Is the Statutory Fiduciary Duty of Corporate Directors Exclusive?

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> But to say that a man is a fiduciary only begins analysis; it gives direction to further inquiry. To whom is he a fiduciary? What obligations does he owe as a fiduciary? In what respect has he failed to discharge these obligations? And what are the consequences of his deviation from duty?[1]

Several panels of the Kentucky Court of Appeals have recently wrestled with the question of whether the statutory formula for a director's fiduciary duties supplants any prior common law, both as to the nature of the fiduciary duties and to whom they are owed, or rather do those statutory formulae simply supplement the common law. At least one of those cases, *1400 Willow*, will be reviewed by the Kentucky Supreme Court. This paper reviews the trio of recent cases addressing the issues, proceeding to the author's views as to the correct assessment of the matters in dispute.

New Lexington Clinic v. Cooper

The Business Corporation Act Sets Forth an Exclusive Standard for Director Fiduciary Obligations

In December, 2011, the Court of Appeals issued its opinion in *The New Lexington Clinic, P.S.C. v. Cooper*,[2] holding that the statutory fiduciary duty formula supplanted the prior common law.

McKinney, a physician and director of The New Lexington Clinic (the "New Clinic" or "NLC"), while still a director, negotiated with Baptist Hospital with respect to moving his practice. He entered into a letter of intent to make that move, and also began negotiating, on Baptist's behalf, with other New Clinic employees about likewise moving. After the move was announced, the New Clinic brought suit against McKinney and others alleging breach of various fiduciary duties, citing in support thereof *Steelvest*[3] and *Aero Drapery*.[4] The complaint did not, however, cite the Kentucky Business Corporation Act in general or specifically KRS § 271B.8-300. Summary judgment was awarded the defendants on the grounds that the New Clinic had sought to bring its action under now defunct common law claims rather than relying upon the statutory standards set forth in KRS § 271B.8-300. The Court of Appeals reversed that decision, holding that the complaint was sufficient to set forth a claim for breach of the statutory fiduciary standard and on the basis that insufficient discovery had been completed prior to the dismissal.

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[1] *S.E.C. v. Chenery Corp.*, 318 U.S. 80, 85-86 (1943).

[2] ___ S.W.3d ___, 2011 WL 6260442 (Ky. App. Dec. 16, 2011).

[3] *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476 (Ky. 1991).

[4] *Aero Drapery of Kentucky, Inc. v. Engdahl*, 507 S.W.2d 166 (Ky. 1974).

An important aspect of the case is the Court's explication of the relationship of the common law fiduciary duties and the statutory standards. The Court wrote:

> At issue is whether KRS 271B.8-300 supplants the common-law claim as the circuit court found, or whether the common-law claim remains viable for the reasons articulated by NLC. We must conclude that the General Assembly intended for KRS 271B.8-300 to apply in all circumstances where money damages are sought in a claim of breach of fiduciary duty against a corporate director. The Legislature stated in clear and unambiguous language that "*any action* taken as a director, or *any failure* to take any action as a director, shall not be the basis for monetary damages . . . unless . . . [t]he director has breached or failed to perform the duties of the director's office *in compliance with this section*[.]" (Emphasis added [by the Court]). KRS 271B.8-300(5). Using mandatory "shall" language, the General Assembly went on to state in section (6) that a "person bringing an action for monetary damages . . . *shall have the burden of proving by clear and convincing evidence the provisions of subsection (5)(a) and (b) of this section*, and the burden of proving that the breach or failure to perform was the legal cause of damages suffered by the corporation. (Emphasis added [by the Court]).
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> In examining whether this language evinces the Legislature's intent to supplant the competing common-law claim of breach of fiduciary duty, we look to *James*, *supra*,[5] which held that a common-law claim may not be repealed by implication, and that the statutory intent to abrogate the common law must be clearly apparent. KRS 271B.8-300(5) provides that *any* action taken as a director or any failure to take action as a director shall not be the basis for a claim of monetary damages unless the director breached a duty under this section. In enacting this section, the Legislature cast a wide net which addresses *any* claim for monetary damages arising from a director's alleged breach of fiduciary duty. The conclusion is bolstered by the inclusion of section (6), which sets out the mandatory burden of proving a breach by clear and convincing evidence -- a burden which the parties acknowledge is greater than that of the common-law claim.[6]

Ergo, the General Assembly having comprehensively and in exclusionary language addressed the subject matter, the prior common law as to a director's fiduciary obligations has been supplanted.[7] Were the Court of Appeals to have there stopped its analysis and conclusions would be clear. Unfortunately, however, it continued writing:

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[5] *James v. Churchill Downs, Inc*., 620 S.W.2d 323 (Ky. App. 1981).

[6] Slip op. at 9-10.

[7] It bears noting that *New Lexington Clinic* sets up a false dichotomy, namely whether the alleged breach of duty arose from a common law or a fiduciary standard. The conduct at issue could have violated both. McKinney was both a director and an employee. The Court of Appeals held that his duties as a director are as set forth in the statute to the exclusion of common law on director obligations setting forth additional rules or rules to the contrary. Accepting that conclusion to be normatively correct, the provisions of the Business Corporation Act addressing director obligations do not control McKinney's actions in the context of his employee/employer ties to the New Lexington Clinic. An employee stands in a fiduciary relationship with his employer. *See*, *e.g.*, RESTATEMENT (THIRD) OF EMPLOYMENT LAW § 8.01(a) (Tentative Draft No. 3 (April 8, 2010)) ("Employees owe a duty of loyalty to their employer in matters related to the employment relationship."); *id.* § 8.01(b) ("Employees breach the duty of

> Aside from this heightened burden of proof, KRS 271B.8-300(5) tracks the common law very closely. The Legislature has merely meticulously set forth the claims and remedies available under common law. We cannot say that the change in the burden of proof indicates an intent to abrogate the common-law claim entirely. Rather, it merely increases the burden of proof.[8]

By these words the Court backtracked from and muddied its prior conclusions as to the exclusivity of the statutory formula, thereby creating unnecessary confusion.

A motion for reconsideration was denied by the Court of Appeals. In denying the motion for reconsideration, the Court of Appeals modified its opinion, revising a sentence on page 3 thereof to provide as follows:

> We conclude that though the circuit court **incorrectly** determined that KRS 271B.8-300 supplanted the common-law claim of breach of fiduciary duty, NLC properly asserted a claim of breach of fiduciary duty in its complaint, it should be availed of additional discovery, and summary judgment was premature.[9]

The suggestion that this reversal ("correctly" vs. "incorrectly") "does not affect the holding of the opinion" is at best difficult to accept. A primary question under consideration is whether the statutory formula as to a director's fiduciary obligations (what are the duties and to whom are they owed) has replaced in toto or merely supplemented the common laws:

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loyalty by such conduct as (i) Disclosing or using the employer's confidential information to serve other than the employer's interest,…"). Kentucky has long recognized an employee's fiduciary obligations to the employer. *See*, *e.g.*, *Davis v. Davis*, 343 S.W.3d 610 (Ky. App. 2011) ("an employee must be loyal and faithful to his employer."), citing *Hoge v. Kentucky River Coal Corp.*, 287 S.W. 226 (Ky. 1926); *id.*:

> Everyone – whether designated agent, trustee, servant or what not – who is under contract or other legal obligation to represent or act for another in any particular business or for any valuable purpose must be loyal and faithful to the interest of such other in respect to such business or purpose. He cannot lawfully serve or acquire any private interest of his own in opposition to it. This is a rule of common sense and honesty as well as of law.

Kentucky law has as well condemned an employee for acting against the employer's interests. *See*, *e.g.*, *Stewart v. Kentucky Paving Co., Inc.*, 557 S.W.2d 435, 438 (Ky. App. 1977) ("He may not use any information that he may have acquired by reason of his employment either for the purpose of acquiring property or doing any other act which is in opposition to his principal's interest.") McKinney's conduct while still a New Lexington Clinic employee, including soliciting other doctors and professional staff to leave for the competing venture, may well have violated his common law duties as an employee. *See*, *e.g.*, *Aero Drapery*, *supra* note 4 at 168 ("It often occurs that a fiduciary resigns and enters or creates a competing enterprise. Unless bound by contract, this is permissible, but he cannot, while still a corporate fiduciary, set up a competitive enterprise . . . , or resign and take with him the key personnel of the corporation for the purpose of operating his own competitive enterprise.") That violation is distinct from any breach of obligation as a director.

Conceptually, the proper response to the question of whether the case is one based on violation of statutory or common law duties is "yes."

[8] Slip op. at 10-11.

[9] Order Denying Petition for Rehearing (March 21, 2012) (**emphasis** in original). The bolded "incorrectly" replaced the prior "correctly." While by this order the Court of Appeals' decision, designated as "To Be Published," was markedly altered, the form of the opinion posted on the Court website does <u>not</u> reflect this alteration.

> At issue is whether KRS 271B.8-300 supplants the common-law claim as the circuit court found, or whether the common-law claim remains viable for the reasons articulated by NLC.[10]

A change in the holding from "yes" to "no" is obviously material.

On April 20, 2012, the various defendants filed a motion for discretionary review with the Kentucky Supreme Court. As of the date of this writing no response has been filed (or is yet due).

Fenley v. Kamp Kaintuck

A Director's Duty of Loyalty is to the Corporation
(and not to the members)

In *Fenley v. Kamp Kaintuck, Inc*,[11] the Court of Appeals addressed the questions of membership in a nonprofit corporation and obligations owed to the members. This decision follows upon, in various aspects, *1400 Willow Council of Co-Owners, Inc. v. Ballard*[12] and *Tinsley v. Wildwood Country Club*.[13]

The Fenleys were members of Kamp Kaintuck, Inc., a Kentucky nonprofit corporation ("KKI"). Under KKI's bylaws, all active members were required to attend once every three years. There was no dispute that the plaintiffs did not do so. On that basis, KKI's Board of Directors terminated the plaintiffs' memberships. They in turn sued for wrongful termination of membership status, made allegations of breach of fiduciary duty, sought an accounting of KKI's assets and as well its liquidation.

As to the first complaint, namely that the Fenleys were wrongfully terminated from member status, the Court easily dismissed that count. They were terminated for violation of the bylaw requirement that they attend the camp at least once every three years.[14]

As to the count for breach of fiduciary duty, and consistent with the earlier decision rendered in *1400 Willow v. Ballard*, the Court stated that fiduciary duties run to the corporation and the shareholders/members as a whole. "Hence, a board member or officer owes no common-law fiduciary duty directly to an individual shareholder/member."[15] From this position, the Court determined that any action for enforcement of fiduciary duties, whether existing at common law or based upon statute, must be brought in the form of a derivative, rather than a direct, action. To the extent that the plaintiffs sought to bring a derivative action, in that their

[10] Slip op. at 9.

[11] 2011 WL 5443440 (Ky. App. Nov. 10, 2011) (Not to be Published).

[12] Reviewed *infra* notes 17 through 21 and accompanying text.

[13] 2011 WL 3862298 (Ky. App. Sept. 2, 2011).

[14] In support of this conclusion, the Court cited 14A C.J.S. *Clubs* § 14 (2011). While this authority supports the proposition for which it was cited, it is curious that *Audubon County Club*, 785 S.W.2d 501 (Ky. App. 1990), which was relied upon by the Court of Appeals in *Tinsley v. Wildwood County Club*, 2011 WL 3862298 (Ky. App. Sept. 2, 2011), was not cited.

[15] Citing 18B AM.JUR.2D *Corporations* § 1462 (2011).

membership status had already been terminated, the Court held that they lacked standing to do so.[16]

With respect to the claims for an accounting and for judicial dissolution, the Court held that, as the Plaintiffs were no longer members of KKI, they lacked standing to seek either of those remedies.

1400 Willow v. Ballard

A Director's Duty of Loyalty Is To the Corporation
(and not to the members)

In *1400 Willow Council of Co-Owners, Inc v. Ballard*,[17] the Court of Appeals considered a case primarily involving the degree to which a condominium association would be responsible for certain costs of maintenance to a unit's windows. For our purposes, the interesting point of the case is an allegation that the directors owed a duty of loyalty to the plaintiff distinct from the duty of loyalty to the corporate entity. Specifically, the Court reversed a determination that fiduciary duties had been violated, finding the following jury instruction did not properly set forth the law:

> It is the duty of the Council, acting through its Board of Directors, to exercise good faith and loyalty in conducting the business of the Council which includes an obligation to exercise good faith and loyalty in making decisions with respect to all co-owners, including co-owner, Patricia Ballard. If you find, from the evidence, that the Council, acting through its Board of Directors, failed to comply with this duty and that such failure was a substantial factor in causing loss to Patricia Ballard, you shall find for Patricia Ballard. Otherwise, you shall find for the Council.

Turning to the language of the statute (more on that below), the Court noted:

> KRS 273.215 specifies the standards to be followed by directors of a nonprofit corporation. Of particular relevance to this case is KRS 273.215(1) which states:
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> > A director of a nonprofit corporation subject to the provisions of KRS 273.161 to 273.387 shall discharge his duties as a director, including his duties as a member of a committee:

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[16] The Court cited *Bacigalupo v. Kohlhapp*, 240 S.W.3d 155, 157 (Ky. App. 2007), for the continuous ownership standard that is applicable in the context of a business corporation. Purely as an aside, why do courts, in addressing statutory requirements, cite cases that talk about the statute rather than directly citing to the statute? *See* KY. REV. STAT. ANN. § 271B.7-400(1). The Court set forth its position that, in any derivative action involving a nonprofit corporation, a similar requirement would be applied, but specifically sidestepped the question as to whether derivative actions exist in nonprofit corporations. 2011 WL 5443440, *3, note 2. While beyond the limited scope of this presentation, in *Porter v. Shelbyville Cemetery Co*., No. 2007-CA-002545-MR, 2009 WL 722995 (Ky. App. March 20, 2009), it was stated that:

> In two cases, *Willis v. Davis*, 323 S.W.2d 847 (Ky. 1959) and *Hollis v. Edmonds*, 616 S.W.2d 80 (Ky. App. 1981), our Supreme Court held that an action for injunctive relief is the proper remedy by which to enforce duties owed by officers of a nonprofit corporation to its members.

[17] 2010 WL 2010521, 2010 Ky. App. LEXIS 94, No. 2008-CA-001155-MR (Ky. App. 2010).

(a) In good faith;

(b) On an informed basis; and

(c) In a manner he honestly believes to be in the best interests of the *corporation*.

It was the Court of Appeals that italicized "*corporation*" in its recitation of the statute. Interpreting this provision, the Court wrote:

> We read KRS 273.215(1) to mean directors in Kentucky owe their allegiance to the corporation (or in this case, the Council) as a whole, and not to individual members/shareholders (or in this case, co-owners like Ballard). This is a reasonable interpretation since co-owners could have competing agendas, none of which may be in the best interests of the Council.[18]

The Court's holding leads to two observations. First, if the duty of loyalty is owed exclusively to the corporation, and there exists no duty of loyalty to the members, as individuals, of the nonprofit corporation, it would follow that a suit complaining of a breach of loyalty must be derivative, and not direct, in nature.[19] Second, because KRS § 273.215(1) is identical in terminology to KRS § 271B.8-300(1) (the two statutes were adopted in the same 1988 General Assembly), this holding is equally applicable in the context of a business corporation.

As to the *1400 Willow* Court actually referencing and discussing the particulars of the statutory formulation of the fiduciary duty, such is too often missing from decisions of this nature. Rather, the typical formula is a bland conclusion that the actor was subject to and violated a duty of loyalty. As I have elsewhere observed:

> A simple statement that a person is a fiduciary and therefore owes a duty of loyalty is misleading because it is incomplete. The duty of loyalty is not a monolithic, self-defined, and self-effective rule or series of rules; rather, different duties of loyalty are applicable under different circumstances. A bare declaration that a person is a fiduciary subject to a duty of loyalty and that his conduct violated the duty ignores the crux of the question; that is, the nature of the duty of loyalty as relating to particular facts and circumstances.

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[18] This position is consistent with that of the Court of Appeals in *Dahlenburg v. Young*, No. 96-CA-0443-MR and 96-CA-0550-MR, 1998 Ky. App. Unpub. LEXIS 1 (Ky. App. March 20, 1998) ("Dr. Dahlenburg cannot cite any controlling Kentucky statutory or case law imposing a fiduciary duty between shareholders in a closely-held corporation. Those duties which are recognized by law, create liability upon corporate directors or officers to the corporation, not individual directors, officers, or shareholders.") (emphasis in original; slip op. at 4). *See also* MODEL BUSINESS CORPORATION ACT § 8.30(a), Official Comment:

> The phrase "best interests of the corporation" is key to an explication of a director's duties. The term "corporation" is a surrogate for the business enterprise as well as a frame of reference encompassing the shareholder body. In determining the corporation's "best interests," the director has wide discretion in deciding how to weigh near-term opportunities versus long-term benefits as well as in making judgments where the interests of various groups within the shareholder body or having other cognizable interests in the enterprise may differ.

[19] This reasoning was subsequently adopted by the *Fenley* court.

> The only way the duty of loyalty can be properly evaluated is by making an inquiry that includes interpretation of the applicable agreement and of the particular governing statute and applying the same to the unique facts and circumstances of the case.[20]

On September 14, 2011, the Kentucky Supreme Court, granted discretionary review in this case, and the petition for discretionary review included this point of the Court of Appeals' opinion. Essentially, Ballard seeks a determination that common law fiduciary duties of "candor and good faith" are owed by the directors to the members individually.[21] 1400 Willow's response is that "The legislature settled this question clearly when it enacted KRS 273.215(1)."[22] The argument continued with "The legislature explicitly and clearly defined the 'duties' of a director of nonprofit corporations that are organized under Chapter 273," noting that when a broad statute addresses the subject matter of the common law, the statute supplants the common law.[23]

IMHO[24]

IMHO, the decisions of the Court of Appeals with respect to the exclusivity of the statutory formulae of a director's fiduciary obligations, both as to their extent and the beneficiary,[25] should be upheld. I submit that this conclusion is supported by statutory construction, by the supremacy of statutory law to common law, by the role of the board in making decisions on behalf of the corporation, and by the availability of alternative organizational forms providing different rules.

Statutory Construction

The various formulae employed in our business entity statutes define the existence of duties, who owes those duties, to whom those duties are owed, and the standards required for holding one culpable for breach. The General Assembly well knows how to leave the duties open-ended. The partnership and limited partnership acts enacted in 2006 provide fiduciary formulae stating that the duties "include" and that particular obligations "include, but are not limited to."[26] In contrast, in the formulae employed in the corporate acts, there exists no statutory indicia of a legislative intent that the law should be more than the statute provides. While there has long existed the principle that statutes in derogation of the common law are to be strictly construed, that rule does not apply in Kentucky.[27] The common law of fiduciary obligations is and should be applicable only where there exists a gap or where it is intended by the legislature, such as in the case of partnerships, that the common law still apply. Where, in contrast, the legislature has comprehensively addressed the topic, such as addressing who owes a duty and to whom the duty is owed, it is the statutory language that must control. Consequently, there exists no basis for extending "to the corporation," that being the statutory designation, to read "to the corporation and each shareholder." Where a class of beneficiaries is defined, the statute as well "acts to exclude other unmentioned classes by application of the legal maxim of

[20] Thomas E. Rutledge & Thomas Earl Geu, *The Analytic Protocol for the Duty of Loyalty Under the Prototype LLC Act*, 63 ARK. L. REV. 473, 499-500 (2010).

[21] Motion for Disc. Review at 2, 13.

[22] Response to Motion for Disc. Review at 10.

[23] *Id*. at 11, 12, citing *Aetna Ins. Co. v. Comm.*, 51 S.W. 624 (Ky. 1899).

statutory construction, '*expressio unius est exclusio alterius*,' which means that the inclusion of specific things implies the exclusion of those not mentioned."[28] It bears noting that the phrase "the best interests of the corporation and its shareholders" does appear in KRS § 271B.8-300(5)(b), and "[I]t has been held that where the legislation includes particular language in one section of a statute, but omits it in another section of the same Act, it is generally presumed that the legislature acted intentionally and purposefully in the disparate inclusion or exclusion."[29]

The drafters of Kentucky's Business Corporation Act are well aware of examples of statutes that provide expressly for fiduciary obligations either to or inter-se the shareholders.[30] No such provisions have been added to the Kentucky Business Corporation Act.

The Statutory Law Controls Over Common Law

Our Constitution provides that it is the General Assembly that is to determine the rules for corporations.[31] If the General Assembly is not able to make determinations as to the rules in corporations adverse to the common law, then there cannot be proxy-voting,[32] approval of a merger by majority vote,[33] a heightened standard of culpability for violation of the duty of care[34] or a near elimination of the doctrine of *ultra vires*.[35] Where, as here, the General Assembly has both defined the nature of the duty and to whom it is owed, any prior common law imposing either different obligations or providing different beneficiaries thereof is no longer good law.[36]

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[24] In My Humble Opinion.

[25] With respect to the *New Lexington Clinic* decision, the original decision providing that the statute has supplanted the common law is that which should be affirmed.

[26] *See*, *e.g*., KY. REV. ANN. STAT. §§ 362.1-404(2), (3).

[27] KY. REV. ANN. STAT. § 446.080(1).

[28] *Willis v. Louisville/Jefferson County Metro. Sewer District*, No. 2009-CA-001874-MR, slip op. at 6 (Ky. App. 2010), quoting *Fiscal Court of Jefferson County v. Brady*, 885 S.W.2d 681, 685 (Ky. 1994).

[29] *Palmer v. Comm*., 3 S.W.3d 763, 764-65 (Ky. App. 1999) (citations omitted). Both KRS § 271B.8-300(1)(c) ("best interests of the corporation") and KRS § 271B.8-300(5)(b) ("best interests of the corporation and its shareholders") were adopted by the 1988 General Assembly and have not been subsequently amended.

[30] *See*, *e.g*., MINN. STAT. § 302A.751(1)(a)(3); *id.* § 302A.751(3a); N.D. CENT. CODE § 10-19.1-115(3); and N.J. STAT. § 14A:12-7(1)(c).

[31] KY. CONST. § 190. *See also Willis v. Louisville/Jefferson County Metropolitan Sewer District*, 2011 WL 4137492 (Ky. App. Oct. 22, 2010) ("We are ever mindful 'that the judicially created common law must always yield to the superior policy of legislative enactment and the Constitution.'") (quoting *Comm. ex rel. Cowan v. Wilkinson*, 828 S.W.2d 610, 614 (Ky. 1992), overruled on other grounds by *Comm. ex rel. Conway v. Thompson*, 300 S.W.3d 152 (Ky. 2009)).

[32] At common law shareholders were forbidden to vote by proxy.

[33] At common law a merger required the approval of all shareholders.

[34] *See* KY. REV. ANN. STAT. § 271B.2-020(2)(d); *id*. § 271B.8-300(5).

[35] *See* KY. REV. ANN. STAT. § 271B.3-040; *id*. § 273.173.

[36] *See also KNC Investments, LLC v. Lane's End Stallion, Inc*., 2012 WL 1831276 (E.D. Ky. May 17, 2012) (where contract defines rights and responsibilities of fiduciary, general principles of agency law do not supplement or alter those rights and responsibilities).

The Role of the Board

It is the responsibility of the board to exercise control over the business and affairs of the corporation.[37] In so doing the statutes direct that the directors are to discharge their duties "in the best interests of the corporation."[38] Shareholders, in contrast, may act selfishly and be concerned with only their personal and even selfish interests.[39] An individual shareholder may have objectives adverse to those of the corporation, or for that matter adverse to those of the other shareholders. The directors are not agents of the shareholders subject to their direction and control.[40] Rather, they must determine and promote/protect the interests "of the corporation." To attempt to promote/protect the interests of both an individual shareholder (much less each individual shareholder) and the corporation would require each director to serve at least two masters.[41] The law of loyalty is replete with condemnations of efforts by fiduciaries to split their loyalties. To require the directors to look to the interests of the corporation and of the shareholders would be, in effect, a requirement that the directors serve two masters. The only unitary interest for the directors to protect is that of the corporation <u>distinct</u> from that of any individual shareholder.[42]

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[37] KY. REV. ANN. STAT. § 271B.8-010(2); *id*. § 273.207; and *id*. § 272.171(1).

[38] KY. REV. ANN. STAT. § 271B.8-300(1)(c); *id*. § 273.215(1)(c).

[39] *See*, *e.g*., HOWARD HILTON SPELLMAN, A TREATISE ON THE PRINCIPLES OF LAW GOVERNING CORPORATE DIRECTORS 54 (1931) ("Since the right to vote is inherent in the ownership of stock, a stockholder cannot be prevented from voting, upon the theory that he will use his vote to further his selfish interests, against the general corporate welfare."); *Haldeman v. Haldeman*, 197 S.W. 376, 381 (Ky. 1917) ("A stockholder occupies a position and owes a duty radically different from a director. A stockholder may in a stockholders' meeting vote with a view of his own benefit; he represents himself only."); *Kirwan v. Parkway Distillery*, 148 S.W.2d 720, 723 (Ky. 1941) ("In the case of *Haldeman v. Haldeman,* it is pointed out that there is a radical difference when a stockholder is voting strictly as a stockholder and when voting as a director. When voting as a stockholder he has the legal right to vote with a view of his own benefits and is representing himself only; …." (citation omitted); *id*. quoting *Windmuller v. Standard Distillery & Distributing Company*, 114 F. 491, 495 "'At such a meeting each shareholder represents himself and his own interest, and he in no sense acts as the representative of others.'") The author freely acknowledges that certain states have adopted rules that shareholders generally or controlling shareholders stand in a fiduciary relationship with the other shareholders. *See generally* 2 ROBERT B. THOMPSON, O'NEAL AND THOMPSONS' CLOSE CORPORATIONS AND LLCS: LAW AND PRACTICE § 9.21. Kentucky has never adopted and indeed has rejected those positions. *See Estep v. Werner*, 780 S.W.2d 604 (Ky. 1989) (Dissent by Justice Liebson lamenting that Kentucky has not adopted the rule of *Donahue v. Rodd Electrotype Co. of New England, Inc*., 328 N.E.2d 505 (Mass. 1975) to the effect that, in closely held corporations, shareholders should be deemed to stand in a fiduciary relationship with another.); *Vinson v. Koerner*, No. CA-001217-MR, slip op. at 8-9 (Ky. App. Nov. 9, 2001) (discussing Justice Liebson's dissent in *Estep v. Werner* and holding itself, the Court of Appeals, bound to not infer duties in opposition to the Supreme Court's decision to not endorse his views). The issue of fiduciary duties among and between shareholders in Kentucky corporations is addressed in depth in Rutledge, *Shareholders are not Fiduciaries – A Positive and Normative Analysis of Kentucky Law*, __ LOUISVILLE L. REV. __ (2012-13) (forthcoming), available on SSRN, abstract 2078236.

[40] *See*, *e.g*., *Haldeman*, *supra* note 39; SPELLMAN, *supra* note 39 at 6.

[41] *Aero Drapery*, *supra* note 4 at 169; *Bryan v. Security Trust Co*., 176 S.W.2d 104, 107 (Ky. 1943); *Gospel of Thomas* 47, from Robert I. Miller, ed., THE COMPLETE GOSPELS (4th ed. 2012) ("No one can mount two horses or bend two bows. And a slave cannot serve two masters, otherwise the slave will honor the one and offend the other.").

[42] *See also* MODEL BUSINESS CORPORATION ACT § 8.30(a), Official Comment, *supra* note 18.

Other Forms Provide for Direct Duties (a/k/a Daywear versus Eveningwear)

No doubt some will lament, on at least a normative basis, that fiduciary duties should be owed by those who are in control to those who are the ultimate residual owners of the venture. Indeed there are structures of that nature including partnerships and limited partnerships.[43] The contrary rules espoused in *New Lexington Clinic*, *Fenley* and *1400 Willow* are not good or bad – they are simply rules.[44]

Different forms of business organization provide different rules for a wide variety of different situations; those rules are selected when one form or another is adopted.[45] That the outcome in a particular circumstance in one form of organization is different from what would be the outcome were those facts applied in a different form of organization in no manner indicates that one form or the other is deficient. Recall (and for those of you too young to recall, it is on YouTube) the Wendy's commercial featuring the Soviet fashion show and the great distinctions between "daywear" and "eveningwear." That is not where we are and it is not where we want to be. Different outcomes are the intended consequence of a robust menu of organizational forms; if that were not the case we would have no need for alternative forms. Participants in a venture can have different rules by selecting a different form of organization.[46] Having chosen a form, however, they are bound by its rules and should not be heard to lament that the rules should be different than they are.[47]

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[43] *See*, *e.g.*, KY. REV. ANN. STAT. § 362.1-404(1) ("The fiduciary duties a partner owes to the partnership *and the other partners* include ….") (*emphasis* added).

[44] *See also* Rutheford B. Campbell, Jr., *Corporate Fiduciary Duties in Kentucky*, 93 KY. L.J. 551, 553 note 6 (2004-05) ("It is hard to argue against the idea that parties, in this case owners and managers, should be free to construct the terms of their own arrangement when, as seems to be the case, there are no significant externalities or third-party effects to the contract. *See*, *e.g.*, Frank H. Easterbrook & Daniel R. Fischel, *The Corporate Contract*, 89 COLUM. L. REV. 1416, 1428 (1989) ('Just as there is no right amount of paint in a car, there is no right relation among managers, investors, and other corporate participants.').").

[45] *See*, *e.g.*, *Vinson v. Koerner*, No. 2000-CA-001217-MR, slip op. at 6-7 (Ky. App. Nov. 9, 2001) ("The selection of the form of business (*i.e.*, sole proprietorship, partnership, or corporation) is a decision of utmost importance in establishing a business. That decision requires weighing numerous factors including tax laws and the consequences thereof, limitation of personal liability, and spreading the amount of potential risk and profit among one or more principals to determine which form is best for a given individual, group, or company.").

[46] *See generally* Thomas E. Rutledge, *Vampires and the Law of Business Organizations: The Fruitless Search for Authenticity*, 14 J. PASSTHROUGH ENTITIES 51 (Nov./Dec. 2011). *See also* Campbell, *Corporate Fiduciary Duties in Kentucky*, *supra* note 43.

[47] *See*, *e.g.*, *Beatty v. Melody Lake Ranch Club, Inc.*, No. 2003-CA-001652-MR, 2005 WL 858063 (Ky. App. Apr. 15, 2005) (Not to be Published) (effort to recharacterize a business corporation as a nonprofit corporation rejected); *CML V, LLC v. Bax*, 6 A.3d 238, 249 (Del. Ch. 2010) ("[T]here is nothing absurd about different legal principles applying to corporations and LLCs."), aff'd 18 A.3d 1037, 1043, 2011 WL 3863132, at *4 (Del. 2011) ("[I]t is hardly absurd for the General Assembly to design a system promoting maximum business entity diversity. Ultimately, LLCs and corporations are different; investors can choose to invest in an LLC, which offers one bundle of rights, or in a corporation, which offers an entirely separate bundle of rights.").