CORPORATE OPPORTUNITY AND CORPORATE COMPETITION: A DOUBLE-BARRELED THEORY OF FIDUCIARY LIABILITY

In an era where corporate governance has been the subject of debate by many legal scholars, it is appropriate to discuss the differences between the doctrines of corporate opportunity and corporate competition. Both of these doctrines fall within the general duty of loyalty, imposed on all fiduciaries, but each focuses on a different aspect of that duty. Although there are other aspects of the duty of loyalty, this note addresses the limitations imposed on fiduciaries by the doctrines of corporate opportunity and corporate competition. The corporate opportunity doctrine provides that a corporate fiduciary may not appropriate to himself an opportunity that rightfully belongs to his corporation. A corporate opportunity analysis focuses on the closeness of the tie between a fiduciary's acquisitions and the


2. See Miller v. Miller, 301 Minn. 207, 220, 222 N.W.2d 71, 78 (1974) (stating that the doctrine of corporate opportunity "is derived essentially from fundamental rules of agency concerning the duty of utmost good faith and loyalty owed by a fiduciary to his principal"); see also Guth v. Loft, Inc., 23 Del. Ch. 255, 270-71, 5 A.2d 503, 510 (Sup. Ct. 1939) (stating that the corporate opportunity doctrine is one manifestation of the duty of loyalty); Rowen v. Le Mars Mut. Ins. Co., 282 N.W.2d 639, 660 (Iowa 1979) (the court, in dictum, noting that it is universally held that the doctrine of corporate opportunity is one phase of a director's duty of loyalty); ABC Trans Nat'l Transp., Inc. v. Aeronautics Forwarders, Inc., 62 Ill. App. 3d 671, 683, 379 N.E.2d 1228, 1237 (1978) (stating that it is a breach of the duty of loyalty for a fiduciary to serve two rival corporations at the same time); Las Luminarias of the N.M. Council of the Blind v. Isengard, 92 N.M. 297, 302, 587 P.2d 444, 449 (Ct. App. 1978) (noting that the requirement that competition must be in good faith is part of the duty of loyalty).

3. For purposes of this note, the term "fiduciaries" includes officers, directors, and management personnel with significant fiduciary responsibilities. It may, however, be appropriate to apply less stringent standards to the obligations of non-management directors. See Brudney & Clark, A New Look at Corporate Opportunities, 94 Harv. L. Rev. 997, 1042-45 (1981). But see Fuller, Restrictions Imposed by the Directorship Status on the Personal Business Activities of Directors, 26 Wash. U.L.Q. 189 (1941) (arguing that managerial status should not be used as a basis to distinguish between directors).

4. See Knauss, supra note 1, at 492-96.

corporation to whom he owes a duty. The doctrine of corporate competition mandates that a fiduciary not compete with his corporate employer after acquiring a competing enterprise, except where the competition is in good faith. The focus of a competition inquiry, therefore, is on the closeness of the tie between the actions taken by a fiduciary to make the acquired enterprise competitive and the corporation to whom he owes a duty.

Theoretically, the doctrine of corporate opportunity adequately protects a corporation when one of its fiduciaries engages in competitive acts; practically, however, it does not. This note discusses the three principal reasons for that doctrine's failure to provide corporations with adequate protection in situations where the acquisition of a corporate opportunity is aided or accomplished through the use of competitive acts: First, a corporate opportunity analysis focuses primarily on the relationship between the acquired opportunity and the fiduciary's corporation, not on the actions taken to further the fiduciary's competing enterprise; second, there are many defenses to a finding of usurpation of a corporate opportunity that may be unre-

6. Rowen v. Le Mars Mut. Ins. Co., 282 N.W.2d 639, 660 (Iowa 1979). The Rowen court noted, in dictum, that corporate opportunity cases “involve the wrongful acquisition of a business or other property which rightfully belongs to the corporation.” Id. (emphasis in original). See also Burg v. Horn, 380 F.2d 897, 899-900 (2d Cir. 1967) (stating that the corporate opportunity doctrine, as expressed by the expectancy test, prevents a fiduciary's acquisition of property that the corporation either needs or seeks).

7. See Red Top Cab Co. v. Hanchett, 48 F.2d 236, 238 (N.D. Cal. 1931) (citations omitted) (stating that “directors or officers entering into such competing enterprises must act in good faith and may not cripple or injure the corporation which they serve”); Lincoln Stores, Inc. v. Grant, 309 Mass. 417, 423, 34 N.E.2d 704, 707 (1941) (citations omitted) (stating that “[d]irectors or officers of a corporation are not, by reason of the fiduciary relationship they bear toward the corporation, necessarily precluded from entering into an independent business in competition with it, but, in doing so, they must act in good faith”); Foley v. D'Agostino, 21 A.D.2d 60, 68-69, 248 N.Y.S.2d 121, 129-30 (1st Dep't 1964) (explaining that competition during the term of fiduciary's employment may be a violation of the duty of loyalty).


10. See, e.g., Burg v. Horn, 380 F.2d 897 (2d Cir. 1967) (stating that corporate consent to a fiduciary's acquisitions of property was a defense to allegations that the property was a corporate opportunity); Fliegler v. Lawrence, 361 A.2d 218 (Del. 1976) (stating that evidence of a corporation's financial inability worked as a defense to charges that a fiduciary usurped a
lated to the competitive acts of a fiduciary; and third, the remedy for wrongful appropriation of corporate opportunity is the imposition of a constructive trust, a remedy that may not always redress the injury caused by competition.

The doctrine of corporate competition is another basis for imposing liability on a fiduciary who wrongfully competes with an enterprise to which he owes a duty of loyalty. Like the doctrine of corporate opportunity, corporate competition may present problems in its application. Some courts have imposed liability and awarded damages where a fiduciary's competition was not in good faith. Yet limitations on the imposition of liability for competition have emerged. Mere preparation to compete may not warrant a finding of liability for competition. Nor would competition that does not injure a corporation serve as a basis for liability grounded in the competition doctrine. Also, a court may determine that a fiduciary has

11. For a discussion of the questionable connection between corporate opportunity defenses and the competitive acts of an acquiring fiduciary, see infra text accompanying notes 137-55.

12. A constructive trust is a device used by courts when the property at issue "belong[s] in good conscience to the plaintiff." D. Dobbs, Handbook on the Law of Remedies § 4.3, at 242 (1973) (footnote omitted). When this device is used, the court declares the defendant to be a constructive trustee and orders him, as trustee, to transfer the property to the beneficiary of the constructive trust, the plaintiff. Id. at 241. The constructive trust allows the plaintiff to recover not only what he lost, but also any profits earned on the property. Id. at 242. Thus, as beneficiary of a constructive trust, a plaintiff can follow his property into its product. Id. For examples of cases in which constructive trusts have been imposed, see Morad v. Coupounas, 361 So. 2d 6, 10 (Ala. 1978) and Guth v. Loft, Inc., 23 Del. Ch. 255, 270-71, 5 A.2d 503, 510 (Sup. Ct. 1939).

13. For example, the imposition of a constructive trust on the wrongfully appropriated opportunity may be inadequate to recompense a corporation for loss of customers or employees due to wrongful competition. See infra notes 156-70 and accompanying text.

14. See, e.g., Red Top Cab Co. v. Hanchett, 48 F.2d 236, 238-39 (N.D. Cal. 1931) (finding the defendant's competition to have been undertaken in bad faith, allowing the plaintiff either to recover the defendant's profits or to purchase what the defendant acquired, and remanding the issue of damages to a special master); Craig v. Graphic Arts Studio, Inc., 39 Del. Ch. 447, 451-52, 166 A.2d 444, 446-47 (1960) (authorizing damages arising from competition); Lincoln Stores, Inc. v. Grant, 309 Mass. 417, 420-24, 34 N.E.2d 704, 706-08 (1941) (affirming both the award of damages for competition in bad faith and the refusal to impose a constructive trust on the stock of the acquired stores because the acquisition was not a usurpation of a corporate opportunity).


failed to compete in good faith where the fiduciary has breached an independent duty owed to the corporation (either the duty of care or a part of the duty of loyalty falling outside the scope of the corporate opportunity or corporate competition doctrines), such as the duty not to misuse corporate assets.\textsuperscript{17}

In addition to the problems present within the doctrines of corporate opportunity and competition, other problems are presented by the non-uniform application of both doctrines:\textsuperscript{18} First, the director or officer who wishes to compete is left in a precarious position because the limits on his freedom of action are not clearly defined; second, the corporation is left with uncertain protection and a potentially inadequate remedy when a corporate fiduciary is in breach of a duty.\textsuperscript{19}

This note examines the inadequacies of the doctrines of corporate opportunity\textsuperscript{20} and corporate competition,\textsuperscript{21} focusing on the problems of applying them to situations involving both bad faith competition and the taking of an opportunity by a fiduciary. Moreover, it proposes a uniform framework for analysis that may help solve some of the problems inherent in the application of each doctrine and lessen the confusion that courts experience when confronted with the question of which doctrine to apply.\textsuperscript{22}

\section{I. \textsc{Corporate Opportunity}}

\subsection{A. \textit{Theoretical Framework}}

The corporate opportunity doctrine prohibits a corporate fiduciary from appropriating to himself any opportunity that rightfully belongs to the corporation to which he owes a duty of loyalty.\textsuperscript{23} Generally, three tests are used to determine whether an asset is a corporate opportunity.\textsuperscript{24} First, does the corporation have an interest or expen-

\begin{footnotes}
\item[17.] See Red Top Cab Co. v. Hanchett, 48 F.2d 236, 238 (N.D. Cal. 1931).
\item[19.] See infra text accompanying notes 142-55.
\item[20.] See infra text accompanying notes 23-170.
\item[21.] See infra text accompanying notes 171-220.
\item[22.] See infra text accompanying notes 221-33.
\item[23.] E.g., Guth v. Loft, Inc., 23 Del. Ch. 255, 271, 5 A.2d 503, 510 (Sup. Ct. 1939); Brudney & Clark, supra note 3, at 998.
\item[24.] Southeast Consultants, Inc. v. McCravy Eng'g Corp., 246 Ga. 503, 507-08, 273 S.E.2d 112, 117 (1980); Miller v. Miller, 301 Minn. 207, 222-23, 222 N.W.2d 71, 79-80
\end{footnotes}
tancy in the opportunity? Second, is the opportunity within the corporation's line of business? Third, do considerations of fairness suggest that the opportunity is one that should belong to the corporation? The corporate opportunity doctrine, as applied by these tests, is relevant to deciding whether a fiduciary has breached his duties by acquiring a competing business.

1. The Interest or Expectancy Test.—In a jurisdiction using the interest or expectancy test, the court determines whether the competitive business or property appropriated by the fiduciary is one that the corporation would expect to acquire for itself. If the corporation has an expectancy in the enterprise or property acquired, then, absent any defenses, the fiduciary will be liable to the corporation. Abbott Redmont Thinlite Corp. v. Redmont illustrates such an approach. Abbott Redmont Thinlite Corp. ("Abbott") was in the business of furnishing and installing skylights. Using trade journals to discover projects that were still in the design stage, Abbott would contact the architect for a particular project and try to convince him to work a skylight into the project's design. The process of finding and persuading the architect was part of Redmont's job in his capacity as president of Abbott. Abbott was the sole distributor of skylights in metropolitan New York until Redmont quit his job with Abbott and formed his own company, Circle Redmont Corporation ("Circle"). Prior to the formation of Circle, once an architect had agreed to incorporate skylights into his design, Abbott was assured of the required subcontract. After establishing the Circle company,
however, Redmont entered into contracts for skylights that he had secured while employed by Abbott.\(^{33}\) As threshold questions, the court asked "whether Abbott Redmont Thinlite Corporation had a "tangible expectancy" . . . in the . . . contracts . . . and [if so,] whether Redmont violated his fiduciary duty by diverting that expectancy to his own profit."\(^{34}\) The court found that Redmont's conduct in making Circle a competitor of Abbott—his contracts with the general contractor on projects he initially solicited while an employee of Abbott—occurred after he had left Abbott's employ.\(^{35}\) This fact, however, did not shield Redmont from liability, because the court found that "he was taking advantage of a corporate opportunity which he had helped obtain for Abbott and which would have almost certainly been Abbott's but for [his] departure."\(^{36}\) Because Abbott invariably had been awarded the subcontract for projects in which its specifications had been written, the court held that Abbott had an expectancy—bordering on a certainty—of securing the final contract.\(^{37}\) In making its determination, the court considered "[t]he high degree of likelihood that but for Redmont's competition, Abbott would have been awarded these contracts."\(^{38}\) Thus, under the expectancy test, the Abbott court concluded that Redmont's submission of competitive bids, aided by his use of inside information, constituted a wrongful appropriation of an opportunity that rightfully belonged to Abbott.

In the course of its analysis, however, the court considered competition in a general sense rather than in the context of a competition analysis. In Abbott, Redmont's status as a competitor showed that Abbott's expectation had been defeated\(^{39}\) and thus, that Red-

33. Id. at 88. Five contracts were at issue. Id. Only two contracts were found to be corporate opportunities. Id. at 89-90. Of the remaining three contracts, two were found to have been intentionally abandoned by Abbott, and the court remanded for further findings with respect to the last contract. Id. This note's discussion of the case relates only to those contracts that were found to be corporate opportunities.

34. Id. (citations omitted) (footnote omitted).

35. Id.

36. Id.

37. Id.

38. Id. at 89 (emphasis in original). The court also considered Redmont's use of specific information obtained while in the employ of Abbott. Id. Redmont's "knowledge of the details of the specifications, knowledge of the contractor's requirements, [and] knowledge of Abbott's probable costs . . . made Abbott particularly vulnerable to [Redmont's] competition." Id.

39. As noted earlier, Abbott was practically assured of getting the contracts until Circle was formed. Thus, the mere existence of a competitor might serve to defeat Abbott's expectancy. Redmont's use of specific information in furtherance of his competition was arguably of secondary importance to the court's corporate opportunity inquiry.
mont’s acquisition of the contracts constituted wrongful usurpation of a corporate opportunity.40 Under a competition analysis, however, a court would have begun its inquiry with the premise that Abbott and Circle were in competition and then would have determined whether Redmont’s specific actions were repugnant to the obligations owed to Abbott by virtue of his fiduciary relationship.41 In short, the interest or expectancy test of the corporate opportunity doctrine examines the acquired property vis-à-vis the corporation’s expectancy; and competition serves to show that an expectancy has been defeated. A competition inquiry looks to the fiduciary’s actions in making the property competitive (not to its having been acquired) in terms of his fiduciary obligation to the corporation.

Although the Abbott court considered both Redmont’s acquisition of contracts for Circle and the specific actions taken to further the establishment of Circle as a competitor, i.e., the use of inside information, it couched the imposition of liability in corporate opportunity terms.48 Instead, the court should have delineated the doctrines of corporate opportunity and corporate competition, using the competitive actions taken by Redmont as a factor in the competition inquiry. The doctrines should be delineated because each affords a different remedy.49 By its failure to delineate, the Abbott court may have left uncompensated any injury caused by the competition. The Abbott court remanded “for the award of damages in accordance with [its] opinion.”44 It is unclear whether the court intended “damages” to mean imposing a constructive trust,46 which is the traditional remedy in corporate opportunity cases, or whether it meant money damages. If the court intended only that the remedy be a

40. Id. at 88.
41. See infra text accompanying notes 171-83.
42. 475 F.2d at 90. The court affirmed in part, reversed in part, and remanded in part the decision of the district court.
43. Id. at 89-90. The traditional remedy for the diversion of a corporate opportunity is the imposition of a constructive trust; for wrongful competition, damages are generally awarded to compensate for the harm caused by the competition. See infra notes 156-70 and accompanying text.
44. 475 F.2d at 90.
45. Professor Dobbs observes: “Occasionally courts speak of a constructive trust even though there is no res or property to which a trust might attach. This makes sense only on the assumption that the court is referring to the substantive principle against unjust enrichment, as grounds for granting an ordinary money judgment.” D. Dobbs, supra note 12, § 4.3, at 242 (footnote omitted). It is possible that the Abbott court used a converse rationale; by using the term “damages,” 475 F.2d at 90, the court really may have been referring to a constructive trust because that is generally the remedy awarded for the usurpation of a corporate opportunity.
constructive trust imposed on the contracts lost by Abbott, and used the term "damages" loosely, then the question of whether Abbott suffered injury resulting from Redmont's use of inside information and his position as a competitor was left unexplored. Alternatively, the court may have intended money damages, in which case the plaintiff would have had a chance to prove the extent of harm inflicted by the competition.48

The difference in focus of the corporate opportunity and competition doctrines is also shown in Burg v. Horn.47 The Burgs and the Horns formed the Darand Corporation in 1953.48 Prior to this time, the Horns had acquired three low-rent buildings in Brooklyn. The Burgs and the Horns became directors of Darand; the Horns carried on the active management of Darand, while Mr. Burg handled its accounting and tax planning.49 The corporation purchased a low-rent building in Brooklyn, sold it, and bought two more. Meanwhile, between 1953 and 1963, the Horns, individually or through wholly-owned corporations, purchased nine similar properties. In the course of purchasing some of these properties, the Horns secured some loans from Darand and from Mr. Burg.50 Burg instituted suit, claiming that the Horns' acquisition of these properties was a usurpation of an opportunity belonging to the Darand corporation.51 The lower court held that Darand had no interest or expectancy in the properties acquired by the Horns, noting first "that there was no agreement that all low-rent buildings found by the Horns should be offered to Darand"52 and second, "that the Burgs were aware of the purposes of the loans from Darand and Louis Burg and of at least some of the Horns' post-1953 acquisitions."53 The Court of Appeals for the Second Circuit affirmed the lower court decision.54 In its determination of whether Darand had an expectancy in acquiring properties like those acquired by the Horns, the appellate court relied on the lower court's findings and held that Darand did not expect the Horns to offer all properties to it.55 The court's determina-

46. See infra text accompanying notes 156-71.
47. 380 F.2d 897 (2d Cir. 1967).
48. Id. at 898.
49. Id. at 898-99.
50. Id. at 899.
51. Id.
52. Id. (summarizing the findings of the district court).
53. Id. (summarizing the findings of the district court).
54. Id. at 902.
55. Id. at 900-01.
The court's corporate opportunity analysis recognized that the Horns' acquisitions of properties placed them in competition with Darand. The court found that Darand's expectancy was not defeated, and it declined to impose liability for the usurpation of a corporate opportunity. Were it not for the implied consent by Darand to the Horns' competitive acquisitions of property, the competing acts might have defeated Darand's expectation, since the tie between Darand and the Horns' acquisition of low-income properties was so close. The implied consent, however, worked as a defense, shielding the Horns from liability for diversion of a corporate opportunity, because Darand could not expect to acquire for itself properties that it had allowed the Horns to acquire personally.

In addition to considering competition as a factor in its corporate opportunity analysis, the court very briefly discussed competition as a potential basis for liability. The court did not, however, by this mere mention, undertake the kind of two-step inquiry that is necessary. The court observed that the same factor (implied consent) that led it to hold that there was no corporate opportunity would suggest a similar finding against liability for competition. This statement, prompted solely by the court's corporate opportunity analysis, was conclusory at best. Instead, the court should have undertaken a separate competition analysis, focusing on the closeness of the tie between the Horns' competitive acts and the Darand Cor-

---

56. The court noted the district court's finding that there was no agreement to offer all properties to Darand, and that the Burgs knew the purposes for the loans to the Horns. Id. at 899, 902. The role of consent as viewed by the Burg court has been criticized. See Comment, 43 N.Y.U. L. Rev. 187 (1968). The Burg court inferred consent from both the lack of an agreement to offer all properties to Darand and the Burgs' knowledge of the Horns' purchases; thus, the Horns were free to acquire the properties. Instead, the Burg court should have imposed a duty on the Horns to disclose all properties unless an agreement to the contrary could be proven by the Burgs. Id. at 193.

57. The court recognized that the Horns purchased properties similar to the type usually acquired by Darand. 380 F.2d at 899.

58. See supra text accompanying notes 34-41.

59. 380 F.2d at 900-01.

60. See infra notes 151-55 and accompanying text.

61. 380 F.2d at 901.

62. See infra notes 221-33 and accompanying text.

63. Id.
poration. Its failure to do so, despite its discussion of competition as a factor in its corporate opportunity analysis, may have left the Darand Corporation uncompensated for injury suffered by nonownership of the subject properties. In its brief consideration of competition, the court noted the lack of evidence that Darand had been harmed by the Horns’ operation of the properties. If the court had engaged in a more searching analysis of competition, however, it might have recognized that a failure to earn profits due to a fiduciary’s competition may be as harmful to a corporation as is a reduction in its profits.

2. The Line-of-Business Test.—In a jurisdiction using a line-of-business test, the court determines whether the appropriated opportunity falls within the corporation’s line of business. An examination of the landmark case of Guth v. Loft, Inc. reveals the factors considered in applying such a test.

Guth was the president and a director of Loft, a corporation engaged in the manufacture and sale of fountain syrups. He became dissatisfied with the prices of Loft’s supplier of cola syrup, Coca-Cola, and, while investigating the possibility of using another supplier, Pepsi-Cola, he learned that Pepsi’s manufacturer had gone bankrupt. Using Loft’s resources on a wide scale, Guth acquired

64. For a detailed discussion of the factors considered in a corporate competition analysis, see infra notes 171-83 and accompanying text.

65. By competing with Darand, the Horns deprived Darand of earning the profits that the Horns may have earned on the properties acquired. Pursuant to a competition inquiry, damages may be awarded for a failure to earn profits resulting from competition. See infra notes 160-70. If the implied consent to the Horns’ acquisitions applies as well to their competition (as the court appears to believe), then Darand would not be recompensed for harm in the way of a failure to earn profits. Generally, however, consent is not raised as a separate defense to an allegation of competition; rather, the presence of consent is part of the determination of whether the competition was undertaken in good faith. For a discussion of the concept of competition, see infra notes 171-220 and accompanying text.

66. 380 F.2d at 901.

67. See Comment, 43 N.Y.U. L. REV. 187, 190 (1968). The Comment recognizes that Darand may have been harmed by the failure to earn profits on the properties acquired. Id.


69. 23 Del. Ch. 255, 5 A.2d 503 (Sup. Ct. 1939).

70. Id. at 258-59, 5 A.2d at 505.

71. Id. at 259-60, 5 A.2d at 505-06.

72. Id. at 261, 5 A.2d at 506.

Without the knowledge or consent of Loft’s Board of Directors [Guth] drew upon Loft without limit to further the Pepsi enterprise having at one time almost the entire working capital of Loft engaged therein. He used Loft’s plant facilities, materials, credit, executives and employees as he willed. Pepsi’s payroll sheets were a part of Loft’s and a single Loft check was drawn for both.
and developed the Pepsi Corporation for himself. Guth's development of Pepsi made him Loft's direct competitor since Loft was in the business of manufacturing fountain syrups to supply its own needs. Guth stood on both sides of the transactions between Loft and Pepsi; Guth would offer to sell syrup to Loft, and then, acting for Loft, would buy the syrup from his own corporation. Loft commenced suit against Guth, alleging that Guth had wrongfully appropriated a corporate opportunity belonging to Loft. In spite of Guth's argument that his use of Loft's resources to develop Pepsi was justified by Pepsi's ability to supply the syrup so sorely needed by Loft, the Delaware Supreme Court affirmed the chancery court's decree that Guth had wrongfully appropriated a corporate opportunity and held that:

[I]f there is presented to a corporate officer or director a business opportunity which the corporation is financially able to undertake, [and] is from its nature, in the line of the corporation's business and is of practical advantage to it, . . . the law will not permit him to seize the opportunity for himself.

The line-of-business test, as applied by the Guth court, encompassed Guth's competitive actions. The determination that Guth's new enterprise fell within Loft's line of business (and was thus a corporate opportunity) was based on the finding that the two enterprises were in competition. Similar to the expectancy test, where competition may be evidence of a corporation's defeated expectation, the finding in Guth that Loft and Pepsi were in the same line of business flowed from the court's recognition that Guth and Loft, both manufacturers of fountain syrups, were in competition. And,

---

73. Id. at 260-61, 5 A.2d at 506.
74. Id. at 269, 5 A.2d at 509-10.
75. Id. at 281, 5 A.2d at 515.
76. Id. at 257-58, 5 A.2d at 505.
77. Id. at 269, 5 A.2d at 510.
79. Id. at 272-73, 5 A.2d at 511.
80. Noting that the phrase, "'in the line' of a business," has a flexible meaning, the court applied it to the facts and circumstances of the case. Id. at 279, 5 A.2d at 514. Included in the court's analysis was the fact that "Guth's appropriation of the Pepsi-Cola opportunity to himself placed him in a competitive position with Loft." Id. at 281, 5 A.2d at 515.
81. Id.
82. See supra text accompanying notes 34-39.
83. 23 Del. Ch. at 279-80, 5 A.2d at 514. "The manufacture of syrup was the core of
parallel to the expectancy test, the line-of-business test here considered competition in a general sense—as a synonym for “in the same line of business”—as relevant to demonstrating the closeness of the relationship between Loft and Pepsi. Having determined that the two enterprises were competitive, the court stated that “[t]he tie was close between the business of Loft and the Pepsi-Cola enterprise.”

Because the line-of-business test is so integrally tied to competition, the justification for a two-tier analysis, where doctrines with different focuses are treated separately, may seem less compelling. A second step of analysis that focuses on competition as a basis for liability, rather than viewing it simply as a factor in the corporate opportunity inquiry, however, would serve to delineate the two doctrines. Their delineation is important because other corporate opportunity tests do not always overlap the competition doctrine as the line-of-business test overlaps it. In the interests of clarity and consistency, the two doctrines should be separated because, more often than not, they are not interchangeable.

At least one court has had problems with the nexus between competition and the line-of-business test. In Southeast Consultants, Inc. v. McCrary Engineering Corp., Hood, president of McCrary, used many of McCrary’s resources to form Southeast, a competitive enterprise. Part of McCrary’s business involved contracting to perform preliminary studies for projects it hoped to undertake. While employed by McCrary but acting for Southeast, Hood acquired an expectancy in a contract for which McCrary had already performed a preliminary study. The court refused to apply a line-of-business test to analyze the situation because the “adoption of the ‘line of business’ test could preclude a former officer from competing with the Pepsi-Cola opportunity. The manufacture of syrups was one of Loft’s not unimportant activities.” Id. at 279, 5 A.2d at 514.

84. Id.
85. 246 Ga. 503, 273 S.E.2d 112 (1980).
86. McCrary was an Indiana corporation involved in various phases of the construction of water and sewage projects. Id. at 503, 273 S.E.2d at 114. Hood, who became president of McCrary in 1972, formed Southeast in 1976. Id. “Unknown to McCrary’s directors, Southeast used McCrary’s Atlanta office as its office and used McCrary’s equipment, supplies and personnel in its engineering operations.” Id. at 503-04, 273 S.E.2d at 114. In 1979, after Hood tried unsuccessfully to purchase McCrary, four of McCrary’s engineers and employees left McCrary with Hood to join him at Southeast. Id. at 504, 273 S.E.2d at 114.
87. Id.
88. Id. at 509, 273 S.E.2d at 118. McCrary alleged that Southeast had submitted competitive bids on contracts for which McCrary had already prepared the initial designs. Id. at 504, 273 S.E.2d at 114. McCrary sued Hood for breach of fiduciary duty by forming a competing engineering firm and by usurping business opportunities belonging to McCrary. Id.
his former employer." Instead, the court applied the expectancy test and held that McCrary had an expectancy only in the contract for which McCrary had performed a preliminary study. The court explained that, if it applied the line-of-business test, Hood would have been liable for diverting to Southeast those contracts in which Hood participated while president of McCrary. Yet, as noted earlier, the court feared that the use of the line-of-business test might sweep too broadly by imposing liability for contracts acquired by Southeast after Hood had left McCrary's employ. Such an approach, the court warned, might prohibit all competition between a fiduciary and his former employer.

A two-step analysis would allay the court's fear that the line-of-business test might impose liability too broadly for the diversion of a corporate opportunity. A second tier of competition analysis, addressing the relationship between a fiduciary's competitive actions and the corporation, would confine the use of the corporate opportunity doctrine as a basis for liability where the taking of an opportunity involves competitive actions. Two steps, each with a different focus, would address the issue of competition within the competition doctrine and would avoid the potential for stretching the corporate opportunity doctrine beyond its limits.

3. The Fairness Test.—In addition to the expectancy and line-of-business tests, some courts, in assessing whether something is a corporate opportunity, ask whether, in fairness, an opportunity should be deemed to belong to the corporation. The fairness test was aptly described by the court in Paulman v. Kritzer, where the plaintiff instituted a derivative suit on behalf of Kritzer Radiant Coils, Inc. (KRC), a company engaged in the manufacture and sale of heating equipment. Because the company's quarters were inade-

89. Id. at 509, 273 S.E.2d at 117.
90. The court specifically held that the "contract fell within the scope and ability of McCrary's business and that McCrary had both an interest and expectancy in that contract growing out of its prior relationship (the preliminary study contract)." Id. at 509, 273 S.E.2d at 118.
91. Id. at 509 n.2, 273 S.E.2d at 117 n.2.
92. Id. at 509, 273 S.E.2d at 117.
93. Id.
96. Id. at 287, 219 N.E.2d at 542.
quate, the defendant, who was president and a director of KRC, purchased two adjacent tracts of land. He purchased the first tract individually, although he used KRC funds. The defendant later repaid KRC, with interest, but retained a profit of approximately $140,000. The defendant also purchased the second tract of land in his individual capacity, using KRC funds for the down payment and the first two installment contract payments. KRC also had decided that it would be advantageous for it to purchase the heating division of the Union Asbestos and Rubber Company (UNARCO). Subsequent to KRC’s decision, the defendant organized Batavia-Kritzer, Inc., (B-K), and then he individually purchased substantially all of UNARCO’s assets and assigned them to B-K. In the five to six years following the formation of B-K, KRC rented the use of B-K’s equipment, machinery, and manufacturing facilities. The rental money received by B-K paid substantially all of B-K’s purchase price for these assets. In deciding whether the defendant’s purchases of land and acquisition of UNARCO constituted a usurpation of a corporate opportunity belonging to KRC, the court applied a fairness test:

The basis of the corporate opportunity doctrine rests fundamentally on the unfairness, in particular circumstances, of an officer or director, whose relation to the corporation is fiduciary, taking advantage of an opportunity for his own personal profit when the interest of the corporation justly calls for protection. The resolution of such question [sic] calls for the application of ethical stan-

97. Id. at 287-88, 219 N.E.2d at 542-43.
98. Id. at 287-88, 219 N.E.2d at 542. The money used by the defendant was carried on KRC’s books as “Advances to Officers.” Id. at 288, 219 N.E.2d at 543.
99. Id. There was no explanation as to how the interest was determined. Id.
100. Id.
101. Id. at 289, 219 N.E.2d at 543.
102. Id. KRC advanced $45,000 to B-K so that it could begin its operation. Id. at 290, 219 N.E.2d at 544. KRC paid $381,600 to B-K as rental for B-K’s equipment and machinery; UNARCO’s purchase price to B-K for these assets was $298,750. Id. at 291, 219 N.E.2d at 544. KRC also paid B-K $392,400 as rental for UNARCO’s premises; B-K’s rental paid to UNARCO was $331,200. Id.
103. Id. at 294, 219 N.E.2d at 546. The following factors, as well as others, are considered in a fairness inquiry:

[T]he manner in which the offer was communicated to the officer; the good faith of the officer; the use of corporate assets to acquire the opportunity[;] . . . the degree of disclosure made to the corporation; the action taken by the corporation with reference thereto; and the need or interest of the corporation in the opportunity.
Applying the fairness test, the court examined the circumstances surrounding the defendant's acquisitions. Because KRC had expressed an interest in acquiring a new location, and because the defendant's purchases of property were made in furtherance of that purpose, and with KRC funds, the court held the defendant accountable to KRC for his net profits on the purchase and sale of the first tract of land, and for the title to the second tract of land, which he still held.\textsuperscript{105} Regarding the defendant's acquisition of UNARCO, the court considered the following factors in its decision to hold the defendant liable for usurping a corporate opportunity: KRC's ultimate payment for UNARCO;\textsuperscript{106} the defendant's good faith;\textsuperscript{107} KRC's financial ability to acquire UNARCO;\textsuperscript{108} and UNARCO's position in the same line of business as KRC.\textsuperscript{109} This application of the fairness test, like that of other tests developed to ascertain whether a corporate opportunity has been usurped, was sensitive to the defendant's competition with KRC as shown by his acquisition of an interest in UNARCO while owing a duty of loyalty to KRC. There is a crucial distinction, however, between recognizing the defendant's competition as a factor in a fairness analysis of corporate opportunity, and using competition as a basis for liability without reference to the usurpation of a corporate opportunity. In a fairness inquiry, on the one hand, the competition between B-K and KRC evidenced the close nexus between the enterprise acquired by the defendant and the corporation to which the defendant owed a duty of loyalty. A competition analysis, on the other hand, addresses the broader question of whether the fiduciary should be allowed to compete after assessing the good faith of the fiduciary.

In \textit{Kritzer}, the court did not concern itself with the defendant's good faith in terms of the competing policy considerations relevant

\begin{enumerate}
\item[104.] \textit{Id.} at 295, 219 N.E.2d at 546-47 (citation omitted).
\item[105.] The court affirmed the decree of the trial court which had affirmed the master's decree that the defendant account to KRC for the items described above. \textit{Id.} at 289, 219 N.E.2d at 543. The defendant's liability was subject to credit for his payments on the property still held by him. \textit{Id.}
\item[106.] \textit{See supra} note 102.
\item[107.] \textit{74 Ill. App. 2d} at 292, 219 N.E.2d at 545. The court found the defendant's actions lacking in good faith. \textit{Id.}
\item[108.] \textit{Id.} at 292-93, 219 N.E.2d at 545. The court found that KRC was financially able. \textit{Id.}
\item[109.] \textit{Id.} at 296, 219 N.E.2d at 547.
\end{enumerate}
to a competition analysis;\textsuperscript{110} rather, its concern with the defendant's good faith hinged on the relationship between the defendant's acquisition and KRC. Because it found that relationship to be close, it held that there was a usurpation of a corporate opportunity.\textsuperscript{111} The fairness test in \textit{Kritzer} did protect the plaintiff from the competition that occurred along with the taking of a corporate opportunity by one of its fiduciaries. Yet there is no guarantee that it will always afford such protection.\textsuperscript{112} The fundamental problems with this test are that it neither provides guidelines for the corporation or fiduciary nor serves as a workable precedent for future courts.\textsuperscript{113} A second-step competition inquiry would not only ensure due consideration of competitive acts undertaken to divert a corporate opportunity, but also would channel the competition factor into the appropriate framework for analysis.

\section{B. Drawbacks to the Use of the Corporate Opportunity Doctrine to Assess Liability for Competition}

\subsection{1. Focus of the Tests.---Applications of the corporate opportunity tests have been criticized for their over-\textsuperscript{114} or under-\textsuperscript{115} inclusive-}

\begin{itemize}
  \item The competing policies are a concern for the integrity of the employment relationship which demands an undivided duty of loyalty to the corporation and a desire to safeguard society's interest in fostering free competition. \textit{Science Accessories Corp. v. Summagraphics Corp.}, 425 A.2d 957, 962-63 (Del. 1980).
  \item Whether a fiduciary has wrongfully diverted a corporate opportunity to himself depends on the facts and circumstances of each case and is not subject to precise definition. \textit{Miller v. Miller}, 301 Minn. 207, 222, 222 N.W.2d 71, 79 (1974). For an analysis of the fairness test as applied by the \textit{Miller} court, see 2 J. CORP. L. 405 (1977).
  \item "The case law gives [the concept of fairness] no principled content and seems designed to leave the courts with boundless discretion; in this context, the discretion generates much uncertainty about the operational meaning of the legal rule, but no offsetting benefits." \textsuperscript{116} \textit{Brudney \& Clark, supra} note 3, at 1020 (footnote omitted).
  \item \textit{Southeast Consultants, Inc. v. McCrary Eng'g Corp.}, 246 Ga. 503, 509, 273 S.E.2d 112, 117 (1980) (refusing to apply the line of business test because the court feared the test would sweep too broadly and impose liability for competition by former employees). \textit{Brudney \& Clark} draw a distinction between the rules that should be applied to close and public corporations. The authors argue for a case by case approach when determining whether an opportunity should belong to a close corporation and a categorical approach for public corporations. \textit{Brudney \& Clark, supra} note 3, at 1002. \textit{Brudney \& Clark} argue that the distinction is warranted because close and public corporations operate quite differently, primarily because of their differences in size. \textit{Id.} at 1001-06. They criticize the application of rigid tests to small, closely-held corporations because the parties are better able to make individual bargains. \textit{Id.} The implication from this is that the current treatment given the corporate opportunity doctrine might preclude a fiduciary from appropriating to himself an opportunity which, under a test that is more sensitive to the circumstances, ought not to be precluded. If courts engaged in a separate analysis of competition, in addition to the corporate opportunity analysis, they would
The foregoing discussion has demonstrated that an expectancy test considers competition as a factor in determining whether a corporation's expectancy was defeated. The courts in both Abbott and Burg considered competition in a general sense and not in terms of its potential as a basis for liability. Treated generally, competition is evidence that the corporation would have had the opportunity for itself but for the fiduciary's competitive actions in acquiring the enterprise. In other words, the existence of competition is relevant where in its absence, the corporation, not the fiduciary, would hold the opportunity at issue. This notion is different from the use of competition as a basis for liability. The competition doctrine places less emphasis on the fact that the opportunity should belong to the corporation than on the fact that a fiduciary's competitive actions are repugnant to the duties of good faith and loyalty that underlie the fiduciary relationship. In corporate opportunity terms, competition speaks not to the relationship between the corporation and the fiduciary, but rather to the relationship between the corporation and the opportunity. If the relationship is close, then the opportunity should be viewed as one belonging to the corporation.

As seen in Guth v. Loft, the line-of-business test is potentially

115. See Brudney & Clark, supra note 3. The authors advocate a categorical approach to the question of corporate opportunity in the context of public corporations, noting that the three tests for corporate opportunity do not adequately reflect today's economic realities which enable a large corporation to embrace any opportunity that will produce a favorable rate of return. Id. at 1024-28. The utility of a separate competition analysis, in addition to the corporate opportunity analysis as applied to a public corporation, is that it would adequately address the factor of competition. If the authors are correct in their assertion that the corporate opportunity doctrine as applied to public corporations does not adequately account for economic realities, then a competition analysis would compensate for this inadequacy by addressing a corporation's expectation that its fiduciaries act loyally, not competitively. If competition were to be considered as a basis for liability, a corporation might recover damages for harm caused by the competition if the competition were undertaken in bad faith. See cases cited supra note 14. The potential to recover damages for bad faith competition is not addressed by the corporate opportunity doctrine and, therefore, a second step of analysis is warranted. This note refrains from suggesting a categorical prohibition on competition. Brudney and Clark, supra note 3, at 1026 n.95, also decline to support such a rule. This note does advocate a separate competition analysis so that a court may address the issue of whether competition should be barred in a specific case.

116. See supra text accompanying notes 29-67.
117. See supra notes 31-46 and accompanying text.
118. See supra notes 47-67 and accompanying text.
119. See supra text accompanying notes 31-113.
120. See supra text accompanying notes 171-83.
inclusive of competitive conduct. Nevertheless, a second step of analysis is important because of the doctrinal consistency it would provide. Additionally, at least one court has been reluctant to apply a line-of-business test for the very reason that it would focus not only on the tie between the opportunity and the corporation, but also on the relationship between the fiduciary's actions and the corporation. In such a situation, a second step of competition analysis would force the court to focus on the fiduciary-corporation relationship, and to do so in the appropriate context. The fairness test of corporate opportunity may encompass the factor of competition. Because this test is given no definite content by case law, it is hard to tell whether the courts always will consider competition and, if so, whether they will treat it in the same manner as they would if applying corporate competition principles.

Some courts have recognized that each doctrine has a distinct focus and have reflected this in their analysis. For example, in *Science Accessories Corp. v. Summagraphics Corp.*, the court analyzed both corporate opportunity and corporate competition issues. A key employee of the plaintiff corporation (SAC) with significant fiduciary responsibilities learned of a new digitizer concept called a magwire. SAC produced another digitizer, a grafpen, in its business of manufacturing and selling high technology instruments for use in the computergraphics field. To develop the new magwire concept, the defendants formed the Summagraphics Corporation instead of presenting the new concept to SAC. The court found that the defendants did not wrongfully appropriate a corporate opportu-

---

121. *See supra* notes 68-84 and accompanying text.
123. *See supra* text accompanying notes 94-113.
126. 425 A.2d 957 (Del. 1980).
127. The defendants were a nuclear physicist in charge of SAC's research and development and engineering department, a chief engineer, and a supervisor of manufacturing. *Id.* at 960 n.5. The court terms these defendants "key" employees and states that the principles which apply to officers and directors apply to these employees as well. *Id.* at 962. This note does not advocate a rule that key employees should always be dealt with as fiduciaries; further analysis might lead to a contrary conclusion.
128. *Id.* at 960.
129. *Id.*
nity, since SAC was neither willing nor able to embrace the new digitizer concept.\textsuperscript{130} Turning next to the question of competition, the court held that the employees engaged in no misconduct that served to defeat their privilege to arrange to compete.\textsuperscript{181}

Similarly, in \textit{Lincoln Stores, Inc. v. Grant},\textsuperscript{132} the court distinguished the acquisition of a competitive enterprise from the operation of one. It found no liability for the usurpation of a corporate opportunity because there was no interest or expectancy in the acquisition, but it did assess liability for competition based on the operation of the acquired enterprise.\textsuperscript{183} Pursuant to its corporate opportunity analysis, the court examined the relationship between the store, acquired by the defendants, and the plaintiff corporation and found that the defendants had committed no breach since the plaintiff had had no interest in the acquisition.\textsuperscript{184} Dealing separately with the issue of competition, the court examined the defendants' actions in making the store competitive in light of the duty of loyalty they simultaneously owed to the plaintiff.\textsuperscript{185} The competition inquiry focused on the defendants' use of information obtained through their employment with the plaintiff to make their new store competitive.\textsuperscript{186}

Because the two doctrines do not always share the same focus, a second tier of analysis is useful. A second step would scrutinize a fiduciary's competitive actions separately from the issue of corporate opportunity. A finding of liability, therefore, would be the product of a systematic analysis that preserves free competition and minimizes employee disloyalty. Further, such an analysis avoids the promulgation of confusing and unpredictably applied legal principles. It would explicate the distinction between the use of competition as a factor in assessing whether an opportunity is a corporate one and the use of competition as a basis for liability. Additionally, it would ensure the examination of a fiduciary's competitive actions in the event that they remain unaddressed in a corporate opportunity inquiry.

\section*{2. Defenses to Corporate Opportunity.}—Defenses to a finding of corporate opportunity may be successfully raised to shield a fiduciary from liability. These defenses include a corporation's rejec-
tion of an opportunity presented to it, a corporation’s financial inability to acquire an opportunity due to its insolvency, and a corporation’s consent to a fiduciary’s appropriation of an opportunity. However pertinent these defenses may be to shield a defendant from liability for the diversion of a corporate opportunity, they may not be as relevant where, in addition to the acquisition of an enterprise, actions are taken to make the enterprise a competitive one. A competition analysis assesses a fiduciary’s actions to see if they are in good faith. While such an assessment may consider, for example, the corporation’s financial capacity and resolutions by the Board of Directors that reject an opportunity presented to it, such circumstances are not dispositive of the question of whether a fiduciary has remained faithful to his duty of loyalty. The potential irrelevance of corporate opportunity defenses to a fiduciary’s competition compels the use of a second step of analysis so that if, under the corporate opportunity analysis, a fiduciary is shielded from liability due to one of these defenses, his competitive acts will not likewise be shielded.

In Foley v. D’Agostino, the court held that although board rejection of a corporate opportunity precluded the use of the opportunity as a basis for liability, the rejection did not, under competition principles, absolve the defendants of their breach of fiduciary duty by entering into competition with the plaintiff. The defendants could not escape liability simply because the defendants’ competition also involved the taking of a corporate opportunity; in short, the defense of corporate rejection of an opportunity would not work as a defense to their competition. Thus, the Foley court expressed that, as a policy matter, a fiduciary may not compete with a corporation to whom he owes a duty of loyalty, simply because the corporation

139. See Burg v. Horn, 380 F.2d 897 (2d Cir. 1967).
140. See infra text accompanying notes 171-83.
141. See Foley v. D’Agostino, 21 A.D.2d 60, 248 N.Y.S.2d 121 (1st Dep’t 1964) (stating that board rejection is not a defense to competition by a fiduciary); Note, Fiduciary Duty of Officers and Directors Not to Compete with the Corporation, 54 Harv. L. Rev. 1191, 1199 (1941) (stating that “the fact that the competing business undertaken presented itself in the form of a corporate opportunity which the corporation was financially unable or for other reasons unwilling to undertake should be no excuse for an officer undertaking it individually”).
142. 21 A.D.2d 60, 248 N.Y.S.2d 121 (1st Dep’t 1964).
143. Id. at 67, 248 N.Y.S.2d at 129. The court held that competition would serve as a basis for liability.
144. Id. at 67-68, 248 N.Y.S.2d at 129 (citing Note, supra note 141, at 1199).
rejected the opportunity as a matter of its business judgement.\textsuperscript{145} The duty of loyalty owed by the fiduciary undoubtedly is undercut by his interest in a competitive enterprise,\textsuperscript{146} because by competing, the fiduciary no longer promotes the best interests of his corporation.\textsuperscript{147}

Evidence of a corporation's financial inability is also a defense to a finding of a corporate opportunity.\textsuperscript{148} Financial inability may bar a corporation from acquiring a new business and, as a result, the fiduciary may acquire it himself. Nevertheless, as a matter of policy, this defense, like that of corporate rejection, should not justify a fiduciary's breach of his duty of loyalty to that corporation by engaging in a competing enterprise while still employed.\textsuperscript{149} The integrity of the employment relationship, as protected by the duty of loyalty, should not be undercut merely because, in addition to a fiduciary's competition, the taking of a corporate opportunity was involved. By engaging only in a corporate opportunity analysis, a court would allow the defense of financial inability to shield a fiduciary from liability for his competitive acts. Under a competition analysis, this defense would not shield a fiduciary because a corporation is entitled to its fiduciary's undivided loyalty regardless of its financial straits.\textsuperscript{150} Thus, a two-step analysis would prevent a fiduciary, who was involved both in competition and the taking of an opportunity, from escaping liability merely because a defense fortuitously defeats a corporate opportunity claim against him.

In \textit{Burg v. Horn},\textsuperscript{151} the defense of consent\textsuperscript{152} shielded the defen-

\textsuperscript{145} Id. (citing Note, supra note 141, at 1199).
\textsuperscript{146} Id. (citing Note, supra note 141, at 1199).
\textsuperscript{147} Id. (citing Note, supra note 141, at 1199).
\textsuperscript{148} See Fliegler v. Lawrence, 361 A.2d 218 (Del. 1976). In Fliegler, objective evidence of the corporation's financial inability to acquire the opportunity was sufficient to shield the defendant from liability. Id. at 220. But see Paulman v. Kritzer, 74 Ill. App. 2d 284, 219 N.E.2d 541 (1966), aff'd, 38 Ill. 2d 101, 230 N.E.2d 262 (1967). The Paulman court notes the danger of permitting financial inability to act as a defense when the corporation is financially solvent: "'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 of profit will be open to them personally.'" Id. at 293, 219 N.E.2d at 545-46 (quoting Irving Trust Co. v. Deutsch, 73 F.2d 121, 124 (2d Cir. 1934)).
\textsuperscript{149} See Note, supra note 141, at 1199.
\textsuperscript{150} Id.
\textsuperscript{151} For further discussion of this case, see supra notes 47-67 and accompanying text.
\textsuperscript{152} In a close corporation such as Darand, consent by directors is more likely to be a conscious response than in public corporations where consent would be elicited by the proxy process. See Brudney & Clark, supra note 3, at 1018-19.
dant from liability based on a corporate opportunity theory. The court found that the plaintiff impliedly consented to the defendant’s independent acquisitions of property since it did not require that every property found be offered to Darand. Unlike the defenses previously discussed, consent may be relevant to shield a fiduciary from liability for competition. The issue of consent, however, could be considered along with other factors in the court’s assessment of whether the defendant competed in good faith. A separate competition analysis, not subject to the defenses of corporate opportunity, would further the policy underlying the duty of loyalty—protecting the integrity of the employment relationship. Also, it would inject more certainty into the law of corporate opportunity and corporate competition. Both fiduciaries and corporations would know that the obligations stemming from the fiduciary relationship will be protected by the competition doctrine even if the competitive acts are inextricably tied to the lawful or unlawful taking of a corporate opportunity. Moreover, both would be aware that corporate opportunity defenses will not necessarily defeat a meritorious claim of corporate competition.

3. The Remedy For the Taking of a Corporate Opportunity.—The traditional remedy for the usurpation of a corporate opportunity is the imposition of a constructive trust on the wrongfully appropriated properties. The policy underlying this remedy is the desire to place individuals in their proper financial positions without forcing them to enter into business together under strained circumstances. Additionally, the knowledge that a trust will be imposed for the benefit of the corporation on any interest wrongfully acquired serves to remove the temptation to breach the duties imposed by the fiduciary relationship. For wrongful competition in breach of fiduciary obligations, however, the remedy may take the form of an injunction restraining further competition, or money damages

153. See 380 F.2d at 900.
154. The Burg court makes mention that the factors relevant to a finding that there is no liability for diversion of a corporate opportunity would probably result in a finding that there is no liability for competition. Id. at 901.
155. Generally, liability is not imposed for competition in good faith. See infra text accompanying notes 171-83.
156. E.g., Morad v. Coupounas, 361 So. 2d 6, 10 (Ala. 1978); Guth v. Loft, Inc., 23 Del. Ch. 255, 270, 5 A.2d 503, 510 (Sup. Ct. 1939); see supra notes 12, 45.
159. ABC Trans Nat’l Transp., Inc. v. Aeronautics Forwarders, Inc., 62 Ill. App. 3d 671, 379 N.E.2d 1228 (1978) (stating that an injunction to prevent further competition is
for the harm to the corporation caused by the competition.

Imposing a constructive trust on the wrongfully appropriated property may not always redress the injury suffered by the corporation as a result of the defendant's competitive acts aside from the acquisition of the enterprise. For example, in Copounas v. Morad, the Alabama Supreme Court affirmed the trial court's imposition of a constructive trust on the profits of the wrongfully acquired business. Previously, this court had reversed the award of a remedy requiring the defendants to offer original shareholders damages of thirty percent of the stock in the new corporation. The award of a constructive trust did not necessarily compensate for all the harm the corporation endured as a result of the competition, because the trust was impressed only on the profits of the acquired enterprise and not on the enterprise itself. Possibly, impressing a trust only on any profits generated by the property wrongfully acquired left the corporation uncompensated for permanent loss of customers or loss of valuable employees to the rival business. However unfair this may seem, under a corporate opportunity analysis it is logical. Because the corporate opportunity analysis focuses on the acquisition and not the competition, the measure of damages also is addressed solely to the wrongful acquisition and the harm it caused. Yet where the acts giving rise to a claim of usurpation of a corporate opportunity involve more than simple acquisition (e.g., the acts include competitive acts taken by a fiduciary while employed by the plaintiff corporation), money damages, in addition to a constructive trust, may more adequately and precisely redress competitive harms. In Red Top Cab Co. v. Hanchett, for example, the court referred the issue of damages to a master, giving the plaintiff the chance to prove appropriate to protect the plaintiff's right to be free from competition by its employees).

160. Red Top Cab Co. v. Hanchett, 48 F.2d 236 (N.D. Cal. 1931) (stating that plaintiff has a right to recover damages that he can prove were caused by the defendant's competition); Lincoln Stores, Inc. v. Grant, 309 Mass. 417, 34 N.E.2d 704 (1941) (allowing plaintiff to recover damages for the failure to earn profits due to competition).

161. 380 So. 2d 800 (Ala. 1980).

162. Id. at 803.

163. 361 So. 2d 6 (Ala. 1978). On remand, the trial court decided that the constructive trust should be imposed only on the net profits or income of the new corporation, and not on its assets and entire business. The shareholder appealed, but the Alabama Supreme Court affirmed the trial court's decision. 380 So. 2d 800 (Ala. 1980).

164. 380 So. 2d at 803.

165. See supra text accompanying notes 114-36.

166. 48 F.2d 236 (N.D. Cal. 1931).
any harm caused by the competition.\footnote{167} And in \textit{Lincoln Stores, Inc. v. Grant},\footnote{168} the court affirmed a decree that the defendants pay the plaintiff damages sustained by reason of the defendants' competitive conduct.\footnote{169} The \textit{Lincoln Stores} court found that the plaintiff suffered harm by not earning profits that it would have earned were it not for the defendants' competition.\footnote{170}

Because a constructive trust may not address the potential harms resulting from competition, it is important to utilize a two-step analysis. A separate competition analysis would afford a second potential basis for liability and a different remedy more likely to redress the harm that gave rise to liability. If a fiduciary engages only in competition, then the corporation would recover damages as compensation for any harm caused. Yet where the fiduciary commits another breach of his duty by taking a corporate opportunity in addition to engaging in competition, under the traditional corporate opportunity approach, the corporation can avail itself only of a constructive trust remedy. Without a second potential basis for imposing liability that provides for damages, a corporation might be left at least partially uncompensated where one of its fiduciaries participates in competition as well as appropriates a corporate opportunity. Thus, if courts do not engage in a two-step inquiry, a corporation might be compensated less for a fiduciary's competition when it is combined with the taking of a corporate opportunity than when it exists alone.

\section*{II. Competition}

The general rule governing a situation where a fiduciary becomes involved in a competing enterprise is that he can compete so long as he does so in good faith.\footnote{171} This general rule, like that prohibiting a fiduciary from appropriating a corporate opportunity,

\footnotesize
\begin{itemize}
\item \textit{Id.} at 239. The court decreed that the defendant pay the plaintiff $4,000 plus interest as compensation for the salary that the defendant had paid to himself during his uncompleted term as manager of the plaintiff company. \textit{Id.} at 238. Additionally, the court allowed the plaintiff the choice of recovering the profits earned by the defendant or, alternatively, purchasing the property and stock of Green Top upon paying for the permits originally paid for by the defendant plus the fair appraised value of the properties and stock of Green Top. \textit{Id.} at 239. Finally, the court referred the issue of damages to a master, giving the plaintiff the opportunity to prove damages incurred by competition. \textit{Id.}
\item \textit{309 Mass.} 417, 34 N.E.2d 704 (1941). For further discussion of this case, see \textit{supra} text accompanying notes 132-36.
\item \textit{Id.} at 424, 34 N.E.2d at 708.
\item \textit{Id.} at 420, 34 N.E.2d at 706.
\item See cases cited \textit{supra} note 7.
\end{itemize}
is part of the duty of loyalty. There are, however, limits on the imposition of liability for competition. First, liability for competition may not be imposed where a fiduciary merely engages in preparation to compete. Second, where a fiduciary competes with his corporation but causes no injury to it, courts will refrain from imposing liability for competition. Where courts do impose liability for competition in bad faith, it is generally because a fiduciary has breached what is here described as an independent fiduciary duty, which is either a duty stemming from the general duty of loyalty, but not part of the doctrines of corporate opportunity or corporate competition, or part of the duty of care.

A. Actual Competition

Actual competition exists when a corporate fiduciary is involved in the business of a competing enterprise, as distinguished from merely preparing to enter it. In Foley v. D'Agostino, the court found that a fiduciary's involvement in a competing enterprise while he was still employed by the corporation to whom he owed a duty of loyalty would, if proven, constitute a basis for liability. "[A]n officer or director who actively engages in a rival or competing business to the detriment of his corporation, must answer to the corporation for the injury it thereby sustains." In Foley, the defendants acquired a supermarket located near the plaintiff's supermarket and used the name D'Agostino, implying that it was operated by the plaintiff. Since the plaintiff corporation had rejected the acquisition of the new supermarket, the corporate opportunity doctrine

172. "The fiduciary duty of loyalty which a director or officer owes to his corporation broadly forbids him to pursue his own interests in a manner injurious to the corporation." Note, supra note 57, at 765 (citing BALLANTINE, CORPORATIONS § 79 (1946)); see cases cited supra note 2.


176. 21 A.D.2d 60, 248 N.Y.S.2d 121 (1st Dep't 1964). For further discussion of this case, see supra text accompanying notes 142-47.

177. 21 A.D.2d at 66-69, 248 N.Y.S.2d at 128-30. On appeal from an order to dismiss, the court held that the complaint sufficiently stated a cause of action for unfair competition. Id. at 69, 248 N.Y.S.2d at 130.

178. Id. at 67, 248 N.Y.S.2d at 128.

179. Id. at 68, 248 N.Y.S.2d at 130.
could not serve as a basis for liability. Nevertheless, the court found that competition would be a sufficient basis for liability, holding that the corporation was "'entitled to freedom from competition by those charged with the promotion of its interests." By distinguishing between competition and corporate opportunity as bases for liability, the court recognized the difference in the focus of the two doctrines. Pursuant to its competition inquiry, the court examined the defendants' competitive actions insofar as they may have violated the fiduciary duty of loyalty. The court found actionable competition where employees competed with their employer during the term of their employment.

B. Preparation to Compete

Some courts have determined that a fiduciary's actions do not constitute actionable competition where the fiduciary has merely engaged in preparation to compete. The implication then is that only where the fiduciary is actually engaged in the operations of a competing enterprise will he be liable for acting in bad faith. The rule that mere preparation to compete is not a basis for liability is based

---

180. Id. at 67-68, 248 N.Y.S.2d at 129; see supra notes 142-47 and accompanying text.
181. Id. at 68, 248 N.Y.S.2d at 129 (quoting Note, supra note 141, at 1199).
182. Id. at 67-69, 248 N.Y.S.2d at 129-30.
183. Id. at 69, 248 N.Y.S.2d at 130.
184. Science Accessories Corp. v. Summagraphics, Corp., 425 A.2d 957 (Del. 1980); Maryland Metals, Inc. v. Metzner, 282 Md. 31, 382 A.2d 564 (1978). At least one court has imposed liability for competition in bad faith when only preparatory activity occurred. Craig v. Graphic Arts Studio, Inc., 39 Del. Ch. 447, 166 A.2d 444 (1960). In Craig, an action by the former president of the defendant corporation for compensation, the plaintiff was held to have violated his fiduciary duties to Graphic by becoming an undisclosed 50% owner of a competing business (Reproduction, Inc.) while still employed by Graphic. In finding the plaintiff liable, the court said:

The only reasonable inference that can be drawn is that the growth of Reproduction had to be in part at the expense of Graphic's business. It is contrary to human nature to suppose that plaintiff, while continuing to run Graphic's business with knowledge that in time he was leaving and going with "his" own company, would be diligent in seeking to further the business of Graphic.

Id. at 451, 166 A.2d at 446.

Although the Craig case stands for the proposition that fiduciaries will be liable for engaging in competition with their corporate employer while they are still employed, the case has been the subject of criticism. The basic objection to the court's holding is that it is unclear whether the plaintiffs in Craig did anything beyond preparing to compete and that mere preparation is not grounds for liability. See Newman, Formation of Competing Enterprise by Corporate Fiduciary, 3 Hous. L. Rev. 221, 222 (1965). The Craig decision was regarded as bad law and was not followed in Maryland Metals, Inc. v. Metzner, 282 Md. at 45 n.6, 382 A.2d at 572 n.6.
on a public policy of encouraging competition and free enterprise.\footnote{185. In Maryland Metals, Inc. v. Metzner, 282 Md. 31, 38-39, 382 A.2d 564, 569 (1978) (citations omitted), the court observed: [The] policy in favor of free competition has prompted the recognition of a privilege in favor of employees which enables them to prepare or make arrangements to compete with their employers prior to leaving the employ of their prospective rivals without fear of incurring liability for breach of their fiduciary duty of loyalty.}{186. Id. at 39-40, 382 A.2d at 569 (emphasis in original) (quoting Cudahy Co. v. American Labs., Inc., 313 F. Supp. 1339, 1346 (D. Neb. 1970)).}{187. 425 A.2d 957 (Del. 1980). For further discussion of this case, see supra notes 126-31 and accompanying text.}

Admittedly the mere decision to enter into competition will eventually prove harmful to the former employer but because of the competing interests of allowing an employee some latitude in switching jobs and at the same time preserving some degree of loyalty owed to the employer the mere entering into competition is not enough. It is something more than preparation which is so harmful as to substantially hinder the employer in the continuation of his business.\footnote{188. 425 A.2d at 964-65.}{189. Id. at 965.}{190. Id. (quoting Maryland Metals, Inc. v. Metzner, 282 Md. 31, 47-48, 382 A.2d 564, 573 (1978)).}{191. Id.}

In \textit{Science Accessories Corp. v. Summagraphics Corp.}, the court held that the defendants’ establishment of Summagraphics Corp., while in the employ of Science Accessories Corp. (SAC), constituted mere preparation to compete.\footnote{188. Because the defendants were not under non-competitive covenants or employment contracts with SAC, “they were free to make reasonable preparations to compete while still employed by SAC and after quitting SAC’s employ, to compete with SAC.”}{189. The court held that the “defendants’ concealment from SAC of their plans to enter into competition with SAC was not, without more, a violation of their fiduciary duty of loyalty. To require employees to divulge such information to their employers ‘would create an undesirable impediment to free competition in the commercial and industrial sectors of our economy.’”}{190. Even though the court did not impose liability, its competition analysis focused on the defendants’ competitive actions—or lack thereof—rather than on the actions taken to acquire Summagraphics, as a corporate opportunity analysis would.}{191. The defendants in \textit{Science Accessories Corp.} did not actively engage in the business of Summagraphics (the competitive enterprise
that they formed) during the time they were still employed by SAC; rather, they only prepared to compete with SAC by forming Summagraphics. They did not use corporate assets on a wide scale, as the defendant did in Guth,\textsuperscript{192} nor did they appropriate clients of SAC as their own as the defendant did in Abbott v. Redmont.\textsuperscript{193} In this light, it is easy to see why the court found that the defendants' actions were somewhat disloyal but not of the magnitude necessary to constitute breach of the duty of loyalty.\textsuperscript{194} The defendants used approximately twenty dollars worth of SAC's materials and made approximately ten dollars worth of phone calls in connection with their formation of Summagraphics. Also, the defendants circulated a prospectus that unfavorably compared the SAC digitizer with Summagraphic's digitizer.\textsuperscript{195}

Recognizing that the right to make arrangements to compete is a privilege, the exercise of which could conceivably amount to a breach of the duty of loyalty, the court found that the defendants' actions fell within the parameters of the privilege.\textsuperscript{196} In the course of its determination, however, the court examined all of the actions taken by the defendants to further their competitive enterprise. "'[T]he ultimate determination of whether an employee has breached his fiduciary duties to his employer by preparing to engage in a competing enterprise must be grounded upon a thoroughgoing examination of the facts and circumstances of the particular case.'"\textsuperscript{197} This inquiry, unlike the corporate opportunity analysis, was not limited to an exploration of the relationship between SAC and Summagraphics. The court examined the defendants' conduct vis-à-vis their duty of loyalty to determine whether liability for competition was warranted.

C. Competition Without Injury

Although the court in Science Accessories Corp. declined to impose liability for corporate competition primarily because the defendants' acts were largely preparatory, a closer examination of the court's reasoning indicates that the absence of actual injury also in-

\textsuperscript{192} For a discussion of Guth, see supra notes 68-84 and accompanying text.
\textsuperscript{193} For a discussion of Abbott, see supra notes 31-46 and accompanying text.
\textsuperscript{194} 425 A.2d at 965.
\textsuperscript{195} Id.
\textsuperscript{196} Id.
\textsuperscript{197} Id. (quoting Maryland Metals, Inc. v. Metzner, 282 Md. 31, 41, 382 A.2d 564, 570 (1978)).
fluenced its holding that the defendants would not be subject to liability for their actions. As previously noted, the court questioned various actions of the defendants, namely their use of approximately thirty dollars of SAC assets to form Summagraphics and their circulation of a prospectus comparing the SAC digitizer unfavorably with the new magwire digitizer, and acknowledged that such actions were disloyal to SAC. Nevertheless, since neither of these actions caused any actual damages to SAC, the court did not impose liability on the defendants. It is significant that the Science Accessories Corp. court, in its competition analysis, thoroughly examined whether the defendants' competitive actions caused any harm to the plaintiff. A court that confined its analysis to corporate opportunity principles might not be sensitive to all the potential harms that could accrue to a corporation when one of its fiduciaries engages in competition.

D. Good Faith Competition as the Absence of a Breach of an Independent Fiduciary Duty

Perhaps the largest group of cases dealing with competition find liability for competition under what is really a breach of an independent fiduciary duty. The implication from these cases is that,
absent the breach of an independent fiduciary duty, the competitive acts would be deemed competition in good faith. "As a general proposition it may be said that a corporate officer or director is entirely free to engage in an independent, competitive business, so long as he violates no legal or moral duty with respect to the fiduciary relation that exists between the corporation and himself." 203

*Red Top Cab Co. v. Hanchett* is but one in a line of cases where liability was imposed when the defendant breached an independent duty. 204 Hanchett was financed by the Yellow and Checker Cab Company ("Yellow") to purchase all the shares of the Red Top Cab Company ("Red Top") so that Yellow could consolidate with Red Top without impairing its good will, which arose from its position as a competitor. 205 Hanchett did so and became director, president, and sole shareholder of record; he then endorsed the stock over to Yellow. Hanchett subsequently formed Green Top Cabs, Ltd. ("Green Top"), placing himself as sole stockholder and president. 206 Hanchett solicited personnel for Green Top by posting notices on an employee bulletin board and thereby acquired over fifty of Red Top's employees as his own. The evidence showed that Red Top's business suffered a significant decline after Green Top's emergence as a competitor. 207 In finding for the plaintiff, the court held that Hanchett breached his fiduciary obligations to Red Top. The court stated that the defendant, "in organizing his competing business, knowingly crippled and injured the plaintiff company, depriving it of selected personnel and using its facilities in the launching of his own project." 208 It is unclear whether the absence of this knowing breach of fiduciary duty alone would have absolved the defendant from liability.

In *Las Luminarias of the New Mexico Council of the Blind v. Isengard*, 209 the court held the defendants liable for violating their duty of loyalty by competing with the plaintiff in bad faith. The plaintiff was a non-profit organization that provided training and job development services to the severely disabled. 210 The defendants,

---

204. See cases cited supra note 189. For further discussion of the Red Top case, see supra text accompanying notes 166-67.
205. 48 F.2d at 237.
206. Id.
207. Id.
208. Id. at 238.
210. Id. at 300, 587 P.2d at 447.
employees of the plaintiff at the time of the breach, used confidential information obtained during the course of their employment to form another corporation that competed with the plaintiff for the same federal funding. While the court recognized that mere organization of a rival corporation is not a violation of a fiduciary's duty of loyalty, it also stated that participation in disloyal acts in anticipation of future competition does constitute such a breach.211

Thus, in making arrangements to compete, an employee may not use confidential information peculiar to his employer's business and acquired through the course of employment . . . . In addition, an employee may not solicit customers before the end of his employment or do other similar acts in direct competition with the employer's business.212

Similarly, the court in Lincoln Stores213 held the defendants liable for competition in bad faith on the basis of a breach of an independent fiduciary duty.214 While employed by the plaintiff store, the defendants acquired an undisclosed interest in a similar store and made it competitive, while employed by and using information acquired through the plaintiff.215 The court held that although the defendants did not usurp a corporate opportunity by acquiring a new store216—because the plaintiff had no interest or expectancy217—the defendants violated their duty to the plaintiff by their use of plaintiff's information to transform the defendants' store into a competing business.218

In each of the cases discussed in this section, the court defines bad faith competition as competition plus some other breach of duty. This implies that the competition is permissible without the other breach. A closer look, however, demonstrates that the independent breach is integrally tied to the competition and should not be separated. The language in these cases suggests that competition between a fiduciary and his corporation is allowed except where it is undertaken in bad faith, and implies that the bad faith stems from actions

211. Id. at 302, 587 P.2d at 449.
212. Id. (citations omitted).
213. For further discussion of Lincoln Stores, see supra text accompanying notes 132-36, 168-70.
214. 309 Mass. at 422-23, 34 N.E.2d at 707.
215. Id. at 418-20, 34 N.E.2d at 705-06.
216. Id. at 422, 34 N.E.2d at 707.
217. Id. at 421-22, 34 N.E.2d at 707.
218. Id. at 422-23, 34 N.E.2d at 707-08.
other than the competition. This implication, however, simply does not withstand scrutiny. In Red Top, Las Luminarias, and Lincoln Stores, the competition would not have been called competition were it not for the other actions taken in bad faith. If those defendants had not used their company's resources, they would not have been able to make their new enterprises competitive with the plaintiffs' enterprises. In the absence of conduct that has been labelled a breach of an independent duty, the defendants, in these cases and in others involving similar determinations, would not likely have been held in violation of any duty.

Even though the actions that constitute the breach of an independent duty are very closely related to competition, courts should indicate in their decisions that the independent duties that are breached in the course of a fiduciary's attempts to make an acquired enterprise competitive are the factors that give rise to a finding of liability. By failing to make this distinction clear in their opinions, courts have implied that the competition alone is the basis for imposing liability. A fiduciary's participation in a competing enterprise without the breach of an independent duty may be a basis for liability. This could occur, for example, where the fiduciary's employment with his corporation is concurrent with his actual involvement in a rival business. Where there is no clear violation of the fiduciary's duty of loyalty, however, and the competition itself occurs after the termination of the fiduciary's employment, the courts should indicate that liability for competition in bad faith is based on the fiduciary's breach of an aspect of the duty of loyalty unrelated to otherwise prohibited wrongful competition or usurpation of a corporate opportunity.

In all of the cases where a court applies a competition analysis, the focus is on factors other than those relevant to a corporate opportunity analysis. The competition inquiry primarily scrutinizes the fiduciary's actions to determine whether they comport with his duty of loyalty. This inquiry is different from one pursuant to the corporate opportunity doctrine; competition is considered in a general sense in the corporate opportunity scheme and is relevant to illustrate the relationship between the acquired enterprise and the corporation. It is not considered as a potential basis for liability when examined in a corporate opportunity framework, leaving fiduciaries

220. Foley v. D'Agostino, 21 A.D.2d 60, 248 N.Y.S.2d 121 (1st Dep't 1964); see supra notes 176-83 and accompanying text.
and corporations with uncertain guidelines as to what types of competitive conduct are protected.

III. SUGGESTED FRAMEWORK FOR ANALYSIS

The framework for analysis that this note suggests is not entirely new; many courts have undertaken an analysis of both corporate opportunity and corporate competition.\textsuperscript{221} The importance of a two-step analysis is that it works as a guide both for corporations uncertain as to the protection afforded them and for fiduciaries uncertain as to the limits on their freedom of action. Present guidelines are unclear because many courts do not follow the two-step analysis.\textsuperscript{222}

Courts, confronted with a case where a fiduciary has taken a corporate opportunity and participated in competition, should engage in a two-step analysis as did the courts in \textit{Science Accessories Corp.}, \textit{Lincoln Stores}, and \textit{Foley}.\textsuperscript{228} The first step involves an analysis of whether a corporate opportunity was wrongfully appropriated by the fiduciary. Depending upon the jurisdiction, a court may use either the interest or expectancy test,\textsuperscript{224} the line-of-business test,\textsuperscript{225} the fairness test,\textsuperscript{226} or a combination thereof.\textsuperscript{227} Generally, the analysis under any of the tests focuses primarily on the tie between the corporation and the competitive enterprise.\textsuperscript{228} Sometimes, however, the line-of-business test may be broad enough to encompass the competitive actions taken by a fiduciary.\textsuperscript{229} Even where the application of a corporate opportunity analysis does examine the factors of competition, that analysis alone may be inadequate. First, it considers competition only in a general sense and not with regard to the policies

\begin{itemize}
\item \textsuperscript{222} Courts in the following cases did not apply a two-step analysis: \textit{Abbott Redmont Thinlite Corp.} v. Redmont, 475 F.2d 85 (2d Cir. 1973); \textit{Red Top Cab Co. v. Hanchett}, 48 F.2d 236 (N.D. Cal. 1931); \textit{Morad v. Coupounas}, 361 So. 2d 6 ( Ala. 1978); \textit{Guth v. Loft, Inc.}, 23 Del. Ch. 255, 5 A.2d 503 (Sup. Ct. 1939); \textit{Southeast Consultants, Inc. v. McCrary Eng’g Corp.}, 246 Ga. 503, 273 S.E.2d 112 (1980).
\item \textsuperscript{223} See cases cited supra note 221.
\item \textsuperscript{224} See supra notes 29-67 and accompanying text.
\item \textsuperscript{225} See supra notes 68-93 and accompanying text.
\item \textsuperscript{226} See supra notes 94-113 and accompanying text.
\item \textsuperscript{227} See supra note 28.
\item \textsuperscript{228} See supra text accompanying notes 114-36.
\item \textsuperscript{229} See supra text accompanying notes 80-84.
\end{itemize}
underlying the establishment of competition as a basis for liability.  

Second, the defenses applicable to a finding of corporate opportunity may shield a defendant from liability for competition unless the court separately analyzes the competitive acts undertaken to acquire or develop a corporate opportunity.  

Third, the traditional remedy for the usurpation of a corporate opportunity may not compensate a corporation for all the harms potentially caused by a fiduciary’s wrongful competition.

Since the corporate opportunity analysis does not provide any certainty in a situation where the taking of a corporate opportunity is coupled with competitive acts, courts should uniformly engage in a second step of analysis. This second step, with its focus on competition, will ensure a full analysis of the fiduciary’s competitive acts and will result in an appropriate measure of damages. As the court in Burg observed: “[A] director may be barred from competing with his corporation even though he does not by doing so appropriate a corporate opportunity.” To protect against the evils of bad faith competition, the courts, following this second step of analysis, should determine whether the competitive actions of a fiduciary were taken in good faith. Regardless of whether the court finds liability, the focus is always on the competitive actions—not merely on the acquisition.

The problems discussed throughout this note highlight the need for uniform application of a second step of analysis. This step should be invoked whenever there is competition, regardless of whether liability may be imposed under a corporate opportunity theory. If there is liability for diversion of a corporate opportunity, the use of a second step would serve primarily to assess and award damages in order to redress the harm caused the corporation by its fiduciary’s competition. When liability is not imposed as a result of a corporate opportunity analysis, the second step might afford a separate basis for liability. In short, a second tier of analysis would ensure scrutiny of a fiduciary’s competitive actions even if he were not liable for wrongful diversion of a corporate opportunity. This makes sense, since without such scrutiny the corporation’s entitlement to a fiduciary’s undivided loyalty would mean nothing. If courts follow this two-tier analysis in

---

230. See supra notes 114-36 and accompanying text.
231. See supra notes 137-55 and accompanying text.
232. See supra notes 156-70 and accompanying text.
233. 380 F.2d at 901 (citations omitted). For further discussion of the Burg case, see supra notes 47-67, 151-55, and accompanying text.
their decision-making processes, the results will favor both corporations and fiduciaries. Corporations will benefit from a greater degree of protection and a guarantee that the competitive actions of their fiduciaries will be examined. Currently, they are given no such guarantee. Fiduciaries will know, with some degree of certainty, the limits of their freedom of action. Although they may dislike the imposition of this double-barreled theory of liability, they will be more certain of the form of analysis that courts will take and will be able to act accordingly. Without a guaranteed two-step inquiry, it remains uncertain whether competitive actions otherwise would inspire analysis.

Jodi L. Popofsky