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## SHOULD YOU BECOME A DIRECTOR OF A PUBLIC CORPORATION? MORE RISK THAN YOU MIGHT THINK.

**Y**ou have been asked to become a director of a corporation whose shares are publicly traded on the New York Stock Exchange. Naturally, you are flattered, and you think to yourself, "This is great for me. I'll go to three or four meetings a year, be paid a director's fee of \$75,000.00 plus expenses, and receive stock options. And, boy oh boy, the price of the company's stock has increased 75% over the last three years." Sounds good, but is it?

### Deciding Whether to Join a Board

A person asked to join a board of directors must first learn all he can about the corporation and the other members of the board and must understand why he is being asked to join the board. In today's litigious environment, where actions of a publicly traded corporation's board of directors are scrutinized by activist shareholders, it is essential that anyone thinking about becoming a board member of a publicly traded corporation does his homework. The stakes are high – very high.

An excellent book, *Corporate Director's Guidebook*, is essential reading for anyone considering becoming a board member of a corporation whose shares are publicly traded.

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It lists some questions that should be considered before joining a board, such as:

- *Is the opportunity sufficiently compelling to engage your interest and attention in view of competing business and family commitments?*
- *Do you have any present, foreseeable or perceived conflicts of interest that relate to the corporation's business?*
- *Given your business background and experience, do you believe you can develop an understanding of the corporation's business to function effectively as a member of the board?*

### **Responsibilities and Rights of a Director**

The objective of every for-profit business corporation is to be profitable and therefore to create and increase shareholder value. The board of directors is charged with a leadership role in achieving this goal in two ways: decision-making and oversight.

Decision-making normally involves formulating corporate policy and strategic goals with management and making specific decisions. That requires each board member to make informed decisions in good faith and with the care that a person in a like position would reasonably believe to be in the best interests of the corporation. The oversight function concerns the board's responsibility for the ongoing monitoring of the corporation's business affairs.

Directors owe the corporation a duty of loyalty. That means that directors must place the interests of the corporation and its shareholders ahead of the directors' own interest, and directors must disclose conflicts of interest.

Directors must require management to present the board with sufficient information so that board decisions are informed ones. Directors should not be reticent to request additional information and reports from senior management and consultants. The board must:

- *Put systems in place that will allow the board to review and monitor the performance of the corporation's business and its operating, financial and other corporate plans and strategies, and to comply with regulatory requirements.*
- *Adopt policies of ethical conduct.*
- *Understand the corporation's financial statements.*
- *Develop a management succession plan.*

- *Review the process for providing adequate and timely financial and operational information to shareholders.*

- *Evaluate management's performance.*

- *Evaluate the board's own performance.*

Directors have the right of access to the corporation's information and resources, including the right to inspect books, records and facilities, receive timely notice of board meetings, receive copies of minutes and report. Directors must also have access to the corporation's legal counsel and other advisors.

Quite a lot more work is required of a director of a publicly traded corporation than simply attending a few meetings each year.

### **Director's Liability**

Directors can be liable for money damages if they breach their fiduciary duties to the corporation. But it is not all gloom and doom.

Directors are protected in their decision-making role by the business judgment rule. That means that the law presumes that in making a decision the board acted in good faith and in the corporation's best interests. But that presumption can be rebutted. Unless the presumption is rebutted, courts are loathe to second guess the business judgment of the board. However, if the presumption is rebutted, the burden is on the board to prove the fairness of the decision or transaction.

A breach of the duty of oversight is even harder to prove. Only a sustained and systemic failure of the board to fulfill its oversight function will cause a director to be held liable.

To protect against personal liability, directors are generally indemnified from liability for judgments and settlement of third party claims, including legal fees. Even when indemnification is unavailable, directors can be protected by directors' and officers' liability insurance. Before joining a board, a director should be certain that the amount of such liability insurance is adequate.

The statutes of most states provide that directors found liable for breaches of the duty of care can be exculpated from liability. Exculpation means that the personal liability of a director to the corporation or its shareholders for

money damages can be eliminated. Thus, even if there is a judgment for damages against a director for breach of the duty of care, the plaintiff in a shareholders' derivative lawsuit cannot recover. However, the exculpatory protection of directors can never shield a director from a breach of the duty of loyalty.

### Weighing the Risks and Rewards

Perhaps the most crucial factor in deciding whether to become a director of a corporation is the reputation for competence and integrity of current senior management and the directors. Unless a prospective board member is satisfied that senior management and the current

directors meet the competency and integrity tests, there is, more likely than not, too much risk associated with serving on the board.

On the reward side of the equation, the potential director should analyze the stock option plan for directors, including the number of option shares, the length of time a director must serve on the board to become eligible to receive stock options, any restrictions on the sale after the stock options are exercised, the ancillary business benefits of serving on the board and any other monetary or non-monetary benefit of board service.

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## REVERSE MORTGAGES: BLESSING OR CURSE?

Life expectancy in the United States has increased dramatically in recent years. No longer is it unusual to see people living into their 90s. Hopefully, this trend will continue forever. Senior citizens not only live longer but live healthier and are frequently able to care for themselves. They value their independence and want to continue living in their mortgage-free homes.

Unfortunately, although living longer and better, many seniors are financially challenged and monetarily unable to live an independent lifestyle. Inflation and lower interest rates on savings are squeezing these individuals. The thought of selling their cherished residence and moving into a smaller unit or a nursing home can be depressing and frightening.

Although a senior's residence may be mortgage-free, after decades of continuous occupancy it may be in need of costly repairs or improvements. The senior may be reluctant to borrow against the value of the home, as this would mean putting a mortgage on the house and going back to making those painful monthly payments. The adult children of seniors are often unable to help. As the saying goes, one parent can easily care for three children but three children never seem to be able to care for one parent.

To deal with this problem – and to make money – the banking industry created the home equity conversion loan, often referred to as a reverse mortgage. Under a reverse mortgage, the borrower who is over age 65

would obtain a loan on his mortgage-free residence. At the borrower's option, the money could be taken as a lump sum loan, in fixed monthly payments for life or as a line of credit to be drawn on at the borrower's pleasure.

The borrower would make *no monthly payments* to the bank. No repayment on the loan would be due until the borrower sold the property or died. When the loan was ultimately repaid, any excess [sale price minus loan balance] would go to the borrower or his heirs.

When reverse mortgages were first marketed two decades ago, they appeared to be a great blessing. The senior could obtain needed money, remain in his residence and the loan would not have to be repaid until he moved away or passed away.

Unfortunately, reverse mortgages have not always been entirely beneficial. Borrowers sometimes were steered into investments that may be beneficial for the short term but not necessarily for the long term. A typical product sold to seniors was an annuity that was not U.S. Government insured and often lacking liquidity for the borrower in the event of a sudden need of funds. The cost of breaking the annuity could be very substantial. Annuities are not necessarily bad investments, but they must be carefully analyzed.

Reverse mortgages often had high fees and hidden charges that were incurred at the inception of the loan

or when the loan was repaid. Reverse mortgages also usually had a higher interest rate than conventional mortgages, leaving much less at the end of the loan for the borrower or his heirs.

Also, if the borrower opted to take the money from the bank in the form of monthly payments, rather than as a lump sum, the amount of the payments frequently did not adequately factor in the inflationary increases in the cost of food, real estate taxes, utilities and medical costs. After a few years, borrowers sometimes found themselves in the same financial crunch as before, but with far less equity value in their home and accordingly with significantly reduced options.

Whether a reverse mortgage is a desirable solution for any given person depends upon many factors; age, health, financial needs and available community services. If the borrower is opposed to downsizing and

the family is unable to provide financial assistance, the reverse mortgage may be the only viable solution, and it may well be a good option. If that path is taken, the borrower should keep these thoughts in mind:

- *The reverse mortgage is probably going to be costly in terms of fees and interest.*
- *The benefits of the reverse mortgage may not last as long as hoped.*
- *Financial products suggested by the lender may not be in the best interest of the borrower.*
- *Before signing up for a reverse mortgage, borrowers are well advised to have the terms reviewed carefully by a capable independent professional adviser who is not trying to sell the senior on the benefits of the reverse mortgage.*

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## PLANNING FOR THE FUTURE: DURABLE HEALTH CARE POWERS OF ATTORNEY AND LIVING WILLS

*A father of two young adolescent boys lies in a hospital bed in a coma, clinging to life. His wife, children and parents surround his bedside. The prognosis for recovery is bleak. He can only remain alive through medical intervention. As he did not legally declare his desire whether to receive life sustaining medical intervention, his attending physician asks his wife to make that decision...*

Sadly, situations like this occur frequently. In the midst of the heartache over a life threatening condition of a loved one, family members are forced to decide whether to continue life sustaining treatment. The burden of such a decision can be overwhelming. While the agony of the death of the loved one cannot be changed by any legal document, the agony of the decision-making can.

### **The Living Will**

If the dying person in our example had signed a living will before his illness, the decision-making for the family would have been eliminated. In a living will, you state your instructions for your family and your doctors about your choice of end-of-life treatment. The living will states

precisely what you want done when you can be kept alive only by machines. The instructions in the living will become effective only when your doctor certifies in writing that death would occur without the use of death-delaying procedures.

### **The Health Care Power of Attorney**

In a separate legal document called a durable health care power of attorney, you do *not* state your so-called “pull-the-plug” wishes. Rather, you name a trusted person who will make that decision for you – and other health care decisions – when the time comes.

The durable health care power of attorney becomes active any time you are medically certified as having decisional or communicative incapacity. The person you designated is then called upon to step into your shoes and make decisions consistent with what he believes you would have wanted.

A durable health care power of attorney can be as broad or as narrow as you desire. You may delegate all health

care decisions and for an indefinite period, or you may delegate health care decisions for one particular procedure on one particular day.

A living will and a durable health care power of attorney should be on the short list of the most important legal document for every person to have. Those documents will speak for you when you are medically unable to do so on your own. They should be part of your personal contingency planning in addition to your last will and testament and other estate planning instruments.

Illinois and most states have specific laws governing durable health care powers of attorney and living wills. The majority of states have some form of reciprocity regarding the recognition of living wills made in other states. However, a durable health care power of attorney or a living will might have no legal effect in a foreign

country whose legal system is quite different from that of America.

Durable health care powers of attorney and living wills can be written to be consistent with your spiritual beliefs. Organizations like the *Catholic Health Association of the United States*, *Agudath Israel of America*, the *Islamic Medical Association of North America* and others have promulgated directives specific to their religious beliefs, customs and law.

#### **The Property Power Of Attorney**

Another legal document, the property power of attorney, gives a trusted person the power to buy, sell and transfer your stocks, bonds, house, car bank accounts and other property while you are alive. It does not encompass any health care needs.

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## CONSUMER PROTECTION FOR HOME REPAIRS AND REMODELING

The *Illinois Home Repair and Remodeling Act* can be a very beneficial law for homeowners. This law mandates that every contractor who does home repair or remodeling work must:

- *Deliver to the homeowner a disclosure brochure written by the State entitled "Home Repair: Know your Consumer Rights."*
- *Provide a written estimate of the work to be done with reasonable particularity.*
- *Have a written contract with the home owner for all work over \$1,000.*

If a contractor does not deliver the required disclosure pamphlet to the homeowner at the time of contracting and does not comply with the requirement for a written contract, the homeowner may not have to pay the contractor.

Also, if the court concludes that the contractor knowingly deceived the homeowner, the court can enter a judgment against the contractor personally and not just against his corporation, and the homeowner may be able to recover his attorney's fees and punitive damages from the contractor under another Illinois law, the Consumer Fraud Act.

A contractor's failure to comply with the Home Repair and Remodeling Act can be a costly, but avoidable problem. The requirements of this law generally are not unreasonable or burdensome for contractors. Homeowners and contractors who get involved in home repair and remodeling should make sure that proper and required contract forms and disclosure documents are provided.

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Grandmothers make the best babysitters. Unlike teenagers, grandmothers actually watch the baby... not the television.

GREAT URBAN LEGENDS OF THE LAW

*Fact or Fiction?*

A handshake is necessary to make a verbal contract valid.

*A: Fiction. Although most contracts are valid even if not in writing, proving in court that the parties in fact made a verbal contract can often be difficult. To prove the existence of a verbal contract, the law requires only that there was a meeting of the minds on the essential points of the agreement. A handshake is not necessary. However, in trying to prove that there was a meeting of the minds, evidence of a handshake can often be very persuasive to a judge or jury. So, when you make a verbal agreement, shake hands. Better yet, put it in writing.*

*Fact or Fiction?*

You can get a court order against your ex-spouse commanding him to stay away from your cat.

*A: Fact. In its infinite wisdom and perpetual desire to make every special interest group happy, the Illinois legislature has authorized courts of this state to enter orders of protection commanding one spouse (or ex-spouse) to stay away from an animal owned by the other spouse or by the children and ordering him not to take, transfer, encumber, conceal, harm or dispose of the animal. 725 ILCS 5/112A-14(b)(11.5).*

*Good grief...What's next?*

## RECENT ANNOUNCEMENTS

All the news you can use...

RECENT ARRIVALS

**Scott Spears** is the new father of a bouncing, bubbly, baby girl; **Rebecca Mae**, 7 lbs., 3 oz.

**Caroline Smith** is the new mother of a bouncing, bubbly, baby girl; **Mackenzie Isabelle**, 8 lbs., 9 oz.

ACHIEVEMENTS OF NOTE

**Andrés Gallegos** delivered a lecture on practical legal considerations for convenient care clinics at the World Research Group's retail clinic summit in Chicago. Andrés was also appointed to the diversity committee of the American Health Lawyers Association.

**Paul Saharack** is a volunteer member of the board of directors of the Child's Voice School for hearing impaired children.

**R. Kymn Harp** authored two articles on loan workouts for the Scotsman Guide, a national periodical for mortgage brokers. Kymn also authored a real estate article entitled, "It Ain't Rocket Science, but . . ." for the Illinois Institute for Continuing Legal Education.

**Bob Winter** recently worked with a group of volunteer attorneys in Indiana to prevent election fraud during the Indiana presidential primary.

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