FIDUCIARY DUTIES: OVERLOOKED FACTOR IN CORPORATE DECISION-MAKING

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ABSTRACT

The objective of this paper is to identify different types of fiduciary duties in corporate decision-making and the different standards of review for violating these duties in an official or personal capacity. This Article will explain the duty of care and the duty of loyalty that directors and officials owe to a corporation, and the different standards of review such as the much-discussed Business Judgement Rule and the Entire Fairness Review. It also discusses the courses of action one must take to ensure, or hold liable, the directors and officials of a corporation to comply with this high standard.

INTRODUCTION

A Board of Directors (hereinafter, "Board") is an elected group of individuals that represent the best interests of a corporation's shareholders. Each individual member from the Board must act in the best interests of the company, meaning they owe a fiduciary duty to the corporation. The fiduciary duties are typically comprised as duty of care, duty of loyalty and duty of good faith. According to the Puerto Rico legislature, directors will be protected and exempt of responsibility if they trust the company's books and records, and information given to them by other officials.[1] Also, if they trusted the information given to them by an external party whom the director reasonably believed was professionally competent to provide such information. One of the ways to establish if there was a breach of fiduciary duties is through the Business Judgment Rule. The Business Judgment Rule is a "rule of law that provides corporate immunity to directors of corporations protecting them from liability for the consequences of informed decisions made in good faith."[2] Directors are obligated to

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[1] General Corporations Act of 2009, 14 LPRA § 3561(i) (2020).

[2] MERRIAM-WEBSTER, https://www.merriam-webster.com/legal/business%20judgment%20rule. (Last visited May 5, 2022)

maintain a certain level of dedication to their corporate affairs and must do what any other director in that position would do, to their best of their ability. In a nutshell, they must act in good faith and maintain the same duty of care another director in a similar position would have.[3] Fiduciary duties are extremely important for corporations considering it will ensure that the company's directors and officials will serve in the best interest of the company.

I. LEGISLATION

It is worth to start by mentioning where the corporate legislative background comes from and how it is displayed in Puerto Rico. On the island, the law that governs private corporations is known as the General Corporations Act of 2009 (hereinafter, "Act" or "Puerto Rico Corporations Act").[4] This Act regulates the different areas and aspects of private corporations such as requirements for commercial transactions, the Board of Directors, dissolution, among others. The Puerto Rico Corporations Act is modeled after the Delaware Corporations Act.[5] The reasoning behind this is that Delaware has extremely favorable corporate laws due to the fact that there was a political consensus which required the Delaware statute to be constantly reviewed and amended (adjusted) to adapt to the present and future of the corporate world.[6] The other reason is that the state of Delaware has a separate court for commercial affairs known as the Court of Chancery.[7] The judges in the Court of Chancery have a great deal of experience in business affairs and understand complex commercial business transactions. It all boils down to Puerto Rico being able to have corporate law precedent in order for the courts to pass better judgment against a topic that could turn out to be extremely difficult and they don't necessarily have the preparation, nor any other state, to make such rulings. Even though Delaware statutory law is utilized as a highly persuasive source in Puerto Rico, it is one that, I believe should be looked at with a different mindset, considering that our corporate statutes arise from theirs.

II. FIDUCIARY DUTIES

A. *Intra Vires*

The *intra vires* doctrine entails those members of the Board of Directors must act within the limit of the powers of the corporation. All corporations, directors and officials will possess all of the faculties and privileges portrayed in the Act, other legislative acts, or the Certificate of Incorporation.[8] Article 2.01 of the Act also states that these include any acts necessary for the promotion of their business or the purpose described in the Certificate of Incorporation.[9] Nowadays, many corporations, instead of writing a specific purpose in the Certificate of Incorporation, include what is known as the *all-purpose clause*. This clause is included in the purpose section of the Certificate of Incorporation and allows corporations to participate in any lawful activity. If this clause is included, then the *intra vires* doctrine does not apply because the corporation is not limited to any specific power, the only requirement is that the acts are within the boundaries of the law. If there are specified

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[3] 14 LPRA § 3563.
[4] *Id.* § 3501-4084.
[5] DEL. COD. ANN. Tit. 8 § 101-392 (2020).
[6] Jan Ting, *Why do so many corporations choose to incorporate in Delaware?,* WHYY (Apr. 27, 2011), https://whyy.org/articles/why-do-so-many-corporations-choose-to-incorporate-in-delaware/#:~:text=There%20are%20two%20major%20reasons,of%20the%20corporate%20incorporation%20business.&text=The%20other%20major%20reason%20corporations,corporate%20law%20disputes%20without%20juries (Last visited May 25, 2022).
[7] *Id.*
[8] 14 LPRA § 3521.
[9] *Id*.

purposes in the Certificate of Incorporation, and the director does not act to fulfill those purposes, then the *ultra vires* doctrine can be invoked if these acts harm the company in any way. *Ultra vires* acts, or doctrine, are acts that are beyond the authority or the powers of the corporation. According to the Act, the three instances in which the *ultra vires* doctrine can be invoked are the following: (1) In a proceeding initiated by a stockholder to enjoin any action or the transfer of personal or real property by or to the corporation; (2) In a proceeding by the corporation in a suit against an officer or director for the losses or damages as a result of the unauthorized act; and (3) in a proceeding by the Commonwealth of Puerto Rico to dissolve the corporation or to enjoin the transaction by the corporation of any unauthorized business.[10] The acts made with third parties will still be valid, but the director or the official at fault will be liable to the corporation if they were caused any damage to the corporation.

B. Duty of Care

A corporation's Certificate of Incorporation is allowed to include a provision to limit or eliminate the directors' and stockholders' personal liability in case of monetary claims for damages due to a breach of their fiduciary duties.[11] However, this provision is not of absolute discretion. A corporation is not permitted, by law, to eliminate any of the following actions: (1) breach of the duty of loyalty; (2) acts or omissions not in good faith or involving intentional misconduct; (3) illegal payments of dividends and (4) any transaction in which the director derives improper personal benefit.[12] I believe that a corporation should thread lightly when including such provisions considering it may be harmful to the company in the long run. If the Certificate of Incorporation is silent when it comes to the directors' personal liability, the Business Judgment Rule will reign. The Business Judgment Rule establishes that "only gross negligence in the exercise of the duties and obligations . . . result in personal liability."[13] This is important to notice since this is a much higher standard than mere ordinary negligence. Delaware's Court of Chancery stated that gross negligence "involves a devil-may-care attitude or indifference to duty amounting to recklessness."[14]

It's important to note how this has been interpreted throughout the years. In *Francis v. United Jersey Bank*, the issue is whether a corporate director is personally liable for acting negligent because of the failure to prevent the misappropriation of trust funds by other directors.[15] The Supreme Court of New Jersey held that a corporate director has a duty to monitor and be aware of what is going in the company.[16] The director does not need to be an active participant in misconduct in order to be held liable, passive participants are equally liable. In *In Re Caremark Int'l Inc. Derivative Litigation*, the Court of Chancery ruled that a director is not liable for the company's employees' individual acts, but is indeed liable for not implementing a system in which that director is able to monitor their wrongdoings.[17] The Court of Chancery ruled that the liability arising from the breach of the duty of care can result from two different behaviors.[18] The first is that the damaged caused by the breach of the fiduciary duty is caused by the directors' wrongdoing due to negligence or bad advice.[19] The other occurs when directors do not pay the necessary attention and are unaware of unlawful activity, therefore they do not take action.[20] The breach of fiduciary duty is well

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[10] *Id.* § 3525.
[11] *Id.* § 3502(b)(6).
[12] *Id.*
[13] *14 LPRA* § 3563.
[14] Gelfman v. Weeden Investors, L.P., 859 A.2d 89, 114 (Del. Ch. 2004).
[15] Francis v. United Jersey Bank, 432 A.2d 814 (N.J. 1981).
[16] *Id.*
[17] In re Caremark Intern. Inc. Derivative Litigation., 698 A.2d 959 (Del. Ch. 1996).
[18] CARLOS E. DÍAZ OLIVO, TRATADO SOBRE DERECHO CORPORATIVO 204 Editorial Almaforte 2nd ed. (2018).
[19] *Id.*
[20] *Id.*

explained in *Smith v. Van Gorkom*, in which shareholders brought a class action against the Board of Directors for approving a cash out merger without properly conducting a valuation report.[21] The Court of Chancery ruled that these acts constituted gross negligence and that the directors should have had all of the information possibly available in order to make an informed decision.[22] Every time the Board of Directors faces decisions surrounding complex commercial affairs or transactions such as a merger, acquisition or an asset or stock purchase agreement, they must consult with officials such as the Chief Executive Officer and the Chief Financial Officer, or if the situation demands it, outside investment bankers. In doing so, the directors will be protected because they relied on the information given to them by experts.

C. *Duty of Loyalty*

Corporate directors are selected because of their background and experience, even though it is not a requirement. In doing so, the corporation expects them to act and make decisions to protect the company's best interests.[23] In other words, they must put the interests of the company before their own personal interests.[24] According to article 4.04 of the Act, "[w]henever the directors, officers and majority stockholders have personal interests in matters affecting the corporation, they shall be subject to a duty of loyalty which bounds them to act fairly in relation to corporate issues."[25]

When a suit arises from a breach of duty of loyalty, the burden of proof falls on the plaintiff to establish the fiduciary obligation and breach.[26] However, if the plaintiff successfully proves the alleged conflict of interest, then the burden of proof falls on the defendant, who must prove that the transaction or decision involved was in the best interests of the company.[27] The most important question when it comes to the breach of the duty of loyalty is whether the transaction involved was considered reasonable by the corporation.[28] The following categories for this breach are: (1) corporate competition; (2) corporate opportunity; (3) conflict of interest; (4) insider trading; (5) oppression of the minority shareholders; (6) sale of corporate ownership; and (7) acting in bad faith.[29]

i. Corporate Competition

As mentioned before, directors must always act and make decisions in the company's best interest. Puerto Rico has maintained slow and steady progress when it comes to interpreting corporate statutes. However, *Epstein v. F&F Mortgage Corp*. shed some light on the matter. In *Epstein*, the Court ruled that a member from a corporation's Board of Directors may engage in business activity outside of the company's business, as long as that director acts in good faith and does not interferes with the organization's plans and/or interests.[30] The director may act in such a manner, especially if there is not a Non-Compete Agreement.[31] Delaware case law has established that directors are able to conduct personal business activity, even if it is related to the company's activities, as long as they accomplish their fiduciary duties.[32] In *Craig v. Graphic Arts Studio, Inc*., the Court of Chancery ruled that

[21] Smith v. Van Gorkom, 488 A.2d 858 (Del. Supr. 1985).
[22] *Id.*
[23] DÍAZ OLIVO, *supra* note 19, at 210.
[24] *Id.*
[25] 14 LPRA § 3564 (2020).
[26] OLIVO, *supra* note 19, at 211.
[27] *Id.*
[28] *Id.*
[29] *Id.*
[30] Epstein v. F.&F. Mortgage Corp., 106 DPR 211, 224 (1977).
[31] *Id*.
[32] Craig v. Graphic Arts Studio, Inc., 166 A.2d 444 (Del. Ch. 1960).

failure to divulge this type of information constitutes a breach of fiduciary duties, specifically the duty of loyalty.[33] In conclusion, directors can engage in any personal business activity, as long as it does not interfere with the corporation's interests. It is important to note this because it means directors will more likely become a part of an organization knowing very well that he or she will be able to engage in other personal business matters.

ii. Corporate Opportunity

When the corporation has the possibility of engaging in new business opportunities, directors must place the interests of the corporation before their own personal interests. However, when the business opportunity presents itself, and the corporation has no interest in it, then the director may take advantage of that opportunity.[34] Another factor is that the opportunity must be financially takeable.[35] This means that if the corporation is interested in taking advantage of the opportunity, they must have the financial resources for it. It is important to mention the properties or requirements for a business to be considered a corporate opportunity under this doctrine. The Supreme Court of Delaware have expressed themselves about such matter in *Broz v. Cellular Information Systems, Inc*.,:

> [A] corporate officer of director may not take a business opportunity for his own if: (1) the corporation is financially able to exploit the opportunity; (2) the opportunity is within the corporation's line of business; (3) the corporation has an interest or expectancy in the opportunity; and (4) by taking the opportunity for his own, the corporate fiduciary will thereby be placed in a position inimicable to his duties to the corporation. [A] director or officer *may* take a corporate opportunity if: (1) the opportunity is presented to the director or officer in his individual and not his corporate capacity; (2) the opportunity is not essential to the corporation; (3) the corporation holds no interest of expectancy in the opportunity; and (4) the director or officer has not wrongfully employed the resources of the corporation in pursuing or exploiting the opportunity.[36]

This test was first established in *Guth v. Loft, Inc*. but has been utilized in subsequent cases.[37] Corporations must be wary of engaging in legal action against directors for possible violations of fiduciary duties under the corporate opportunity doctrine. According to *Guth*, the determination in deciding whether the director or official usurped the corporate opportunity is "a factual question to be decided by reasonable inference from objective facts."[38] The problem here is mainly an evidentiary one. Whether a director put his personal interests before those of the company is a "question of fact."[39]

iii. Conflict of Interest

It is not uncommon that a situation arises in which a director or official is at a crossroads. A conflict of interest arises when the director or official plays a part in both sides of the transaction or has a personal interest in the business activity. These issues are mainly regulated by state law, most of which state that a situation arising from a conflict of interest

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[33] *Id.*
[34] Guth v. Loft, Inc., 5 A.2d 503, 511 (Del. Supr. 1939).
[35] *Id.*
[36] Broz v. Cellular Information Systems, Inc., 673 A.2d 148, 155 (Del. Supr. 1996).
[37] *Id.*
[38] *Guth*, 5 A.2d 503 (Del. Supr. 1939) (*See also* Johnston v. Greene, 121 A.2d 919 (Del. Supr. 1956).
[39] 3 WILLIAM MEADE FLETCHER ET AL, FLETCHER CYCLOPEDIA OF THE LAW OF CORPORATIONS § 862 (2020).

does not nullify the transaction or business activity.[40] Essentially, these transactions will not be considered null if: (1) they are approved by the uninterested majority of the directors; (2) the decision is ratified by the shareholders; and (3) they are reasonable.[41] If any of these situations occur, then the transaction will not be considered null for a possible conflict of interest. If they do not, then the transaction or business activity will be considered null. It is worth noting that one of the most important things is to divulge the possible conflict of interest in order to not be held responsible for a possible breach of a fiduciary duty. According to the article 4.05 of the Act, the contract or transaction involved will not be null or nullified if any of the following alternatives are present: (1) the influence or material facts of the relationship or interest is disclosed to the Board of Directors and they approve in good faith by the affirmative vote of the majority of the disinterested directors, even when these do not constitute quorum; (2) the influence or the material facts of the relationship or interest is disclosed to the shareholders and these approve as well; and (3) the contract or transaction is fair and reasonable to the corporation *at the time* it is authorized.[42] It is extremely important to discuss the wording of the final alternative. It states that the transaction must be fair and reasonable at the time of its authorization. This means that, in hindsight, if the contract or transaction turns out to be unjust or unreasonable, then the director will not be held liable if he complied with any of the alternatives aforementioned.

iv. Insider Trading

Insider trading is considered fairly known as referring to the purchase and sale of stocks and/or securities while possessing information that is not yet publicly available.[43] The people who are in possession of this information would usually be top-level executives and employees that fall within that chain of command. In *Brophy v. Cities Service Co*., the Court of Chancery ruled that a person "in a confidential or fiduciary position, in breach of his duty, uses his knowledge to make a profit for himself, he is accountable for such a profit."[44] The Court states that an employee does not occupy a position of trust towards their employer, however if said employee acquires confidential information "in the course of [their] employment" then that employee now possesses a fiduciary duty to protect that information.[45] Lastly, in a cause of action for insider trading, the burden of proof falls on the plaintiff, who has to prove that the information acquired was not yet publicly available.[46]

v. Oppression of the Minority Shareholders

The key aspect is to protect the minority shareholders. Their voice is not as loud as those of the majority shareholders in a corporation. The Court of Chancery, in *Litle v. Waters*, defines oppression as a "violation of the 'reasonable expectations of the minority'."[47] The Court also defined oppression as "burdensome, harsh and wrongful conduct; a lack of probity and fair dealing in the affairs of a company to the prejudice of some of its members . . ."[48] This is known as the reasonable expectations test; what the minority shareholders should expect when purchasing the company's stock and becoming a minority shareholder.

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[40] DÍAZ OLIVO, *supra* note 19, at 213.
[41] *Id.*
[42] 14 LPRA § 3565.
[43] CORPORATE FINANCE INSTITUTE, https://corporatefinanceinstitute.com/resources/knowledge/trading-investing/what-is-insider-trading/ (Last visited May 22, 2022).
[44] Brophy v. Cities Service Co., 70 A.2d 5, 8 (Del. Ch. 1949).
[45] *Id.* at 7 (alteration in original).
[46] DÍAZ OLIVO, *supra* note 19, at 220-221.
[47] Litle v. Waters, No. CIV. A. 12155, 1992 WL 25758, at 327 (Del. Ch. Feb. 11, 1992) (citing minority." Gimpel v. Bolstein, 477 N.Y.S.2d, at 1018 (1984)).
[48] *Id*. at 327-28.

vi. Sale of Ownership

The directors and shareholders have a fiduciary duty to protect the best interests of the corporation in any major commercial transaction such as a merger, acquisition, or – in the case of Revlon – a hostile takeover. In *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc*., in the middle of a hostile takeover, the fiduciary duty of the directors was towards preserving the company.[49] After this became inevitable, the directors' fiduciary duties changed to getting the best possible price for the transaction.[50] It is interesting to see how the directors' fiduciary duties change, or somewhat modified, as the transaction goes on.

D. Liability for False Statements

According to article 4.07 of the Act, if a corporation's directors and/or officials publish any false information or written statement or report, then they shall be jointly liable for any damage or loss caused.[51]

E. Standard of Review

i. Business Judgment Rule

As mentioned, Puerto Rico Supreme Court has not had the opportunity to go in depth in analyzing the Business Judgment Rule. The Business Judgment Rule arises from article 4.03 of the Act, which reads:

> The directors and officers shall be bound to dedicate to the affairs of the corporation and to the exercise of their duties the attention and care which in a similar position and under analogous circumstances a responsible and competent director or officer would execute in applying his/her business Judgment in good faith or his/her best Judgment in the case of nonprofit corporations. Only gross negligence in the exercise of the duties and obligations mentioned above shall result in personal liability.[52]

The Business Judgment Rule essentially means that directors must act in good faith and with the duty of care that any other director in a similar position would have acted in the same situation. The standard for a director to be held liable is gross negligence, which has been previously defined by the Puerto Rico Supreme Court as the "complete lack of care or exercise of such a small degree of diligence as to justify the belief that there is complete disregard for the interests and well-being of others."[53] This gives directors a certain amount of freedom in the decision-making process as a result, they will be more likely to make risky and difficult decisions.

On a different note, as mentioned, the reason many courts across the United States and Puerto Rico rely on Delaware case law is because of their Court of Chancery. The Court of Chancery is a separate court which specifies in resolving corporate law disputes, therefore many courts rely on the Court of Chancery's interpretation. Despite this, a commonly discussed case regarding commercial disputes proceeds from the Appellate Court of

[49] Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173 (Del. Supr. 1986).
[50] *Id* at 182.
[51] 14 LPRA § 3567.
[52] *Id.* § 3563.
[53] Elias Vega v. Chenet, 147 DPR 507, 521 (1999) (*citing* Pueblo v. Telmaín Escalera, 45 DPR 447, 453 (1933)) (unofficial translation).

Illinois.[54] According to the Court in *Schlensky v. Wrigley*, courts will not intervene in specific commercial affairs and/or decisions and make a ruling against the defendant because of poor decision making.[55] If there was "no fraud illegality or conflict of interest", then the directors will not be held liable, even if the decision in question was of poor judgment.[56]

The courts in Puerto Rico did not have the chance to make a ruling involving the Business Judgment Rule until 2015 when Puerto Rico Supreme Court (hereinafter "the Court" or "PRSC"), in *Rivera Sanfeliz v. Junta de Dir. de FirstBank Corp.*, ruled that the Board of Directors of FirstBank (hereinafter "Bank") were not personally liable for violation of their fiduciary duties for the alleged breach of contract between the corporation and an employee arguing they were responsible for the Banks compliance of its obligations and promptly dealing with any violation.[57] The Court rejected this argument for lack of standing. While they reiterated the standard of gross negligence, the main reason for the Court to reject the argument was because a directors fiduciary duty is with the bank, thus any alleged violation of a director's fiduciary duty should be contested through a derivative action initiated by the shareholders.[58] Due to the fact that FirstBank is a corporation, the breach of contract is attributed only to the corporation.[59] The directors are not personally liable because they acted in their official capacity.[60] This is beneficial to the future of commercial disputes in Puerto Rico because it states some type of precedent.

The jurisprudence of the state of Delaware has interpreted this doctrine much more in depth. As per the Court of Chancery, the Business Judgment Rule exists to promote freedom to the managerial power of directors.[61] In *Smith v. Van Gorkom*, the Court of Chancery defined the Business Judgment Rule as:

> [A] presumption that in making a business decision, the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company. Thus, the party attacking a board decision as uninformed must rebut the presumption that its business judgement was an informed one.[62]

Again, the Supreme Court of Delaware affirms that the proper standard is gross negligence.[63] This means that it will be presumed that directors act in good faith and in the best interests of the company, regardless of how poor of a decision it was. If the corporation decides to challenge this, they must rebut the presumption by proving that the alleged violation of fiduciary duties was because the director acted grossly negligent. If the rebuttal is successful, then the burden of proof shifts to the director to prove that the transaction was fair and reasonable to the corporation and to the shareholders at the time of approval.[64] It's not enough to prove that it was an improper and wrong decision, there must be proof of a violation of the director's fiduciary duties. Poor judgment does not constitute a violation of a fiduciary duty.

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[54] Schlensky v. Wrigley, 237 N.E. 2nd 776 (III. App. 1 Dist. 1968).
[55] *Id.*
[56] *Id.* at 780.
[57] Rivera Sanfeliz v. Junta de Dir. de FirstBank Corp., 2015 PRSC 61 (2015).
[58] *Id.*
[59] Antonio E. Escudero Viera, *Derecho Corporativo*, 85 REV. JUR. 583, 590 (2016).
[60] *Id.*
[61] Smith v. Van Gorkom, 488 A.2d 858 (Del. Supr. 1985).
[62] *Id.* at 872 (citing: Aronson v. Lewis, 473 A.2d 805, 812 (1984)).
[63] *Id*. at 873.
[64] In re Walt Disney Co. Derivative Litigation, 906 A.2d 27, 56-57 (Del. Supr. 2006).

ii. Entire Fairness

If the presumption is rebutted, then "the burden shifts to the defendant directors . . . to prove to the trier of fact the 'entire fairness' of the transaction to the shareholder plaintiff." [65] Under the entire fairness standard, "directors must establish to the *court's* satisfaction that the transaction was a product of both fair dealing *and* fair price."[66] It is important to notice that the shareholders are not the ones that need to be satisfied, it's the court who determines whether the transaction was reasonable under the entire fairness review. When members of the Board of Directors participate in both sides of the transaction, they have the burden of establishing the entire fairness of the transaction.[67] In *Weinberger v. UOP, Inc*., the Supreme Court of Delaware explains the entire fairness doctrine the following way:

> The concept of fairness has two basic aspects: fair dealing and fair price. The former embraces questions of when the transaction was timed, how it was initiated, structured, negotiated, disclosed to the directors, and how the approvals of the directors and the stockholders were obtained. The latter aspect of fairness relates to the economic and financial considerations of the proposed merger, including all relevant factors: assets, market value, earnings, future prospects, and any other elements that affect the intrinsic or inherent value of a company's stock.[68]

According to *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc*., in a hostile takeover, the directors must analyze the consequences and what it means for the corporation in order to be able to respond accordingly.[69] The directors are "strictly held to fiduciary standards" when managing the corporation's business affairs.[70] When dealing with the potential sale of the company, the directors must always try obtaining the highest value.

III. Derivative Action

Finally, as mentioned, *Rivera, supra*, reaffirmed that when the corporation wants to hold the director accountable for violating their fiduciary duties, they must do it through what is known as a derivative action.[71] This concept arises from article 12.06 of the Act.[72] Whoever is bringing suit against any or all of the directors must have been a shareholder at the time of the transaction. Also, since this action is taken in benefit of the corporation, any recovery in the suit will belong to the corporation.[73] "Litigation of derivative nature are essentially legal battles founded on the violation of the fiduciary duties of care and loyalty by the administrators of the corporation."[74]

In *Bangor Punta Operations, Inc. v. Bangor & A. R. Co.*, the Supreme Court of the United States established that "contemporaneous ownership", from the Federal Rules of Civil Procedure, is required in order to maintain the shareholder derivative action.[75] "The continuous ownership requirement . . . prevents a person who obtains an ownership interest

[65] Cede & Co. v. Technicolor, Inc., 634 A.2d 345, 361 (Del. Supr. 1993).
[66] *Id.* (emphasis added)
[67] Nixon v. Blackwell, 626 A.2d 1366 (Del. Supr. 1993) (*citing* Weinberger v. UOP, Inc., 457 A.2d 701 (Del. Supr. 1983)).
[68] Weinberger v. UOP, Inc., 457 A.2d 701, 711 (Del. Supr. 1983).
[69] Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173 (Del. Supr. 1986).
[70] *Id.* at 181.
[71] Rivera Sanfeliz v. Dir. FirstBank, 193 DPR 38 (2015).
[72] 14 LPRA § 3786.
[73] DÍAZ OLIVO, *supra* note 19, at 428 (citing Cantor v. Sachs, 162 A.2d 73, 76 (Del. Ch. 1932)).
[74] *Id.*, at 429 (unofficial translation).
[75] Bangor Punta Operations, Inc. v. Bangor & A. R. Co., 417 U.S. 703 (1974).

in a corporation after a claim arose from suing derivatively on the claim behalf of the corporation."[76] The *Bangor Punta* doctrine is better explained in *Midland Food Services, LLC v. Castle Hill Holdings V, LLC* stating that:

> [A] shareholder may not complain of acts of corporate mismanagement if he acquired his shares from those who participated or acquiesced in the wrongful transaction. The basis for this rule is that where shareholders have purchased all or substantially all of the shares of a corporation at a fair price, they have personally sustained no injury from wrongs which occurred prior to their purchase, and consequently, any recovery on their part for such prior wrongs would constitute a windfall and would enable such shareholders to obtain funds to which they had no just title or claim. In addition, to allow recovery to subsequent shareholders for prior wrongs would permit them to recoup a large part of the price they agreed to pay for their shares even though they had received all they had bargained for. Finally, to allow recovery would be to permit after-acquiring shareholders to profit from wrongs done to others, and thus encourage speculative litigation.[77]

Essentially, the *Bangor Punta* doctrine prevents the shareholders who acquired their shares after the alleged mismanagement to assert a derivative action against the directors because this would constitute unjust enrichment considering that those shareholders were not affected by the alleged mismanagement. In *Multinational Ins. v. Benitez y otros*, the Puerto Rico Supreme Court adopted the *Bangor Punta* doctrine.[78] The Court reiterates that because our Act is modeled after the Delaware Corporations Act, corporate Delaware case law is extremely persuasive in the jurisdiction of Puerto Rico.[79] According to *Multinational*, the judicial action must be directed against the person who sold the shares and is the culprit of the alleged violation of fiduciary duties, or if any of the following two exceptions are present: (1) fraud; and (2) continuous damages.[80] The doctrine "does not prevent a party who obtained control of a corporation from a seller from asserting a claim that the sales agreement should be rescinded because the seller defrauded or otherwise wrongfully induced the purchaser to execute the agreement".[81] This ruling by the Supreme Court of the United States was adopted by the courts of Delaware, meaning that its value to corporate law is now greater.

CONCLUSION

Fiduciary duties are often overlooked when making high-level corporate decisions, especially if one is set to obtain a personal gain. It is a factor that not many directors and officials consider, even though they should be aware of the consequences their decisions may cause. A director must always put the interests of the company before his or her own personal interests. They are many times found at a crossroads, which result in legal battles. To reiterate, fiduciary duties are mainly composed of duty of care and duty of loyalty. A corporation can include in their Certificate of Incorporation situations in which a director or official will not be liable for violating their duty of care. However, this provision does not

[76] Midland Food Services, LLC v. Castle Hill Holdings V, LLC., 792 A.2d 920, 929 (Del. Ch. 1999).
[77] *Id*. at 928 (*citing* Courtland Manor, Inc. v. Leeds, 347 a.2d 144, 147 (Del. Ch. 1975)).
[78] Multinational Ins. v. Benitez y otros, 193 DPR 67 (2015).
[79] *Id.* at 86.
[80] DÍAZ OLIVO, *supra* note 19, at 438.
[81] Multinational Ins. v. Benitez y otros, 193 DPR 67, 88 (2015) (*citing* Bangor Punta Operations, Inc. v. Bangor & A. R. Co., 417 U.S. 703 (1974)).

apply to the duty of loyalty. It is important to always consider the fiduciary duties owed to the corporation because this will ensure, or heavily contribute, to a company's short and long-term success. A company, and its employees and representatives must always act in good faith and do everything to protect the well-being of the company in their official capacity, and many times, in their personal capacity.