by insisting upon adequate financing as a condition to awarding an exclusive distributorship for its product. This set in motion the chain of events that gave rise to the corporate opportunity claim in *Anest*.

In 1997 and 1998, Precision Pour, LLC, was the exclusive distributor in the United States of a patented beer line cleaning device called the BLM 2000, and in 1999 it was the nonexclusive sales agent for this product in the United States.²⁹⁵ To promote the BLM 2000, Precision Pour completed the first step in a two-step regulatory approval process.²⁹⁶ Precision Pour also worked with Coors Brewing Company to begin testing the BLM 2000 for Coors' draft beer facilities.²⁹⁷ Coors notified Precision Pour on May 3, 1999, that it had completed its initial testing of the BLM 2000, and Coors completed its testing of the device on March 9, 2000.²⁹⁸

The corporate opportunity fight centered on an offer Precision Pour received from BLM International, the holder of the patent for the BLM 2000, for a five-year exclusive distributorship agreement.²⁹⁹ BLM International apparently made the offer on October 29, 1999, and purportedly set a short deadline of November 1, 1999, for acceptance of this offer.³⁰⁰ Out of concern over Precision Pour's finances, BLM International demanded a letter of credit to guarantee Precision Pour's purchase of a certain number of BLM 2000 units.³⁰¹ Precision Pour was in financial straits at the time of the offer, and three of its four members, including Anest, held an emergency meeting on November 1 and voted against making additional capital contributions to keep it afloat.³⁰² The same three then held a second meeting at which they agreed to create a new company to seize the opportunity.³⁰³ That company, BLM Technologies, LLC, was formed on December 9,

294. 332 Ill. App. 3d 468, 773 N.E.2d 202 (2d Dist. 2002).

295. *Id.* at 471, 773 N.E.2d at 205.

296. *Id.* at 473, 773 N.E.2d at 207.

297. *Id.* at 473-74, 773 N.E.2d at 207.

298. *Id.*

299. *Id.* at 472-73, 773 N.E.2d at 206.

300. *Id.*

301. *Id.* at 473, 773 N.E.2d at 206-07.

302. *Id.* at 473, 773 N.E.2d at 206.

303. *Id.*

1999, with Anest putting up the money needed to secure the letter of credit required by BLM International.³⁰⁴ The exclusive distributorship deal then closed with BLM International on that day.³⁰⁵ The fourth Precision Pour member, Audino, who had objected to the November 1 emergency meeting on the ground of inadequate notice in violation of Precision Pour's operating agreement, thereafter sued Audino for usurping the exclusive distributor opportunity in breach of his fiduciary duty as a member of Precision Pour.³⁰⁶

The trial court felt third-party patent-holder BLM International's insistence on sufficient financing set the terms of the debate, and the trial court therefore accepted Anest's argument that Precision Pour's lack of financing and its members' unwillingness to put up additional capital meant there was no opportunity for Precision Pour to seize.³⁰⁷ The Illinois Appellate Court reversed this ruling, holding that Anest, as a limited liability company member and hence a fiduciary,³⁰⁸ was estopped from denying that the opportunity belonged to Precision Pour.³⁰⁹ Precision Pour's regulatory approval efforts, its testing work with Coors, and its past service as a BLM 2000 distributor all showed that the BLM 2000 exclusive distributorship offer was developed with Precision Pour's assets.³¹⁰ This fact controlled under the *Graham* "asset misappropriation" test, the *Anest* court held, rendering irrelevant Precision Pour's inability to meet third party BLM International's financing hurdle.³¹¹ The appellate court added that the opportunity was not adequately disclosed and tendered under *Kerrigan*: the emergency meeting notice did not sufficiently describe the nature of the meeting, and the timing of the meeting was contrary to the five-day meeting notice requirement under Precision Pour's operating agreement.³¹² A "five-day notice could have been given and the opportunity properly described," the appellate court observed, "because the offer was still available on December 9, when BLM Technologies accepted it."³¹³

Apart from being the only Illinois case decided after *Kerrigan* to explicitly find an inadequate tender where a tender had

304. *Id.*

305. *Id.* at 479, 773 N.E.2d at 211.

306. *Id.* at 474, 773 N.E.2d at 207-08.

307. *Id.* at 474-75, 773 N.E.2d at 208.

308. *Id.* at 477, 773 N.E.2d at 210.

309. *Id.* at 478, 773 N.E.2d at 211.

310. *Id.*

311. *Id.* at 478-79, 773 N.E.2d at 211.

312. *Id.* at 479, 773 N.E.2d at 211.

313. *Id.*

occurred,³¹⁴ *Anest* is important for its fidelity to the “prophylactic” purpose of the Illinois corporate opportunity doctrine. The appellate court properly found opportunity usurpation on estoppel grounds even in the face of a trial court finding that Precision Pour lacked the financial wherewithal to meet third party BLM International’s terms. This was the right ruling: an opportunity under *Kerrigan* and *Graham* cannot be defined by a third party’s unwillingness to deal when corporate assets have been diverted.

7. *Delta Medical Systems, Inc. v. Mid-America Medical Systems, Inc.*

As demonstrated in my first paper, when corporate competition and corporate opportunity claims appear together, it is crucial to distinguish between the two for liability, remedy and defense purposes.³¹⁵ Failure to do so can turn a case upside down, with irrelevant “preparing to compete” and “head start” defenses jeopardizing otherwise incontestable corporate opportunity liability.³¹⁶ The same is true when trade secret misappropriation and corporate opportunity claims are pressed in tandem: corporate opportunity claims may be erroneously subjected to trade secret defenses like “preemption.”³¹⁷ The allure of these errors becomes particularly powerful when they are mixed with a third party “refusal to deal” defense based upon customer testimony, as in *Delta Medical Systems, Inc. v. Mid-America Medical Systems, Inc.*,³¹⁸ an opinion fraught with error at almost every level from a corporate opportunity standpoint.

The facts of *Delta Medical Systems* followed the familiar pattern of opportunistic employees departing *en masse* to compete head-to-head with their ex-employer. In 1995, Delta Medical Systems acquired Advanced Diagnostic Systems from defendant John Ottum’s father.³¹⁹ Ottum came along as part of his father’s sale and remained a Delta employee after his father retired in 1998.³²⁰ When Delta terminated its dealership relationship with diagnostic equipment manufacturer Lorad in February 2001,

314. *Glasser* and *Northwestern Terra Cotta*, decided in 1953 and 1966, respectively, both involved “tenders” of sorts, but both pre-dated the 1974 *Kerrigan* decision and thus were not trying to apply the “disclose and tender” requirements of *Kerrigan*.

315. Schaller, *supra*, note 10 at 13-31.

316. *Id.* at 27-31.

317. See William Lynch Schaller, *Secrets of the Trade: Tactical and Legal Considerations from the Trade Secret Plaintiff’s Perspective*, 29 REV. LITIG. 729, 840-41 (2010) (collecting trade secret preemption decisions in Illinois and other jurisdictions).

318. 331 Ill. App. 3d 777, 772 N.E.2d 768 (1st Dist. 2002).

319. *Id.* at 780, 772 N.E.2d at 772.

320. *Id.*

Ottum immediately began discussing the formation of a new Lorad dealership with his fellow Delta employees and with Lorad.³²¹ On May 9, 2001, Ottum, joined by his boss Donati, formed their rival company, Mid-America Medical Systems, and they then quickly confirmed their dealership award from Lorad.³²² The next day Ottum advised a customer, Kishwaukee Community Hospital, about the formation of Mid-America, and then on June 1, 2001, Mid-America executed its dealership agreement with Lorad.³²³ Finally, on June 15, 2001, Ottum and Donati gave Delta notice of their intent to resign.³²⁴

Although most of the *Delta Medical Systems* opinion was devoted to rejecting Delta's trade secret claims, our primary interest lies with the Illinois Appellate Court's treatment of the events surrounding the non-renewal of Delta's contract with third party Randallwood Radiology. When Donati told Delta's executive vice president in May 2001 that he was resigning, Donati lied and said he had nothing "lined up" and that he was "moving on to other things."³²⁵ Not-so-coincidentally, Randallwood's twelve-month contract was up for renewal on May 30, 2001, and Donati as service manager and Ottum as service engineer were charged with renewing it.³²⁶ A Frick and Frack routine ensued, with third party Randallwood, of course, ending up in the arms of Donati and Ottum rather than Delta—a forbidden outcome the court blessed without discussion of any corporate opportunity test and without citation to a single corporate opportunity decision:

During that time [May 2001], Randallwood Radiology had a contract with Delta that stated it would automatically renew upon termination of the 12-month period ending May 30, 2001, unless written notice was provided within 30 days. In April and June, Delta prepared a new service contract proposal for Randallwood Radiology to sign. Donati acknowledged that he gave such a contract proposal to Ottum to have signed by Randallwood. Ottum could not recall whether he was given such a contract. He testified that if he received such a contract he could have had it signed. One month later, after the formation of Mid-America, Donati and Ottum presented Randallwood with an identical contract, which Randallwood signed. However, Syzmanski [Randallwood's practice administrator] testified that she chose to enter into service agreements with the company that is the dealer of the equipment based upon her relationship with the service engineer. She had a business relationship with Robert Ottum for 15 years and had

321. *Id.* at 780-81, 772 N.E.2d at 773.

322. *Id.* at 781, 772 N.E.2d at 773.

323. *Id.*

324. *Id.* at 780-81, 772 N.E.2d at 772-73.

325. *Id.* at 787, 772 N.E.2d at 777.

326. *Id.*

worked for Sam Ottum for several years. She testified that she chose to do business with Mid-America and terminate her relationship with Delta because of her long-term relationship with the Ottums. She also stated that she was concerned that Delta could not get parts for its Lorad equipment as quickly as Mid-America could as a dealer. . . .³²⁷

Delta contends that it was against the manifest weight of the evidence for the trial court to find it failed to present a sufficient showing that Donati and Ottum breached their duty of loyalty. . . . [T]o the extent that these claims involve an alleged misappropriation of Delta's trade secrets, they are preempted by the [Illinois Trade Secrets] Act. 765 ILCS 1065/8 (West 2000). . . .³²⁸

Generally, employees may plan, form, and outfit a competing corporation while still working for the employer, but they may not commence competition. In the absence of fraud, a contractual restrictive covenant, or the improper taking of a customer list, former employees may compete with their former employers and solicit former customers provided there was no demonstrable business activity before termination of their employment. *Dowel v. Bitner*, 273 Ill. App. 3d 681, 691, 652 N.E.2d 1372, 1379 (1995). The trial court found there was insufficient evidence to suggest that Donati or Ottum breached his duty of loyalty in failing to procure the Randallwood contract. This finding was not against the manifest weight of the evidence where it was unclear from the record why Donati and Ottum were required to sign Randallwood to a new contract with Delta when its contract specifically stated it was to be automatically renewed and where there was no evidence of pretermination solicitation of this business. Syzmanski stated that she chose to do business with Mid-America because of the relationship she had with the service engineers that worked on her equipment and the relationship she had with Robert Ottum.³²⁹

What's wrong with this picture? The controlling and undisputed facts under *Kerrigan* were that Delta held the Randallwood contract and wanted to renew it. The "line of business" test was therefore triggered as a matter of law, and the burden should have shifted to Donati and Ottum to show their full disclosure and timely tender of the Randallwood renewal opportunity. "Full" disclosure did not occur under *Vendo* since Donati and Ottum did not reveal their secret competitive plans and Ottum in fact lied about those plans when asked. Worse still, Donati was Ottum's immediate supervisor and therefore breached his affirmative duty under *Unichem* to protect Delta's interests that he knew were under secret attack by his subordinate Ottum—a duty Donati further breached by failing to disclose his

327. *Id.* at 787, 772 N.E.2d at 777-78.

328. *Id.* at 796, 772 N.E.2d at 784.

329. *Id.* at 796-97, 772 N.E.2d at 785.

own conflict of interest as a participant in the Mid-America start-up scheme that was fueling employee disloyalty and threatening the Randallwood contract at that very moment. Obviously, Delta would never have left Donati and Ottum in charge of the Randallwood account had Delta known these material facts; it would have immediately fired them and assigned someone else in order to level the playing field.

But failure to make full disclosure was only the half of it; Donati and Ottum compounded their breach of fiduciary duties by failing to actively pursue the Randallwood contract for Delta, even though it was their job to do so. Donati certainly understood this; according to the opinion, he gave the proposed contract to Ottum for delivery to Randallwood but Ottum failed to deliver it—meaning Ottum not only breached his duty of loyalty but his duty of obedience as well.³³⁰ Ottum's excuse was no excuse at all: "Ottum could not recall whether he was given such a contract."³³¹ The court could hardly have been more credulous in accepting this explanation, since only a few weeks later Donati and Ottum secured the Randallwood contract for themselves at Mid-America using an exact duplicate of Delta's contract³³²—a sequence of events no reasonable person could forget. A far simpler explanation for this self-evident breach of fiduciary duty was that Donati and Ottum were laying the groundwork for seizing the Randallwood contract through sabotage while still at Delta.³³³ Indeed, it's hard to reach any conclusion other than that sabotage was afoot, as Ottum admitted "that if he had received [the Delta] contract [from Donati] he could have had it signed [by Randallwood]"³³⁴—and then Randallwood would have been unable to contract with Donati's and Ottum's new firm, Mid-America. Randallwood's representative, Practice Administrator Jacqueline Szymanski, agreed that she would have signed the Delta renewal

330. RESTATEMENT (THIRD) OF THE LAW OF AGENCY, §8.09 (agent's duty to obey all reasonable directions of his principal); Megan Wischmeier Shaner, *Restoring the Balance of Power in Corporate Management: Enforcing an Officer's Duty of Obedience*, 66 BUS. LAW. 27 (2010) (an agent's duty of obedience is distinct from an agent's duty of loyalty, although the two can overlap).

331. *Delta Med. Sys.*, 331 Ill. App. 3d at 787, 772 N.E.2d at 777.

332. *Id.* ("One month later, after the formation of Mid-America, Donati and Ottum presented Randallwood with an identical contract, which Randallwood signed.").

333. *Cf. Veco Corp. v. Babcock*, 243 Ill. App. 3d 153, 162, 611 N.E.2d 1054, 1060 (1st Dist. 1993) (defendants' resignations were followed the next day by insurance customers' "broker of record" letters replacing plaintiff with defendants; such instant success established pre-resignation solicitation in breach of defendants' fiduciary duties).

334. *Delta Med. Sys.*, 331 Ill. App. 3d at 787, 772 N.E.2d at 777.

contract in May 2001 if Ottum had given her the contract.³³⁵

Because Donati and Ottum were in breach of multiple fiduciary duties under *Kerrigan* and its progeny, it was irrelevant for the appellate court to ask “why Donati and Ottum were required to sign Randallwood to a new contract with Delta when its contract was to be automatically renewed.”³³⁶ Furthermore, Delta did not have to explain “why” it instructed Donati and Ottum to tender the new contract to Randallwood; Delta had an absolute right to give such a lawful instruction to its employees, with or without a good reason. Nor should it have been any mystery why Delta gave the contract to Donati, who in turn gave the contract to Ottum to give to Randallwood: Delta wanted to be sure the renewal went smoothly, in an effort to avoid any disputes with its customer over timeliness of notice.³³⁷

But even if Randallwood had given notice, this was an obvious case of Donati and Ottum inducing third party Randallwood’s “refusal to deal” with Delta by their pursuit of the deal for themselves, regardless of whether their pursuit began before or after they resigned from Delta. They plainly used their knowledge of the impending renewal date and Delta’s proposed terms to target Randallwood for their own purposes after resigning. This was a corporate opportunity usurpation in and of itself, as the Illinois Appellate Court held on nearly identical post-resignation “renewal” facts in *Comedy Cottage*.³³⁸

Considering the skilled author, the failure to cite *Kerrigan*—or indeed any Illinois corporate opportunity decision—was surprisingly lax and invited the absurd outcome in *Delta Medical Systems*. The court clearly fell for the “preparing to compete” defense (the absence of “pretermination solicitation,” as the court put it), as per its citation to *Dowel v. Bitner*,³³⁹ even though this is

335. Combined Appellee’s and Cross-Appellant’s Brief of Delta Medical Systems, Inc., at 41 (“Significantly, Randallwood’s Practice Administrator, Jacqueline Szymanski, testified that if Sam Ottum had given her the Delta renewal contract in May of 2001, she would have signed it.”).

336. 331 Ill. App. 3d at 796-97, 772 N.E.2d at 785.

337. Ironically, the Illinois Appellate Court omitted any discussion of whether Randallwood timely exercised its right to give notice of non-renewal 30 days before the May 30, 2001 termination date. If the court’s point was that Delta abandoned the contract by not pursuing it, the court should have so held. In the alternative, if the court’s point was that Randallwood rightly exercised its right to terminate the contract by giving notice of non-renewal, the court should have framed its analysis in this fashion.

338. 145 Ill. App. 3d 355, 360-61, 495 N.E.2d 1006, 1011-12 (1st Dist. 1986) (even assuming former manager did not begin competing for the lease until after his resignation, he remained bound by his fiduciary duty because his acquisition of the lease was based upon knowledge acquired during his employment).

339. 273 Ill. App. 3d 681, 652 N.E.2d 1372 (4th Dist. 1995).

not a defense to corporate opportunity usurpation. Indeed, the absence of any “pretermination solicitation”—assuming, liberally, that none occurred—was precisely the problem: the court completely overlooked the duty of Donati and Ottum to actively pursue the Randallwood contract *for Delta’s benefit*, as they plainly were instructed to do.³⁴⁰ The court also did not seem to appreciate that a fiduciary’s resignation does not sever liability for wrongdoing begun before quitting but completed after quitting, as *Mile-O-Mo* and many subsequent Illinois cases like *Comedy Cottage* have held. The twelve-month service contract for Randallwood was a classic corporate opportunity, and not simply a series of one-off purchase orders Donati and Ottum were free to pursue after quitting.

The Illinois Appellate Court’s perfunctory treatment of trade secret preemption in *Delta Medical Systems* was also mistaken at multiple levels. To begin with, the Illinois Trade Secrets Act expressly states that it does not preempt “other civil remedies that are not based upon misappropriation of a trade secret,”³⁴¹ a statutory provision the *Delta Medical Systems* opinion simply ignored. Thus, to the extent Delta’s duty of loyalty claim rested on its internal information relating to the Randallwood renewal opportunity, it was not necessary for Delta to show this information rose to the level of a trade secret.³⁴² To the extent Delta’s duty of loyalty claim rested on Donati’s and Ottum’s wrongful solicitation of Randallwood, or more likely, their complete failure to solicit Randallwood on Delta’s behalf, such conduct also does not depend on misuse of information, secret or not, as other courts have held in rejecting similar trade secret preemption defenses in fiduciary liability cases.³⁴³

340. *Delta Med. Sys.*, 331 Ill. App. 3d at 787, 772 N.E.2d at 778.

341. 765 ILCS 1065/8(b)(2) (West 2000).

342. See *Cottage Comedy Cottage v. Berk*, 145 Ill. App. 3d 355, 360-61, 495 N.E.2d 1006, 1011-12 (1st Dist. 1986) (fact that lease information did not rise to the level of a trade secret did not negate the existence corporate opportunity liability with respect to lease renewal transaction); Robert W. Unikel, *Bridging the “Trade Secret” Gap: Protecting “Confidential Information” Not Rising to the Level of Trade Secrets*, 29 LOY. U. CHI. L.J. 841, 882-90 (1998) (arguing against trade secret statutory preemption of “idea” claims and other common law causes of action falling short of trade secret status); Michael Starr and Christopher N. Franciose, *Disloyalty and the UTSA*, NAT’L L.J., April 20, 2009, at 13 (arguing against preemption of common law disloyalty claims against employees based upon misuse of confidential information not rising to the level of a trade secret).

343. *Hecny Transportation Co. v. Chu*, 430 F.3d 402 (7th Cir. 2005) (reversing trade secret preemption ruling relating to breach of fiduciary duty / pretermination solicitation claim); *Alpha School Bus Co., Inc. v. Wagner*, 391 Ill. App. 3d 722, 910 N.E.2d 1134 (1st Dist. 2009) (Illinois Trade Secret Act did not preempt fiduciary duty claim against employee who prepared rival bid before resigning).

Delta Medical Systems is a profound example of the dangers of allowing the third party “refusal to deal” defense in corporate opportunity cases. A fair reading of the opinion suggests that both the trial and appellate courts thought the controlling facts were Randallwood’s purported independent decision to go with Ottum based upon Randallwood’s purported long-time love for Ottum. These seductive facts, abetted by Delta’s complete failure to discuss or cite any corporate opportunity case law,³⁴⁴ appear to have caused the trial and appellate courts to reason backward to a result that they attempted to justify with non-sequiturs like “preparing to compete” and “preemption.” Like the defective “customer choice” holding in *Peterson Welding Supply*, the “customer choice” reasoning in *Delta Medical Systems* cannot be squared with *Kerrigan*, *Vendo* and *Mullaney*. As in *Peterson Welding Supply*, the *Delta Medical Systems* customers’ after-the-fact objections—if they had any basis at all—should have been for the principal to deal with and overcome, as the courts held in *Kerrigan* and *Levy*.

8. *Prodromos v. Everen Securities, Inc.*

In *Prodromos v. Everen Securities, Inc.*,³⁴⁵ the appellate court continued the disturbing trend begun in *Delta Medical Systems*: it again resolved a corporate opportunity case without identifying any corporate opportunity test at all. This omission was particularly disappointing because the trial court based its decision in part on the absence of evidence that the third party there would have done the deal with plaintiff, thus giving the appellate court a prime chance to opine on the relevance, if any, of the third party’s willingness to deal. Like *Delta Medical Systems*, *Prodromos* may lead to much mischief if left unattended, so I take the time here to unpack the layers of legal error on which it rests.

In late January 1998 Prodromos, a former employee and president of Howard Savings, met with investment banker Westrope of Everen Securities to discuss Prodromos’ idea of a hostile takeover of Home Bank. Westrope provided some initial advice at this meeting and asked Prodromos for Howard Savings’ audited financial statements when Prodromos was president,

344. The sole fiduciary duty decision cited by Delta, *ABC Trans National Transport, Inc. v. Aeronautics Forwarders, Inc.*, 90 Ill. App. 3d 817, 413 N.E. 2d 1299 (1st Dist. 1980), was a corporate competition case rather than a corporate opportunity case. Combined Appellee’s and Cross-Appellant’s Brief of Delta Medical Systems, Inc., at 43. Delta’s entire corporate opportunity argument consisted of the final sentence in their brief: “Usurping a corporate opportunity, as defendants did with respect to Randallwood, was plainly a breach of the fiduciary duties they owed Delta.” Combined Appellee’s and Cross-Appellant’s Brief of Delta Medical Systems, Inc., at 43.

345. 389 Ill. App. 3d 157, 906 N.E.2d 599 (1st Dist. 2009).

which Prodromos promptly forwarded on February 5, 1998.³⁴⁶ Westrope later made calls to institutional shareholders of Home Bank “to put plaintiff and any dissatisfied shareholders in contact with each other because these large institutional shareholders, along with plaintiff, might be able to ‘put some pressure on the Board or the management to make a change.’”³⁴⁷ Although Westrope apparently did not receive any responses, these “telephone calls to institutional shareholders,” the appellate court concluded, “clearly were for the purpose of advancing plaintiff’s goal of obtaining control of Home Bank.”³⁴⁸

On February 13, 1998, Westrope quit Everen and immediately joined State Financial.³⁴⁹ Westrope never told Prodromos that he knew at the time of their initial meeting that he was about to quit Everen to join State Financial.³⁵⁰ Westrope also never told Prodromos that he had a potential conflict of interest regarding Prodromos’ plan to acquire Home Bank because State Financial had previously engaged him to look for bank acquisition candidates.³⁵¹ What Prodromos *was* told, a few days after Westrope’s departure, was that Everen no longer wanted to represent Prodromos “because Everen did not get involved with hostile takeovers”³⁵²—even though Westrope had previously told Prodromos that drumming up shareholder support for forced corporate change was done “constantly” at Everen.³⁵³

On March 3, 1998, just days after his departure from Everen, and just weeks after he learned about Prodromos’ idea of acquiring Home Bank, Westrope attended a meeting at which State Financial for the first time discussed its own pursuit of Home Bank.³⁵⁴ Westrope claimed he never told State Financial about his discussions with Prodromos concerning Home Bank; an independent deal broker for Home Bank—Hovde—allegedly introduced the idea of a State Financial / Home Bank merger at this key March 3 meeting.³⁵⁵ Unfortunately, the appellate court’s two opinions and the parties’ appellate briefs were silent on the exact circumstances leading up to Hovde’s decision to suddenly approach State Financial about Home Bank, a decision that was

346. *Id.* at 161, 906 N.E.2d at 604.

347. 341 Ill. App. 3d at 725, 793 N.E.2d at 157.

348. *Id.*

349. Appeal No. 1-02-1365 (“*Prodromos I*”), Brief of Appellant Prodromos, at 8.

350. 389 Ill. App. 3d at 165, 906 N.E.2d at 606.

351. *Id.*

352. 341 Ill. App. 3d at 723, 793 N.E. 2d at 155.

353. *Prodromos I*, Brief of Appellant Prodromos, at 15.

354. *Prodromos I*, Brief of Appellees Everen Securities, Inc., Principal Financial Securities, Inc. and Westrope, at 9.

355. *Id.* at 165, 906 N.E.2d at 606.

suspicious by virtue of its timing and the absence of State Financial from Hovde's original list of potential buyers.³⁵⁶ More unfortunate still, the appellate court's two opinions and the parties' appellate briefs were also silent on the exact role Westrope played in State Financial's pursuit of Home Bank at and after the key March 3 meeting. The appellate court's only comment about Westrope's Home Bank deal activities for State Financial was oblique: "The first time [Westrope] discussed Home Bank with anyone at State Financial was when he was called to a meeting with Michael Falbo and Steven Hovde in March 1998, where Hovde presented Home Bank as a potential merger or acquisition candidate."³⁵⁷

On June 2, 1998, State Financial publicly announced that it intended to merge with Home Bank and that "Westrope was named the president and CEO of the newly acquired bank."³⁵⁸ State Financial then engaged Everen, in early June 1998, to prepare a fairness opinion for the State Financial / Home Bank transaction, an opinion for which Everen was paid \$250,000.³⁵⁹ Prodromos learned about the State Financial / Home Bank merger announcement, heard a rumor that Westrope had engineered it, confronted Westrope about it, and then put together a rival bid backed by Success Bank that he presented to Home Bank on July 2, 1998.³⁶⁰ Home Bank rejected Prodromos' bid on July 7, 1998,³⁶¹ and Prodromos thereafter sued Westrope and Everen for breach of fiduciary duty and constructive fraud—but, oddly, not corporate opportunity usurpation.

On the first appeal from summary judgment in favor of the

356. The appellate court and Prodromos both noted that State Financial was not on Hovde's original list of buyers. 341 Ill. App. 3d at 727, 793 N.E.2d at 158; *Prodromos I*, Brief of Appellant Prodromos, at 20; Reply Brief of Appellant Prodromos, at 7. The defendants begged the question of the exact circumstances leading up to Hovde's overture to State Financial on March 3, 1998, commenting only that "Hovde identified State as a potential, albeit second tier, prospective purchaser in 1997 or 1998." *Prodromos I*, Brief of Appellees Everen Securities, Inc., Principal Financial Securities, Inc., and Westrope. The appellate court noted this "second tier" comment but offered no additional discussion of how Hovde happened to come to State Financial at the magic moment in question – right after Westrope arrived. 341 Ill. App. 3d at 723, 793 N.E.2d at 155.

357. 341 Ill. App. 3d at 722-23, 793 N.E.2d at 155.

358. 389 Ill. App. 3d at 159, 906 N.E.2d at 602.

359. 341 Ill. App. 3d at 723, 793 N.E.2d at 155.

360. In *Prodromos I*, the court emphasized that Success Bank was interested in backing Prodromos' plan. 341 Ill. App. 3d at 727-28, 763 N.E.2d at 159. But in *Prodromos II*, the court noted that Saul Binder, the driving force behind Success Bank, died before Prodromos' plan could be completed and Success Bank therefore withdrew its backing. 389 Ill. App. 3d at 162-63, 906 N.E.2d at 605.

361. 389 Ill. App. 3d at 162, 906 N.E.2d at 605.

defense, the appellate court succinctly summed up these circumstances and Westrope's central role:

The record reveals that State Financial was not on Hovde's original list of potential buyers for Home Bank. State Financial had been Westrope's client at Everen since 1996. Westrope's responsibilities included finding potential acquisitions for State Financial. State Financial advised Westrope of its desire to expand into the Northern Illinois market. Prior to the January 1998 meeting with plaintiff, Westrope had no knowledge of Home Bank. At that meeting, plaintiff identified the Home Bank deal to Westrope, who had been engaged to look for such acquisition deals for State Financial. Westrope agreed to undertake certain actions with regard to the deal on plaintiff's behalf. Within one month after that meeting, Westrope was hired by State Financial. By June 1998, State Financial had acquired Home Bank, hired Everen to do the fairness opinion on Home Bank, and Westrope was named regional president of the former Home Bank. This time line of events raises a question of fact regarding whether or not Westrope usurped plaintiff's Home Bank deal.³⁶²

The appellate court in *Prodromos I* reversed and remanded the case for trial, but *Prodromos* later lost. So what went wrong?

Rather than asserting a corporate opportunity claim against Westrope, Everen and State Financial, or even asserting his "constructive fraud" claim against Westrope and Everen that the appellate court approved in *Prodromos I*,³⁶³ *Prodromos* inexplicably limited his appeal in *Prodromos II* to just an interested agent / self-dealing transaction claim against Westrope and Everen, arguing that Westrope and Everen had to prove by clear and convincing evidence that the State Financial / Home Bank transaction was "fair" to *Prodromos*, meaning fair process and fair price.³⁶⁴ But an interested agent transaction claim assumes a two-party dispute arising out of a *transaction between the parties* in which an agent sells something to or buys something from his principal, and Westrope and Everen did not buy anything

362. 341 Ill. App. 3d at 727, 793 N.E.2d 151 at 158.

363. *Id.* at 726, 793 N.E.2d at 158 ("To recover on a constructive fraud claim, plaintiff must show that the defendant (1) breached the fiduciary duty he owed to plaintiff and (2) knew of the breach and accepted the fruits of the fraud.") (citing *Stathis v. Geldermann, Inc.*, 295 Ill. App. 3d 844, 860, 692 N.E.2d 798, 809 (1st Dist. 1999)).

364. 389 Ill. App. 3d at 171, 906 N.E.2d at 611-12 ("Plaintiff initially notes that this court held in *Prodromos I* that a transaction in which the agent profits is presumed to be fraudulent unless the agent presents clear and convincing evidence that the transaction was fair and equitable.") (citing *In re Estate of Miller*, 334 Ill. App. 3d 692, 778 N.E.2d 262 (5th Dist. 2002)). The appellate court framed the question as one involving transaction fairness in *Prodromos II* because *Prodromos* himself did so. *Prodromos II*, Brief of Appellant *Prodromos*, at 15.

from or sell anything to Prodromos;³⁶⁵ Prodromos was, in fact, a stranger to the State Financial / Home Bank transaction. The problem in *Prodromos* was instead a traditional three-party corporate opportunity dispute, with Prodromos and Westrope simultaneously vying for the affections of third party Home Bank. Moreover, a corporate opportunity dispute does *not* raise a “fairness” inquiry; corporate opportunity usurpation is inherently unfair under the *Kerrigan* “line of business” test and can only be defended on legal or financial disability grounds—if at all—after disclosure and tender.

The poor fit between Prodromos’ two-party transaction “fairness” theory and the three-party diverted transaction problem at hand became apparent in *Prodromos II* when the appellate court unwittingly mixed and matched tort fraud elements with interested transaction elements—two entirely distinct species of fiduciary duty claims:

To state a claim for breach of fiduciary duty, a plaintiff must allege that: (1) a fiduciary duty exists; (2) the fiduciary duty was breached; and (3) such breach proximately caused the plaintiff’s injury. . . .

In this case, the trial court disposed of plaintiff’s complaint and granted defendants’ motion by examining the third element in a breach of fiduciary duty claim, viz., whether plaintiff’s claimed injuries were proximately caused by defendants. Plaintiff initially notes that this court held in *Prodromos I* that a transaction in which an agent profits is presumed to be fraudulent unless the agent presents clear and convincing evidence that the transaction was fair and equitable. See *Prodromos I*, 341 Ill. App. 3d at 724, citing *In re Estate of Miller*, 334 Ill. App. 3d 692, 778 N.E.2d 262 (2002). Plaintiff then argues that, when the trial court began examining whether proximate cause was established, it implicitly recognized that there was a fiduciary duty between defendants and plaintiff and that defendants breached that duty. Finally, plaintiff concludes that the trial court erred in subsequently granting defendants’ motion without requiring that defendants prove, by clear and convincing evidence, that the transaction was fair and equitable. We disagree.³⁶⁶

Faced with plaintiff’s confused analytic “fairness” framework, the trial and appellate courts skipped to the seemingly more familiar “proximate cause” inquiry introduced by Prodromos’ constructive fraud theory in his first appeal. At the trial level, the

365. The appellate court made this clear in *Prodromos I*, 341 Ill. App. 3d at 724, 793 N.E.2d at 156:

If a fiduciary relationship exists, any transaction between the parties in which the agent profits is presumed to be fraudulent and the agent has the burden of proving by clear and convincing evidence that the transaction was fair and equitable. (Emphasis added.)

366. 389 Ill. App. 3d at 171, 906 N.E. 2d at 611.

following proximate cause fact findings were made in a ruling for the defense at the close of plaintiff's case:

So the court does find that there was no deal to usurp, only possible prospects on the horizon. No substantial step was taken [by plaintiff] to get this deal done. And plaintiff admitted that he didn't know how to go about buying this bank. So in those six months he still didn't know how to buy a bank. He is blaming *** Westrope, but it was clear that Everen wasn't going to do anything more for him early in the year. Therefore, . . . the court is going to grant the motion for judgment in favor of the defendants on all counts.³⁶⁷

The appellate court affirmed, holding that it was not against the manifest weight of the evidence for the trial court to find "that plaintiff's plan was a mere prospect on the horizon and that plaintiff made no substantial step in accomplishing his plan."³⁶⁸ In other words, the trial and appellate courts accepted defendants' argument that "plaintiff's own lack of follow-up broke the chain of causation."³⁶⁹

Even though the appellate court characterized plaintiff's claim as one for usurpation of an opportunity,³⁷⁰ *Prodromos I* and *Prodromos II* surely would have yielded a different outcome had the appellate court employed *any* cognizable corporate opportunity standard, let alone the correct *Kerrigan* canon. One would have expected a citation to *Kerrigan* followed by an analysis of whether Westrope was *Prodromos*' agent and whether the Home Bank acquisition was an opportunity within *Prodromos*' line of business. These appeared to be easy questions under *Kerrigan*: (1) *Prodromos* obviously was in the banking business; (2) Westrope assumed the position of *Prodromos*' agent; (3) Westrope learned *Prodromos*' confidential plan as a result of his agency; (4) Westrope failed to disclose his conflict of interest; and (5) Westrope then joined and assisted a firm that was chasing and ultimately seized the very opportunity *Prodromos* was trying to pursue. These facts presented a straightforward "competition for a corporate opportunity" case. Indeed, like Williams and Glen Ellyn in *Mullaney*, Everen and State Financial both faced liability themselves for knowingly benefiting by Westrope's conflict of interest: Everen and Westrope had actual knowledge of *Prodromos*' plan to acquire Home Bank, and State Financial had imputed knowledge of *Prodromos*' plan by virtue of Westrope's

367. *Id.* at 169, 906 N.E.2d at 610.

368. *Id.* at 173, 906 N.E.2d at 613.

369. 341 Ill. App. 3d at 727, 793 N.E.2d at 158.

370. *Id.* at 172, 906 N.E.2d at 172 (remarking that *Prodromos I* had found "questions of fact [existed] regarding proximate cause and even whether Westrope usurped plaintiff's opportunity").

knowledge.³⁷¹ Given these circumstances, and given the appellate court's rejection of their "legal disability" defense in its *Prodromos I* opinion,³⁷² *Kerrigan* would have foreclosed Westrope, Everen and State Financial from pursuing the Home Bank opportunity without disclosure and tender to Prodromos.

To be sure, "possible prospects on the horizon," "no substantial step taken," and "plaintiff's own lack of follow-up" would not have been defenses under *Kerrigan* absent disclosure and tender, if then. Characterizing Home Bank as a "mere prospect on the horizon" adds nothing under a *Kerrigan* analysis; all corporate opportunities are "mere prospects on the horizon" in the vapid sense used in *Prodromos II*, and Home Bank, as a hot takeover target, was more than a mere "prospect" in any sense of the word. "No substantial step taken" was utterly irrelevant as well; *Kerrigan* imposes no "substantial steps" requirement upon plaintiff-principals, and in any event Prodromos *did* take substantial steps—he hired Westrope and Everen and lined up financing sources, however tentative their commitments may have been. Finally, Prodromos' supposed "lack of follow up" was especially galling from a *Kerrigan* perspective: he had no duty to do anything absent disclosure and tender by Westrope and Everen; he was dropped without warning by Westrope and Everen and necessarily had to regroup; and he even went so far as to send an initial indication of interest to Home Bank, backed by Success Bank, all within a three-month window—hardly a "lack of follow up." Viewed through the *Kerrigan* lens, then, these "defenses" were non-sequiturs and empty ones at that.

As I read *Prodromos I* and *Prodromos II*, these arguments were makeweights intended to bolster the trial and appellate courts' real reason: they thought Prodromos couldn't raise the money following Saul Binder's untimely death and Success Bank's resulting withdrawal of financial support for Prodromos' plan. In

371. *Mullaney, Wells & Co. v. Savage*, 78 Ill. 2d 534, 550, 402 N.E.2d 574, 582 (1980) (holding Glen Ellyn Corporation liable for corporate opportunity usurpation by its president, Savage, prior to his joining Glen Ellyn, based upon Savage's knowledge of his own wrongdoing); *Lozman v. Putnam*, 328 Ill. App. 3d 761, 770, 767 N.E.2d 805, 813 (1st Dist. 2002) (describing Putnam as the "fiduciary link" between his first employer, Blue Water Partners, Inc., and his subsequent employer, Archipelago, LLC, for purposes of Blue Water's corporate opportunity claim). Because Westrope was acting on State Financial's behalf, the "adverse agent" exception precluding corporate liability would not apply. Cf. *Williams Electronic Games, Inc. v. Garritty*, 366 F.3d 569, 580 (7th Cir. 2004) (analyzing adverse agent rule at length under Illinois law); *Kirschner v. KPMG, LLP*, 15 N.Y.3d 783, 933 N.E.2d 1037 (2010) (analyzing adverse agent rule at length under New York law).

372. 341 Ill. App. 3d at 726, 793 N.E.2d at 157 ("Defendants have pointed to no legal prohibition to plaintiff's obtaining controlling interest in Home Bank.").

particular, the trial court described Prodromos' remaining financial backing as "somewhat iffy" because his alternative funding sources had not yet done due diligence,³⁷³ a finding the appellate court endorsed while adding that Prodromos "had no agreements with any of them, no funds were collected from them, nor did they even purchase any Home Federal stock."³⁷⁴ This raises an interesting question: Would lack of financing have been a defense under *Kerrigan*?

I doubt it. *Anest* said in *dicta* such a financial disability defense exists, citing *Graham*,³⁷⁵ but *Anest* and *Graham* were both decided on "asset misappropriation" / estoppel grounds and therefore did not actually reach this issue. *Graham* itself cited no authority for its "financial disability" assertion,³⁷⁶ and for good reason: *Kerrigan* implicitly *rejected* it. The actual holding in *Kerrigan* was not simply that it was legal for Unity Savings to be an insurance agency;³⁷⁷ the Illinois Supreme Court made a point of going further and holding that the fiduciaries there were precluded from arguing the "legal disability" defense because they had failed to disclose and tender to Unity Savings the opportunity to be an insurance agency.³⁷⁸ It was in this context that the *Kerrigan* court then analogized to the "financial disability" defense rejected in *Irving Trust*, quoting from that decision to show that fiduciaries must disclose and tender to allow the corporation in the first instance to decide whether and how it can finance the opportunity.³⁷⁹

373. 389 Ill. App. 3d at 169, 906 N.E.2d at 609.

374. *Id.* at 172, 906 N.E.2d at 612.

375. *Anest*, 332 Ill. App. 3d at 478, 773 N.E.2d at 211 ("In *Graham*, the court stated that 'it is relevant to consider whether it was feasible for the corporation to take advantage of the opportunity.'").

376. 111 Ill. App. 3d at 763, 444 N.E.2d at 557 ("So, as Mimms correctly points out, when a fiduciary is accused of usurping a corporate opportunity, it is relevant to consider whether it was feasible for the corporation to take advantage of the opportunity, and whether the corporation had a reasonable expectation that its fiduciary would disclose and tender the opportunity.").

377. 58 Ill. 2d at 25, 317 N.E.2d at 42 ("We are of the opinion, however, that upon the facts alleged in the complaint and admitted by defendants the liability of the latter does not depend solely on whether in 1962 Unity had the power to engage in the insurance brokerage business.").

378. *Id.* at 28-29, 317 N.E.2d at 43-44.

379. *Id.* at 28-29, 317 N.E.2d at 44:

In the latter case, with regard to the alleged financial inability of a corporation to make certain purchases, the court quoted from the following passage from *Irving Trust*: "If the directors are uncertain whether the corporation can make the necessary outlays, they need not embark upon the venture; if they do, they may not substitute themselves for the corporation any place along the line and divert possible benefits into their own pockets." [Citation omitted.] We consider that this reasoning is equally applicable to a claim that a corporation

Even assuming “financial disability” were a defense in the absence of proper disclosure and tender, “legal disability” was raised as an affirmative defense in *Kerrigan*. This suggests that “financial disability”—if it is a defense at all, absent disclosure and tender—must be proven affirmatively, and by clear and convincing evidence, by the defendant. If so, then the trial court under *Kerrigan* would have been unable to dismiss Prodrornos’ case at the close of his evidence based upon Prodrornos’ “somewhat iffy” financial support, and most likely the defendants would have been unable to meet their heavy burden of proof during their case-in-chief as to Prodrornos’ supposed lack of financial wherewithal.

For the narrow purposes of our discussion here, then, *Prodrornos I* and *Prodrornos II* are poor platforms for analyzing the third party refusal to deal defense under Illinois corporate opportunity law. First, analytically, both decisions are wrong at almost every level from the perspective of *Kerrigan*. Second, *Prodrornos I* and *Prodrornos II* both mentioned third party Home Bank’s rejection of Prodrornos’ bid, but neither opinion attached any specific weight to this fact. Third, although *Prodrornos II* did recount statements by the trial court “that there was no evidence ‘whatsoever’ that Home [Bank] would have accepted plaintiff’s offer”³⁸⁰ and that “there was no evidence Home [Bank] would still have been on the market in 12 to 18 months,”³⁸¹ the appellate court did not address the legal significance of the first remark and treated the second as a fact relating to Prodrornos’ supposed sloth rather than Home Bank’s purported prerogative. Fourth, the notions that Prodrornos did not act quickly enough and lacked sufficient financing would have been beside the point under *Kerrigan*; full disclosure and tender must occur *before* abandonment and financial disability even come into play under *Kerrigan*, and neither occurred in *Prodrornos*. Fifth and finally, the holding in *Prodrornos II* is directly contrary to *Kerrigan*, *Vendo* and *Mullaney*, where all three plaintiffs prevailed without any showing that their respective third parties were willing to deal with them.

By failing to bring a corporate opportunity claim, and by allowing the appellate court to erroneously characterize his disloyalty claim as an “intentional tort,”³⁸² Prodrornos inadvertently invited the trial and appellate courts to import a proximate cause defense in both *Prodrornos I* and *Prodrornos II*.

was precluded from following a course of action by legal, rather than financial, reasons.

380. 389 Ill. App. 3d at 169, 906 N.E.2d at 609.

381. *Id.*

382. 341 Ill. App. 3d 727, 793 N.E.2d at 158-59 (quoting *Martin v. Heinold Commodities, Inc.*, 163 Ill. 2d 33, 60, 643 N.E.2d 734, 747 (1994)).

Nonetheless, in his first appeal Prodromos presented a reasonable rebuttal to the defense that Prodromos had to show he could have done the deal with third party Home Bank. Citing *Kirkruff v. Wisegarver*,³⁸³ in which the appellate court rejected a real estate broker's proximate cause defense that his principal could not have developed the property even assuming the broker had breached his fiduciary duty in acquiring the property and developing it himself,³⁸⁴ Prodromos suggested that the relevant proximate cause facts were that he would not have retained Westrope and Everen had he known they would be disloyal and that their disloyalty caused him to miss the Home Bank opportunity.³⁸⁵ In other words, as in *Kirkruff*, loss of the opportunity established proximate cause; he was not required to show that he would have won the deal.³⁸⁶ Unfortunately for our purposes, the appellate court in *Prodromos I* did not respond to this important proximate cause argument, and Prodromos chose not to raise it in *Prodromos II*.

Finally, even if Prodromos failed to prove proximate cause with respect to his loss, he surely proved proximate cause with respect to Westrope's and Everen's (and State Financial's) gain—

383. 297 Ill. App. 3d 826, 697 N.E.2d 406 (4th Dist. 1998).

384. 297 Ill. App. 3d at 834, 697 N.E.2d at 413:

Consistent with this authority, we hold that to recover for misrepresentation in cases involving breach of fiduciary duty, plaintiffs must prove (1) cause in fact – namely, that the misrepresentation in fact induced the recipient to enter into the transaction; and (2) proximate cause – namely, that the character of the fiduciary's misrepresentations could reasonably be expected to result in the recipient's injury. Therefore, in this case, plaintiffs had to show that the character of Wisegarver's misrepresentations and omissions could reasonably be expected to result in their injury – that is, their missed opportunity to develop the property. It follows then that plaintiffs' missed opportunity to develop the property could not reasonably be expected to result from Wisegarver's misrepresentations and omissions if plaintiffs could not have developed the property regardless of Wisegarver's misrepresentations and omissions. However, we disagree with Wisegarver's assertion that plaintiffs had to show that they could have developed the property on their own. If we were to accept such an assertion, a realtor could almost always avoid liability for his misrepresentations or omissions given that few untrained private property owners could develop property without any assistance whatsoever. Moreover, we disagree with Wisegarver's contention that plaintiffs had to show that they could have duplicated Wisegarver's profits. That contention goes solely to the measure of damages.

385. *Prodromos I*, Brief of Appellant Prodromos, at 19-20.

386. See also *Wolinsky v. Kadison*, 2013 IL App (1st) 111186, ¶¶78-79, 987 N.E.2d 971, 986-87 (1st Dist. 2013) (rejecting defense argument that plaintiff had to prove she would have prevailed had the condominium board conducted the vote required by the bylaws, and holding instead that plaintiff had established proximate cause as a matter of law between the board's breach of fiduciary duty and plaintiff's loss).

at least under his original “constructive fraud” theory. Completely lost in the shuffle of *Prodromos II* was the appellate court’s holding in *Prodromos I* that to prove “constructive fraud,” Prodromos only had to show Westrope “(1) breached the fiduciary duty he owed plaintiff and (2) knew of the breach and accepted the fruits of the fraud.”³⁸⁷ The same sentiment is found in *Martin v. Heinold Commodities, Inc.*,³⁸⁸ the principal proximate cause case upon which the appellate court relied in *Prodromos II*: disgorgement of the fiduciary’s fake fees was ordered in *Martin*, even though the fiduciary had not caused the plaintiff-principal’s investment losses. Although he failed to cite *Mullaney*, Prodromos rightly argued in *Prodromos I* that Westrope served as Prodromos’ agent on his Home Bank plan at least initially, thereby triggering Westrope’s duty not to compete for the Home Bank deal.³⁸⁹ In other words, his initial service disqualified Westrope from playing “hot potato” and switching sides with respect to the subject of his agency.³⁹⁰ Perhaps Westrope could still have joined State Financial, but at the very least State Financial should have precluded Westrope via a “clean room” or “Chinese wall” from participating in the Home Bank pursuit.³⁹¹ As a result of Westrope’s involvement, Westrope and Everen (and State Financial) should have been required to disgorge their Home Bank gains—but Prodromos chose not to argue this theory in his opening appellate brief in *Prodromos II* and the appellate court chose not to address it.³⁹²

387. 341 Ill. App. 3d 726, 793 N.E.2d at 158 (citing *Stathis v. Geldermann, Inc.*, 295 Ill. App. 3d 844, 860, 692 N.E.2d 798, 809 (1st Dist. 1998) (citing in turn *Beaton & Assoc’s, Ltd. v. Joslyn Mfg. & Supply Co.*, 159 Ill. App. 3d 834, 844, 512 N.E.2d 1286, 1291 (1st Dist. 1987))).

388. 163 Ill. 2d 33, 55-56, 643 N.E.2d 734, 745 (1994).

389. *Prodromos I*, Brief of Appellant Prodromos, at 17-18 (citing Sections 13 and 387 of the RESTATEMENT (SECOND) OF AGENCY).

390. *Cf. Ransburg Corp. v. Champion Spark Plug, Inc.*, 648 F. Supp. 1040, 1044 (N.D. Ill. 1986) (law firm cannot drop one client like a “hot potato” in order to take on a more lucrative assignment from another client against the dropped client).

391. Westrope was surely familiar with the concept, as another Everen employee testified at trial that a “conflict wall” existed between the retail and investment banking arms of Everen. 389 Ill. App. 3d at 167, 906 N.E.2d at 608.

392. Prodromos did raise the wrongful gain argument in his reply brief, but he linked it to the appellate court’s “unfair transaction” holding in *Prodromos I* rather than the “constructive fraud” holding in that earlier opinion. *Prodromos II*, Reply Brief of Appellant Prodromos, at 3-4:

There are benefits and profits, to Westrope and to Everen. The profits were obtained in a series of acts which began with Prodromos sitting in Westrope’s office and telling him about the Home Bank transaction. A fiduciary duty existed, and profit occurred when the fiduciary became the beneficiary of the proposed transaction. It is the fiduciary’s profit,

Prodromos shows what can happen when the appellate court examines unfamiliar facts against unfamiliar precedent. With the exception of the limited liability company members in *Anest*, Illinois cases before *Prodromos* concerned usurpations by partners, directors, officers or employees, all traditional fiduciary relationships covered by existing Illinois decisions. But *Prodromos* involved usurpation by an independent agent—an investment banker—and this apparently confounded the appellate court and counsel,³⁹³ judging by their failure to cite or discuss a single corporate opportunity decision on either appeal.³⁹⁴ *Prodromos* was correct to situate the case within the law of agency as an alternative, and he probably would have won if he had invoked *Mullaney*, a corporate opportunity decision explicitly tied to agency principles (and one that involved an investment banker to boot, albeit an employee rather than an independent agent). Unfortunately, his failure to cite any factually similar case invited doctrinal confusion and spawned the first discussion of proximate cause in any Illinois corporate opportunity case, if *Prodromos* can bear that label. As a result, the appellate court erroneously framed the issues in terms of how seriously *Prodromos* sought the opportunity and how likely he was to land it—totally irrelevant inquiries under *Kerrigan*. *Prodromos*' banking background and his undeniable interest in Home Bank instead should have triggered “line of business” liability under *Kerrigan*, no matter how remote his chances may have been to win the Home Bank bidding battle.

9. *Happy R Securities, LLC v. Agri-Sources, LLC*

With the exception *Reliable Fire Equipment Co. v. Arredondo*,³⁹⁵ a corporate competition case in which the trial and appellate courts held that plaintiff failed to muster factual proof of

not *Prodromos*' loss, that should be considered.

393. Cf. *Gregg v. U.S. Indus., Inc.*, 715 F.2d 1522, 1541 (11th Cir. 1983) (CEO's fiduciary obligations terminated when he became a mere consultant, and he therefore had no corporate opportunity liability since his consulting duties did not relate to acquisitions); *In re Del Monte Foods Company Shareholders Litigation*, 25 A.3d 813 (Del. Ch. Feb. 14, 2011) (sharply criticizing Barclays Capital investment bank for its conflicts of interest in manipulating the \$4 billion Del Monte sale).

394. *Prodromos* may also have thought “corporate” opportunities must be brought by corporations rather than individuals, even though the rule is more accurately known as the “business” opportunity doctrine, the label the Illinois Supreme Court used in *Kerrigan* itself. 58 Ill. 2d at 28, 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.”).

395. 405 Ill. App. 3d 708, 940 N.E.2d 153 (2d Dist. 2010), *rev'd on other grounds*, 2011 IL 111871, 965 N.E.2d 393 (2011).

pre-termination fiduciary misconduct, the Illinois Appellate Court was silent on fiduciary disloyalty until *Happy R Securities, LLC v. Agri-Sources, LLC*.³⁹⁶ Though correctly decided and generally well-reasoned, *Happy R Securities* suffered from the same flaw as *Prodromos*: it affirmed a corporate opportunity ruling using the wrong liability test.

The corporate opportunity in *Happy R Securities* concerned usurpation of Oquawka River Terminal, LLC's opportunity to purchase land by one of its own members, Kurt McChesney. ORT sought to acquire the land it rented and had substantially improved for its fertilizer business, and to this end ORT entered into a purchase agreement with its landlord, Agri-Sources, an entity owned in part by McChesney. The transaction initially failed to close in June 2011 when McChesney, in his capacity as a member of the ORT limited liability company, objected to the closing, and the transaction later stalled when Agri-Sources' lender decided in August 2011 to foreclose on its loan to Agri-Source. As it turned out, McChesney had secretly taken an assignment from the lender so that McChesney owned the Agri-Sources loan, with McChesney's loan ownership disguised through another entity he owned, Happy R Securities. The apparent purpose of these machinations was to enable McChesney as lender to veto Agri-Sources's ability to close the real estate sale to ORT, leaving Agri-Sources as the happy beneficiary of ORT's \$400,000 in improvements to the property. The trial court saw through this scheme and enjoined Happy R Securities from foreclosing on the loan in order to preserve the status quo pending a determination on the merits of ORT's request for specific performance of the real estate sale contract.

For fans of this field, *Happy R Securities* contains much to commend it, not least the Illinois Appellate Court's organized and disciplined march through equitable principles relating to specific performance of real estate contracts, unclean hands, cancellation of a note via merger when one is both obligor and obligee on the note, corporate veil piercing under the Illinois Limited Liability Company Act, and McChesney's fiduciary status under the Act as a member of a member-managed limited liability company.³⁹⁷ The court also exercised appropriate restraint in refusing to decide the merits of these matters in light of the procedural posture of the case, rightly stressing that only a "fair question" had to be presented to preserve the status quo through a preliminary injunction.³⁹⁸ The appellate court's irreparable harm and

396. 2013 IL App (3d) 120509, 988 N.E.2d 972 (3d Dist. 2013).

397. *Id.* at ¶¶ 38-54, 988 N.E.2d at 980-84.

398. *Id.* at ¶ 32, 988 N.E.2d at 979.

inadequate legal remedy holdings,³⁹⁹ coupled with its emphasis on the unique nature of real estate,⁴⁰⁰ also deserve praise.

Yet for all its thoroughness, the Illinois Appellate Court failed to discuss or cite a single corporate opportunity case, even though the appellate court noted that the trial court had found McChesney had “usurped ORT’s opportunity to purchase 8 acres of the Agri-Sources property” by blocking the closing and “seeking to dispossess ORT of its place of business, consequently reaping the benefits of ORT’s over \$400,000 worth of improvements on the property.”⁴⁰¹ The appellate court instead relied upon the duty/breach/proximate cause formulation found in *Neade v. Portes*,⁴⁰² an Illinois Supreme Court fiduciary duty case that did not involve a corporate opportunity claim and thus did not set forth the disclosure and tender requirements of the Illinois Supreme Court’s decision in *Kerrigan*. Perhaps this omission can be explained on the ground that the appellate court implicitly disagreed with the trial court’s choice to frame the issue as one of opportunity usurpation rather than straightforward bad faith by a fiduciary in interfering with his limited liability company’s affairs for personal gain. As in *Prodromos*, the appellate court’s use of the wrong liability standard in *Happy R Securities* set a poor precedent, even if the right outcome was reached.

Happy R Securities did not directly address a third party refusal to deal defense, though perhaps it may do so on remand. McChesney, it seemed, was trying to pose as a neutral third party—the lender, or more precisely, the lender’s assignee, Happy R Securities—to block the underlying contract closing between Agri-Sources and ORT. I gather McChesney saw no escape from the underlying real estate contract wearing his Agri-Sources hat, so he resorted to his lender-assignee subterfuge. As such, McChesney can hardly be called a “neutral third party” or indeed a third party at all. Thus, if *Happy R Securities* teaches anything, it teaches that fiduciaries cannot masquerade as third parties in an effort to usurp deals.

10. *Northwest Podiatry Center, Ltd. v. Ochwat*

The Illinois Appellate Court’s most recent corporate opportunity opinion is *Northwest Podiatry Center, Ltd. v.*

399. *Id.* at ¶¶ 35-37, 988 N.E.2d at 979-80.

400. *Id.* at ¶ 37, 988 N.E.2d at 980 (“Where land is the subject matter of the agreement, the inadequacy of the legal remedy is well-settled.”) (quoting *Heritage Standard Bank & Trust Co. v. Steel City Nat’l Bank*, 234 Ill. App. 3d 48, 56, 599 N.E.2d 1283, 1288 (1st Dist.1992)).

401. *Id.* at ¶ 28, 988 N.E.2d at 979-80.

402. 193 Ill.2d 433, 444, 739 N.E.2d 496 (2000).

Ochwat.⁴⁰³ The case offered the usual fiduciary fraud in the form of Dr. Ochwat's solicitation of patients and employees for months before his resignation as employee, vice-president, board member and 37% owner of Northwest Podiatry Center. For good measure, he diverted to himself Northwest's one-year contract with IPA, a managed care provider that subcontracted some of its medical care business to Northwest. Dr. Ochwat accomplished this latter feat by offering IPA lower charges than Northwest based upon his knowledge of Northwest's rates for podiatry services it provided to IPA.

As one might expect, the trial court found that Dr. Ochwat tried to "usurp NPC's corporate opportunity with IPA by undercutting the capitation amount charged by NPC."⁴⁰⁴ The trial court also found Dr. Ochwat had breached his fiduciary duties in soliciting patients and employees prior to his resignation from Northwest and in using corporate assets, employee time, and company equipment to set up his rival firm.⁴⁰⁵ Accordingly, pending a merits trial, the trial court preliminarily enjoined Dr. Ochwat from treating Northwest patients; ordered Dr. Ochwat to return all Northwest patient records; prohibited Dr. Ochwat from hiring current or former employees of Northwest other than the three who had already left with him; and barred Dr. Ochwat from entering into any agreement with IPA or from treating any patients referred by IPA.⁴⁰⁶

The Illinois Appellate Court affirmed the IPA injunction but reversed the patient injunction. The appellate court properly found that "Dr. Ochwat used information he learned as a corporate officer of [Northwest] to attempt to usurp [Northwest's] contract with IPA,"⁴⁰⁷ a view consistent with the asset misappropriation holding in *Kerrigan*, although the *Northwest Podiatry Center* court did not cite *Kerrigan* itself. But in a remarkable display of inconsistency, the appellate court ignored the very fiduciary duty corporate competition cases it cited elsewhere in its opinion and held that plaintiff had cited "no sufficient basis for the trial court's" patient injunction against Dr. Ochwat.⁴⁰⁸ *Veco Corp. v. Babcock*⁴⁰⁹ and *Delta Medical Systems v. Mid-America Medical Systems, Inc.*,⁴¹⁰ both of which were discussed and quoted by the *Northwest Podiatry Center* court as part of its own fiduciary duty framework, prohibit officers from soliciting their employer's

403. 2013 IL App (1st) 120458, 990 N.E.2d 347 (1st Dist. 2013).

404. *Id.* at ¶ 16, 990 N.E.2d at 353.

405. *Id.* at ¶ 15, 990 N.E.2d at 353.

406. *Id.* at ¶ 27, 990 N.E.2d at 356.

407. *Id.* at ¶ 62, 990 N.E.2d at 361.

408. *Id.* at ¶ 53, 990 N.E.2d at 360.

409. 243 Ill. App. 3d 153, 160, 611 N.E.2d 1054, 1059 (1st Dist. 1993).

410. 331 Ill. App. 3d 777, 796, 772 N.E.2d 768, 785 (1st Dist. 2002).

customers prior to resignation. Thus, the *Northwest Podiatry Center* court's patient injunction holding—that “[a] patient has a right to seek treatment from his or her doctor at the doctor's new place of employment unless that doctor is restrained by contract”⁴¹¹—was flatly wrong.

Veco Corp. and *Delta Medical Systems* are the least of the problems with *Northwest Podiatry Center*. First, as noted above, the Illinois Supreme Court in *Vendo* explicitly held that fiduciary duties exist independent of any contract restrictions;⁴¹² thus, *Northwest Podiatry Center* is contrary to controlling supreme court precedent. Second, as also noted above, “patient choice” was rejected as a defense in the Illinois Supreme Court's physician noncompetition agreement decision in *Mohanty v. St. John Heart Clinic, S.C.*,⁴¹³ and “client choice” held no sway in the Illinois Supreme Court's law firm fiduciary duty decision in *Dowd & Dowd Ltd. v. Gleason*.⁴¹⁴ It is therefore hard to accept the assertion in *Northwest Podiatry Center* that patient choice controls in the absence of a restrictive covenant, and it is certainly no surprise that the *Northwest Podiatry Center* court cited no authority for this manifestly mistaken statement. Unfortunately, even though patently wrong, the “patient choice” statement in *Northwest Podiatry Center* invites the third party refusal to deal defense in future medical practice cases by focusing the fight on the desires of third party patients instead of the desires of principals to whom fiduciaries owe their loyalty.

11. Summary of Illinois Appellate Court “Refusal to Deal” Jurisprudence

If ever a case fit the “hard cases make bad law”⁴¹⁵ mold, *Peterson Welding Supply* is it. Or perhaps *Peterson Welding Supply* is simply an example of Professor Schauer's theory that all cases decided through the case law method tend to make bad law.⁴¹⁶ Either way, Chemetron's insistence that it would not have

411. 2013 IL App. (1st) 120458, at ¶ 54, 990 N.E.2d at 360.

412. 58 Ill. 2d at 303, 321 N.E. 2d at 9. See note 123 and accompanying text.

413. 225 Ill. 2d 52, 67, 866 N.E. 2d 85, 94 (2006). See note 178 and accompanying text.

414. 181 Ill. 2d 460, 484, 693 N.E. 2d 358, 371 (1998). See notes 153 and 154 and accompanying text.

415. *Northern Sec. Co. v. United States*, 193 U.S. 197, 400 (1904) (Holmes, J., dissenting).

416. Frederick Schauer, *Do Cases Make Bad Law?*, 73 U. CHI. L. REV. 883, 884 (2006):

If in fact concrete cases are more often distorting than illuminating, then the very presence of such cases may produce inferior law whenever the concrete case is nonrepresentative of the full array of events that the

dealt with plaintiff had a seductive appeal the court could not resist, causing the court to lose sight of the sole interest that counts in corporate opportunity cases: the principal's. Whether Peterson Welding Supply could have changed Chemetron's mind is unknown and probably unknowable, but it was entitled to try, armed with disclosure of all facts known to its fiduciaries, with their assistance, and certainly free from their interference. The correct answer under *Kerrigan* to this simple problem is found in *Levy*, where the court condemned Gust and Bakal and came to Markal Sales' aid:

Gust and Bakal took no steps to persuade Pioneer to change its position and did not even attempt to follow the course Bakal suggested to Sony by establishing a separate Markal-owned company to sell Apple products. . . . Therefore, Gust and Bakal could not take advantage of the Apple opportunity without first offering it to Markal and having Markal reject it. As noted in *Kerrigan*, perhaps Markal would have chosen not to risk any present clients on the possibility of future Apple earnings. Nonetheless, Markal, as an electronics dealer with an interest in computers, might have decided to create a separate entity to pursue this opportunity or might have persuaded Pioneer to remain a client like the other Apple representative was able to do. In any event, Markal should have been "given the opportunity to decide that question for itself." (*Vendo*, 58 Ill. 2d at 305).⁴¹⁷

The appellate court in *Levy* was therefore right to later criticize *Peterson Welding Supply* as inconsistent with *Kerrigan*, *Vendo*, and *Mullaney*. All of these criticisms apply with equal if not greater force to *Delta Medical Systems*, where the third party "refusal to deal" defense carried the day without so much as a single corporate opportunity citation and in the face of undeniable fiduciary breaches.

As this review shows, with the exceptions of *Peterson Welding Supply* and *Delta Medical Systems*, no defendant has actually won on a third party refusal to deal defense in a reported Illinois state court corporate opportunity decision. Some have lost after trial court factual determinations that the third party's refusal was potentially subject to change, as in *Comedy Cottage*, *Lindenhurst Drugs*, and *Levy*. But others have lost as a matter of law, as in *Vendo*, *Mullaney*, and *Patient Care Services*, all of which ignored factual defenses tethered to third party refusals. *Patient Care*

ensuing rule or principle will encompass. Such distortion may rarely be seen or appreciated by the common law judge, who focuses, as she must, on the *this-ness* of this case. But the distortion of the immediate case may systematically condemn common law lawmaking not only to suboptimal results, but also to results predictably worse than those that would be reached by making law in a less dispute-driven fashion.

417. 268 Ill. App. 3d at 368, 643 N.E.2d at 1216.

Services is especially illuminating: (1) the appellate court offered a clear statement of principle—“We finally are dubious over the legal conclusion defendants seek to draw from the May 2, letter, namely that the hospital, a third-party, was in a position to effect a change in the time-honored obligations a fiduciary owes his corporation”; and (2) the appellate court reversed a defense judgment that had been entered after a trial on the merits, entered judgment for plaintiff, and then remanded with instructions to impose a constructive trust on the diverted hospital contract, all without requiring evidence of what the third party hospital’s intentions were.

Adherence to these first principles will be, if anything, even more important as the Illinois Appellate Court confronts new and novel corporate opportunity puzzles.⁴¹⁸ *Anest*, for example, was the first Illinois case to explore a corporate opportunity in the limited liability company context, and the first as well to be brought by an individual for his own benefit rather than for an organization.⁴¹⁹

418. Cf. Emily Kadens, *Justice Blackstone’s Common Law Orthodoxy*, 103 NW. U. L. REV. 1553, 1583-92 (2009) (describing Blackstone’s preference to decide cases on broad principles unless controlling precedent dictated a particular outcome); ALBIE SACHS, *THE STRANGE ALCHEMY OF LIFE AND LAW*, at 7 (Oxford U. Press 2009) (opening with “[e]very judgment [opinion] I write is a lie” and then explaining that “the falsehood lay not in the content of the judgment, which I sought to make as honest as possible, but in the discrepancy between the calm and apparently ordered way in which [the opinion] read, and the intense and troubled jumping backwards and forwards that had actually taken place when it was being written”).

419. The *Anest* opinion appeared to be sanctioning an individual cause of action in favor of Audino, who was counterclaiming for corporate opportunity usurpation in response to *Anest*’s personal claims against Audino on loan transactions. It is possible Audino brought his corporate opportunity claim derivatively for the ultimate benefit of Precision Pour, however, as derivative actions for the benefit of business entities have been the standard procedural vehicles for other forms of theft or waste of corporate assets in Illinois. See *Frank v. Hadesman & Frank, Inc.*, 83 F.3d 158 (7th Cir. 1996) (transfer of corporate assets to another entity); *Brown v. Tenney*, 125 Ill. 2d 348, 532 N.E.2d 230 (1988) (authorizing “double derivative” actions where the subsidiary and its parent holding company are both controlled by the alleged wrongdoer); *Willmschen v. Trinity Lakes Improvement Assoc.*, 362 Ill. App. 3d 546, 550-51, 840 N.E.2d 1275, 1279 (2d Dist. 2005) (the business judgment rule protects directors, not corporations; it “does not afford a corporation *carte blanche* to behave unlawfully”); *Hamilton v. Conley*, 356 Ill. App. 3d 1048, 827 N.E.2d 949 (2d Dist. 2005) (equitable considerations allowed former shareholder to succeed to dissolved corporation’s rights to pursue sole officer and director who had transferred corporate assets to firms he controlled); *Goldberg v. Michael*, 328 Ill. App. 3d 593, 766 N.E.2d 246 (2d Dist. 2002) (plaintiffs could not bring derivative corporate opportunity action on behalf of corporation because the board had voted not to proceed with a suit); *Small v. Sussman*, 306 Ill. App. 3d 639, 713 N.E.2d 1216 (1st Dist. 1999) (charges of waste of corporate assets had to be brought derivatively for the benefit of the injured corporation); 805 ILCS § 180/140-1, 5, 10 (West 2010) (providing for

Had it addressed the financial distress defense directly, *Anest* would have been the first Illinois case in this respect, too. Yet, the appellate court rightly refused to be distracted by the financial disability defense that was tied to the third party's distributorship offer in *Anest*, invoking settled estoppel precedents in favor of the victim. The appellate court's stray statements in *Anest* about the financial incapacity defense, however, may invite trouble down the road, especially if a fiduciary seeks to defend based on the ground that a faltering firm could not meet the third party's purported demand for extraordinary financial terms. The correct answer, under *Kerrigan*, is that the principal is entitled to try to meet such financial demands, after disclosure and tender by its fiduciary.

Prodromos, on the other hand, is trouble. Applying no known Illinois corporate opportunity standard, the appellate court treated the problem as if it were an auction fight between rival bidders Prodromos and State Financial and therefore asked all the wrong questions, not least of which was whether Prodromos, ultimately, would have won Home Bank's favor in light of his "somewhat iffy" financial backing. This misconceived the case at its most basic level. Focusing on Prodromos' shortcomings instead of Westrope's conflict of interest missed entirely the "prophylactic purpose" of the *Kerrigan* line of business rule: when a conflict of interest arises, a principal cannot lose the diverted transaction *to its own agent*, regardless of whom the third party target may have chosen as the winning suitor under other circumstances. Indeed, a constructive trust to remove the agent's wrongful gain is automatic on such facts under *every* branch of fiduciary duty law, even if an abstract question lingers as to whether the principal might have won the deal with the third party had things been on the square.

The Illinois Appellate Court's latest offerings, *Happy R Securities* and *Northwest Podiatry Center*, present a decidedly mixed bag. While neither speaks directly to the third party refusal to deal defense, both offer erroneous fiduciary liability statements in the corporate opportunity context. *Happy R Securities* failed to cite the controlling *Kerrigan* corporate opportunity liability standard; had it done so, this might have prompted the court to explicitly state that McChesney, as a fiduciary seeking to divert his limited liability company principal's property improvement benefits to himself, was anything but a neutral third party. *Northwest Podiatry Center*, in turn, failed to realize that fiduciary liability is independent of contractual restrictions;

derivative actions on behalf of limited liability companies). *But see* Larry E. Ribstein, *Litigating in LLCs*, 64 BUS. LAW. 739 (2009) (discussing standing to sue and questioning the direct action / derivative action distinction in the limited liability company context).

indeed, the whole point of the *Vendo* saga was the Illinois Supreme Court's holding that fiduciary duties exist independent of restrictive covenants. To be sure, "patient choice," like "client choice," should have no role in fiduciary duty litigation, as *Mohanty* and *Dowd & Dowd* together plainly teach.

In summary, whether the principal would have won is not the test under *Kerrigan*; a fiduciary's failure to disclose and tender moots any such inquiry. Thus, *Peterson Welding Supply*, *Delta Medical Systems*, and *Prodromos* all got the question exactly backward, and they all did so precisely because of the third party "refusal to deal" defense. *Happy R Securities* and *Northwest Podiatry Center* shed little light on the third party refusal to deal defense, as both failed to follow the *Kerrigan* corporate opportunity "disclose and tender" liability standard, both had no third party testimony presented, and thus both did not squarely face the refusal to deal issue.

E. Seventh Circuit Court of Appeals "Refusal to Deal" Cases

The Seventh Circuit Court Appeals, sitting in Illinois diversity jurisdiction cases, necessarily looks to Illinois substantive case law for its rule of decision.⁴²⁰ Illinois Supreme Court opinions are of course binding in diversity cases under *Erie Railroad Co. v. Tompkins*,⁴²¹ and Illinois Appellate Court decisions should be treated as supplying the best evidence of what the Illinois Supreme Court would do in the absence of a definitive decision of the state high court.⁴²² The Seventh Circuit's approach to the third party refusal defense in fiduciary disloyalty cases has been mixed, with the federal court of appeals thus far resisting a definitive opinion on the question. Even though the Seventh Circuit's opinions on Illinois state law are not binding on Illinois state courts,⁴²³ their persuasive force makes them required reading.

1. Grace v. E.J. Kozin Co.

The Seventh Circuit's first post-*Kerrigan* corporate opportunity opinion was issued in *Grace v. E.J. Kozin Co.*,⁴²⁴ a

420. *Frank v. Hadesman & Frank, Inc.*, 83 F.3d 158, 159 (7th Cir. 1996) (Illinois substantive law supplied the rule of decision in diversity jurisdiction corporate opportunity case in which plaintiff shareholder Frank accused defendant "Hadesman of making off with the [Hadesman & Frank] corporation's business, effectively transferring it to a new firm, Hadesman & Associates, Inc., from which Frank has been excluded").

421. 304 U.S. 64 (1938).

422. *Salve Regina College v. Russell*, 499 U.S. 225 (1991).

423. *Travelers Ins. Co. v. Eljer Mfg., Inc.*, 197 Ill. 2d 278, 302, 757 N.E. 2d 481, 496 (2001).

424. 538 F.2d 170 (7th Cir. 1976).

garden-variety commercial bribery case.⁴²⁵ Grace, as bankruptcy trustee for S.I. Greene Company, a Chicago food wholesaler, brought an action against Greene's former president Kane, the son-in-law of Greene's founder. Grace charged that Kane committed fiduciary fraud against Greene by causing Greene to purchase food products from E.J. Kozin Company—without revealing that Kane was a secret partner in Kozin. Grace also claimed Kane breached his fiduciary duties under the corporate opportunity doctrine by making food sales to third parties on behalf of Kozin that could have been made by Greene.

The court of appeals followed *Kerrigan* and *Vendo* in finding Kane guilty of breach of fiduciary duty, as one would expect, but no third party refusal defense was offered.⁴²⁶ Nevertheless, the case is noteworthy for the Seventh Circuit's firm grasp of the public policy implications of the situation. The court of appeals affirmed Kane's compensation forfeiture as a matter of public policy, even though it reversed Grace's damages award based upon faulty proof—a result completely consistent with *Vendo*, upon which the Seventh Circuit explicitly relied. In addition, the court of appeals *sua sponte* awarded Kane's gains to Grace, thereby sparing the parties an unnecessary remand. Clearly, Kane was not about to gain in any way as a fiduciary wrongdoer before the Seventh Circuit.

2. *Durasys, Inc. v. Leyba*

Grace missed the third party mark, but the same can't be said for *Durasys, Inc. v. Leyba*.⁴²⁷ In fact, *Durasys* turned exclusively on the Seventh Circuit's acceptance of a third party refusal defense with a twist: the third party was the City of Chicago, and the City of Chicago was perfectly willing to deal with the plaintiff—at least until the City of Chicago didn't get the terms it wanted. *Durasys* therefore demands extended treatment as the textbook example of all that's wrong with the third party refusal to deal defense in terms of factual fraud and policy perversion.

At one level *Durasys* was no different from any of the cases reviewed here: disloyal employees saw their chance and took it, diverting a major contract from their employer to themselves before quitting. The story began in 1982 when Electron developed and operated a computerized parking system for the City of

425. *E.g.*, *In re Salem Mills, Inc.*, 881 F.Supp. 1109 (N.D. Ill. 1995) (describing bribery scheme supplier used to secure a customer's business).

426. *Id.* at 175 (commenting that Greene was not capable of making all the same sales as Kozin, an apparent reference to Kozin's much larger sales volume rather than any resistance on the part of third parties to buying from Greene).

427. 992 F.2d 1465 (7th Cir. 1993).

Chicago's giant O'Hare Airport. Electron staffed the facility with on-site technicians, including defendants Leyba and Walker. Electron collapsed in 1987 and was replaced in early 1988 by Durasys, a California split-off formed by other former Electron employees who were licensed to use the Electron system, and Leyba and Walker remained with the new firm as on-site technicians at O'Hare. The original one-year O'Hare parking contract held by Durasys was repeatedly renewed through brief extensions while the City of Chicago and Durasys negotiated, with the City of Chicago putting out a request for proposals in September 1989 and Durasys submitting a bid. Durasys remained on the job throughout this process, with its last contract extension running through February 23, 1990.

Much to Durasys' surprise, in January 1990 one of its on-site O'Hare employees advised that Leyba had secretly submitted a competing bid for the O'Hare contract. A Durasys principal immediately flew to Chicago and terminated Leyba on January 11, 1990. Two days later, on January 13, 1990, the City of Chicago abruptly terminated Durasys and awarded the O'Hare contract to Digitron—a firm owned and operated by none other than Leyba and Walker. Durasys' remaining O'Hare technicians immediately resigned and joined Digitron. Durasys thereafter commenced litigation and discovered that a parallel universe of employee disloyalty had existed for the preceding six months.

As it turned out, in August 1989 "Leyba and Walker began talking with the City about replacing Durasys."⁴²⁸ These talks began when the City of Chicago approached Leyba and Walker about the possibility of them staying on as independent contractors if the Durasys contract ended, but Leyba and Walker did not trust the City of Chicago to make timely payments to them under its voucher system.⁴²⁹ A meeting followed, "[a]t the City's request," with a "potential Durasys competitor, DSU, apparently to discuss a possible joint venture of some sort."⁴³⁰ After the DSU meeting, it was clear to Leyba and Walker that DSU was not going to get a contract, so Leyba and Walker submitted their own bid as Digitron on November 15, 1989.⁴³¹ Their bid criticized their employer Durasys as an inaccessible, out-of-state contractor⁴³² and undercut Durasys' price.⁴³³ Thereafter, at the City of Chicago's urging, in December 1989 Leyba and Walker "solicited and obtained written statements from each of Durasys' other

428. 1992 U.S. Dist. LEXIS 44, at *9 (N.D. Ill. Jan. 3, 1992).

429. *Id.* at *6.

430. *Id.* at *9.

431. Brief of Defendants-Appellees Leyba, Walker and Digitron, at 26.

432. Brief of Plaintiff-Appellant Durasys, at 7.

433. Brief of Defendants-Appellees, at 15-16.

employees at the site—who had been hired and trained by Durasys—to the effect that if Digitron was selected as the contractor, they would go to work for Digitron.”⁴³⁴ The story, then, was as simple as it was self-evident: the City of Chicago encouraged Leyba and Walker to breach their fiduciary duty of loyalty at every turn so that the City of Chicago could get a better deal than the one Durasys was offering, without the City of Chicago risking the uncertainty and loss of continuity a new contractor would present.

Both the district court and the court of appeals agreed Leyba and Walker breached their fiduciary duties to Durasys under Illinois law; indeed, Leyba and Walker did not even contest their liability on appeal.⁴³⁵ The question was how to remedy it. The district court limited its damage award to six months’ profits, on the theory that the City of Chicago’s extreme dissatisfaction with Durasys meant Durasys “was on its way out.”⁴³⁶ The district court then denied permanent injunctive relief, offering the following grounds:

If Durasys is, as it contends, indispensable, it should be able to compete for the City’s business in the future. The court is also reluctant to force the City to deal with a supplier it apparently does not wish to deal with, a likely result of an injunction.⁴³⁷

The Seventh Circuit affirmed these rulings, focusing its entire attention on the interests of a third party—the City of Chicago.⁴³⁸ The court of appeals recounted the City of Chicago’s dilemma: (i) it was “disturbed at its continuing dependence on a sole vendor”; (ii) it knew “since Electron went of business the O’Hare parking system functioned best under Durasys”; (iii) it faced the “admittedly drastic step of replacing the Electron equipment” if it changed suppliers; and (iv) it received an August 1989 termination notice from Durasys, which felt it had the leverage to drive a hard bargain because “the City would have no choice but to continue its relationship with Durasys.”⁴³⁹ The City of Chicago’s problems were compounded, the Seventh Circuit noted, when only two bidders responded to its request for bids: Durasys and Digitron.⁴⁴⁰ Yet, for

434. Brief of Plaintiff-Appellant Durasys, at 8. *See also* Brief of Defendants-Appellees Leyba, Walker and Digitron, at 26 (acknowledging that Leyba and Walker received and responded “to a letter sent to them by the purchasing department requesting further information including a training program and letters of intent from the on-site technicians”).

435. 992 F.2d at 1468.

436. *Id.* at 1469 (reciting the City of Chicago’s testimony that Durasys’ performance was “inept,” “unprofessional,” and “abysmal”).

437. *Id.* at 1471.

438. *Id.* at 1469, 1471-72.

439. *Id.* at 1468-69.

440. *Id.* at 1469.

all this detail, the Seventh Circuit's opinion was strangely silent on an inconvenient fact: the City of Chicago was aware Leyba and Walker were Durasys employees at the time they were bidding against Durasys for the O'Hare contract—a fact made abundantly clear in the district court's opinion and indeed the very fact the district relied upon in ordering Leyba and Walker to forfeit their salaries for disloyalty.⁴⁴¹

On damages, the court of appeals deferred to the district's fact findings, even though they were internally inconsistent: they assumed Durasys was readily replaceable for damages purposes but irreplaceable for injunction purposes. By the court of appeals' own admission, and contrary to the district court's central assumption, replacing Durasys with someone other than the defendant fiduciaries was not realistic: (1) no other parking system operators, including Standard Parking and Anchor Parking, bothered to bid on the contract in question,⁴⁴² even though Standard Parking and Anchor Parking had briefly operated the Electron system at O'Hare after Electron's 1987 collapse, and even though several parking system operators attended a "walk through" after the request for proposals was announced;⁴⁴³ and (2) the City of Chicago's every act showed it did not want to take "the admittedly drastic step of replacing the Electron equipment."⁴⁴⁴ There was no reasonable factual basis, therefore, for the assumption that even absent the fiduciary wrongdoing, the City of Chicago would have readily replaced Durasys within six months of awarding it the one-year contract at issue.⁴⁴⁵

The court of appeals also declined to disturb the district

441. 1992 U.S. Dist. LEXIS 44, *6-9 (N.D. Ill. Jan. 3, 1992).

442. 992 F.2d at 1469.

443. 992 F.2d at 1469; 1992 U.S. Dist. LEXIS 44, at *1-2. The "walk through" by vendors was not referenced by the courts; it was referenced in the Brief of Plaintiff-Appellant, at 10. Durasys also noted on appeal that according to the City of Chicago's own witnesses, the results were "dismal" under the three contractors between Electron's collapse in 1987 and Durasys' initial contract in 1988. Brief of Plaintiff-Appellant Durasys, at 19.

444. 992 F.2d at 1469. Other facts, omitted from both courts' opinions, corroborated Durasys' irreplaceable status: (1) the Electron system cost \$3.2 million when the City of Chicago purchased it in 1982 and would have cost millions more to replace in 1990; (2) only one other firm, in Minneapolis, had experience with the Electron system, but it was a later generation and completely different from the one at O'Hare; (3) there was no evidence that a substitute system was available to meet the needs of O'Hare; (4) there was no evidence the City of Chicago considered a substitute to be an option, assuming one existed; and (5) no meaningful alternative to Durasys was identified by either court. Brief of Plaintiff-Appellant Durasys, at 10.

445. The City of Chicago contract awarded to Digitron ran from January 13, 1990 to January 13, 1991, per Section 5.05 of the contract. Brief of Defendants-Appellees Leyba, Walker and Digitron, Appendix 4, at 16.

court's permanent injunction denial, even though the denial rested on the following district court non-sequiturs: (1) "If Durasys is, as it contends, indispensable, it should be able to compete for the City's business in the future"; and (2) "The court is reluctant to force the City to deal with a supplier it apparently does not wish to deal with, a likely result of an injunction."⁴⁴⁶ As to the first assertion, the whole point of Durasys' injunction request was to enable Durasys "to compete for the City's business in the future"—free from the unfair advantage gained by fiduciary wrongdoers who had, in effect, shifted the "incumbent's advantage" from Durasys to Digitron.⁴⁴⁷ As to the second, Durasys was seeking a prohibitory injunction to stop Digitron and its owners from dealing with the City of Chicago, not a mandatory injunction compelling the City of Chicago to deal with Durasys.

It's hard to accept the court of appeals' approval of such obviously defective reasoning. In the face of uncontested fiduciary wrongdoing, the court of appeals should have begun with the premise that a fiduciary wrongdoer cannot be permitted to gain from his wrong, as the Seventh Circuit recognized in *Grace*—especially since Judge Cummings, the author of *Grace*, also sat on the panel that decided *Durasys*. The federal appeals court also should have discussed the Illinois Supreme Court's decisions in *Kerrigan* and *Vendo*, both of which were prominently featured in *Grace* and both of which offered total deterrence rationales that dictated very different damage and injunction results from those approved in *Durasys*. Indeed, the Seventh Circuit's omission of both *Vendo* and *Grace* was particularly puzzling because the district court presumably relied upon the public policy holding in *Vendo* and *Grace* or their progeny in ordering forfeiture of Leyba's and Walker's salaries for the full six months they were secretly competing with Durasys.⁴⁴⁸

Finally, the Seventh Circuit at no point wrestled with the policy implications of allowing a third party—the City of Chicago—to dictate the outcome in fiduciary duty litigation.⁴⁴⁹ The

446. 1992 U.S. Dist. LEXIS 44, at *18.

447. 292 F.2d at 1471.

448. 1992 U.S. Dist. LEXIS 44, at *18-20 (discussing computation of compensation forfeiture beginning on August 1, 1989, and running through January 12, 1990, the date their employment ended).

449. In its appellate reply brief, Durasys made this very point:

Under *ABC Trans National Transport [v. Aeronautics Forwarders]*, 62 Ill. App. 3d 671, 379 N.E.2d 1228 (1st Dist. 1978), Durasys is entitled to injunctive relief without regard to whether the City has or can find an alternative vendor. The Magistrate's concern for the City's interests is misplaced. Operating in the commercial marketplace, the City found itself [in] a difficult bargaining position because it had no alternative to Durasys. By actively encouraging Defendants' wrongdoing, it escaped that predicament. Awarding injunctive relief would only place the City

City of Chicago and Durasys were locked in hardball negotiations, and Durasys had the right to press its every advantage, as did the City of Chicago.⁴⁵⁰ But the City of Chicago went beyond the pale when it approached and encouraged Leyba and Walker to act against the interests of their employer Durasys, knowing full well they were still agents and fiduciaries of Durasys.⁴⁵¹ In simplest terms, when the City of Chicago couldn't get its desired terms with Durasys in July 1989, the City of Chicago responded with illegal collusion and improper bid rigging—no small irony considering the City of Chicago's insistence on an "anti-collusion" affidavit from all bidders, including Digitron.⁴⁵² The City of Chicago was thus anything but an innocent bystander caught between warring bidders.⁴⁵³ Under these circumstances, the court of appeals was wrong to assume that the welfare of City of Chicago taxpayers trumped all.

The court of appeals should have granted the permanent injunction and forced the City of Chicago to compete on a level playing field—even if that meant accepting Durasys going forward, which the City of Chicago was plainly willing to do only months before it began conspiring with Durasys' employees.⁴⁵⁴

back in the position it occupied in the summer of 1989 when the unlawful conduct occurred. There is no need to protect the City from the status quo ante. Reply Brief of Plaintiff-Appellant Durasys, at 22.

450. The district court inexplicably employed pejoratives like "extort," "provoked," "insensitive," "unrealistic," and "coercive" to describe Durasys' negotiating tactics, without suggesting any basis for legal impropriety on Durasys' part. 1992 U.S. Dist. LEXIS 44, at *13, 14. Durasys argued on appeal, correctly, that "Durasys was never accused of conduct which violated any legal rights of either the City or its employees. Hardball negotiating tactics are not damage reducing factors." Brief of Plaintiff-Appellant Durasys, at 18. The Seventh Circuit carefully avoided such terminology in referring to Durasys' conduct.

451. See, e.g., *Beaton & Assocs., Ltd. v. Joslyn Mfg. & Supply Co.*, 159 Ill. App. 3d 834, 512 N.E. 2d 1286 (1st Dist. 1987) (third party's liability to Joslyn turned on third party's awareness that Washburn was Joslyn's agent at the time of Washburn's disloyal acts in cooperation with third party).

452. Brief of Defendants-Appellees Leyba, Walker and Digitron, Appendix 3, Item 5 (Digitron's "Anti-Collusion Affidavit").

453. *E. Trading Co. v. Refco, Inc.*, 229 F.3d 617, 623 (7th Cir. 2000) (firms which assist or benefit by a fiduciary's wrongdoing have no standing to object; they are simply wrongdoers themselves); *Mullaney, Wells & Co. v. Savage*, 78 Ill. 2d 534, 550-53, 402 N.E.2d 574, 582-83 (1980) (same holding); *Herman v. Prudence Mutual Casualty Co.*, 41 Ill. 2d 468, 472-75, 244 N.E.2d 809, 811-13 (1969) (collecting cases in which client conspired with one attorney to breach or terminate client's contract with another attorney).

454. It was undisputed that the City of Chicago was perfectly willing to work with Durasys: the chain of events ending in litigation began with the City of Chicago tendering a new contract to Durasys in late July 1989, a fact noted in the district court's opinion. See 1992 U.S. Dist. LEXIS 44, at *13, n. 4 ("It is not clear why Durasys declined to enter into the contract the City had

Had the permanent injunction been granted, the City of Chicago at that point would have had every right to ignore Durasys, to negotiate with Durasys, or to select someone else. The City of Chicago certainly knew how to award short extensions to enable additional bidding in the event of a permanent injunction against Digitron—the City of Chicago had, in fact, granted precisely such extensions time and again to Durasys itself while the City of Chicago conducted the “bidding” that triggered the lawsuit.

Why such bad law from such good judges? The answer can be found in the parties’ appellate briefs, which were decidedly lacking on the permanent injunction issue, as the court of appeals noted.⁴⁵⁵ The defendants offered no case law dealing with similar facts or even permanent injunctions, but they did make three good points not mentioned in the Seventh Circuit’s opinion: (i) Durasys did not bother to sue until August 1990—nearly seven months after discovering the wrongdoing and well into the defendants’ contract performance; (ii) Durasys did not bother to seek a preliminary injunction until December 1990—nearly one year after discovering the wrongdoing and even further into the defendants’ contract performance; and then (iii) Durasys did not bother to appeal the preliminary injunction denial in January 1991.⁴⁵⁶ Durasys rightly responded that the defendants had stolen its “incumbent’s advantage” but failed to cite a single case in which permanent injunctive relief had been granted on equivalent facts, even though such cases existed in Illinois and elsewhere.⁴⁵⁷ Durasys also failed to reply to the defendants’ “undue delay” / “altered status quo” arguments, a cardinal error in a case then three years old.⁴⁵⁸ But most remarkably, Durasys failed to argue

proposed a few days before the termination notices were sent out.”). As Durasys aptly observed in its appellate brief: “Whatever dissatisfaction the City had with Durasys, any determination not to continue with Durasys arose after that date”—meaning, of course, after the date the City of Chicago commenced its secret talks with Leyba and Walker.

455. 992 F.2d at 1471 (“The parties’ discussion regarding the proper standard of review of the permanent injunction question has been particularly unenlightening. Durasys has confronted the issue, but the cases it cites all involve *preliminary* injunctions. Digitron points out this flaw in Durasys’ argument, but offers no suggestions of its own.”) (emphasis in original).

456. Brief of Defendants-Appellants Leyba, Walker and Digitron, at 44.

457. *E.g.*, *Molex, Inc. v. Nolen*, 759 F.2d 474 (5th Cir. 1986) (affirming permanent injunction against employee for breach of fiduciary duty); *Smith-Shrader Co., Inc. v. Smith*, 136 Ill. App.3d 571, 483 N.E.2d 283 (1st Dist. 1985) (affirming nine year permanent injunction against employee for breach of fiduciary duty).

458. *Samuel Bingham Co. v. Maron*, 651 F. Supp. 102 (N.D. Ill. 1986) (denying injunctive relief where plaintiff-employer waited three months before seeking injunctive relief against ex-employee to enforce non-compete agreement; an injunction at that point would have altered the status quo); William Lynch Schaller, *Some Preliminary Thoughts About Preliminary*

the deterrence policy of *Kerrigan*, *Vendo*, and *Grace*, and failed to even argue the case was one of corporate opportunity usurpation rather than mere corporate competition.⁴⁵⁹

Asking the court of appeals to issue a permanent injunction in these circumstances—nearly three years after the usurpation, based upon the wrong arguments, in the face of unexplained and unexcused delay by Durasys itself—was decidedly not the way to argue an injunction question of first impression in the Seventh Circuit. Adrift at sea, the court of appeals fell under the spell of the more limited remedies characteristic of corporate competition and non-compete agreement cases, such as the six-month “head start” limitation on damages and the complete denial of permanent injunctive relief in the interest of competition.⁴⁶⁰ But such balancing of interests has no place in the categorical *Kerrigan* scheme that emphasizes the “prophylactic” policy of deterring fiduciary wrongdoing, and such balancing certainly has no place in cases of undisputed fiduciary guilt. The court of appeals should therefore have either granted the permanent injunction to vindicate the *Kerrigan* deterrence policy or denied the permanent injunction on the grounds of undue delay and altered status quo.

3. *Foodcomm Int’l v. Barry*

What the court of appeals took away on injunctive relief in *Durasys* it gave back in *Foodcomm Int’l v. Barry*.⁴⁶¹ This

Injunctions, 85 ILL. B.J. 12, 13 (1997) (discussing need for diligence in prosecuting preliminary injunctions, since equity aids the vigilant).

459. Durasys, in fact, mentioned the word “usurp” exactly once in its opening appellate brief—in its statement of facts—and not at all in its reply brief, apparently oblivious to the “prophylactic purpose” of *Kerrigan* and its corporate opportunity progeny. See Brief of Plaintiff-Appellant Durasys, at 3 (challenging the district court’s finding that Durasys would have lost the contract even if defendants “had not breached their fiduciary duty and usurped the contract in January, 1990”).

460. Cf. *ABC Trans Nat’l Transp. v. Aeronautics Forwarders*, 90 Ill. App. 3d 817, 833, 413 N.E.2d 1299, 1312 (1st Dist. 1980):

A permanent injunction, on the other hand, generally extends, maintains, or restores the status quo indefinitely or for a limited time. Thus, in the usual case, where the defendant is already subject to a preliminary injunction and the plaintiff prevails on the merits, the preliminary injunction is properly made permanent. In contrast, in this case the parties’ positions were not frozen in time through a preliminary injunction. Absent the element of continuing, irreparable harm at *this* time, the granting of a permanent injunction would greatly disrupt Aeronautics’ ongoing business while not substantially benefiting plaintiff, who conceded is currently profitable. Thus, the restorative purpose of injunctive relief would not be effectuated. (Emphasis in original.)

461. 328 F.3d 300 (7th Cir. 2003).

vigorously contested case—which I tried below and argued on appeal for the plaintiff—covered the entire spectrum of issues discussed here, including the third party refusal to deal defense, which was explicitly rejected by the district court and implicitly rejected on appeal.

As always, the disloyalty facts were essentially uncontested. Foodcomm, an Australian beef importer and distributor, was approached by one of its largest customers, Empire Beef, about a possible redistribution deal. The proposal was, in essence, a joint venture through which Foodcomm would import beef from Australia and Empire Beef would then sell it in the United States, with the parties thereafter splitting the costs and revenues. Foodcomm's principal Bourke and his subordinate Leacy attended the redistribution deal negotiations. When these negotiations broke down, Leacy—who was responsible for the Empire Beef account independent of the negotiations—told Bourke he would “smooth things over” with Empire Beef.⁴⁶² And Leacy did—for himself and Foodcomm co-employee Barry. Together they secretly approached Empire Beef about doing the redistribution deal with them instead of Foodcomm. Leacy and Barry then set up Outback Imports in Chicago to serve as the corporate vehicle for their proposed joint venture with Empire Beef, although they later abandoned this approach for visa reasons and instead became direct employees of Empire Beef upon quitting Foodcomm.⁴⁶³

Foodcomm recognized that Empire Beef was poised to compete against Foodcomm by purchasing Australian beef through Leacy and Barry in Australia and then reselling it in the United States through Empire Beef. Accordingly, Foodcomm brought corporate opportunity and corporate competition claims under Illinois law against Leacy and Barry, and later added Empire Beef as a defendant under a civil conspiracy theory. The district court found Leacy and Barry breached their fiduciary duties as a matter of law, rejected their third party refusal to deal defense resting on Empire Beef's testimony that it no longer wished to deal with Foodcomm, and issued a preliminary injunction barring Leacy and Barry from providing any services to Empire Beef.⁴⁶⁴ Leacy and Barry pursued an expedited appeal to

462. *Id.* at 302.

463. The court of appeals did not explain these visa details, though its opinion correctly noted that Outback Imports, Inc. was initially created and then began operating as a division of Empire Beef when Leacy and Barry joined Empire Beef as employees. *Id.*

464. At the outset of the temporary restraining order hearing, defense counsel asserted that Foodcomm's verified complaint contained no allegation that “there was any interest at all on Empire's part to do this [redistribution] deal with Foodcomm” after negotiations broke down. Judge Coar firmly rejected this argument:

the Seventh Circuit, which immediately affirmed the district court's preliminary injunction ruling and then issued its published opinion several months later.

Although the court of appeals' opinion does not reveal it, Leacy and Barry made several arguments relevant to the discussion here. Specifically, they argued (i) they were not fiduciaries;⁴⁶⁵ (ii) they were merely "preparing to compete" in contacting Empire Beef about their own redistribution proposal;⁴⁶⁶ (iii) Empire Beef's refusal to deal with Foodcomm, prompted by Bourke's tough negotiating, meant there was no corporate opportunity to usurp;⁴⁶⁷ and (iv) the district court's open-ended preliminary injunction should have been limited to a few months, under *Durasys*, since Leacy and Barry had only been secretly talking with Empire Beef for a few months before quitting.⁴⁶⁸ Foodcomm, in turn, contended (i) Leacy and Barry were fiduciaries under *Vendo* and especially *Mullaney*;⁴⁶⁹ (ii) Leacy and Barry were not simply "preparing" but in fact were caught competing for a corporate opportunity;⁴⁷⁰ (iii) Empire Beef's "refusal to deal" was not a defense as a matter of public policy under *Vendo* and *Mullaney*;⁴⁷¹ and (iv) *Durasys* did not mandate that all fiduciary duty injunctions be limited in time.⁴⁷²

The court of appeals dispatched the first argument by holding that Leacy and Barry, as agents of Foodcomm, were fiduciaries under *Mullaney*,⁴⁷³ and then ignored the remaining defense arguments identified above. For present purposes, however, the most important feature of the *Foodcomm* opinion was the court of

THE COURT: But that's not the point. If you take a look at, for example, the usurpation of corporate opportunity cases where if it doesn't matter whether or not the opportunity would have come to fruition, the issue is whether they – when the corporation does not have the opportunity to negotiate free of a breach of fiduciary duty, then that is a breach. That's what's important.

It's not that the – whether the deal was close or not close. It was the opportunity that was at issue. Here there were negotiations going on. And at least based on the declaration from Bourke, Leacy who's conducting those negotiations on behalf of Foodcomm tells everybody else to stay away while he conducts the negotiations. And then lo and behold Leacy winds up working for Empire, for Outback, a subsidiary of Empire. And Empire disappears as a customer. That is peculiar.

Brief of Plaintiff-Appellee, at 31-32 (quoting Record 28, at 32-33).

465. Brief of Defendant-Appellants, at 23.

466. *Id.* at 26-28.

467. *Id.* at 24-25.

468. *Id.* at 36-38.

469. Brief of Plaintiff-Appellee, at 17-18.

470. *Id.* at 19-24.

471. *Id.* at 28-33.

472. *Id.* at 38-42.

473. 328 F.3d at 304.

appeals' explicit acknowledgement that Empire Beef was absolutely unwilling to deal with Foodcomm *before* Leacy began his illegal overtures to "smooth things over."⁴⁷⁴ Despite this seemingly adverse fact, the court of appeals affirmed the district court's preliminary injunction in its entirety, even though it potentially subjected Leacy and Barry to deportation.⁴⁷⁵ Obviously, the court did not consider Empire Beef's refusal to deal to be a defense to either liability or injunctive relief. As far as the court was concerned, Leacy's and Barry's secret competition,⁴⁷⁶ combined with Leacy's failure to disclose Empire Beef's militant dislike of Foodcomm,⁴⁷⁷ warranted the injunction—a view fully supported by *Kerrigan*, *Vendo*, and *Mullaney*, as Foodcomm argued.⁴⁷⁸ The court of appeals did note, however, that it was not addressing Foodcomm's corporate opportunity theory, given its resolution of the appeal on corporate competition grounds.⁴⁷⁹

4. *Hess Newmark Owens Wolf, Inc. v. Owens*

*Hess Newmark Owens Wolf, Inc. v. Owens*⁴⁸⁰ offered still another corporate opportunity injunction appeal for the Seventh Circuit's consideration, but without the third party refusal to deal defense. Simplified, Owens joined three others in forming the plaintiff advertising/publicity firm serving the movie industry, but the founders agreed Owens could also maintain her own firm so long as it did not compete. In violation of this agreement, and in violation of her fiduciary duties as an officer and director of plaintiff, Owens began assisting a rival advertising/publicity firm, Terry Hines Associates. As part of this secret assistance, Owens serviced a client, Dreamworks. There was no suggestion that Dreamworks was unwilling to work with plaintiff; the evidence was simply that Dreamworks wanted to work with Owens,

474. *Id.* at 302. Specifically, the court of appeals recounted the following key facts:

Although both sides initially expressed interest in the arrangement, negotiations broke down following a meeting between Empire's Scott Brubaker and Foodcomm's Greg Bourke in March 2002. Leacy, who had been present at the meeting, asked Bourke to leave it to him (Leacy) to "smooth things over" with Empire. During this "smoothing over" process, Leacy learned from Brubaker how badly damaged the Foodcomm-Empire relationship had become when Brubaker informed Leacy that Empire would not conduct further business with Foodcomm. Leacy did not relay this information to anyone at Foodcomm, and Foodcomm's business with Empire dropped roughly 75 percent.

475. *Id.* at 304.

476. *Id.* at 302, 304.

477. *Id.* at 302.

478. Brief of Plaintiff-Appellee, at 24-28.

479. 328 F.3d at 303, n. 1.

480. 415 F.3d 630 (7th Cir. 2005).

implying that Dreamworks would have followed Owens to plaintiff just as easily as it followed Owens to Terry Hines Associates.⁴⁸¹

The lower court denied plaintiff's injunctive relief request on the erroneous view that no such relief was warranted since no business had yet been lost. The court of appeals recognized that Owens had likely wrongfully competed and usurped corporate opportunities under Illinois law⁴⁸² and held that plaintiff did not have to await the actual loss of customers before seeking injunctive relief.⁴⁸³ The Seventh Circuit had no occasion to pass on third party Dreamworks' willingness to work with plaintiff, however, because it was not in issue.

5. Summary of Seventh Circuit Decisions

As this review shows, the Seventh Circuit clearly understands the fiduciary duty of loyalty under *Kerrigan*, *Vendo* and *Mullaney*, as reflected in *Grace* and *Foodcomm*. It also understands that injunctive relief is an available remedy in such cases, as it demonstrated in *Foodcomm* and *Owens*. Indeed, even *Durasys* recognized injunctive relief can be an appropriate remedy, though of course the court did not grant it on the facts.

Unfortunately, the court of appeals has yet to explicitly answer the question of whether a third party's refusal to deal should be rejected as a matter of Illinois public policy. The issue was argued to the court in *Foodcomm*, but there was no necessity to address it there since *Foodcomm* won in any event. Still, the court's pointed recitation of Empire Beef's flat refusal to deal with *Foodcomm* and the immediate 75% drop in Empire Beef's purchases from *Foodcomm*, coupled with the court's affirmance of the injunction against Leacy and Barry despite Empire Beef's testimony, surely should give pause to anyone assuming a third party's refusal to deal constitutes a defense. It certainly did not in *Foodcomm*.

Even so, *Durasys* and *Foodcomm* are hard to reconcile. One can argue that in each instance the court was simply deferring to district court factual determinations and equity balancing, as reviewing courts generally do when examining lower court injunction rulings. But this argument falls short in *Foodcomm* because the district court made no fact finding as to whether Empire Beef was willing or unwilling to deal with *Foodcomm*; the court of appeals, therefore, could only have affirmed if it believed Empire Beef's professed refusal to deal was irrelevant as a matter of law. The district court deference argument also falls short in *Durasys* because the court of appeals mainly relied upon the City

481. 2004 U.S. Dist. LEXIS 25636, *22-23 (N.D. Ill. Dec. 15, 2004).

482. 415 F.3d at 632.

483. *Id.* at 632-33.

of Chicago's unhappiness with Durasys in affirming the permanent injunction denial there, something the court could not have done if it thought public policy prohibited consideration of the City of Chicago's refusal to deal.

The easy answer lies elsewhere: the public interest was overriding in *Durasys* given the government contract at issue, whereas mere private interests were at stake in *Foodcomm*. But the better answer would have been that the third parties in both cases deserved no sympathy because they both knowingly dealt with disloyal employees who were undercutting their employer's interests.⁴⁸⁴

F. Illinois Federal District Court "Refusal to Deal" Cases

Many Illinois federal district court decisions have addressed corporate opportunity and corporate competition claims. These decisions are not precedential,⁴⁸⁵ and many do not offer nuanced legal discussions.⁴⁸⁶ Three Illinois district court corporate opportunity decisions stand out, however, as they all directly or indirectly wrestled with third party testimony, and one of them even explicitly analyzed the public policy arguments I am advancing here with respect to the third party refusal to deal defense. Each is treated below.

484. *Triple Five of Minnesota, Inc. v. Simon*, 404 F.3d 1088, 1100 (8th Cir. 2005) (rejecting third party TIAA's refusal to deal argument and commenting that "TIAA's hands were not exactly unsullied with regard to the 1999 transaction" given its knowledge of Simon's fiduciary wrongdoing in excluding Triple Five from the diverted TIAA sale transaction); *Regal-Beloit Corp. v. Drecoll*, 955 F. Supp. 849, 867, n.13 (N.D. Ill. 1996) (rejecting third party Brad Foote's refusal to deal argument and commenting that Brad Foote "was not entirely 'innocent' in its dealings" given its knowledge of Drecoll's fiduciary wrongdoing in competing with Regal-Beloit for the diverted Brad Foote sale transaction).

485. *See Hecny Transportation, Inc. v. Chu*, 430 F.3d 402 (7th Cir. 2005) (district court opinions have no precedential force); *Miller UK, Ltd. v. Caterpillar, Inc.*, 859 F. Supp. 2d 941, 945 (N.D. Ill. 2012) (Shadur, J.) (acknowledging *Hecny* holding); *State Bank of Cherry v. CGB Enterprises, Inc.*, 2013 IL 113836, ¶¶ 33-35, 984 N.E.2d 449, 458-59 (2013) (discussing Illinois state court standard for assigning weight to lower federal court opinions addressing federal law); *Wolinsky v. Kadison*, 2013 IL App. (1st) 111186, 987 N.E.2d 971 (1st Dist. 2013) (federal district court and even federal circuit court opinions are not binding on Illinois state courts).

486. *E.g.*, *Sain v. Nagel*, 997 F. Supp. 1002, 1016 (N.D. Ill. 1998) (citing *Regal Beloit* and invoking the Wisconsin "interest or expectancy" test, even though *Sain* was an Illinois corporate opportunity case and hence should have been governed by the *Kerrigan* "line of business" test); *MPC Containment Sys., Ltd. v. Moreland*, 2008 U.S. Dist. LEXIS 60546, *39 (N.D. Ill. July 23, 2008) (quoting *Sain* for the "interest or expectancy" test, even though *MPC* was an Illinois corporate opportunity case and hence governed by the *Kerrigan* "line of business" test).

1. *CSFM Corp. v. Elbert & McKee Co.*

For overwhelming complexity, it is hard to beat *CSFM Corp. v. Elbert & McKee Co.*,⁴⁸⁷ a case decided under Wisconsin law pursuant to the internal affairs choice-of-law rule. A third party refusal to deal was at the center of the dispute and resulted in denial of both sides' cross-motions for summary judgment. The case is thus instructive on the implications of this defense when treated as a purely factual inquiry.

The corporate opportunity in question was a steel fabrication plant in a Chicago suburb. For ease of understanding, we can disregard the original transactions and intervening entities and simply call plaintiff CSFM, a Wisconsin bank that took over the steel plant following its borrower's loan default. CSFM was not interested in operating a steel plant and therefore hired consulting firm Elbert & McKee to run the facility and to ultimately find a buyer. Elbert and McKee, the principals of this eponymous firm, were initially elected president and executive vice president of CSFM, although they later recruited Jasica to be CEO. The three then ran the plant for a few months before agreeing to buy it from the bank with a loan from the bank. All of this was above-board and uncontroversial, but relations soured when the bank later found out that Elbert & McKee had an undisclosed buyer, PDM, waiting in the wings.

Although Elbert and McKee offered other defenses, their main argument of interest here was their contention that third party PDM was "interested solely in employing Defendants and would not have purchased the plant from Plaintiffs under any circumstances"⁴⁸⁸—i.e., third party PDM's refusal to deal. This wrinkle introduced a whole new level of complexity to the dispute, with PDM testifying that because its principals were all in their seventies and eighties, PDM would not have done the deal without Elbert, McKee, and Jasica coming to work for PDM to run the CSFM steel plant. The parties then engaged in a mind-boggling debate over indeterminate minutiae bearing upon whether PDM may or may not have been willing to buy directly from the bank or as part of a three-party transaction, including the efficiency of the CSFM plant relative to PDM's existing steel plants, the niche market the CSFM plant addressed, PDM's purchase of a California steel plant at about the same time, PDM's excess steel making capacity at its existing plants, and PDM's financial condition at the time of these events.⁴⁸⁹ Plaintiff CSFM was forced to admit, of course, "that there was no way to surmise what might

487. 870 F. Supp. 819 (N.D. Ill. 1994).

488. *Id.* at 828.

489. *Id.* at 827-28.

have happened had [CSFM] been informed of PDM's interest."⁴⁹⁰

The Wisconsin corporate opportunity doctrine, the court noted, is an amalgam of the "interest or expectancy" test, the "line of business" test, and the "fairness" test.⁴⁹¹ This multifactor approach called for the court to first consider whether CSFM, as plaintiff, had proven it had the ability to take advantage of the opportunity. The court looked to such factors as (i) whether the corporation had a legitimate interest or expectancy in the alleged opportunity, (ii) whether the alleged opportunity was essential, necessary, or desirable to the corporation's reasonable needs and aspirations, (iii) whether the opportunity presented a potentially harmful or unfair competitive situation with respect to the corporation, and (iv) whether the corporation had the financial, technical, and other resources needed to take advantage of the opportunity. Once this threshold showing was made, the court ruled, Wisconsin law then shifted the burden to the defense to show no fiduciary duties were breached, including equitable factors such as good faith, loyalty and fair dealing. "In other words, whereas in the first prong of the analysis the factfinder examines the relationship between the corporation and the alleged corporate opportunity, in the second prong, the factfinder examines the relationship between the defending officer and the corporation."⁴⁹²

The court found abundant questions of fact existed to preclude summary judgment for either side, and it would be hard to see how the court could have concluded otherwise under Wisconsin law. But the result surely would have been in favor of plaintiff under *Kerrigan* had Illinois law applied, given the defendants' failure to disclose PDM's lurking interest. As the *CSFM* court observed: "Had [CSFM] been informed of PDM's interest, [CSFM] may have reconsidered whether to go forward with the sale to Defendants; to approach PDM directly; or to restructure the sale and thereby share in some of the alleged \$2,750,000 in profits obtained by Defendants."⁴⁹³ Under *Kerrigan*, all of these choices would have been for CSFM and CSFM alone to make; PDM's views would have been entirely irrelevant.

2. *Regal-Beloit Corp. v. Drecoll*

Regal-Beloit Corp. v. Drecoll,⁴⁹⁴ a corporate opportunity case I tried and one in which the court analyzed both Wisconsin and Illinois law, presents an interesting contrast with *CSFM*. But I

490. *Id.* at 828.

491. *Id.* at 830, n. 20.

492. *Id.* at 831.

493. *Id.* at 838.

494. 955 F. Supp. 849 (N.D. Ill. 1996).

feature *Regal-Beloit* here not simply because I lived it; *Regal-Beloit* receives pride of place because it offers the most detailed and sophisticated consideration by any Illinois court of the third party refusal to deal defense as a matter of public policy.

Somewhat simplified, the facts in *Regal-Beloit* showed that Regal-Beloit actively pursued the acquisition of Brad Foote, a rival gear maker, for over two years. From Regal-Beloit's perspective, the transaction presented synergies with its existing Foote-Jones gear division, which was headed up by defendant Drecoll. From Brad Foote's perspective, the sale was a necessity; its owners were old and sick.⁴⁹⁵ The transaction progressed significantly, from indications of interest and a letter of intent all the way to definitive documents, but the deal did not close. Regal-Beloit reported this disappointment to its due diligence team, which included Drecoll, but also told them that Regal-Beloit intended to continue its pursuit of Brad Foote, a message Regal-Beloit sent to Brad Foote as well.⁴⁹⁶ Brad Foote had other ideas, however, and commenced wooing Drecoll under the guise of an ESOP buy-out plan that purportedly required hiring someone like Drecoll to ensure management succession.⁴⁹⁷ The ESOP idea was quickly abandoned (assuming it was ever seriously considered), and Drecoll commenced his own pursuit of Brad Foote with the assistance of two fellow Regal-Beloit employees, whom the court collectively dubbed "the Individual Defendants."⁴⁹⁸

Regal-Beloit discovered this scam and initiated immediate preliminary injunction proceedings to block the Drecoll group from closing their purchase of Brad Foote. The court rejected the usual defense non-starters like "preparing to compete" and "no fiduciary duties," but was more intrigued with the third party refusal to deal defense based upon Brad Foote's adamant assertion that it would not sell to Regal-Beloit under any circumstances. The district court, though nominally proceeding under Wisconsin law, also relied heavily upon Illinois law in exploring the policy implications of the third party refusal to deal defense in fiduciary duty cases and therefore paid special attention to the Illinois opinions in *Kerrigan*, *Lindenhurst Drugs*, and *Comedy Cottage*.⁴⁹⁹ The district court then surveyed opinions from Massachusetts,⁵⁰⁰

495. *Id.* at 855 (noting Brad Foote principals Ward and Iglar were eager to sell and retire, because Ward had recently suffered a heart attack and Iglar had recently suffered a stroke).

496. *Id.* at 855.

497. *Id.*

498. *Id.*

499. *Id.* at 860-61.

500. *Energy Resources Corp., Inc. v. Porter*, 14 Mass. App. Ct. 296, 438 N.E.2d 391 (Mass. App. 1982) (specifically rejecting the defense argument that, since the third party professor with the government grant proposal

Michigan,⁵⁰¹ and Texas⁵⁰² that rejected refusal to deal defenses as a matter of law and policy, despite pro-defense factual determinations that the third parties were unwilling to deal with the plaintiffs in those cases.⁵⁰³ After reviewing these authorities, the *Regal-Beloit* court had little difficulty in ruling that the defendants were unlikely to prevail on the third party refusal to deal defense from either a factual or a legal standpoint for a simple reason: there was no way to test the “unalterability” of Brad Foote’s supposed unwillingness to sell to Regal-Beloit in the absence of full disclosure by Drecoll of all material facts.⁵⁰⁴ The court could just have easily commented that Brad Foote’s willingness to deal with the Drecoll group was itself strong evidence that Brad Foote’s refusal to deal with Regal-Beloit was decidedly less than “unalterable.”⁵⁰⁵

Four aspects of *Regal-Beloit* stand out. First, as noted, the court explicitly dealt at length with the policy implications of the refusal to deal defense and the invitation for fraud it presents. Second, the court did so on unusual facts: no one disputed that Brad Foote called off the Regal-Beloit deal before Drecoll emerged as a rival buyer and thus no one argued Drecoll induced Brad Foote’s initial refusal to deal with Regal-Beloit. Rather, Drecoll’s liability rested entirely on his interference with Regal-Beloit’s opportunity to change Brad Foote’s mind—even though Brad Foote’s mind was completely made up against Regal-Beloit, according to Brad Foote.⁵⁰⁶ Third, the court issued a preliminary injunction barring Drecoll from closing his deal with Brad Foote,

refused to deal with the plaintiff-principal, plaintiff was unable to avail itself of the grant opportunity and the defendant-fiduciary was, therefore, free to exploit it for himself).

501. *Production Finishing Corp. v. Shields*, 158 Mich. App. 479, 405 N.W.2d 171 (Mich. Ct. App. 1986) (following *Energy Resources* and holding that even though Ford was unlikely to ever sell its polishing business to the plaintiff-principal, defendant was still liable to plaintiff for failing to disclose his pursuit of the opportunity for himself).

502. *Imperial Grp. (Texas), Inc. v. Scholnick*, 709 S.W. 2d 358 (Tex. Ct. App. 1986) (defendant fiduciary usurped opportunity by purchasing land for himself, notwithstanding that the former owner of the land would not have sold it to plaintiff-principal under the same terms and conditions).

503. 955 F. Supp. at 861-63.

504. *Id.* at 863.

505. *Cf. Kirkruff v. Wisegarver*, 297 Ill. App. 3d 826, 835, 697 N.E.2d 406, 413-14 (4th Dist. 1998) (rejecting fiduciary Wisegarver’s proximate cause defense that plaintiff would have been unable to develop the property Wisegarver tricked plaintiff into selling to Wisegarver: “perhaps the best evidence of the property’s development potential was the fact that Wisegarver actually developed it”).

506. *Id.* at 854-55 (listing six reasons why Brad Foote claimed it was unwilling to deal with Regal-Beloit, including Ward’s and Iglar’s overall lack of trust in the people at Regal-Beloit).

but limited the injunction to six months, tying the restriction to the length of time the court felt Drecoll had enjoyed an unfair “head start.”⁵⁰⁷ And fourth, the court omitted any discussion of or citation to either *CSFM* on liability or *Durasys* on the length of the injunction.

The *Regal-Beloit* court’s limited injunction merits further comment. In restricting the injunction to six months, the court offered the following analysis:

In simplest terms, injunctive relief should be fashioned in such a way as to put the parties back to where they would have been but for the Defendants’ alleged wrongdoing and to assure that no further damage is done. Brad Foote has a right to sell to whomever they choose, at the terms most acceptable to them; Regal-Beloit has a right to pursue its “corporate opportunity” with knowledge of all material information. It may be that Brad Foote, in fact, will refuse to sell to Regal-Beloit on any terms, but Regal-Beloit should have the unfettered opportunity to put Brad Foote’s refusal to the “to the test.”

Now that the Individual Defendants are no longer Regal-Beloit employees, and because they are not bound by any restrictive covenants, Drecoll, Palmer and Rosmonowski have the right to pursue Brad Foote for themselves, assuming Brad Foote refuses to strike a deal with Regal-Beloit. Yet, since the Individuals’ purported breach of fiduciary occurred over a six-month period, an equivalent period of time seems to be reasonable, and, indeed, required, to put Brad Foote’s refusal-to-deal with Regal-Beloit “to the test.”⁵⁰⁸

This injunction limitation reasoning was flawed on its face. Regal-Beloit did not seek an injunction compelling Brad Foote to deal with Regal-Beloit; Regal-Beloit sought an injunction preventing the Drecoll group from dealing with Brad Foote. Such an injunction would indeed have put Brad Foote “to the test” with respect to Regal-Beloit by allowing Brad Foote to choose Regal-Beloit or anyone else in the world—except the Drecoll group. By allowing the Drecoll group to resume bidding in six months and a day, the court did not give Regal-Beloit “the unfettered opportunity to put Brad Foote ‘to the test.’” The court merely delayed the inevitable; so long as the Drecoll group offered better terms, Brad Foote was not about to select Regal-Beloit. The net effect of this injunction limitation, then, was to resurrect Brad Foote’s refusal to deal as a remedy defense for the Drecoll group, thereby defeating in practice the very “refusal to deal” public policy the court had just recognized in theory.

507. *Id.* at 868.

508. *Id.*

3. *LCOR Inc. v. Murray*

The same judge who wrote the *CSFM* summary judgment opinion analyzed above had the chance to revisit the same topic, this time under Illinois law, in our final case, *LCOR Inc. v. Murray*.⁵⁰⁹ The case provides an interesting and instructive contrast to *Regal-Beloit* on the preliminary injunction remedy and, indirectly, on the refusal to deal riddle.

LCOR was still another in the long line of real estate diversions that seem to epitomize Illinois corporate opportunity disputes. *LCOR*, a real estate developer, successfully purchased some Illinois property from the Oliver Hoffmann Corporation and later sought to purchase some additional Illinois property in a different location from Hoffmann. This second parcel, the so-called River Run property, was the subject of *LCOR* vice president Polich's letter of intent on behalf of *LCOR*, which prompted a counterproposal from Hoffmann. *LCOR* found Hoffmann's counterproposal acceptable and Polich therefore directed *LCOR*'s attorneys to prepare a definitive purchase agreement. Polich then directed his subordinate, defendant Murray, to deliver the draft purchase papers to Hoffmann. Hoffmann and its attorneys sent back their proposed changes, Murray communicated these changes to *LCOR*'s attorneys, and then *LCOR*'s attorneys returned the revised purchase papers to Murray.

Then the wheels came off. Murray not only failed to forward these revised deal papers to Hoffmann; he lied to his boss Polich about the status of the project and then lied to Hoffmann in turn, telling Hoffmann "that *LCOR* had instructed him to deceive Oliver Hoffmann and lie to them regarding the reasons for the delay in the River Run deal."⁵¹⁰ Murray and his secret partners, Churchill and Michigan Avenue Partners, then sent Hoffmann their own proposal to purchase the River Run property, and a few days later Murray submitted his resignation to *LCOR*. Hoffmann—displaying self-interest rather than virtue—demanded that Churchill indemnify Hoffmann "not because [Hoffmann] believed *LCOR* ha[d] contractual rights to purchase River Run, but because [Hoffmann was] concerned that *LCOR* might have claims against Michael Murray."⁵¹¹ In the meantime, *LCOR* discovered its never-sent deal papers on Murray's desk, realized something was wrong, and sent its deal papers to Hoffmann. Hoffmann then found itself in the catbird's seat and, naturally enough, "announced that it had rejected both offers" and instead "would prepare its own draft purchase agreement and submit it to both prospective purchasers

509. 1997 U.S. Dist. LEXIS 3373 (N.D. Ill. March 19, 1997).

510. *Id.* at *10.

511. *Id.* at *14.

with a blank space for the prices, inviting bids.”⁵¹²

The court cited its previous decision in *CSFM* for the general proposition that the internal affairs doctrine pointed to Pennsylvania law in light of LCOR’s incorporation in Pennsylvania, but the court analyzed both Illinois and Pennsylvania corporate opportunity law. Applying Illinois law and citing *Levy and Comedy Cottage*, the district court had no difficulty finding that Murray, though a mere employee, was nevertheless a fiduciary of LCOR under *Mullaney* and that he had breached his fiduciary duties in sabotaging LCOR’s bid and then submitting his own. The fact that Murray resigned did not in any way sever his liability for wrongdoing begun before quitting, and of course he was also subject to fiduciary liability for “misuse of the knowledge he acquired during his employment” with respect to LCOR’s bid on the River Run deal.⁵¹³ The court considered Churchill and Michigan Avenue Partners equally guilty under Illinois secondary liability rules: “Michigan Avenue Partners and Churchill knowingly induced and intimately participated in Murray’s scheme to pursue River Run and are, therefore, liable to LCOR.”⁵¹⁴

Interestingly, although the *LCOR* court cited *Regal-Beloit* for general fiduciary loyalty principles,⁵¹⁵ it did not follow *Regal-Beloit* by imposing a time limit on its injunction. Indeed, the opposite was true: the court issued an open-ended preliminary injunction barring Murray, Churchill and all those in active concert and participation with them—including, by definition, Hoffmann itself, to the extent Hoffman wished to work with any of them—“from negotiating or closing any acquisitions of the River Run property owned by Oliver Hoffmann Corporation.”⁵¹⁶ In other words, the *LCOR* court did not simply leave it up to third party Hoffmann to choose its partner. Instead, to borrow the *Regal-Beloit* court’s apt but misapplied phrase, the *LCOR* court properly put Hoffmann “to the test” by first removing the wrongdoers from the picture, leaving Hoffman free to reject LCOR if Hoffmann so desired.

4. Summary of Illinois Federal District Court Cases

Illinois federal district court cases, while not precedential, provide helpful illustrations of courts directly confronting third

512. *Id.* at *15.

513. *Id.* at *25-26.

514. *Id.* at *27.

515. *Id.* at *21.

516. *Id.* at *36 (“For all of the foregoing reasons, this Court concludes that a preliminary injunction should be entered enjoining Defendants Murray, Churchill, Michigan Avenue Partners and all others in active concert or participation with them from negotiating or closing any acquisitions of the River Run property owned by Oliver Hoffmann Corporation.”).

party refusals to deal. The analyses and outcomes in these cases varied in part because *CSFM* considered the problem under Wisconsin law, *LCOR* considered it under Illinois law, and *Regal-Beloit* considered it under both. But these cases mainly differed in their conceptualization of the third party refusal: *CSFM* treated it as question of fact and thus denied both sides' summary judgment motions; *Regal-Beloit* viewed it as a question of law and thus condemned the refusal on policy grounds; and *LCOR* skipped the debate entirely by treating the third parties as just as guilty as the fiduciary. In this respect *LCOR* stands alone as the only Illinois decision, state or federal, to give knowledgeable third parties exactly what they deserved: secondary liability for participating in a fiduciary's disloyalty.

III. CONCLUSION

Jean Paul Sartre famously quipped that "hell is other people."⁵¹⁷ That certainly can be said for the customers and other third parties who posed as neutral, objective witnesses in the cases described in this article. With the sole exceptions of *Glasser* and *Mile-O-Mo Fishing Club*, every significant discussion of a third party's role in these cases revealed the third party *knew* the fiduciary defendants were secretly acting against the interests of their principals, yet in every one of these cases the third party happily went along with the wrongdoing in an effort to get a better deal. Indeed, in *Durasys* and *Regal-Beloit* the third parties were not simply complicit in fiduciary wrongdoing; they actively invited it. Neutral they were not.

But bias built on third party self-interest is only part of the problem. At least as great is the difficulty, expense and indeterminacy of proof concerning the third party's willingness or unwillingness to deal. *Durasys*, *CSFM*, *Regal-Beloit*, *LCOR*, *Davis*, *Glasser*, *Lawlor*, *Consumers Co.*, *Patient Care Services*, *Comedy Cottage*, *Lindenhurst Drugs*, *Levy*, *Delta Medical Systems*, and *Prodromos* offer brutal examples of the obscene complexity inherent in analyzing third party motives after a dispute has arisen. The trial alone lasted 14 months in *Levy*, and 6 "disinterested" witnesses from third party Chemetron were needed to testify about Chemetron's market plans in addition to the other 15 witnesses who appeared in *Peterson Welding Supply*. Indeed, the Illinois Supreme Court itself encountered the most extreme effects of entertaining third party refusals: 13 years passed from Stoner's wrongdoing in 1961 until the supreme court decided *Vendo* in 1974, and 14 years passed from Savage's wrongdoing in

517. JEAN-PAUL SARTRE, NO EXIT AND THREE OTHER PLAYS at 45 (Vintage International 1989).

1966 until the supreme court decided *Mullaney* in 1980.⁵¹⁸ Plainly, to borrow Holmes' famous phrase, the "brooding omnipresence" of third party refusals profoundly colored each of these cases.⁵¹⁹

This old-fashioned exercise of learning from the cases themselves proves as usual that experience is the best teacher.⁵²⁰ These cases provide the discipline of evidence and leave nothing to the imagination: in almost every one since *Kerrigan*, the only seriously debated fact was the third party's willingness or unwillingness to deal with the plaintiff-principal, a fact that should have been entirely irrelevant. The remaining facts, viewed through the lens of *Kerrigan* as sharpened by *Vendo* and *Mullaney*, should have dictated summary judgment for plaintiff time after time. Indeed, this is precisely what occurred in *Patient Care Services*, decided only months after *Kerrigan* and *Vendo*—the appellate court on the authority of *Kerrigan* and *Vendo* not only reversed a defense judgment, secured after a trial that turned on the third party hospital's purported refusal to deal with plaintiff; the appellate court remanded with instructions to enter judgment for plaintiff as a matter of law and directed that a constructive

518. Fiduciary duty litigation can be profoundly protracted enough even without the burden of third party refusal to deal inquiries. *See, e.g.*, *Wolinsky v. Kadison*, 2013 IL App (1st) 111186, 987 N.E.2d 971 (1st Dist. 2013) (describing 34 years of litigation in condominium board fiduciary duty case arising from events in 1979); *Borsellino v. Putnam*, 2011 IL App. (1st) 102242, 962 N.E.2d 1000 (1st Dist. 2011) (describing 11 years of litigation in corporate fiduciary duty case arising from events in 1997); *Lozman v. Putnam*, 379 Ill. App. 3d 807, 884 N.E.2d 756 (1st Dist. 2008) (describing 9 years of litigation in corporate fiduciary duty case arising from events in 1995); *Johnson v. Central Standard Life Insurance Co.*, 102 Ill. App. 2d 15, 243 N.E.2d 376 (1st Dist. 1968) (describing 39 years of litigation arising from events in 1929 that spawned the Illinois Supreme Court's landmark corporate fiduciary duty opinion in *Winger v. Chicago City Bank & Trust Co.*, 394 Ill. 94, 67 N.E.2d 265 (1946)).

519. *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting).

520. *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, dissenting) ("Common-law method tends to pay respect instead to detail, seeking to understand old principles afresh by new examples and new counterexamples."); Ian Williams, "*He Credited More the Printed Booke*": *Common Lawyers' Receptivity to Print, c. 1550-1640*, 28 LAW & HIST. REV. 39, 45 (2010) (quoting Francis Bacon as saying that until precedents were reported in formal print, beginning in 1600 with Edward Coke's *Reports*, the law "had been almost like a ship without a ballast"); JOHN H. LANGBEIN, RENEE LETTOW LERNER & BRUCE P. SMITH, HISTORY OF THE COMMON LAW: THE DEVELOPMENT OF ANGLO-AMERICAN LEGAL INSTITUTIONS 255-56 (Wolters Kluwer 2009) (discussing the British evolution from oral pleading to reasoned judicial precedent); FRIEDRICH A. HAYEK, THE CONSTITUTION OF LIBERTY 55-56 (U. Chi Press 1960) (arguing that the "British tradition" of liberty was "rooted in the jurisprudence of the common law" and "stands for organic, slow, half-conscious growth" based upon "trial and error procedure").

trust be imposed for plaintiff's benefit. By contrast, when *Kerrigan*, *Vendo*, and *Mullaney* are removed from the picture, Illinois courts have slavishly deferred to the third party's preferences as a factual matter, as in *Delta Medical Systems* and *Durasys*, or far worse, have granted judgment as a matter of law in favor of the fiduciary defendant, as in *Prodromos II*.

If fiduciary deterrence is the goal, as the Illinois Supreme Court has declared time and again, how is this "prophylactic purpose" served by forcing principals through extended third party refusal to deal litigation like the 13-year ordeal in *Vendo* and the 14-year nightmare in *Mullaney*? Having personally fought these battles in many cases, including *Foodcomm* and *Regal-Beloit*, I can testify to the fantastic expense and uncertainty inherent in trying to determine after-the-fact what the third party would or would not have done. To be sure courts can demand this metaphysical exercise, but as *Vendo* and *Mullaney* show, there is no warrant for it in Illinois Supreme Court jurisprudence. Nor should there be, as I argue in my next and final article.⁵²¹

521. William Lynch Schaller, *Corporate Opportunities and the Third Party "Refusal to Deal" Defense: Policy and Practice Lessons from Illinois*, 47 J. MARSHALL L. REV. (forthcoming 2014).

