WHEN HALF RIGHT IS ALL WRONG: ILLINOIS ABOLISHES THE CORPORATE OPPORTUNITY DOCTRINE

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INTRODUCTION

It is not every day the Illinois Supreme Court overturns longstanding law in any field, much less a field of central importance like agency law. It is even rarer for the court to do so without saying so. Yet that's exactly what the Illinois Supreme Court did in *Indeck Energy Services, Inc. v. DePodesta*,[1] a four-to-three opinion holding that lack of "proximate cause" bars relief when a corporate fiduciary begins his opportunity usurpation before quitting but completes it after. If this decision stands, any faithless fiduciary with the slightest sense will delay closing the diverted deal until a day after he quits and then invoke *Indeck* as a complete bar to meaningful relief.

This has never been the law in Illinois, and it should not be the law now. I doubt there is any more fundamental rule in Anglo-American jurisprudence than a "wrongdoer should not profit from his wrong."[2] The majority opinion in *Indeck* cannot be squared with this ancient precept,[3] nor can it be reconciled with previous Illinois Supreme Court corporate opportunity decisions, not least *Kerrigan v. Unity Savings Assoc.*,[4] *Vendo Co. v. Stoner*,[5] and *Mullaney, Wells & Co. v. Savage*.[6] Collectively these cases hold that the "prophylactic purpose" of the

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1. 2021 IL 125733, ___ N.E.3d ___ (July 29, 2021).
2. *See*, *e.g*., 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.").
3. Keech v. Sandford, 25 Eng. Rep. 223 (1726) ("[I]f a trustee, on the refusal to renew, might have a lease for himself, few estates would be renewed to *cestui que use*."); Leonard I. Rotman, *Fiduciary Law's "Holy Grail": Reconciling Theory and Practice in Fiduciary Jurisprudence*, 91 B.U. L. REV. 921, 922, 942-45 (2011) (discussing the importance of *Keech* as one of the foundational cases establishing the fiduciary duty of loyalty under English law).
4. 58 Ill.2d 20, 317 N.E.2d 39 (1974).
5. 58 Ill.2d 289, 321 N.E.2d 1 (1974).
6. 78 Ill.2d 534, 402 N.E.2d 574 (1980).

Illinois corporate opportunity doctrine requires a fiduciary to disclose and tender any opportunity within or reasonably incident to his principal's "line of business" and to obtain his principal's consent before seizing it for himself, as the three *Indeck* dissenters rightly recognized.[7] The remedies for such wrongdoing are equally established under these towering precedents: the principal is entitled to its loss even if the fiduciary has obtained no gain,[8] or the principal is entitled to the fiduciary's gain even if the principal has suffered no loss.[9] And these aren't the only remedies–constructive trusts, compensation forfeiture, injunctions, accountings, prime rate prejudgment interest and punitive damages are also available and routinely awarded under Illinois law.[10]

The relief at issue in *Indeck* was not mysterious. Indeck wanted and was entitled to the defendants' gains under *Kerrigan* and *Mullaney*. As Professor Palmer has explained:

> When a fiduciary profits through breach of fiduciary obligation, he will be held accountable to his principal without regard to whether or not the profit is at the expense of the principal. The principle is applied most frequently when the fiduciary violates his duty of loyalty to his principal, a duty based upon the avoidance of a conflict of interest. The retention of the benefit is clearly unjust, there is no one else who has a valid claim, and the only feasible means of preventing the unjust enrichment is to grant restitution in favor of the principal. The duties of a fiduciary are among the most important known to the law, it is indispensable that there be some sanction for their breach, and often the only effective sanction is restitution in favor of the principal of gains realized by the fiduciary. Sometimes a breach causes loss to the principal but frequently it does not, and in these circumstances there is no satisfactory remedy except restitution.[11]

So how did the *Indeck* majority get this wrong? As I read the opinion, the majority reasoned backward from "no remedy" to "no proximate cause," or more

7. Indeck Energy Servs., Inc. v. DePodesta,, 2021 IL 125733, at ¶77 (Overstreet, J., dissenting) ("The tender/disclose/consent requirements of the corporate opportunity doctrine are long-standing principles that should not be circumvented.").

8. *See Vendo*, 58 Ill. 2d at 305–06, 321 N.E.2d at 10:

> Plaintiff was not, as defendants urge, limited to the recovery of the profits which accrued to Lektro-Vend. (See Restatement (Second) of Agency secs. 399, 401, 407 (1958).) The limitation on a plaintiff's recovery proposed by defendants would mean that a fiduciary could violate his duty without incurring any risk. For if his misconduct were discovered the most that he could lose would be the profit gained from his illegal venture; the law would have operated only to restore him to the same position he would have been in had he faithfully performed his duties.

9. *See Kerrigan*, 58 Ill.2d at 31–32, 317 N.E.2d at 45 (holding that defendants were required to disgorge their gains and remanding to the trial court for a determination of the amount); *Mullaney*, 78 Ill. 2d at 552, 402 N.E.2d at 583 (holding that plaintiff was entitled to the defendants' gains from the diverted opportunity, even if the defendants lost that money through subsequent bad investments). *Accord*, City of Chicago *ex rel*. Cohen v. Keane, 64 Ill. 2d 559, 567–68, 357 N.E.2d 452, 456 (1976) (explicitly rejecting the argument that loss must be shown before a conflict of interest gives rise to relief against a fiduciary: "As the cases already discussed make clear, however, such a [loss] limitation cannot be imported into either the statute or the common law rule. To do so would plainly rob them of their effectiveness.").

10. *See* William Lynch Schaller, *Corporate Opportunities and Corporate Competition in Illinois: A Comparative Discussion of Fiduciary Duties*, 46, J. MARSHALL L. REV. 1, 12–13 (2012) (collecting Illinois cases).

11. 1 GEORGE E. PALMER, THE LAW OF RESTITUTION §2.11, at 141 (1978).

precisely, "no injury," as the court put it.[12] The Supreme Court majority apparently could not conceive of how unjust enrichment would work on the facts presented,[13] as the majority stressed Indeck's argument that a restitutionary remedy might extend "in perpetuity."[14] But *Kerrigan* and *Mullaney* point to precisely such an equitable remedy, regardless of duration; affirmance of restitution as relief–with a remand for a trial court determination of the amount, as in *Kerrigan* –was therefore mandated. The *Indeck* majority's alternative remedy criticism–that there was no *res* justifying a constructive trust[15]–was equally erroneous, as *Mullaney* expressly rejected that argument as a defense to monetary restitution,[16] which was the main relief Indeck pursued on appeal.

Explicitly overruling *Kerrigan* and *Mullaney* was evidently a step too far, so the majority chose a different route to avoid them: no "proximate cause," cast as "no injury," on the ground that the defendants signed the diverted contract a few days after they quit as employees of Indeck.[17] This was contrary to the court's own precedent in *Mullaney*: defendant Savage quit his job with Mullaney and exercised the diverted Blossman options the next day, yet he was still found liable to Mullaney, his principal, and was still ordered to disgorge his wrongful gains attributable to the Blossman options. The *Indeck* majority's "no proximate cause" holding was also wrong for larger and more conceptual reasons, as I've explained elsewhere:

> As these teachings suggest, proximate cause can exist as a matter of law, and I contend it is conclusively demonstrated in all cases in which a

12. *Indeck*, 2021 IL 125733, ¶ 51 ("The appellate court reasoned that allowing plaintiff's claim for usurpation of a corporate opportunity to go forward — even in the absence of any evidence that defendants had taken or seized a corporate opportunity — was necessary to serve the prophylactic purposes of fiduciary rules. 2019 IL App (2d) 190043. The problem with this reasoning, however, is that it is contrary to the fundamental principle that a plaintiff must establish an injury to recover for a breach of fiduciary duty.") (citing Lawlor v. N. Am. Corp., 2012 IL 112530, ¶ 69 (2012), and Neade v. Portes, 193 Ill. 2d 433, 444, 739 N.E.2d 496, 502 (2000).).

13. *See, e.g.*, Liu v. SEC, 140 S. Ct. 1936, 1943 (2020):

> No matter the label, this "profit-based measure of unjust enrichment," Restatement (Third) § 51, Comment a, at 204, reflected a foundational principle: "[I]t would be inequitable that [a wrongdoer] should make a profit out of his own wrong," *Root v. Railway Co*., 105 U.S. 189, 207, 26 L.Ed. 975 (1882). At the same time courts recognized that the wrongdoer should not profit "by his own wrong," they also recognized the countervailing equitable principle that the wrongdoer should not be punished by "pay[ing] more than a fair compensation to the person wronged." *Tilghman v. Proctor*, 125 U.S. 136, 145-146, 8 S.Ct. 894, 31 L.Ed. 664 (1888).

14. *Indeck*, 2021 IL 125733, at ¶ 36.

15. *Indeck*, 2021 IL 125733, at ¶¶ 60–61.

16. *See* Mullaney, Wells & Co. v. Savage., 78 Ill. 2d 534, 552, 402 N.E.2d 574, 583 (1974):

> We also question whether a determination of the plaintiff's right to restitution required a tracing of trust property into its product, as the appellate court assumed. No right is asserted here to the shares of American Hydratane stock which Tenneco purchased, but only to a sum of money received by one of the defendants. The plaintiff was entitled to recover a money judgment for the value of the Blossman stock, and it was not required to pursue the trust property. (BOGERT, TRUSTS AND TRUSTEES § 867 (2d ed. 1962).)

17. *Indeck*, 2021, 125733, at ¶¶ 57, 59:

> "[T]he trial court expressly found that defendants' breaches ended upon their resignations from Indeck. *** As the trial court noted, plaintiff offered no caselaw establishing that disgorgement is available after a breach of fiduciary duty has ended. If the breach ended, which the trial court so found, defendants' management fees and profits would not be tied to that breach. As such, they were not gains from their wrongdoing and, therefore, not recoverable under disgorgement principles.

> fiduciary fails to tender and disclose in compliance with *Kerrigan*, and certainly in all cases in which a fiduciary successfully diverts an opportunity to himself. In such cases there is nothing remote at all about causation; in fact, it could hardly be more direct and immediate. Insufficient fiduciary disclosure and tender under the *Kerrigan* "line of business" test always cause a principal to lose its "opportunity" to negotiate fully and fairly with the third party, which is precisely why "proximate cause" was not even mentioned in *Vendo*. The same result is even more obvious under the *Kerrigan* and *Graham* "asset misappropriation" test: the fiduciary is equitably estopped from denying that the corporation could have seized the opportunity, thereby mooting any proximate cause defense to the effect that the third party would have turned down the corporation. Viewed another way, on either of these incontestable fact patterns, proximate cause presents a question of law and therefore no trial is needed, as the fiduciary necessarily produces his principal's injuries– in the form of loss of opportunity, rather than loss of the ultimate deal – under the *Kerrigan* rule.[18]

There are a lot of moving parts here, obviously, and these highlights do not do justice to the problems plaguing Illinois corporate opportunity law in general and the *Indeck* opinion in particular. To clear up this confusion, in Part I below I briefly discuss the history of Illinois corporate opportunity law and then give extended attention to *Kerrigan*, *Vendo* and *Mullaney*. I turn in Part II to a separate source of confusion, the difference between the fiduciary duty of care and the fiduciary duty of loyalty and why this difference matters, greatly, on the question of proximate cause under Illinois corporate opportunity law. I then situate *Indeck* within the Illinois corporate opportunity universe, in Part III, both where it should have landed and where it ended up. As should be apparent, my conclusion in Part IV is that *Indeck* constitutes bad precedent and bad policy.

I. ILLINOIS CORPORATE OPPORTUNITIES: A LITTLE HISTORY AND A LOT OF LAW

Agent conflicts of interest and agent disloyalty have been with us since time immemorial. The Bible lectures us on these old sins, as do opinions of the Illinois Supreme Court found in its earliest Official Reports.[19] The corporate opportunity doctrine is merely a specific application of the general rule prohibiting agent conflicts of interest and agent disloyalty.

As I've explained in an earlier paper, initial Illinois iterations of such fiduciary misconduct implicated all kinds of people and all kinds of deals, including

18. William Lynch Schaller, *Corporate Opportunities and the Third Party "Refusal to Deal" Defense: Policy and Practice Lessons from Illinois*, 47 J. MARSHALL L. REV. 1, 18 (2013) (footnotes omitted).

19. *See*, *e.g.*, Dickson v. People ex rel. Brown, 17 Ill. 191, 193 (1855) (quoting the Bible's famous "no man can serve two masters" injunction); Thorp v. McCullum, 6 Ill. 614, 626 (1844) ("Between two conflicting interests, it is easy to foresee, and all experience has shown, whose interests will be neglected and sacrificed.").

some very important people and some very important deals.[20] The Illinois Supreme Court settled the critical question of whether employees could be liable for fiduciary transgressions early on, holding firmly in 1883, in *Davis v. Hamlin*,[21] that employees, as agents, are fiduciaries and hence cannot compete with their principal for deals (i.e., a lease renewal) during their agency, an unyielding rule it has repeatedly invoked for over a century following *Hamlin*.[22] All that really remained was for the Illinois Supreme Court to definitively establish the rule of decision for such cases, which over the years it had variously framed with vague formulations like "equity," "interest or expectancy," or "asset misappropriation."[23]

Kerrigan ended the uncertainty in 1974 with its absolute and unambiguous "line of business" test: when a business opportunity arises within or reasonably incident to the principal's "present or prospective operations,"[24] the agent must disclose and tender the opportunity.[25] Failure to do either (much less both) forecloses the agent from seizing the opportunity for himself,[26] a strict result fully justified by the "prophylactic purpose" of the rule.[27] Indeed, if the principal's assets are used for the diversion, the *Kerrigan* court held, the result is automatic even if the opportunity falls outside the principal's line of business.[28] Deterrence is the policy, pure and simple, as it has long been in all areas of Illinois fiduciary loyalty law.[29]

20. *See generally* William Lynch Schaller, *The Origin and Evolution of the Third Party "Refusal to Deal" Defense in Illinois Corporate Opportunity Cases*, 46 J. MARSHALL L. REV. 937, 940–43 (2013) (noting, for example, Abraham Lincoln's participation as counsel in Casey v. Casey, 14 Ill. 112 (1852)).

21. 108 Ill. 39 (1883).

22. *See, e.g.*, Lawlor v. N. Am. Corp., 2012 IL 112530, ¶ 69, 983 N.E.3d 414, 433 (2012) ("Employees as well as officers and directors owe a fiduciary duty of loyalty to their employer."); *Mullaney*, 78 Ill. 2d at 546, 402 N.E.2d at 580 (holding that employee Savage, as Mullaney's agent for the diverted Blossman options transaction, was a fiduciary, even though he was not an officer or director of Mullaney).

23. *See* Schaller, *Origin and Evolution*, *supra* note 20, at 943–52 (canvassing Illinois Supreme Court corporate opportunity decisions before *Kerrigan*).

24. Kerrigan v. Unity Savings Assoc., 58 Ill.2d 20, 28, 317 N.E.2d 39, 43 (1974).

25. *Kerrigan*, 58 Ill.2d at 28, 317 N.E.2d at 43.

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

27. *Kerrigan*, 58 Ill.2d at 28, 317 N.E.2d at 44.

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

> Whether the funneling of prospective customers to Plaza is regarded as an appropriation of an asset of Unity, denominated as good will, or whether it is regarded as an employment of Unity's facilities without compensation to it, the result is the same: The defendants were actively exploiting their position as directors of Unity for their personal benefit.

Accord, Graham v. Mimms, 111 Ill. App. 3d 751, 763, 444 N.E.2d 549, 557 (1st Dist. 1982):

> Nevertheless, the "core principle" of the corporate opportunity doctrine is that a corporation's fiduciary will not be permitted to usurp a business opportunity which was developed through the use of corporate assets. (94 HARV. L. REV. 997, 1006 (1981).) "The principle rests on the same considerations that forbid appropriations of the assets themselves, but adds the remedy of tracing the misappropriated assets into their product — a conventional remedy in the law of trusts." (94 HARV. L. REV. 997, 1007.) Therefore, when a corporation's fiduciary uses corporate assets to develop a business opportunity, the fiduciary is estopped from denying that the resulting opportunity belongs to the corporation whose assets were misappropriated, even if it was not feasible for the corporation to pursue the opportunity or it had no expectancy in the project.

29. *See*, *e.g.*, Winger v. Chicago City Bank & Trust Co., 394 Ill. 94, 116, 67 N.E.2d 265, 279 (1946) (quoting Higgins v. Lansingh, 154 Ill. 301, 366, 40 N.E. 362, 380–81 (1895)):

And the court meant what it said. Speaking through Justice Walter Schaefer, the court in *Kerrigan* found the fiduciaries were liable, on the pleadings, given their admission that they had used their principal Unity Savings' building and customer base to build a mortgage insurance business Unity Savings itself could have entered into.[30] The court therefore remanded the case with instructions to the trial court "to ascertain the amounts to which the plaintiff is entitled and to determine what other relief should be granted."[31]

Just as tough was the court's decision 10 days later in *Vendo*, which Justice Schaefer also authored. Greatly simplified, Vendo bought Harry Stoner's vending company and Stoner stayed on as Vendo's president. For reasons real or imagined, Stoner became dissatisfied and began secretly assisting Lektro-Vend, a rival vending firm that had been established by former employees of Stoner's old vending company. This left Stoner "with a foot in each camp,"[32] as the Illinois Supreme Court pointedly put it, a massive conflict of interest that became acute when Vendo asked Stoner to help it purchase Lektro-Vend. Such disloyalty demanded consequences under *Kerrigan*, and consequences there were – Stoner was not only forced to forfeit over $170,000 in salary Vendo had paid him during the three-year period of his disloyalty; he was also hit with a monetary award of over $7.3 million, representing Vendo's losses, even though Stoner argued he had obtained no gain – a result completely consistent with the Restatement (Second) of Agency's disloyalty remedy provisions.[33] In case the message didn't get through, the *Vendo* court awarded all of this relief on its own, without remand, on the authority of *Kerrigan*, even though the *Vendo* case had not been tried on a breach of fiduciary theory.[34] Needless to say, Stoner felt the "sting of disability"[35]–he sedulously but unsuccessfully fought the giant judgement against him in litigation that spanned 17 years and that ultimately outlived him.[36]

Mullaney, an opinion for the court by Justice Daniel Ward in 1980, completed this trilogy. Defendant Barnard Savage, who was an employee but not an officer of director of investment bank Mullaney, came upon the Blossman Hydratane Gas investment opportunity while still employed by Mullaney. When Blossman balked at Savage's initial financing proposal on behalf of Mullaney, Savage secretly restructured it and presented it to Blossman for Savage's own benefit. The Illinois Supreme Court was completely unimpressed with the notion that once the initial proposal faltered, Savage could "begin to act on his own"

Nothing less than incapacity is able to shut the door to temptation, where the danger is imminent and the security against discovery is great. The wise policy of the law has therefore put the sting of disability into the temptation, as a defensive weapon against the strength of the danger which lies in the situation.

30. *Kerrigan*, 58 Ill.2d at 32, 317 N.E.2d at 45 ("[I]n the view we take of this case, the question of the defendants' liability is established on the basis of the pleadings and no trial is required.")

31. *Kerrigan*, 58 Ill.2d at 31–32, 317 N.E.2d at 45.

32. Vendo Co. v. Stoner, 58 Ill. 2d 289, 305, 321 N.E.2d 1, 10 (1974).

33. *See supra*, note 8.

34. *Vendo*, 58 Ill.2d at 314, 321 N.E.2d at 15.

35. Winger v. Chicago City Bank & Trust Co., 394 Ill. 94, 116, 67 N.E.2d 265, 279 (1946).

36. *See* William Lynch Schaller, *Disloyalty and Distrust: The Eroding Fiduciary Duties of Illinois Employees*, 3 DEPAUL BUS. L.J. 1, 11–12 (1991) (detailing the *Vendo* litigation's extraordinary history).

with respect to his Blossman option deal,[37] which had begun while Savage was a Mullaney employee but was not completed until Savage exercised his Blossman stock options the day after he hurriedly quit Mullaney.[38] Citing *Kerrigan* and *Vendo*, the Illinois Supreme Court easily found the corporate opportunity doctrine had been triggered, adding for good measure two straightforward agency law principles:

> Under standard agency doctrine Savage [was] obligated to act solely for the benefit of the plaintiff in all matters connected with his agency, and to refrain from competing with the plaintiff.
>
> ***
>
> 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.[39]

The court in *Mullaney* went on to reject Savage's "no *res* / no constructive trust" argument, holding that it didn't matter whether Savage had lost his Blossman option profits as a result of a later investment; monetary restitution was still owed and ordered to the tune of $800,000.[40]

Justice Schaefer and Justice Ward were arguably the two greatest Justices to sit on the Illinois Supreme Court during the twentieth century. Their opinions in *Kerrigan*, *Vendo*, and *Mullaney* are nothing if not thoughtful and thorough; each is, in truth, a *tour de force*. That they still stand today as bulwarks against the ultimate economic concern of any market system – "agency cost," in the form of agents cheating their principals[41] – is a testament to their significance.

II. WHITHER "PROXIMATE CAUSE"?

Absent from these three striking corporate opportunity opinions is any mention of "proximate cause." This was no oversight on the Illinois Supreme Court's part. The configuration of a corporate opportunity claim under these precedents always results in "injury" when the principal is deprived of the unfettered chance to pursue a deal within or reasonably incident to its line of business,

37. Mullaney, Wells & Co. v. Savage., 78 Ill. 2d 534, 548–49, 402 N.E.2d 574, 581 (1974).

38. *Mullaney*, 78 Ill.2d at 553, 402 N.E.2d at 583.

39. *Mullaney*, 78 Ill.2d at 546, 549, 402 N.E.2d at 582.

40. *Mullaney*, 78 Ill. 2d at 552, 553, 402 N.E.2d at 583:

> The plaintiff was entitled to recover a money judgment for the value of the Blossman stock, and it was not required to pursue the trust property. *** The defendants' duty to make restitution could not be diminished by their subsequent loss of that property through forfeiture, any more than it would be if the value of the Blossman shares had been dissipated in some imprudent investment. We hold accordingly that the plaintiff was entitled to judgment in its favor for $800,000.

Accord, People *ex rel*. Daley v. Warren Motors, 114 Ill.2d 305, 317, 500 N.E.2d 22, 27 (1986) (rejecting argument "that there must be a definable and traceable *res* before a constructive trust may be imposed"); City of Chicago *ex rel*. Cohen v. Keane, 64 Ill. 2d 559, 567, 357 N.E.2d 452, 456 (1976) (ordering restitution for breach of fiduciary duty: "It would be a dangerous precedent to lay down as law that unless some affirmative fraud or loss can be shown, the agent may hold on to any secret benefit he may be able to make out of his agency.") (quoting United States v. Carter, 217 U.S. 286, 306 (1910)).

41. *See* Richard A. Epstein, *In Defense of the Contract at Will*, 51 U. CHI. L. REV. 947, 959–62 (1984) (analyzing the economic threat agency costs pose to firms).

much less when a deal is secretly sealed through use of the principal's assets. This is so, as I stressed above in my *Policy and Practice Lessons from Illinois* article,[42] because the disclosure/tender/consent paradigm arises once the "line of business" (or asset misappropriation) test has been satisfied, and no fiduciary since *Kerrigan* has overcome the disclosure/tender/consent hurdle. The fact of injury, then, is always present, even if damages (the principal's loss, as in *Vendo*) or disgorgement (the fiduciary's gain, as in *Kerrigan* and *Mullaney*) are uncertain or perhaps nonexistent.[43] Indeed, this is precisely why compensation forfeiture is routine and required as a matter of policy (as in *Vendo*), regardless of whether other relief is warranted by the evidence.

The temptation to turn to "no proximate cause" or "no injury" notions in these cases stems from two sources, the tendency to treat fiduciary claims as "torts" and the absence of an Illinois Supreme Court decision definitively explaining the difference between the fiduciary duty of due care and the fiduciary duty of loyalty, common errors I explored at length in a 2015 article.[44] Regarding the first, to the casual observer, fiduciary duty law is often assumed to be a "tort" when, in fact, it is an entirely separate and equally foundational branch of law in Illinois, as the Illinois Supreme Court correctly made clear in both *Kinzer v. City of Chicago*[45] and *Armstrong v. Guigler*.[46] The question in both cases concerned the fiduciary duty of loyalty, and the court in both cases properly characterized such claims as "controlled by the substantive laws of agency, contract and equity"[47] rather than the substantive law of torts. Thus, importing tort conceptions of "proximate cause" into fiduciary law is a fraught approach as a matter of first principle.

Compounding this complexity is the distinction between the fiduciary duty of due care and the fiduciary duty of loyalty. Although this variance is commonly emphasized in Delaware cases, I know of only one appellate decision that expressly compares and contrasts these separate fiduciary duties under Illinois law, *Ball v. Kotter*,[48] authored by the great Judge Bill Bauer. Fiduciary due care cases essentially present tort claims but with heightened levels of inquiry and skill required of the defendants, as befit fiduciaries like lawyers, doctors or directors. It is in these tort-like cases that the Illinois Supreme Court has offered tort-like formulations for fiduciary duty due care claims, including the tort element of

42. *See* Schaller, *Policy and Practice Lessons from Illinois*, *supra* note 18 and accompanying text.

43. This was the very holding of the United States Supreme Court in its famous damages decision on lost profits in Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 114, n. 9 (1969) (emphasis in original) ("Zenith's burden of proving the fact of damage under § 4 of the Clayton Act is satisfied by its proof of *some* damage flowing from the unlawful conspiracy; inquiry beyond this minimum point goes only to the amount and not the fact of damage."), a case the Illinois Supreme Court prominently and properly cited in its lost profits damages discussion in *Vendo*. Vendo Co. v. Stoner, 58 Ill. 2d 289, 311, 321 N.E.2d 1, 13 (1974).

44. *See* William Lynch Schaller, *Scottie Pippen's Airball: On the Role of Fiduciary Duty Law in Illinois Professional Liability Cases*, 48 J. MARSHALL L. REV. 777 (2015).

45. 128 Ill.2d 437, 539 N.E.2d 1216 (1989).

46. 174 Ill.2d 281, 673 N.E.2d 290 (1996).

47. *Armstrong*, 174 Ill.2d at 294, 673 N.E.2d at 296; *Kinzer*, 128 Ill.2d at 445, 539 N.E.2d at 1220.

48. 723 F.3d 813, 823–27 (7th Cir. 2013) (Bauer, J.) (applying Illinois law).

proximate cause, as exemplified by *Neade v. Portes*.[49] By contrast, fiduciary loyalty cases trip very different wires in terms of elements, burdens of proof, remedies and defenses, as I explained at length in my *Corporate Opportunities and Corporate Competition* article.[50] Corporate opportunity claims, of course, are a subset of the duty of loyalty, not of the duty of due care.[51]

III. UNDERSTANDING *INDECK* – OLD LAW, NEW LAW, OR ERROR?

I offer this background because almost all of it, other than a citation to my *Corporate Opportunities and Corporate Competition* article, [52] is nowhere to found in the Illinois Supreme Court's majority opinion in *Indeck*. Once one understands the context of *Kerrigan*, *Vendo* and *Mullaney* and the analytic framework and deterrence policy they establish, the issues in *Indeck* become profoundly easy, as Justice Overstreet's sharp dissent makes plain. At bottom, the only real questions were whether and to what extent the defendants gained from their conduct. They plainly gained, so the proper result should have been simply to so hold and then to remand for a determination as to the amount of restitutionary relief they owed to Indeck, precisely the remedial and procedural results in *Kerrigan*.

The relevant facts in *Indeck* were decidedly unhappy from a fiduciary standpoint, to say the least. The Illinois Appellate Court offered this succinct summary:

> The trial court entered judgment in Indeck's favor on its breach of fiduciary duty claim. The court found that both DePodesta and Dahlstrom owed Indeck a duty of loyalty during their periods of employment with Indeck and that both breached their duties in 2013, with the earliest violation occurring on March 13, 2013. The breaches that the trial court found included setting up the meeting with Vroege to ensure that Lagowski would not attend; telling Vroege, without authority, that Indeck wanted a free option on the Carson Bay turbines and knowing that this representation would discourage further discussion with Indeck; discussing Merced's potential investment in HEV but not disclosing the discussions to Indeck; contacting Vroege from Indeck's offices on July 23, 2013, to tell him that they were starting their own company; discussing with him the following

49. 193 Ill.2d 433, 444, 739 N.E.2d 496, 502 (2000):

An examination of the elements of a medical negligence claim and breach of fiduciary duty claim illustrates the way in which a breach of fiduciary duty claim would "boil down to a malpractice claim." *Herdrich*, 530 U.S. at 235, 120 S.Ct. at 2157, 147 L.Ed.2d at 185. To sustain an action for medical negligence, plaintiff must show: (1) the standard of care in the medical community by which the physician's treatment was measured; (2) that the physician deviated from the standard of care; and (3) that a resulting injury was proximately caused by the deviation from the standard of care.

50. *See* Schaller, *Corporate Opportunities and Corporate Competition*, *supra* note 10, at 4–31.

51. For the same reasons, Lawlor v. N. Amer. Corp., 2012 IL 112530, ¶69, 983 N.E.2d 414, 433 (2012), a fiduciary duty of loyalty case, was simply wrong in citing *Neade* for its duty of due care "proximate cause" formulation. In any event, there was no evidence showing that fiduciary Lawlor did anything improper before her resignation, so she did not breach her duty of loyalty. In other words, proximate cause was not even at issue in *Lawlor*.

52. Indeck Energy Servs., Inc. v. DePodesta, 2021 IL 125733, ¶ 47 (July 29, 2021).

> day, using Indeck's phone service, the possibility of Merced funding defendants' enterprise; accessing Indeck's materials to prepare for the HEV meeting with Vroege; preparing HEV's power development strategy using Indeck's forms, time, and equipment; downloading and taking thousands of Indeck records, intending to use them to support their new enterprise; attempting to destroy the evidence of their downloading activity; traveling to Minnesota on Indeck's time to present the HEV power development strategy to Merced; entering into an agreement with Merced to exchange proprietary and sensitive information; negotiating, on Indeck's time and using its equipment and phone service, a letter of intent (wherein they agreed not to disclose their negotiations to Indeck, even though their positions at Indeck required them to bring development opportunities to Indeck's attention); negotiating the operating agreement and the management agreement, again using Indeck's time and equipment; and, as to Dahlstrom only, encouraging Inns to look for a new job when DePodesta and Dahlstrom were preparing to leave Indeck and knew that if all three left there would be greater damage to Indeck.[53]

The trial court ordered compensation forfeiture of $111,868 for DePodesta and $93,106 for Dahlstrom for the period of their disloyalty while still employed by Indeck, and this relief was not challenged on appeal.[54] The focus on appeal was instead on whether the defendants gained anything attributable to their challenged conduct, and here the dissenters were correct in making short work of the case under *Kerrigan* and *Mullaney*. To borrow from *Mullaney*, the defendants were not free to "begin to act on their own" with respect to the Merced transaction simply because they eventually quit Indeck, as they came upon and indeed began pursuing the Merced transaction while still Indeck employees. In fact, they substituted themselves for Indeck in the proposed Merced transaction, the very outcome *Mullaney* condemned with respect to Savage: "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." Moreover, virtually all corporate opportunity usurpations begin before but are completed after a fiduciary resigns; only the boldest fiduciaries finish the diverted deal and then quit.[55] Thus, under *Mullaney*, the trial court plainly erred in ruling that "the defendants' 'breaches' ended with

53. Indeck Energy Servs., Inc. v. DePodesta, 2019 IL App (2d) 190043, ¶ 75, 165 N.E.3d 913, 932 (2d Dist. 2019).

54. *Indeck*, 2019 IL App (2d) 190043 at ¶ 76, 165 N.E.3d at 932.

55. Of the 32 Illinois state and federal court opinions I surveyed in my *Origin and Evolution* article in 2013, *supra* note 20, none turned on whether the fiduciary first quit before completing the diversion. Indeed, apart from *Mullaney*, scores of Illinois corporate opportunity cases have treated quitting as irrelevant in this context, starting at least as early as 1965 in Mile-O-Mo Fishing Club, Inc. v. Noble, 62 Ill. App. 2d 50, 57, 210 N.E.2d 12, 15 (5th Dist. 1965) ("This rule applies not only to transactions consummated while the fiduciary relation exists, but also to transactions consummated after it has ended, if the transactions began during the existence of the relationship or were founded on information or knowledge acquired during the relationship.").

their resignations."[56] This was a legal conclusion contrary to *Mullaney* and thus one to which the Illinois Supreme Court owed no deference.

At least as problematic, however, was the *Indeck* majority's separate endorsement of the trial court's perverse views that the Merced partnership opportunity had to be "exclusive" to the defendants and that Indeck had to continue seeking this opportunity even after the defendants had diverted it.[57] As to the first point, Indeck argued that the defendants before resigning sought to be partners ("members," technically) with Merced in a limited liability company and then did just that shortly after resigning:

> On August 30, 2013, DePodesta, Dahlstrom and Halyard Energy signed a letter of intent with Merced III to form a limited liability company to develop three natural gas-fired, simple-cycle power plant sites in Texas. (C 6819 ¶131; R 8409; E. 425-31) DePodesta, Dahlstrom and Halyard agreed in the LOI to ***deal exclusively*** with Merced III to negotiate an LLC Agreement and a Management Agreement for HEV's management of the LLC. (C 6819 ¶132, 134; R 8409).[58]
>
> ***
>
> The trial court found DePodesta and Dahlstrom signed the LLC Agreement and the Management Agreement on November 6, 2013 [just days after their resignations on November 1, and November 4, 2013, respectively] (C 6305 ¶ 111-12; R 8419)
>
> Under the LLC Agreement, HEV became a member of Merced Halyard Ventures, LLC ("MHV") and obtained a 20-percent profit interest in MHV. (C6306 ¶ 113; R 8419) The LLC Agreement also provided HEV, DePodesta, and Dahlstrom with broad rights of indemnification and advancement of costs of defense in the event of litigation. (E 542 ¶ 5.1(d)) By May 2017, Vroege testified that Merced advanced $1.5 million to defend Indeck's claims. (R 4257)
>
> Under the Management Agreement, HEV, and its members, DePodesta and Dahlstrom, were ***exclusively engaged*** to manage the development of a portfolio of projects in ERCOT for a $500,000 annual fee. (E 560-70) The management fees paid to HEV were split between DePodesta and Dahlstrom as equal owners of HEV. (C 6831 ¶175; R 8411) Through

56. *Indeck*, 2021 IL 125733, ¶ 55. The Illinois Supreme Court majority at paragraph 36 of its opinion quoted the trial court's precise ruling in this respect:

> Indeck has not brought a case to the Court's attention that holds that after a breach of fiduciary duty has ended, a Plaintiff is entitled to compel a Defendant to disgorge any future salary earned from a subsequent employer as a result of the fact that the Defendant negotiated with the subsequent employer during a period of disloyalty.

57. *Indeck*, 2021 IL 125733, ¶ 49 (quoting the trial court):

> With respect to the funding opportunities, there is no evidence that Merced promised [defendants] an exclusive development agreement for projects in ERCOT or that [plaintiff] made any attempt to partner with Merced after Defendants resigned from [plaintiff]. It appears that the Plaintiff may have assumed that there was only one partnership opportunity with Merced, but Plaintiff presented no evidence of that fact in its case in chief. Defendants' argument that no funding opportunity was usurped and that any funding opportunity that Indeck might [have] had in 2013 is still available today is persuasive on this record.

58. Indeck's Opening Supreme Court Brief, Indeck Energy Servs., Inc. v. DePodesta, 2021 IL 125733 (July 29, 2021), at 14 (emphasis added).

November 6, 2018, DePodesta and Dahlstrom each obtained Management Fees of $1,250,000. (C 6831 ¶176; R 8411)[59]

Assuming this factual recitation is correct, the usurped opportunities were not "the turbine opportunity" or the "funding opportunity," as the Supreme Court majority characterized them.[60] Rather, the diverted opportunities were, at a minimum, the chance to be Merced's exclusive partner (again "member," technically) in MHV with a 20% profit share and the chance to exclusively manage the development of ERCOT projects for MHV.[61] Evidently these exclusive opportunities produced at least $2,500,000 in management fees paid to the defendants through November 6, 2018, independent of any profits or other benefits they may have received as MHV members. Whether everything they received was gain, or just some of it, is impossible to say from the face of the Illinois Supreme Court majority's opinion, but the fact of gain and hence the fact of injury can hardly be disputed, even under the *Indeck* majority's erroneous tort formulation of "proximate cause" based on the fiduciary duty of due care decision in *Neade*. And, of course, the fiduciary duty of loyalty decisions in *Kerrigan*, *Vendo* and *Mullaney* provide the proper analytic framework for corporate opportunity usurpation, not *Neade*.

The alternative condition, that Indeck had to keep bidding forever to be Merced's partner, or at least had to keep bidding through the time of trial years after the defendants resigned in late 2013, finds no support in *Kerrigan*, *Vendo* or *Mullaney*. This "in perpetuity" defense is wrong as a matter of law and policy. First, as the dissenters emphasized, "[t]he opportunity presented to the defendants in 2013 [was] not the same opportunity that was available to plaintiff at the time of trial."[62] Second, requiring Indeck to keep bidding shifts the inquiry away from what Indeck would want to do to in favor of what third party Merced would want to do – the "third party refusal to deal" defense I condemned as unsound as a matter of precedent and policy in my corporate opportunity papers. As I stressed in my *Origin and Evolution* paper,[63] *Kerrigan*, *Vendo* and *Mullaney* do not hold that that the third-party target's willingness to deal with plaintiff is relevant; to the contrary, there was no proof of third party Lektro-Vend's willingness to deal with Vendo, and there was considerable proof of third party Blossman's unwillingness to deal with Mullaney. These outcomes make sense

59. *Id.* at 17 (emphasis added).

60. *Indeck*, 2021 IL 125733, at ¶ 45.

61. Justice Overstreet's dissent offers many more possible benefits Indeck might have received. *See Indeck*, 2021 IL 125733, at ¶ 79 (Overstreet, J., dissenting):

> For example, in 2013, plaintiff could have contracted for exclusive rights, negotiated terms that favored it at that time, dealt exclusively with Merced III, negotiated the initial opportunity to receive profit interest in MHV after Merced III recouped initial investments, managed day-to-day operation of MHV's business, worked exclusively on behalf of MHV, and earned income between 2013 and the time of trial, none of which were realized due to defendants' failure to tender and disclose. *** The opportunity available to plaintiff at the time of defendants' actions was lost to plaintiff, even though a funding opportunity later remained available to plaintiff pursuant to carefully crafted contract terms. In failing to tender and disclose or obtain consent for their activities, defendants usured the opportunity presented at that time.

62. *Id.*, at ¶ 78 (Overstreet, J., dissenting).

63. *See* Schaller, *Origin and Evolution*, *supra* note 20, at 954–61.

because the focus of the "line of business" test is on plaintiff's present and prospective operations, not on what the third party does or does not what to do. As I put it in *Policy and Practice Lessons from Illinois*:

> In short, a third party's refusal to deal under the *Kerrigan* "line of business" paradigm does not present a tort proximate cause defense. Treating proximate cause as an essential element of a corporate opportunity claim, after the fashion of a standard tort, runs completely counter to the "prophylactic" *Kerrigan* disclosure and tender regime, which conclusively presumes the principal would have prevailed on the opportunity, at least as against the fiduciary, when an opportunity falls within the corporation's present or expected line of business. In addition, "proximate cause," in the tort sense of proving actual loss, undercuts the principal purpose of fiduciary duty law in general and the corporate opportunity law in particular: deterrence.[64]

What are we really left with, then, under the *Indeck* majority's opinion? The "no *res* / no constructive trust" argument? We know that's wrong, as *Mullaney* holds that restitution does not requirement a traceable *res*, even assuming constructive trust law does. And on any view of the pleadings and briefs, Indeck was seeking classic restitutionary relief: disgorgement of the defendants' gains.

If there was any difficulty at all in *Indeck*, it was how to calculate the defendants' wrongful gains, not whether to do so. Illinois restitution decisions teach, in essence, that plaintiff need only prove the gross revenues the defendants received from the wrongful diversion; elements of deduction for out-of-pocket costs must be proven by the defendants.[65] Accounting for out-of-pocket expenditures also comes into play when plaintiff seeks title to a discrete asset; plaintiff must reimburse the defendant for the actual amount the defendant paid to acquire it, as in *Paulman v. Kritzer*.[66] Really, the only hard question is whether the defendants deserve reasonable compensation for rendering services when the diverted deal calls for them to render services and they actually do so. There is some authority for such compensation and some against it, though one would think the total deterrence rationale of Illinois fiduciary duty law should loom large here.[67] Regardless, these inquiries should all have been left for the trial court to determine in the first instance on remand.

64. Schaller, *Policy and Practice Lessons from Illinois*, *supra* note 18, at 21.

65. *See, e.g.*, Hill v. Names & Addresses, Inc., 212 Ill. App. 3d 1065, 1084, 571 N.E.2d 1085, 1097 (1st Dist. 1991) ("Because Hill and GDR were held to be constructive trustees on the profits they made from their usurpation of NAI's business expectancies, they had the burden of showing what costs were to be deducted from that trust.").

66. *See, e.g.*, 38 Ill.2d 101, 230 N.E.2d 262 (1967).

67. *Compare* Graham v. Mimms, 111 Ill. App.3d 751, 768, 444 N.E.2d 549, 560 (1st Dist. 1982) ("Furthermore, plaintiffs agree that Mimms was entitled to reasonable compensation for his efforts in developing the usurped opportunities (see DOBBS, REMEDIES sec. 4.3, at 243 (1973)) and the court also erred in imposing a constructive trust on *all* the compensation Mimms received from Wyclif."), *with* White Gates Skeet Club, Inc. v. Lightfine, 276 Ill. App. 3d 537, 541–42, 658 N.E.2d 864, 868 (2d Dist. 1995) (citing Vendo Co. v. Stoner, 58 Ill.2d 289, 321 N.E.2d 1 (1974), and holding that "LaReno, who participated in the breach of a fiduciary duty with Lightfine, should not be entitled to reimbursement for managing the property. Thus, we conclude that the

All of this leaves a final question: How long should restitutionary relief last in such cases? If *Hill v. Names and Addresses* is any indication, the answer should be "in perpetutity," as Indeck argued. The Illinois Appellate Court in *Hill* offered these remarks on the topic:

> In the instant case the trial court awarded damages to NAI only for profits lost as the result of Hill and GDR's diversion of the Banner account. The constructive trust was placed on profits made by GDR and Hill as the result of their diversion of Banner and five other customers. The court held that since the award for lost profits, which was calculated on the basis of NAI's profits from Banner's business in the early months of 1985, failed to reflect adequately the full extent to which Banner's use of a list broker's services was increasing, it would be appropriate, in granting relief, to take into consideration that NAI would have made greater profits from Banner had Hill and GDR not misappropriated NAI's legitimate business expectancy from that source. The court further found that the value to NAI of the business from the other five customers was also increasing at the time of Hill's and GDR's wrongdoing.
>
> A constructive trust may be imposed even when it more than compensates the plaintiff for injury or damage resulting from a breach of loyalty by an employee, because the right to recover from one who exploits his fiduciary position for his personal benefit is triggered by the gain to the agent rather than by the loss to the principal. (*Chicago ex rel. Cohen v. Keane* (1976), 64 Ill.2d 559, 565–66, 2 Ill.Dec. 285, 357 N.E.2d 452.) The imposition of a constructive trust in such circumstances reflects an implementation of the "wise public policy that, for the purpose of removing all temptation, extinguishes all possibility of profit flowing from a breach of the confidence imposed by the fiduciary relation." (*Graham v. Mimms* (1982), 111 Ill. App.3d 751, 762-63, 67 Ill.Dec. 313, 444 N.E.2d 549.) Here, the trial judge was cognizant of the need to apply this public policy when he commented, in his memorandum of opinion, that only "a total disgorgement" of profits "would recognize the seriousness of the wrongdoing" in this case. In short, "[a] plaintiff may be awarded a constructive trust whenever facts are shown in which a person holding title to the property at issue cannot retain the beneficial interest therein without violating some established principle of equity." (*Chicago Park District v. Kenroy, Inc*. (1982), 107 Ill.App.3d 222, 63 Ill.Dec. 134, 437 N.E.2d 783; *Village of Wheeling v. Stavros* (1980), 89 Ill.App.3d 450, 44 Ill. Dec. 701, 411 N.E.2d 1067.) In this case, there was sufficient evidence for the trial court to find inadequate an award of damages based on lost profits when such an award would still have enabled Hill and GDR to profit from Hill's breach, aided by GDR, of her duty of loyalty to NAI. We therefore find no error in the alternate award of a constructive trust on the wrongfully obtained profits of Hill and GDR.[68]

trial court erred in finding that the club owes the defendants reimbursement for a property management fee paid out to LaReno.").

68. *Hill*, 212 Ill. App. 3d at 1083, 571 N.E.2d at 1096.

In perpetuity? Well, whether a partnership produces profits for five years or fifty, a fiduciary wrongdoer cannot gain from his wrong. Judicial creativity in this field should know no bounds under the total deterrence rationale.[69]

IV. CONCLUSION

So, which is wrong? *Indeck*? Or *Kerrigan*, *Vendo* and *Mullaney*? These are not questions any of us should be asking in an area as vital as fiduciary duty law. The dissenters in *Indeck* could not reconcile the majority's opinion with existing Illinois Supreme Court corporate opportunity law, and neither can I. Much mischief awaits if the Illinois Supreme Court does not reverse its *Indeck* opinion and if it does not do so soon.

And I can spell out this mischief rather bluntly: under *Indeck*, no meaningful remedies are available for corporate opportunity usurpation. Why? Because no fiduciary will sign a diverted contract or conclude a diverted deal until after resignation, thereby guaranteeing full immunity from post-resignation "gain" disgorgement relief previously available under *Kerrigan* and *Mullaney*. Only pre-resignation compensation forfeiture will be risked, and even that will be at issue under the "no harm / no foul" rationale found in *Indeck*. But there's more, much more: no "loss" damages under *Vendo* can be awarded if the fiduciary resigns before completing the diverted deal because, once again, there is "no injury" under *Indeck*. Indeed, given that resignation will always occur and thus will always guarantee "no injury" under *Indeck*, injunctions, constructive trusts, accountings, prime rate prejudgment interest, and punitive damages will all be precluded as well.

All of this says nothing about the "injured principal must keep bidding in perpetuity" rule in *Indeck*. Once an opportunity has been diverted, further bidding is useless, especially if the usurped opportunity is exclusive. This is always true, for example, when the chance to buy a business or the chance to buy a building has been lost; the defendant fiduciary now owns the business or building in question. The same is true of any contract; once the fiduciary signs it, the contract counterparty can no longer enter into *<u>that contract</u>* with someone else. That *other contracts* might be available somewhere down the road is beside the point; *that contract* has been lost. And even if *that contract* is terminable at will, the *Indeck* "keep bidding forever" rule operates to shift control to the third party target – the third party "refusal to deal" defense that is plainly at odds with *Kerrigan*, *Vendo* and *Mullaney*.

Thus, properly understood, *Indeck* is half right in finding liability but all wrong in denying meaningful relief. Rules without consequences are no rules at all. This is what is meant by the familiar axiom "for every right a remedy." If *Indeck* stands, *Kerrigan*, *Vendo* and *Mullaney* are dead letters; they will offer

69. *See, e.g.*, Triple Five of Minnesota, Inc. v. Simon, 404 F.3d 1088 (8th Cir. 2005) (ordering sweeping relief in favor of plaintiff based on partnership usurpation claim relating to the Mall of America); McGovern v. General Holding, Inc., 2006 Del. Ch. LEXIS 93 (Del Ch. May 18, 2006) (ordering similarly sweeping relief).

rights without remedies. Indeed, if *Indeck* stands, all deterrence will be lost and the "sting of disability" will now be felt by principals rather than fiduciaries.