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## Keeping Current: Fiduciary Duties

### Renouncing the Corporate Opportunity Doctrine

By [Stuart L. Pachman](#)

New Jersey amended its Business Corporation Act on March 1, 2011, to grant New Jersey corporations the power to renounce the corporate opportunity doctrine. In 2000, the General Corporation Law of the State of Delaware had been amended to the same effect. Renunciation may be accomplished either by a provision in the certificate of incorporation (charter) or simply by action of the corporation's board. Why has this power been afforded? Should it be available to all corporations, or only to some or not at all? And what issues might be inherent in its exercise?

The corporate opportunity doctrine embodies one of the fiduciary duties owed by directors and officers (and sometimes shareholders) to their corporation. It is a duty of disclosure under the concept of duty of loyalty. Although the doctrine itself requires a fact intensive analysis, the theory behind it is simple. The corporation can act only through its human agents. When an opportunity within the corporation's line of business, or its reasonable expansion or expectancy, comes to an agent's attention, the agent must afford the corporation first crack at it. For example, if a corporation is in the business of buying and selling real estate, and its president (or a director or perhaps a major shareholder) learns of a tract of land that can be bought for a song and flipped at a profit, it is incumbent on the agent to disclose to the corporation the possibility of cashing in on this fantastic opportunity. If the corporation declines, perhaps

because the transaction may be viewed by its board as more risky than fantastic, the agent may then seize it personally for better or worse.

What prompted New Jersey and Delaware to amend their corporate statutes to authorize the renunciation of this protective doctrine? The statement annexed to the New Jersey bill describes the doctrine "as a disincentive . . . to attract and retain businesspersons as board members." It also suggests the doctrine is subject to "uncertainty" as to what is to be considered as an "opportunity." As to the latter, there is no doubt. The doctrine's applicability, other than in extreme cases, is often open to question.

As a practical matter, renunciation offers a method for corporations in need of financing to satisfy the requirement imposed by potential sources that wish to place a representative on the board. The doctrine might also be renounced when an established strategic entity looks to acquire an interest in a fledgling "New Corp" or in a vendor, either of which may be seeking fresh capital or a relationship. Renouncing the doctrine avoids the conflict and substantially reduces the risk attendant upon not offering first to the corporation an opportunity that may be desired by the financing source or the outside investor.

Renunciation may also prove useful in the small entity whose principals prefer operating in the corporate form rather than as a limited liability company. Thus if

Mary, Mo, and Jack as the three shareholders of MMJ, Inc., each have individual aspirations to pursue other endeavors, they might wish to renounce the corporate opportunity doctrine. This would be consistent with the principle of freedom of contract inherent in limited liability company law where operating agreements often provide that members may pursue individual opportunities without first offering them to the LLC or to each other.

When a corporation is considering renouncing the doctrine, counsel should air its pros and cons with the board and, where reasonable, with the shareholders as well because, as with all things legal, there is the potential for abuse. We might envision a shareholder-director in a closely held corporation who fails to comprehend the consequences of a renunciation resolution. In a corporation where shares are more widely held, directors could adopt a renouncing resolution without the shareholder body being aware of it. The directors might be acting in the corporation's best interest to make the company, as it grows, more attractive to knowledgeable businesspersons to sit on the board, but if the resolution were adopted after, rather than before an opportunity arose, the resolution could be questioned.

Drafting the resolution or the provision in a new certificate of incorporation or its amendment requires thought. Resolving to "renounce the corporate opportunity doctrine" may be too simple. Both the New Jersey and Delaware statutes speak

of “specified business opportunities or specified classes or categories of business opportunities.” Consideration also should be given to whether renunciation is to apply only to directors or to extend to officers or officers and shareholders.

Unanswered is how renunciation will affect creditors. Common law teaches that the corporate opportunity doctrine does not apply to a solvent corporation where the opportunity is taken by the sole shareholder or by all shareholders because consent or ratification binds them and their entity. If an opportunity knocks at a time that the corporation is insolvent and fiduciary duties are owed to creditors, would a preexisting renunciation bind them? Would a provision in the charter, rather than a director’s resolution, be more binding on creditors? It will be interesting to see what case law develops to answer these questions, and whether more jurisdictions will add to the powers of their corporations the ability to renounce the corporate opportunity doctrine.

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