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CORPORATIONS—NEW TRENDS IN THE CORPORATE OPPORTUNITY DOCTRINE—*Ellzey v. Fyr-Pruf, Inc.*, 376 So. 2d 1328 (Miss. 1979).

On August 17, 1970, "Fyr-Pruf" was incorporated by Ben Ellzey along with Dr. George Bass, Sterling Allen and James B. Lollar for the purpose of producing fire resistant padding material. The incorporators initially planned to use the "Bass formula," a process developed by Dr. Bass to make the padding flame resistant. However, the "Bass formula" proved not to be adaptable to mass production and a contemplated patent for the process was never issued. In spite of the lack of usefulness of the formula, the officers and directors of Fyr-Pruf, Lollar, Allen, John P. Fox and Marlyn Yarborough, decided to keep Fyr-Pruf in the business of manufacturing carpet padding without the flame resistant attribute. Production commenced in October 1970, in a facility in Batesville, Mississippi, that was leased from the Small Business Administration (SBA). The corporation enjoyed moderate success until April 1971, when ownership of the premises changed and the company lost the use of the Batesville building.[1]

The officers and directors of Fyr-Pruf began searching for a new facility and additional manufacturing equipment. A possible site in Water Valley, Mississippi, was located through loan negotiations with the SBA. In an effort to obtain the necessary equipment director-officer Ellzey, representing Fyr-Pruf, contacted a businessman, Mr. Sam Lerman, to discuss the purchase by Fyr-Pruf of manufacturing equipment for mass production of carpet padding. Though faced with operational difficulties, at this time Fyr-Pruf was a solvent corporation, based solely on balance sheet standards.[2]

After several trips to St. Louis, the officers of Fyr-Pruf were able to reach an agreement for the purchase of the needed equipment. A $5,000 deposit was given to Lerman, and he agreed to hold the equipment for ten days while Fyr-Pruf arranged financing and secured a suitable manufacturing facility. However, on June 23, 1971, the SBA notified Fyr-Pruf that its application for a loan in connection with the Water Valley facility had been denied.[3]

On June 24, one day after the loan rejection, the corporate charter for a rival company, Bondafoam, Inc. was issued.[4] Bondafoam was formed for the purpose of manufacturing carpet padding by

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[1]Ellzey v. Fyr-Pruf, Inc., 376 So. 2d 1328, 1330 (Miss. 1979).

[2]*Id.* at 1331. The corporation's assets exceeded its liabilities as evidenced by an audited financial statement of March 31, 1971. One item, listed on the statement as an asset, was an account receivable in the amount of $40,000, representing an amount owed to the corporation as payment for stock. This and one other questionable item appeared on the balance sheet. *Id.*

[3]*Id.*

[4]Brief for Appellant at 7, Ellzey v. Fyr-Pruf, Inc., 376 So. 2d 1328 (Miss. 1979).

Yarborough, Allen, and Lollar, who still held their positions as officers and directors of Fyr-Pruf. Aided by the skills, experience and capital provided by these men, Bondafoam became a successful manufacturer of carpet padding. Bondafoam operated in the facility located in Water Valley, and used equipment purchased from Mr. Lerman. At the time of Bondafoam's purchase, the equipment was indispensable to Fyr-Pruf's expectation of establishing a new manufacturing plant. The organizers of Bondafoam were aware of the equipment because of their part in the negotiations with Lerman on behalf of Fyr-Pruf. Evidence suggested that the purchase was carried on secretly to make it impossible for the complaining directors and officers to participate in the venture.[5]

Following these developments Ben Ellzey, George Bass and J. L. Johnson filed a suit which, after amendment, became a stockholders' derivative action.[6] The complaint alleged that Fyr-Pruf directors and officers, Yarborough, Lollar, Allen and Fox, had usurped corporate opportunities belonging to Fyr-Pruf. The trial court placed on complainants the burden of proving by clear and convincing evidence all the issues presented by the case. After a determination that this burden had not been met, the action was dismissed with prejudice.[7]

Upon appeal by the stockholders, the Mississippi Supreme Court found that the chancellor had erred in his application of the burden of proof,[8] and held that the complainants had made a prima facie showing of usurpation of a corporate opportunity.[9] The court reversed the chancellor's decision and remanded the case to the court for further deliberations.[10]

The court acknowledged that the issues presented by the case upon appeal required it to assess the pleading and proof of this type of derivative action in Mississippi. The court expressed that this opinion would reflect a decision on what proof is required of a complainant alleging usurpation of a "corporate opportunity," as well as "the character of the required proof, the precise role of financial inability of the corporation to take advantage of the opportunity, and how the fiduciary may absolve himself of liability once the complainant has established a prima facie case."[11]

The fundamental import of *Ellzey v. Fyr-Pruf, Inc.* becomes apparent when it is recognized that it represents the first time in almost a half-century that the Mississippi Supreme Court has directly addressed these specific issues in a derivative action for usurpation of a corporate

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[5]376 So. 2d at 1331.
[6]*Id.* at 1330.
[7]*Id.*
[8]*Id.* at 1332.
[9]*Id.* at 1335.
[10]*Id.* at 1336.
[11]*Id.* at 1332.

opportunity by one who stood in a fiduciary relationship to that corporation.[12] Realizing that corporate law has undergone many changes in the span since this issue was last considered, the court made a careful examination of Mississippi law as applied to modern day situations. The court also, in gauging the continuing validity of the "stale" Mississippi decisions, looked to more recent decisions on the same issues from other states. In doing so, the court ultimately reached what it considered satisfactory and practical requisites for pleading and proving cases involving corporate opportunity.

OVERVIEW OF CORPORATE OPPORTUNITY

The culpability of officers and directors in the area of ursupation of corporate opportunity has as its foundation a well-settled principle of law, that corporate officers and directors stand in a fiduciary relationship to their corporations and therefore owe a duty of undivided loyalty and good faith.[13] One component of this principle of undivided loyalty is the concept that because of the fiduciary relationship a director or officer should refrain from competing with his corporation or from appropriating for his personal benefit an opportunity that should, in the interests of justice, belong to his corporation.[14] This rule is known as the doctrine of corporate opportunity.[15] If an officer or director is found to have breached his fiduciary duty in a case involving a true corporate opportunity the monetary profit or other gain realized may be impressed with a constructive trust inuring to the benefit of the wronged corporation.[16]

In the landmark case of *Guth v. Loft, Inc.*,[17] which involved the personal purchase of Pepsi-Cola Co. stock by the president of Loft, Inc., a beverage manufacturer, the Supreme Court of Delaware stated the rule as follows:

> [I]f there is presented to a corporate officer or director a business opportunity which the corporation is financially able to undertake,

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[12]Not since *Pioneer Oil & Gas Co. v. Anderson*, had the Mississippi Supreme Court been squarely faced with a case of seizure of a corporate opportunity. 168 Miss. 334, 151 So. 161 (1933).

[13]American Empire Life Ins. Co. v. McAdory, 319 So. 2d 237, 240 (Miss. 1975). *See, e.g., In re* County Green Ltd. Partnership, 438 F. Supp. 701, 707 (W.D. Va. 1977); Kullgren v. Navy Gas & Supply Co., 110 Colo. 454, 461, 135 P.2d 1007, 1010 (1943); Italo-American Petroleum Corp. of America v. Hannigan, 40 Del. 534, 549-50, 14 A.2d 401, 408 (1940); Flight Equip. & Eng'r Corp. v. Shelton, 103 So. 2d 615, 626 (Fla. 1958); LeMire v. Galloway, 130 Fla. 101, 108, 177 So. 283, 286 (1937). *See also* Pepper v. Litton, 308 U.S. 295, 306 (1939).

[14]3 W. FLETCHER, CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 861.1 (rev. perm. ed. 1975).

[15]Miller v. Miller, 301 Minn. 207, 219, 222 N.W.2d 71, 78 (1974).

[16]*Id.*

[17]23 Del. Ch. 255, 5 A.2d 503 (Sup. Ct. 1939).

> [which] 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 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.[18]

There have been three different standards enunciated by the courts at various times for making a determination of the existence of a corporate opportunity.[19] The "interest or expectancy"[20] test requires that the acquisition for which the officer or director is sought to be held liable be one in which the corporation has an existing legal interest or an expectancy arising from an existing right.[21] The "line of business"[22] test sets out the requirement that the complaining corporation be deprived of an opportunity having "the inherent aptitude of being integrated into the existing business of the company."[23] The third standard used by the courts to determine if a business opportunity is also a corporate one is the "fairness" test.[24] In utilizing the fairness test the courts apply ethical standards to the facts of the case to determine what outcome would be fair and equitable under the particular circumstances.[25]

The "interest or expectancy" test has been criticized as being vague[26] and lenient.[27] Moreover, some decisions purporting to apply the "line of business" test seem also to be couched in terms of fair-

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[18]*Id.* at 272-73, 5 A.2d at 511.

[19]Miller v. Miller, 301 Minn. 207, 221-22, 222 N.W.2d 71, 79 (1974); Comment, *The Corporate Opportunity Doctrine*, 18 S.W.L.J. 96, 97 (1964).

[20]Pioneer Oil & Gas Co. v. Anderson, 168 Miss. 334, 151 So. 2d 161 (1973).

[21]Early in the history of corporate opportunity the courts construed this requirement quite stringently. In *Lagarde v. Anniston Lime & Stone Co.*, the lime company owned a one-third interest in a limestone quarry, had contracted to purchase a one-third interest, and had been negotiating for the remaining one-third interest. Defendant directors purchased the outstanding interests personally. The Alabama court invoked a constructive trust against the one-third interest that was subject to the contract to purchase while finding no breach of fiduciary duty in the acquisition of the one-third interest that the company had merely been negotiating for. 126 Ala. 496, 28 So. 199 (1900).

[22]23 Del. Ch. 255, 5 A.2d 503 (Sup. Ct. 1939).

[23]Turner v. American Metal Co., 268 App. Div. 239, 252, 50 N.Y.S. 2d 800, 813 (App. Div. 1944).

[24]Durfee v. Durfee & Canning, Inc., 323 Mass. 187, 199, 80 N.E.2d 522, 529 (1948).

[25]Rosenblum v. Judson Eng'r Corp., 99 N.H. 267, 109 A.2d 558 (1954).

[26]26 FORDHAM L. REV. 528, 529 (1957). *But see* Burg v. Horn 380 F.2d 897, 899 (2d Cir. 1967) (U. S. District Court applying New York law in diversity case held the test of corporate opportunity in New York to be the interest or expectancy test).

[27]Rosenblum v. Judson Eng'r Corp., 99 N.H. 267, 272, 109 A.2d 558, 563 (1954). "The opinions in *Lagarde v. Anniston Lime & Stone Co.*, 126 Ala. 496, 28 So. 199 and *Pioneer Oil & Gas Co. v. Anderson*, 168 Miss. 334, 151 So. 161 relied on by the defendants, appear to us to adopt too lax a conception of the requirements of fiduciary loyalty." *Id.*

ness.[28] This leads to the conclusion that the corporate opportunity doctrine is an unsettled, oscillating doctrine deserving of clarification. The *Ellzey* court, recognizing the need for clarification of the law of corporate opportunity in Mississippi, looked to the law of other jurisdictions. The case of *Miller v. Miller*,[29] handed down by the Supreme Court of Minnesota in 1974, was relied on by the court as a guideline to modern views of the doctrine. Although the court in *Miller* found that the opportunity in controversy was noncorporate, it set out the test for determining the existence of a corporate opportunity, consisting of a combination of the "line of business" and "fairness" tests.[30]

The Miller test is a two-step process involving, first, a finding of whether the business opportunity under consideration is a corporate one. Several factors should be considered by the fact-finder in making the determination including, inter alia, the relationship between the opportunity and the business purpose of the corporation, the power of the corporation to embrace the opportunity, the adaptability of the opportunity to the business of the corporation, the possibility of harm to the corporation by allowing the opportunity to be acquired by others, and the insolvency or lack of financial ability of the corporation to grasp the opportunity.[31] As to the findings based on the consideration of these factors the Minnesota court stated:

> If the facts are undisputed that the business opportunity presented bears no logical or reasonable relation to the existing or prospective business activities of the corporation or that it lacks either the financial or fundamental practical or technical ability to pursue it, then such opportunity would have to be found to be noncorporate as a matter of law.[32]

The court further stated, however, if the evidence pertaining to these factors was conflicting, a question of fact would arise and the burden of proof rest on the complaining party. The court indicated that if this burden is met and a corporate opportunity exists, the officer or director charged with acquiring it would be required to establish that he acted with good faith and dealt fairly with the corporation in discharging his fiduciary duty, or he would be subjected to liability.[33] In the second step of the *Miller* process several significant factors were considered in making the ultimate determination of whether to impose liability. Among these factors were the amount of corporate control

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[28]*See* American Inv. Co. of Ill. v. Lichtenstein, 134 F. Supp. 857, 863 (D. Mo. 1955) (interpreted *Guth v. Loft* as applying the fairness test).

[29]301 Minn. 207, 222 N.W.2d 71 (1974).

[30]*Id.* at 224-25, 222 N.W.2d at 81.

[31]It appears that the *Miller* test encompasses all three tests under consideration here, as one factor listed by the court was whether the corporation "had an interest or an expectancy growing out of an existing contractual right" in the opportunity. *Id.*

[32]*Id.*

[33]*Id.*

vested in the officer, whether he disclosed the existence of the opportunity to the shareholders and board of directors, the extent to which the corporation was harmed or benefited, whether he received the opportunity as an individual or a representative of the corporation, and other facts or situations determinative of his good faith.[34]

"CORPORATE OPPORTUNITY" IN MISSISSIPPI

The doctrine of corporate opportunity was first considered in Mississippi in the case of *Pioneer Oil & Gas Co. v. Anderson*,[35] a 1933 case in which Anderson, secretary-treasurer and a member of the board of Pioneer, was accused by his corporation of fraudulently acquiring a personal interest in two oil and gas leases to the detriment of Pioneer. In affirming the trial court's dismissal of the complaint the Mississippi Supreme Court adopted the "interest or expectancy" test set out in the Alabama case of *Lagarde v. Anniston Lime & Stone Co.*,[36] and held that the corporation did not acquire an expectancy in the lease because of mere negotiations for its purchase.[37] In a later Mississippi decision, *Knox Glass Bottle Co. v. Underwood*,[38] the court dealt with a similar but different aspect of the rule requiring undivided loyalty to the corporation, that of conflicting interest in the form of "self-dealing."[39] *Knox* involved the leasing of trucks to the corporation by officers and directors. Though not strictly a case of corporate opportunity the Mississippi court applied reasoning similar to that later expounded in *Miller*[40]—that once a conflict between the interests of the corporation and that of an officer or director is shown, the burden shifts to the fiduciary to justify his actions in the equitable sense.[41]

ANALYSIS

Ellzey v. Fyr-Pruf represents the first time the Mississippi Supreme Court has squarely considered the doctrine of corporate opportunity in forty-six years.[42] In *Ellzey* the court was faced with applying a doc-

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[34]*Id.* at 226, 222 N.W.2d at 81-82. The court also injected the proverbial "reasonable man" into the deliberations when it added as a consideration, "whether he exercised the diligence, devotion, care and fairness toward the corporation which ordinarily prudent men would exercise under similar circumstances in like positions." *Id.*

[35]168 Miss. 334, 151 So. 161 (1933).

[36]126 Ala. 496, 28 So. 199 (1900).

[37]168 Miss. at 346, 151 So. at 164.

[38]228 Miss. 699, 89 So. 2d 799 (1956).

[39]H. HENN, LAW OF CORPORATIONS, § 238 (2d. ed. 1970).

[40]301 Minn. 207, 222 N.W.2d 71 (1974).

[41]228 Miss. at 741, 89 So. 2d at 814.

[42]*But see* American Empire Life Ins. Co. v. McAdory, 319 So. 2d 237 (Miss. 1975). The court considered a case involving the doctrine, but the questions presented dealt strictly with the exclusion of evidence and not the application of the corporate opportunity doctrine. *Id.*

trine that had undergone many changes since it was last considered by the Mississippi court. The court had to decide if it would adhere to the seemingly outdated "interest or expectancy" test as it did in *Pioneer*[43] or follow the lead of other jurisdictions, such as Minnesota, and adopt a less rigid and more equitable test. The court had to determine the requirements to be met by a complainant attempting to make out a prima facie case alleging the unlawful acquisition of a corporate opportunity by its officers and directors.[44]

In deciding what proof is required of a complainant in a corporate opportunity case the court adopted certain requirements of the first part of the *Miller* test. In *Ellzey* Chief Justice Patterson seemed to subdivide the first step of the *Miller* test into two parts when he stated:

> [T]he Minnesota Court seems to lay down a two-portion test for determining whether a complainant has made out a prima facie case of conflict of interest arising from the fact that the business opportunity in question is a corporate opportunity. The first asks whether the complainant has shown the business opportunity to be reasonably related to the existing or prospective business activities of the corporation. The second asks whether the plaintiff has shown the financial ability of the corporation to seize the opportunity.[45]

The Mississippi Supreme Court seemed to agree with the Minnesota court in that a fiduciary should not be held liable for participating in a business opportunity that "bears only a remote relationship to the operations of his corporation."[46] However, after this point Mississippi and Minnesota differ. The *Miller* test requires that the plaintiff bear the burden of showing the financial ability of a corporation to acquire the opportunity in question. The Mississippi court on the other hand seemed to adopt a median position between the holding in *Urban J. Alexander Co. v. Trinkle*[47] and that of *Irving Trust Co. v. Deutsch*.[48]

According to the holding in *Urban J. Alexander Co.* the financial inability of a solvent corporation to acquire the opportunity prevents a finding of liability.[49] In *Irving* the defendant directors were accused of personally purchasing stock that was sought by their corporation after having been directed to obtain sufficient

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[43]168 Miss. 334, 151 So. 161 (1933).

[44]376 So. 2d at 1332.

[45]*Id.* at 1334. The first part of Chief Justice Patterson's statement appears to be the "line of business" test utilized in *Guth*.

[46]*Id.* at 1333.

[47]311 Ky. 635, 224 S.W.2d 923 (1949).

[48]73 F.2d 121 (2d Cir. 1934), *cert. denied*, 294 U.S. 708 (1935).

[49]311 Ky. at 640-42, 224 S.W.2d at 926-27. *See, e.g.*, Hannerty v. Standard Theatre Co., 109 Mo. 297, 305, 19 S.W. 82, 84 (1892). *Accord* Schreiber v. Bryan, 396 A.2d 512, 519 (Del. Ch. 1978).

funds to allow the corporation to purchase the stock. In finding that the directors had breached their fiduciary duties the United States Court of Appeals for the Second Circuit placed no emphasis on the financial inability of the corporation to purchase the stock. Judge Swan, speaking for the Second Circuit, stated when commenting of the facts of *Irving*: "Nevertheless, they 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."[50]

The *Ellzey* opinion seemed to reject the *Irving* theory that short of insolvency, financial inability is irrelevant, labeling it as "too extreme"[51] while accepting it somewhat in principle in the statement of required proof for establishing a prima facie case of corporate opportunity.[52] Nevertheless, the court indicated that financial ability should play some part in the determination of whether a business opportunity is corporate when it stated, "while financial ability is not irrelevant, in our opinion, it is certainly not determinative, nor is it invariably an essential element of complainant's prima facie case of usurpation of a corporate opportunity."[53]

Two factors were significant in raising the question of financial ability of the corporation in *Ellzey*. Both concerned items which were carried as assets on Fyr-Pruf's books. The first concerned whether $40,000 worth of Fyr-Pruf stock carried on a March 31, 1971 financial statement as "RECEIVABLE FROM STOCK HOLDERS" was properly reflected as an asset, since the stock had never been paid for. The evidence on this point conflicted and the chancellor, after placing the burden of proof of all issues on the complainants, concluded that this entry in Fyr-Pruf's books was improperly reflected as an asset.[54] The second item that was shown as an asset on the financial statement was certain equipment that Fyr-Pruf possessed subject to outstanding liens. The supreme court had to consider whether the value of this equip-

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[50]73 F.2d at 124. *See, e.g.*, Daloisio v. Peninsula Land Co., 43 N.J. Super. 79, 92-93, 127 A.2d 885, 892 (1956). *But see* 39 KY. L. J. 229, 233 (1950-51). The author criticizes this rule of "uncompromising rigidity" and says the defense of financial inability should be allowed when clearly established as it is the far more practicable and equitable rule. *Id.*

[51]376 So. 2d at 1334.

[52]*Id.* at 1335. "First it must be shown by a preponderance of the evidence that under all the facts and circumstances the business opportunity is logically related to the corporation's existing or prospective activities. Second, the complainant must prove that the corporation was either (a) *not insolvent in the balance sheet sense at the relevant times or* (b) financially disabled as a result of non-payment of a debt or breach of a fiduciary duty by one or more of the defendants." *Id.* (emphasis added). In regard to (b), see Daloisio v. Peninsula Land Co., 43 N.J. Super. 79, 92-93, 127 A.2d 885, 892 (1956).

[53]376 So. 2d at 1335. *See* Morad v. Coupounas, 361 So. 2d 6 (Ala. 1978) (usurpation of corporate opportunity found, although some evidence indicated financial inability).

[54]376 So. 2d at 1332.

ment and the effect of the legal title on its status as an asset were properly considered by the chancellor in the court below. The court found that the chancellor had improperly placed the burden of proof as to the accounting for the $40,000 item on the complainant-appellant.[55] Concerning the equipment, the supreme court found that it "represented a net asset of Fyr-Pruf to the extent its value exceeded any indebtedness secured by it"[56] and that who held the legal title was not an important consideration.[57]

Once a complainant sustains his burden of proving that a business opportunity is also a corporate one the burden shifts to the defendant to show that he has not violated his fiduciary duty of good faith and fair dealings.[58] This is in line with the principles stated in the second step of the *Miller*[59] process and the holding in *Knox Glass Bottle Co. v. Underwood*.[60] While *Knox* involved "self-dealing"[61] and not corporate opportunity, the court felt that since both principles involved conflicting interests between directors and their corporations, the same standards should apply to some aspects of the determination of either. In both instances, the conduct of the directors should be viewed as a possible equitable counterbalance which could prevent the imposition of liability.[62] However, good faith alone is not sufficient to absolve the fiduciary of liability.

The court placed little faith in the chancellor's finding that there was a "business competition doctrine"[63] exception to the corporate opportunity doctrine that allows competition so long as the directors act in good faith, and if the rival business is not actually detrimental to the corporation.[64] Quoting another source, the majority stated, "It is difficult to imagine how directors may enter into an 'independent business,' at least as owners and managers of the business, after acceptance of their membership on the board and during their service as directors

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[55]*Id.* at 1331.

[56]*Id. See* MISS. CODE ANN. § 75-9-504(2) (Supp. 1980). "[I]f the security interest secures an indebtedness, the secured party must account to the debtor for any surplus, and, unless otherwise agreed, the debtor is liable for any deficiency." *Id.*

[57]MISS. CODE ANN. § 75-9-202 (1972) provides that "each provision of this chapter with regard to rights, obligations and remedies applies whether title to collateral is in the secured party or in the debtor."

[58]376 So. 2d at 1335.

[59]301 Minn. at 226, 222 N.W.2d at 81.

[60]228 Miss. 699, 89 So. 2d 799 (1956).

[61]There was a "self-dealing" aspect of *Ellzey* in that one of the defendants sold certain raw materials to Fyr-Pruf at a profit of 1¢ per pound. The court found that the chancellor had not erred in finding that the transactions were mutually advantageous and had been fully disclosed to and ratified by Fyr-Pruf. 376 So. 2d at 1332.

[62]*Id.* at 1332, 1335.

[63]*See The Corporate Opportunity Doctrine* 18 S.W.L.J. 96, 101 (1964). *See also* Torrea Land & Cattle Co. v. Linsenmeyer, 100 Ariz. 107, 121, 412 P.2d 47, 57 (1966).

[64]376 So. 2d at 1334.

in competition with their corporation without acting in bad faith."[65] Thus the court properly rejected the idea that such an exception exists.[66]

CONCLUSION

It seems that Mississippi has come to the forefront in the area of corporate opportunity. By shifting from the rigid "interest" requirements of *Pioneer*[67] to the notions of fundamental fairness outlined in *Ellzey* the court seems to follow the trend of decisions in recent decades in protecting the minority stockholder from the whims of an unscrupulous director. This appears to stem from an underlying judicial recognition that directors should be under an affirmative duty to protect and advance the interests of the corporation and, therefore, those of its stockholders.[68] Further evidence of this judicial recognition is the court's modification of the *Miller* test as to financial ability of the corporation to take advantage of an opportunity. By allowing a corporate opportunity to be found even where financial inability may exist the court lightened the burden of a complaining stockholder while making the task of a defendant director to absolve himself of wrongdoing a bit more onerous. While *Ellzey* should serve as a guiding light for future considerations of corporate opportunity for all jurisdictions, one may only guess if it represents the height of judicial relaxation of the requirements for a prima facie case.[69]

Lonnie D. Bailey

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[65]*Id.* (quoting *Lattin*, THE LAW OF CORPORATIONS, § 79 at 287 (2d ed. 1971)).

[66]376 So. 2d at 1334. The court found that the Mississippi Constitution would prevent the application of such a doctrine without consent of a majority of the stockholders. MISS. CONST. art. 7, § 194.

[67]168 Miss. 334, 151 So. 161 (1933). The court distinguished *Pioneer* but did not expressly overrule it. Apparently it felt that the opportunity presented to Pioneer was not in the line of business of the company, making it noncorporate under the *Ellzey* test. 376 So. 2d at 1336.

[68]18 S.W.L.J., *supra* note 63 at 115.

[69]At the time of this writing *Ellzey v. Fyr-Pruf, Inc.* was on remand for a determination of whether the defendants had discharged their fiduciary obligations to Fyr-Pruf. 376 So. 2d at 1336.

The author feels, however, that the court intended to settle the question of corporate opportunity in Mississippi and that the outcome of a new trial, if one is had, will have no bearing on the principles stated in the opinion and considered in this note.