



Worlds In Collision – Agency Law And A Director’s Fiduciary Duties

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Some of you may recall the consternation that arose when former Chancellor Chandler seemed to classify directors as agents of the shareholders. [Unisuper, Ltd. v. News Corp.](#), No. 1699 (Del. Ch. Dec. 20, 2005) (“the board’s power—which is that of an agent’s with regard to its principal—derives from the shareholders, who are the ultimate holders of power under Delaware law.”). Less than a month later the Chancellor clarified his remarks as follows:

The board of directors owes fiduciary duties to the shareholders. In the Opinion, this Court referred generally to agency law principles to illustrate why the nature and purpose of fiduciary duties is to serve as a shield for shareholders, not as a sword for directors to use against shareholders as a group. Although the Opinion employed agency law principles to illustrate by analogy the gap filling nature of fiduciary duties, it did so in an effort pointedly to reject defendants’ effort to invoke the board’s fiduciary duties as a muzzle to silence shareholders.

[Unisuper, Ltd. v. News Corp.](#), No. 1699 (Del. Ch. Jan. 19, 2006).

As Chancellor Chandler’s opinions illustrate, it is easy to conflate directors and agents because both owe fiduciary duties. However, it seems to me that directors and agents are conceptually different.

California defines an agent as “one who *represents* another, called the principal, in dealings with third persons.” Cal. Civ. Code § 2295, *see also* Restatement (Third) of Agency §1.01 (“Agency is the fiduciary relationship that arises when one person (a ‘principal’) manifests assent to another person (an ‘agent’) that the agent shall act on the principal’s behalf and subject to the principal’s control, and the agent manifests assent or otherwise consents so to act.”). Thus, the key to the agency relationship is the ability to act on another’s behalf. As William Shakespeare has Claudio say in *Much Ado About Nothing*:

Therefore, all hearts in love use their own tongues;
Let every eye negotiate for itself
And trust no agent;

Less poetically, don’t send someone else to do your wooing.

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Directors do not fulfill this key element of agency. A director, qua director, has no authority to represent the corporation or its shareholders in dealings with third parties. Directors, moreover, may only act collectively. In this respect, a director is more akin to a member of Congress than the president. Even the element of control, something specifically required by the Restatement, appears to be lacking in the case of directors. A corporation does not control a director; rather the directors as a group control the corporation. See, e.g., Cal. Corp. Code § 300(a) (“[T]he business and affairs of the corporation shall be managed and all corporate powers shall be exercised by or under the direction of the board.”); Del. Code tit.8, §141(a) (“The business and affairs of every corporation organized under this chapter shall be managed by or under the direction of a board of directors”); and NRS 78.120(1) (“[T]he board of directors has full control over the affairs of the corporation.”). Although a director owes fiduciary duties to a corporation’s shareholders, this does not mean that the shareholders can tell individual directors what to do. At most, shareholders can either remove (or fail to re-elect) a director, make certain decisions directly, or hold directors accountable for breaches of fiduciary duty.

Thus, it is remarkable to see that the California courts seem to have no problem in asserting that directors are agents. See, e.g., *Frances T. v. Village Green Owners Assn.* 42 Cal.3d 490, 505,(1986) (“Directors are said to be agents of their corporate principal.”) and *PMC, Inc. v. Kadisha*, 78 Cal.App.4th 1368, 1381 (2000) (“Directors and officers are agents of the corporate principal.”). If the California courts have it wrong, then so does the California legislature. Section 317, which governs indemnification, specifically defines “agent” as “any person who is or was a director, officer, employee . . .”. In the face of all this authority, I’m resigned to being, like John Gower, a *vox clamantis in deserto*.

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