NOTES

Southeast Consultants, Inc. v. McCrary Engineering Corp.: Georgia Opens the Door to Corporate Opportunity

In *Southeast Consultants, Inc. v. McCrary Engineering Corp.*,[1] the Georgia Supreme Court adopted the two step process approved in *Miller v. Miller*[2] as the procedure to be followed in determining whether a corporate officer or director[3] has wrongfully appropriated a business opportunity of his corporation for himself under section 714 of the Georgia Business Corporation Code.[4] Although section 714 was enacted in 1968 as part of a sweeping revision patterned after the Model Business Corporation Act,[5] this landmark decision was the first to construe the provisions of section 714 that proscribe the appropriation of corporate opportunities by corporate executives. The decision promises to have a far-reaching effect on Georgia corporation law.

Section 714, which prescribes guidelines concerning when actions may be brought against directors and officers, is much broader than its predecessor, section 711,[6] in which the areas of liability were very restrictive[7]

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1. 246 Ga. 503, 273 S.E.2d 112 (1980).

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

3. For the purposes of this casenote, corporate officers and directors will be referred to as corporate executives. While the courts and commentators usually discuss the liability of "officers and directors" under the corporate opportunity doctrine or do not differentiate between the two, this may be a less than desirable approach. *See* Brudney & Clark, *A New Look At Corporate Opportunities*, 94 HARV. L. REV. 997 (1981). Under appropriate circumstances, the corporate opportunity doctrine will also be applied to controlling shareholders. *See* Perlman v. Feldman, 219 F.2d 173 (2d Cir. 1955); Lebold v. Inland Steel Co., 125 F.2d 369 (7th Cir. 1941); Comment, *The Corporate Opportunity Doctrine*, 18 Sw. L.J. 96, 113 (1964); Note, *Corporate Opportunity*, 74 HARV. L. REV. 765, 770 (1961).

4. GA. CODE ANN. § 22-714 (1977).

5. 246 Ga. at 503, 273 S.E.2d at 114. The new Georgia Business Corporation Code did not become effective until April 1, 1969. Section 714 is based on New York Business Corporation Law. N.Y. BUSINESS CORPORATION LAW § 720 (McKinney 1963 & Supp. 1980-81).

6. GA. CODE ANN. § 22-711 (1933) (repealed 1969).

7. Baker, *Liability of Corporate Directors and Officers [And Shareholders] Under The*

and, by negative inference, were intended to be exclusive.[8] In marked contrast, section 714 expressly states that it is not in limitation of any other liabilities imposed by law.[9] It does contain a four year statute of limitations, however, which presumably limits any common law action coinciding with any area of liability enumerated in the section.[10]

The portions of section 714 cited by the supreme court in *Southeast Consultants* read as follows:

> (a) An action may be brought [by the corporation] . . . against one or more directors or officers of a corporation to procure for the benefit of the corporation a judgment for . . . (1) . . . any other relief called for by his official conduct, in the following cases: . . . (C) The appropriation, in violation of his duties, of any business opportunity of the corporation.[11]

Under subsection (b), the corporation, a receiver, trustee in bankruptcy, officer, director, or judgment creditor of the corporation, or shareholder in a derivative action may bring an action under section 714.[12]

McCrary Engineering Corporation was an Indiana corporation engaged "in the planning, design and supervision of construction of water and sewerage projects for municipalities, counties and industry."[13] Defendant Hood, who was McCrary's president from 1972 to July 31, 1979, incorporated defendant Southeast Consultants, Inc. in 1976.[14] Unbeknownst to McCrary's directors, Southeast used McCrary's Atlanta office as its own and employed McCrary's equipment, supplies, and personnel in its ventures.[15]

McCrary sued Hood and Southeast for damages and injunctive relief, and alleged that Hood had breached his fiduciary duties to McCrary in the following respects:

> (1) by forming a competing engineering firm without notice and by improperly using McCrary's resources to set up and operate the new firm; (2) by representing that Southeast was affiliated with McCrary and by actively soliciting McCrary's clients; (3) by disparaging McCrary to its personnel and encouraging them to leave McCrary to work for Southeast; and (4) by usurping current and future business opportunities belonging to McCrary.[16]

Georgia Business Corporation Code, 7 GA. ST. B.J. 277, 282-83 (1971).

8. *Id.* at 282.
9. GA. CODE ANN. § 22-714(d) (1977).
10. GA. CODE ANN. § 22-714(c) (1977); Baker, *supra* note 7, at 285.
11. GA. CODE ANN. § 22-714(a)(1)(C) (1977).
12. GA. CODE ANN. § 22-714(b) (1977).
13. 246 Ga. at 503, 273 S.E.2d at 114.
14. 246 Ga. at 503-04, 273 S.E.2d at 114.
15. *Id.*
16. 246 Ga. at 504, 273 S.E.2d at 114.

Later McCrary amended its complaint to add four of its former employees as defendants: Gooch, formerly McCrary's chief engineer and then Southeast's vice-president; Holcomb, formerly McCrary's resident inspector and then Southeast's branch manager; Henson, formerly McCrary's resident inspector and then Southeast's field man; and Duckett, formerly a McCrary engineer and then Southeast's general engineer.[17] These employees and others had left McCrary with Hood on July 31, 1979, after Hood's efforts to purchase McCrary proved unsuccessful.[18] McCrary did not have any written contracts with these employees and thus had no covenants not to compete.[19]

The trial court issued a temporary restraining order, which was later modified to prohibit defendants from soliciting contracts on twenty-two specified projects on which McCrary either had a contract or was actively seeking a contract at the time defendants and others left McCrary and joined Southeast.[20] Among the specified projects was a planning contract with the city of Danielsville, for which McCrary had completed a preliminary study contract[21] prior to the walkout, and a contract with the city of Bowden.[22] The city of Bowden sought to intervene in the action and alleged that McCrary had breached its contract with the city and that, in any event, the contract permitted it to hire its own resident inspectors.[23] The city also sought to have the restraining order dissolved so that it could contract with Southeast for resident inspectors. The trial court allowed the city of Bowden to contract with Gooch, Holcomb, and Henson as resident inspectors; McCrary's motion to modify this order was denied.[24]

The trial court found as a matter of law that the Danielsville planning contract was a business opportunity properly belonging to McCrary by virtue of the work it had performed on the project prior to the walkout.[25] Subject to McCrary's posting a 75,000 dollar bond, defendants were enjoined from further action on the project.[26] After defendants withdrew

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17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.*
21. In contracting for a complete sewer system, a city commonly follows a bifurcated procedure in which it initially contracts for a preliminary study. After the preliminary study, the city normally seeks financing and if successful, contracts for the preparation of the plans and specifications for the project. A third and separate contract may provide for the inspection of the construction. *Id.* at 507, 273 S.E.2d at 116.
22. 246 Ga. at 504, 273 S.E.2d at 114.
23. *Id.* at 504-05, 273 S.E.2d at 115.
24. *Id.* at 505, 273 S.E.2d at 115.
25. *Id.* The work performed prior to the walkout included the preliminary contract.
26. *Id.*

themselves from consideration for the contract, McCrary's bid was rejected and the city of Danielsville awarded the contract to a third party.[27]

Defendants appealed the trial court's finding that the Danielsville project was a business opportunity belonging to McCrary and the court's concomitant granting of an injunction that forbade their participation in the project.[28] McCrary cross-appealed the trial court's order that allowed Gooch, Holcomb, and Henson to be hired as resident inspectors by the city of Bowden.[29]

In affirming the judgment of the trial court, the Georgia Supreme Court held that insofar as corporate opportunities are concerned, section 714 is not applicable to typical employees,[30] and, therefore, the trial court did not abuse its discretion in allowing Gooch, Holcomb, and Henson to be employed as resident inspectors by Bowden.[31] The supreme court found that the Danielsville planning contract was a corporate opportunity belonging to McCrary and that Hood had violated his fiduciary duties of loyalty, good faith, and fair dealing toward McCrary.[32] Accordingly, it held that the trial court did not err in enjoining Hood and Southeast and its agents from accepting the Danielsville contract.[33]

Although the origin of the corporate opportunity doctrine can be traced further back,[34] the landmark case of *Guth v. Loft, Inc.*[35] is the most appropriate place to begin a discussion of the doctrine. *Guth* has been cited as precedent in almost every case discussing the corporate opportunity doctrine since it was decided in 1939.[36]

The factual situation in *Guth* can be succinctly stated. Charles G. Guth was the president and dominant member of the board of directors of Loft, Inc., a Delaware corporation that produced and distributed soft

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27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.* at 506, 273 S.E.2d at 116. The relevant liability provisions of section 714 address corporate officers and directors only. *See* notes 6-12 *supra* and accompanying text. Subsection (d), which provides that "[t]his section shall not limit any liability otherwise imposed by law upon any director or officer or any third party," simply relegates the question of liability of employees and other third parties to prior law. The court found it clear under Taylor Freezer Sales Co. v. Sweden Freezer E. Corp., 224 Ga. 160, 160 S.E.2d 356 (1968), that a mere employee has no liability for mere customer solicitation and competition with his former employer absent a valid covenant not to compete. 246 Ga. at 506, 273 S.E.2d at 116.

31. 246 Ga. at 506, 273 S.E.2d at 116.

32. *Id.* at 509, 273 S.E.2d at 117.

33. *Id.* at 509-10, 273 S.E.2d at 118.

34. *See* notes 48-55 *infra* and accompanying text.

35. 23 Del. Ch. 255, 5 A.2d 503 (1939).

36. Walker, *Legal Handles Used to Open or Close the Corporate Opportunity Door*, 56 NW. U.L. REV. 608, 617 (1961).

drink syrups, beverages, candies, and foods.[37] As the result of a price disagreement with the Coca-Cola Company, Loft began seeking an alternative cola drink and in this connection, considered Pebasco (Pepsi-Cola's predecessor) as a substitute.[38] Subsequently, the National Pepsi-Cola Company went bankrupt and Guth learned that he was in a position to acquire the secret formula and trademark for the manufacture and sale of Pebasco.[39] Guth and the owner of the formula and trademark formed a new company, in which Guth owned one-half of the stock, to market the cola under the name of Pepsi-Cola.[40] In forming and developing the new enterprise, Guth used Loft's capital, facilities, raw materials, credit, executives, and employees.[41]

In sustaining the chancery court's decree, the Delaware Supreme Court held that Guth had appropriated a valuable business opportunity belonging to Loft[42] and ordered Guth to surrender all of the stock, dividends, and salary he had received from his new company to Loft.[43] In so holding, the court framed the corporate opportunity doctrine in rather sweeping terms, which have been cited in support of several tests or standards not altogether homogeneous.

> It is true that when a business opportunity comes to a corporate officer or director in his individual capacity rather than in his official capacity, and the opportunity is one which, because of the nature of the enterprise, is not essential to his corporation, and is one in which it has no interest or expectancy, the officer or director is entitled to treat the opportunity as his own, and the corporation has no interest in it, if, of course, the officer or director has not wrongfully embarked the corporation's resources therein.[44]

The court further stated:

> On the other hand, it is equally true that, if there is presented to a corporate officer or director a business opportunity which the corporation is financially able to undertake, is, from its nature, in the line of the corporation's business and is of practical advantage to it, is one in which the corporation has an interest or a reasonable expectancy, and, by embracing the opportunity the self-interest of the officer or director will be brought into conflict with that of his corporation, the law will not permit him to seize the opportunity for himself. And, if, in such circumstances,

37. *Id.* at ___, 5 A.2d at 505-06.
38. *Id.* at ___, 5 A.2d at 505.
39. *Id.* at ___, 5 A.2d at 506.
40. *Id.* at ___, 5 A.2d at 506.
41. *Id.* at ___, 5 A.2d at 506.
42. *Id.* at ___, 5 A.2d at 515.
43. *Id.* at ___, 5 A.2d at 508.
44. *Id.* at ___, 5 A.2d at 510-11.

> the interests of the corporation are betrayed, the corporation may elect to claim all of the benefits of the transaction for itself, and the law will impress a trust in favor of the corporation upon the property, interests and profits so acquired.[45]

Having set forth several relevant objective inquiries, the court went on to say that these questions must be evaluated with an eye to the equities of the situation.

> But, the appellants say that the expression, "in the line" of a business, is a phrase so elastic as to furnish no basis for a useful inference. The phrase is not within the field of precise definition, nor is it one that can be bound by a set formula. It has a flexible meaning, which is to be applied reasonably and sensibly to the facts and circumstances of the particular case. Where a corporation is engaged in a certain business, and an opportunity is presented to it embracing an activity as to which it has fundamental knowledge, practical experience and ability to pursue, which, logically and naturally, is adaptable to its business having regard for its financial position, and is one that is consonant with its reasonable needs and aspirations for expansion, it may be properly said that the opportunity is in the line of the corporation's business.[46]

These guidelines in *Guth* are the bases for three distinct tests, growing out of judicial emphasis on different criteria, for determining liability under the corporate opportunity doctrine. These tests or standards are the interest or expectancy test, the line of business test, and the fairness test.[47]

The interest or expectancy test, generally stated, characterizes a business opportunity as a corporate one if the corporation has a legal or equitable interest or expectancy in it growing out of a pre-existing right or relationship. This test probably had its origin in *Lagarde v. Anniston Lime & Stone Co.*[48] In *Lagarde,* a corporation engaged in the quarrying of limestone and the manufacture of lime had been negotiating for the purchase of certain lands.[49] The corporation succeeded in purchasing an undivided one-third interest in the lands and in leasing and contracting to purchase a second one-third interst.[50] While the corporation was negotiating for the purchase of the remaining interest, two of its officers

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45. *Id.* at ___, 5 A.2d at 510-11.

46. *Id.* at ___, 5 A.2d at 514.

47. A fourth approach has been suggested in Carrington & McElroy, *The Doctrine of Corporate Opportunity as Applied to Officers, Directors and Stockholders of Corporations,* 14 BUS. LAW. 957 (1959), which would simply apply principles applicable generally to fiduciary relationships.

48. 26 Ala. 496, 28 So. 199 (1900).

49. *Id.* at ___, 28 So. at 200.

50. *Id.* at ___, 28 So. at 200.

bought the interest as well as the one-third interest leased to the corporation.[51] The Alabama Supreme Court imposed a constructive trust on the one-third interest in which the corporation had contractual rights.[52] Regarding the remaining one-third interest, the court held that the officers were free to acquire it because it was neither alleged to be necessary to the existence of the corporation nor alleged to impair the value of the corporation's property in any way.[53] The court held that it was immaterial that knowledge of the land was gained by the appropriating officers in connection with their duties with the corporation.[54]

> [I]n general the legal restrictions which rest upon such officers in their acquisitions are generally limited to property wherein the corporation has an interest already existing, or in which it has an expectancy growing out of an existing right, or to cases where the officers' interference will in some degree balk the corporation in effecting the purposes of its creation.[55]

In *Solimine v. Hollander*,[56] the New Jersey court purportedly adopted the approach of *Lagarde*. Under the test developed in *Solimine*, the court would not find liability if:

> (1) the corporate official has acted in good faith; *or* (2) the corporation is unable to undertake the opportunity; *or* (3) the opportunity is not essential to the business of the corporation; *or* (4) the corporate official does not use the resources of the corporation to exploit the opportunity; *or* (5) the acquisition of the opportunity by the executive does not bring him into direct competition with the corporation.[57]

The court stated these elements disjunctively using the conjunction "or."[58] Apparently, the presence of any one of these elements would preclude liability.[59] This standard of interest or expectancy is obviously much less restrictive than that in *Lagarde*.

Lincoln Stores, Inc. v. Grant,[60] a Massachusetts decision, also illustrates the interest or expectancy standard and is frequently cited. In the

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51. *Id.* at ___, 28 So. at 200.
52. *Id.* at ___, 28 So. at 201.
53. *Id.* at ___, 28 So. at 201.
54. *Id.* at ___, 28 So. at 201.
55. *Id.* at ___, 28 So. at 201. *Accord*, Colorado & Utah Coal Co. v. Harris, 97 Colo. 309, 49 P.2d 429 (1935); Pioneer Oil & Gas Co. v. Anderson, 168 Miss. 334, 151 So. 161 (1933).
56. 128 N.J. Eq. 228, 16 A.2d 203 (1940).
57. *Id.* at ___, 16 A.2d at 215 (emphasis added).
58. *Id.* at ___, 16 A.2d at 215.
59. Nervig, *Corporate Opportunity—Miller v. Miller—Proper Application of the Fairness Doctrine in the Corporate Opportunity Area*, 2 J. CORP. L. 405, 412 (1977); Walker, *supra* note 36, at 616.
60. 309 Mass. 417, 34 N.E.2d 704 (1941).

course of their employment, the general manager and several directors of a department store learned that a competing store was for sale.[61] In secret, they proceeded to buy the store using confidential information possessed by their company and holding meetings on company time.[62] Although the court allowed damages for the use of the confidential information, it refused to impose a constructive trust on the stock of the newly acquired store.[63] Emphasizing that the new store was not essential to the company, the court concuded that the company had no interest or expectancy because it had never considered acquisition of the store.[64]

In *Litwin v. Allen*,[65] a New York court enumerated three instances that give rise to an interest or expectancy: (1) when the executive has undertaken to negotiate in the field on behalf of the corporation, (2) when the corporation is in need of the particular business opportunity, or (3) when the opportunity is seized and developed at the expense and with the facilities of the corporation.[66] Generally, however, the courts employing the interest or expectancy test have been satisfied to rely on subjective standards in determining whether an interest or expectancy exists.[67] What may be distilled from case law is that the interest or expectancy does not have to constitute ownership, nor does it have to amount to a legal right to exclude third parties from acquiring the interest or expectancy or even a contingent contract.[68] It must, however, be more than a hope or desire.[69] At least one commentator suggests that the criteria for determining when an interest arises varies with the context but he notes that the courts have reached contradictory conclusions in nondistinguishable contexts.[70]

If a business opportunity is "closely associated with the existing and

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61. *Id.* at ___, 34 N.E.2d at 706.

62. *Id.* at ___, 34 N.E.2d at 706.

63. *Id.* at ___, 34 N.E.2d at 708.

64. *Id.* at ___, 34 N.E.2d at 707. Although Durfee v. Durfee & Canning, Inc., 323 Mass 187, 80 N.E.2d 522 (1948), did not expressly repudiate *Lincoln Stores*, it did throw some doubt on its precedential value in Massachusetts. The court said that it did not agree "that the test is whether the corporation has an existing interest or expectancy thereof in the property involved" and adopted the fairness test. The court did not address the fact that the interest or expectancy test was adopted in *Lincoln Stores* but distinguished it on its facts. 323 Mass. at ___, 80 N.E.2d at 529; Walker, *supra* note 36, at 614 n.27. *See generally* note 80 *infra* and accompanying text.

65. 25 N.Y.S.2d 667 (App. Div. 1940).

66. *Id.* at 686.

67. *See* Nervig, *supra* note 59, at 412-13.

68. Brudney & Clark, *supra* note 3, at 1013.

69. Abbott Redmont Thinlite Corp. v. Redmont, 475 F.2d 85, 88-89 (2d Cir. 1973); Pioneer Oil & Gas Co. v. Anderson, 168 Miss. 334, 151 So. 161 (1933); Brudney & Clark, *supra* note 3, at 1014.

70. Brudney & Clark, *supra* note 3, at 1014-15.

prospective activities of the corporation,"[71] a court applying the line of business test should find that the opportunity is a corporate one. Case law is not certain as to the breadth of the standard. In *Lutherland, Inc. v. Dahlen,*[72] the court stated that a corporate executive can never appropriate a business opportunity "which is within the scope of [the corporation's] own activities and of present or *potential* advantage to it."[73] In one case,[74] the court held that an opportunity within the sweep of the corporation's charter is in its line of business. In contrast, another court held that a corporation must have some past experience in similar opportunities in order for a business opportunity to be in its line of business.[75]

The fairness test determines whether a business opportunity belongs to a corporation by applying ethical standards of what is fair and equitable to the particular facts of each case.[76] It follows that there is no general rule. In *Durfee v. Durfee & Canning, Inc.,*[77] the court specifically rejected the interest or expectancy test in favor of the fairness test.[78]

> [T]he true basis of the governing doctrine rests fundamentally on the unfairness in the particular circumstances of a director, whose relation to the corporation is fiduciary, "taking advantage of an opportunity [for his personal profit] when the interest of the corporation justly calls for protection. This calls for the application of ethical standards of what is fair and equitable . . . [in] particular sets of facts."[79]

One commentator has suggested that *Durfee* may be limited as authority because the court drew a distinction between the case before it, in which the executive attempted to resell the opportunity to his corporation at a profit, and *Lincoln Stores,* in which the executives did not.[80]

Finally in *Miller v. Miller,*[81] the Supreme Court of Minnesota combined the three traditional tests above into a two step procedure for de-

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71. Rosenblum v. Judson Eng'r Corp., 99 N.H. 267, 273, 109 A.2d 558, 563 (1954).

72. 357 Pa. 143, 53 A.2d 143 (1947).

73. *Id.* at ___, 53 A.2d at 147 (emphasis added).

74. Weismann v. Snyder, 338 Mass. 502, 156 N.E.2d 21 (1959).

75. Lancaster Loose Leaf Tobacco Co. v. Robinson, 199 Ky. 313, 250 S.W. 997 (1923). *See also* Production Mach. Co. v. Howe, 327 Mass. 372 99 N.E.2d 32 (1951).

76. *See* Durfee v. Durfee & Canning, Inc., 323 Mass. 187, 80 N.E.2d 522 (1948). The test is applied to the circumstances that existed at the time the executive appropriated the opportunity in question. Guth v. Loft, Inc., 23 Del. Ch. 255, 5 A.2d 503 (1939); Litwin v. Allen, 25 N.Y.S.2d 667 (App. Div. 1940); Comment, *supra* note 3, at 98.

77. 323 Mass. 187, 80 N.E.2d 522 (1948).

78. *Id.* at ___, 80 N.E.2d at 529. *See also* American Inv. Co. v. Lichtenstein, 134 F. Supp. 857 (D. Mo. 1955).

79. 323 Mass. at ___, 80 N.E.2d at 529 (quoting BALLANTINE ON CORPORATIONS 204-05 (Rev. Ed. 1946)).

80. Comment, *supra* note 3, at 99.

81. 301 Minn. 207, 222 N.W.2d 71 (1974).

termining whether a corporate executive has wrongfully appropriated for himself a business opportunity belonging to his corporation. Miller Waste Mills, Inc. was incorporated by the defendants Rudolph and Benjamin Miller " 'to manufacture waste and wiping cloth' of all kinds and 'to do other such business as may be incidental to or reasonably necessary to effectuate such manufacturing business.' "[82] During World War II, Miller Waste's mass production operations were frequently disrupted in its attempts to satisfy government contract commitments for smaller packages.[83] Because there was not a local subcontractor who could alleviate the situation, Rudolph and Benjamin Miller organized a partnership to take the small packaging business.[84] Production from the partnership was sold to Miller Waste at a profit equal to the premium paid by the government on its contract with Miller Waste.[85] In a derivative action suit, a minority shareholder sued the Miller brothers and the defendant businesses to recover lost profits and assets.[86] The supreme court affirmed the trial court's order dismissing plaintiff's complaint.[87]

After reviewing and analyzing case law under the corporate opportunity doctrine, the Minnesota Supreme Court adopted a two step procedure to determine liability.[88] Initially, the inquiring court must determine if the opportunity appropriated was in fact a business opportunity belonging to the corporation.[89] If it was not, the corporate executive accused of wrongfully appropriating it is immune from liability.[90] To make this determination, the court combined the interest or expectancy test into the line of business to form an expanded line of business test.[91] The court stated that this inquiry was one of fact and listed several relevant inquiries:

> [W]hether the business opportunity presented is one in which the complaining corporation has an interest or an expectancy growing out of an existing contractual right; the relationship of the opportunity to the corporation's business purposes and current activities—whether essential, necessary, or merely desirable to its reasonable needs and aspirations—; whether, within or without its corporate powers, the opportunity embraces areas adaptable to its business and into which the corporation might easily, naturally, or logically expand; the competitive nature of the opportunity—whether prospectively harmful or unfair—; whether the

82. *Id.* at ___, 222 N.W.2d at 73.
83. *Id.* at ___, 222 N.W.2d at 74.
84. *Id.* at ___, 222 N.W.2d at 74.
85. *Id.* at ___, 222 N.W.2d at 75.
86. *Id.* at ___, 222 N.W.2d at 72-73.
87. *Id.* at ___, 222 N.W.2d at 83.
88. *Id.* at ___, 222 N.W.2d at 81.
89. *Id.* at ___, 222 N.W.2d at 81.
90. *Id.* at ___, 222 N.W.2d at 81.
91. *Id.* at ___, 222 N.W.2d at 81.

> corporation by reason of insolvency or lack of resources, has the financial ability to acquire the opportunity; and whether the opportunity includes activities as to which the corporation has fundamental knowledge, practical experience, facilities, equipment, personnel, and the ability to pursue.[92]

Furthermore, while the fact that an opportunity is not within the scope of the corporation's powers is to be considered, it should not be determinative.[93] Applying these standards, the court affirmed the trial court's ruling that the small packaging business was a corporate opportunity belonging to Miller Waste.[94]

If the inquiring court finds that the appropriated opportunity indeed belongs to the complaining corporation, it must then determine if the cor-

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92. *Id.* at ___, 222 N.W.2d at 81. There is a split of authority concerning the significance of the financial inability of a corporation to take advantage of an oppportunity. If the corporation is actually financially insolvent, the corporate executive can take the opportunity for himself without liability. *See* Electronic Dev. Co. v. Robson, 148 Neb. 526, 28 N.W.2d 130 (1947); Walker, *supra* note 36, at 624. Some courts permit the appropriating executive to defend his actions on the ground of financial inability even though the corporation was not actually insolvent. *See* Urban J. Alexander Co. v. Trinkle, 311 Ky. 635, 224 S.W.2d 923 (1949). The case of Irving Trust Co. v. Deutsch, 73 F.2d 121 (2d Cir. 1934), *cert. denied*, 294 U.S. 708 (1935), illustrates the strict rule that mere lack of financial resources is not a defense.

> If directors are permitted to justify their conduct on such a theory there will be a temptation to refrain from exerting their strongest efforts on behalf of the corporation since, if it does not meet the obligations, an opportunity for profit will be open to them personally. . . . Nevertheless, [the facts] tend to show the wisdom of a rigid rule forbidding directors of a solvent corporation to take over for their own profit a corporate contract on the plea of the corporation's financial inability to perform.

73 F.2d at 124. Durfee v. Durfee & Canning, Inc., 323 Mass. 187, 80 N.E.2d 522 (1948), expressly followed the rule in *Irving Trust*. On the issue of financial inability, *see generally* Nervig, *supra* note 59, at 414; Walker, *supra* note 36, at 624; Comment, *supra* note 3, at 100.

93. 301 Minn. at ___, 222 N.W.2d at 81. The court stated that this is especially true if the corporate executive dominates the board of directors or is the majority shareholder. *Id.* If the acquiring executive does not dominate the board of directors or is not the majority shareholder, Mr. Nervig apparently believes that the court would not find a corporate opportunity, on any set of facts, if the corporation would have to exceed its statutory powers to take advantage of the opportunity. *See* Nervig, *supra* note 59, at 415 n.77. Generally, a corporate executive may take advantage of a business opportunity if it is beyond the powers of the corporation. *See* Urban J. Alexander Co. v. Trinkel, 311 Ky. 635, 224 S.W.2d 923 (1949); Diedrick v. Helm, 217 Minn. 483, 14 N.W.2d 913 (1944). When it is the settled policy of the corporation not to engage in a particular line of business, the corporate executive may appropriate an opportunity in that line. *See* Urban J. Alexander Co. v. Trinkel, 311 Ky. 635, 224 S.W.2d 923 (1949); Lancaster Looseleaf Tobacco Co. v. Robinson, 199 Ky. 313, 250 S.W. 997 (1923); Pioneer Oil & Gas Co. v. Anderson, 168 Miss. 334, 151 So. 161 (1933). Other types of corporate inability that may preclude the appropriating executive's liability are set out in Comment, *supra* note 3, at 100 n.25.

94. 301 Minn. at ___, 222 N.W.2d at 82.

porate executive violated his fiduciary duties of loyalty, good faith, and fair dealing toward the corporation.[95] Liability should not be imposed if the corporate executive did not violate his fiduciary duties toward the corporation.[96] To resolve this inquiry, the court employed the fairness test[97] and enumerated several factors which should be considered in making the determination:

> the nature of the officer's relationship to the management and control of the corporation; whether the opportunity was presented to him in his official or individual capacity; his prior disclosure of the opportunity to the board of directors or shareholders and their response; whether or not he used or exploited corporate facilities, assets, or personnel in acquiring the opportunity; whether his acquisition harmed or benefitted the corporation; and all other facts and circumstances bearing on the officer's good faith and whether he exercised the diligence, devotion, care, and fairness toward the corporation which ordinarily prudent men would exercise

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95. *Id.* at ___, 222 N.W.2d at 81.

96. *Id.* at ___, 222 N.W.2d at 81.

97. An alternative standard employed by some courts is the *strict-trust* approach. Under this approach, once the corporate executive is found to have appropriated a corporate opportunity, the inquiry ends and all profits derived from the purloined opportunity must be turned over to the corporation. The corporate executive is not allowed to prove the fairness of his conduct. *See* Hamilton, *Corporate Opportunity—Tennessee Dressed Beef Co. v. Hall—The Strict-Trust Rationale*, 2 J. CORP. L. 558, 559 (1977) (Tennessee Dressed Beef Co. v. Hall is reported at 519 S.W.2d 805 (Tenn. Ct. App. 1974), *cert. denied*, 519 S.W.2d 805 (Tenn. 1975)). The strict-trust approach is derived from an analogy of the corporate official's position to that of a trustee. Hamilton, *supra* at 563. This analogy is probably not altogether accurate. One commentator pointed out several differences between a corporate executive and a trustee:

> [a] trustee of an express trust may not ordinarily buy trust property; he may not sell to the trust estate any property he owns or in which he has a personal interest; nor may he borrow trust funds for his own purposes. On the other hand a director may either buy from or sell to the corporation, provided that he can prove the price is fair; in many instances, borrowing corporate funds is permissible.

Note, *Liability of Directors for Taking Corporate Opportunities, Using Corporate Facilities, or Engaging in a Competing Business*, 39 COLUM. L. REV. 219 (1939).

There is some conflict concerning whether a strict-trust approach should be used, and if so, when it should be used. Mr. Hamilton apparently would like to see it applied to corporate opportunities generally but states that the argument in favor of the strict-trust approach is especially strong in the case of close corporations. Hamilton, *supra* at 567. Mr Hamilton cites the recent judicial trend of equating the fiduciary responsibility of close corporation officials to that of partners as support for his argument. *Id.* Others would apply the strict-trust approach to publicly-held corporations. In their exhaustive article, Professor Brudney and Professor Clark make a convincing argument for applying a categorial approach (strict-trust approach) to public corporations. In addition, they concluded that separate rules should be applied to full-time executives, outside directors, and parent companies In their view, close corporations, by their nature, require a more flexible approach to the corporate opportunity doctrine. Brudney & Clark, *supra* note 3, at 997.

under similar circumstances in like positions.[98]

The court stated that a finding of bad faith was not essential to impose liability nor would good faith, without more, absolve an executive of liability.[99] While the burden of proving that an opportunity is a corporate one rests on the plaintiff corporation, the burden of proof shifts to the defendant if the second inquiry is reached.[100] Applying these standards, the supreme court affirmed the trial court's finding that defendants Rudolph and Benjamin Miller did not wrongfully appropriate Miller Waste's opportunity.[101]

Quoting extensively from the *Miller* opinion, the Georgia Supreme Court, in *Southeast Consultants,* found the two step procedure set forth by the Minnesota court coincident with the provisions of section 714(a)(1)(C) of the Georgia Business Corporation Code.[102] The court noted that the operative language of the statute requires a finding that the offending official appropriated a business opportunity of the corporation and did so in violation of his duties.[103] While the bifurcated procedure enunciated by the *Miller* court and its subsequent application to section 714(a)(1)(C) by the Georgia Supreme Court has been criticized as adding confusion to an already murky area of the law,[104] it appears to fit the dictates of section 714(a)(1)(C) very well.

In applying the first step of the process, the court found that the Danielsville planning contract fell within McCrary's line of business and that McCrary had both an interest and expectancy in the project arising out of the preliminary study contract.[105] The fact that McCrary was invited to and did bid on the planning contract was also persuasive to the court.[106] On the second inquiry, the court found that Southeast had been incorporated and operated at McCrary's expense and that Hood had vio-

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98. 301 Minn. at ___, 222 N.W.2d at 81-82. Concerning appropriation of an opportunity in the executive's official or individual capacity, *see* Nervig, *supra* note 59, at 417; Note, *Corporate Opportunity,* 74 HARV. L. REV. 765, 776 (1961).

The court in Johnston v. Greene, 35 Del. Ch. 479, 121 A.2d 919 (1956), stated that a corporate executive may freely take an opportunity which has been rejected by an independent board of directors. Mr. Walker indicates, however, that other decisions indicate that rejection by an independent board may not be an absolute defense. Walker, *supra* note 36, at 622. *But see* Nervig, *supra* note 59, at 417.

99. 301 Minn. at ___, 222 N.W.2d at 82.

100. *Id.* *See* Comment, *supra* note 3, at 111.

101. 301 Minn. at ___, 222 N.W.2d at 82.

102. GA. CODE ANN. § 22-714(a)(1)(C) (1977). *See* notes 6-12 *supra* and accompanying text.

103. 246 Ga. at 508-09, 273 S.E.2d at 117.

104. Brudney & Clark, *supra* note 3, at 998-99 n.2.

105. 246 Ga. at 509, 273 S.E.2d at 118.

106. *Id.*

lated his fiduciary duties toward McCrary by forming and operating Southeast without its knowledge and in hiring McCrary's engineers and employees *en masse*.[107] Therefore, the trial court did not err in finding that the Danielsville contract was a business opportunity belonging to McCrary and did not err in enjoining Hood and Southeast and its agents from accepting that contract.[108]

Although the supreme court found section 714(a)(1)(C) applicable to both former and existing officers and directors,[109] it declined to adopt the expanded line of business test of *Miller* as the standard for the initial inquiry of the two step procedure for former officers and directors.[110] Former officers and directors of a corporation have the right to compete against their former employer as long as they do not appropriate its business opportunities in violation of their fiduciary duties.[111] Concerned that adoption of the expanded line of business test would infringe on this right, the court adopted the interest or expectancy test as the standard for the initial inquiry.[112]

The *Southeast Consultants* decision is an abrupt departure from the prior law in Georgia. The court noted in its opinion, by way of footnote,[113] that they had found no Georgia case declaring a business opportunity to be the property of the employer within the meaning of *Taylor Freezer Sales Co. v. Sweden Freezer Eastern Corp.*[114] One commentator has noted in connection with section 714(a)(1)(C) that mention of the corporate opportunity doctrine itself might be a substantial expansion of Georgia law.[115] The expanded line of business test employed by *Miller* and adopted by the supreme court goes well beyond the concept of the opportunity as corporate property that gave rise to the strict interest or expectancy test of *Lagarde*.[116] The spirit of the holding in *Taylor Freezer* seems to indicate that the supreme court would have adopted a restrictive rule similar to that in *Lagarde* if the corporate opportunity doctrine had been considered prior to the enactment of section 714.

Arguably, however, the enactment of section 714 was not the driving force behind the decision in *Southeast Consultants*. The language in section 714(a)(1)(C) could just as easily have justified the employment of

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107. *Id.*
108. *Id.* at 509-10, 273 S.E.2d at 118.
109. *Id.* at 507, 273 S.E.2d at 116.
110. *Id.* at 509, 273 S.E.2d at 117.
111. *Id.* at 507, 273 S.E.2d at 116.
112. *Id.* at 509, 273 S.E.2d at 117.
113. *Id.* at 506 n.1, 273 S.E.2d at 115 n.1.
114. 224 Ga. 160, 160 S.E.2d 356 (1968).
115. Baker, *supra* note 7, at 284 n.57.
116. *See* notes 48-55 *supra* and accompanying text.

any of the traditional tests;[117] the language appears to be merely a definition of a corporate opportunity. In this vein, it is interesting to note that the decision in *Southeast Consultants* went far beyond the factual situation. Southeast used McCrary's office as its own and employed McCrary's equipment, supplies, and personnel in its operations.[118] Liability could have been imposed on defendants under the strictest standard of the corporate opportunity doctrine or even on the simplest principles of agency law. Given the court's expansive interpretation of section 714, it is probably fair to expect the appellate courts of Georgia to continue to interprete the doctrine liberally.

Whatever the motivating force behind the decision, the opinion in *Southeast Consultants* is to be applauded. The two step procedure adopted by the court adds clarity and definition to the corporate opportunity doctrine. Moreover, it provides the flexibility needed to deal effectively with both close corporations and publicly-held corporations without rendering the tests so nebulous that an executive is uncertain of his liability in a given situation.

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117. This conclusion is supported by inference by Brudney & Clark, *supra* note 3, 998-99 n.2.

118. 246 Ga. at 503-04, 273 S.E.2d at 114.