

Answer Outline: Question 1

1. Did the Hook directors satisfy their fiduciary duty of care in adopting the defensive measures to the Bumper tender offer?
 - a) Unocal Standard
 - Did the directors act in good faith?
 - Must reasonably inform themselves as to the threat
 - Entitled to rely on reports of experts
 - Investment bankers
 - That board comprised primarily of outside directors raises presumption of good faith
 - Were the defensive measures proportionate to the threat posed by the unsolicited offer?
 - Must not be coercive; coercive defensive measures are draconian and deemed excessive
 - Debentures in second tier of plan created coercion and threat to remaining shareholders
 - Poison Pill probably a reasonable response
 - b) Revlon Standard
 - When a break up or change in control becomes inevitable, directors duties switch to obtaining highest price for the shareholders.
 - Merger with Umbrella would be a change in control because of ownership after the merger; control would no longer be a public market
 - Directors prematurely ended the bidding for Hook by agreeing to the merger with Umbrella.
 - Agreeing to submit to a vote of the shareholders not automatically a breach of fiduciary duty but seems to have been done too quickly here.
2. Did the directors violate Rule 14a of the 1934 Securities Act by including a material misleading statement in the proxy solicitation?
 - a) Jurisdiction of at least 500 shareholders and \$10 million in assets
 - b) Was false statement about earnings history material?
 - Does it change the total mix of information?
 - c) Contestant in a proxy battle has not standing to bring a private action.
3. What remedies may apply?
 - a) Shareholders
 - Action under 14a for misleading proxy solicitations
 - invalidate the vote
 - Violation of fiduciary duty
 - Impact of exculpation clause
 - No monetary damages, but could enjoin the merger
 - Merger is unenforceable because it breaches fiduciary duties
 - b) Bumper might be able to enjoin merger but lacks standing under 14a.

Issue Outline: Question 2

1. Did Judy comply with pleading rule for demand futility?
 - (a) Must plead particular facts raising reasonable doubt that a majority of the directors are entitled to protection of the business judgment rule.
 - i. Not enough to say only majority shareholder controls board.
 - ii. But moot point since board does not demurrer

2. Will the Court follow the recommendation of the litigation committee and dismiss the action?
 - (a) New York Rule:
 - i. Determine if Committee independent and acting in good faith.
 - ii. If so, examine procedures followed by committee to inform themselves but defer to their business judgment regarding the lawsuit.
 - (b) Delaware approach.
 - i. Was committee independent and acting in good faith
 - ii. Court applies its judgment in light of all facts to determine if case should proceed.
 - (c) Analysis:
 - i. May not pass test of independence with lawyer and banker on committee.

3. Did Fred breach his fiduciary duty to Mixers by usurping a corporate opportunity?
 - (a) Line of Business Test:
 - i. Is opportunity within line of business?
 - ii. Does corporation have an interest or expectancy in opportunity?
 - iii. Did corporation have financial ability to exploit opportunity?
 - iv. Does taking of opportunity create a conflict between individual and corporation?
 - A. How did individual learn of opportunity? Corporate capacity?
 - v. Analysis: Learned of opportunity in corporate capacity.
 - Lack of funds not controlling
 - (b) ALI Test: Must offer opportunity to Corporation before taking for personal use.

4. Did Fred and the Board breach duty of loyalty to Mixers?
 - (a) Actions by controlling shareholder judged by either BJR or intrinsic fairness test
 - i. BJR if both majority and minority shareholders enjoy benefits.
 - ii. If only majority benefit, then intrinsic fairness test applies.
 - (b) Only Fred and his new corporation benefited from pledge of assets and special price, so intrinsic fairness applies.

Answer Outline: Question 3

1. Are any of the individuals liable for insider trading based on material, non-public information?
 - (a) Authority conflicting as to whether there is a common law cause of action.
 - (b) Rule 10b-5
 - i. Applies to all companies, regardless of size
 - ii. Criminal statute enforced by the Justice Department
 - iii. Private rights of action in some cases
 - iv. Elements of Private right of action:
 - A. Misrepresentation or Omission
 - B. Material
 - C. Scier: Intent
 - D. touching on the sale of securities
 - E. reliance
 - F. loss
 - G. loss causation
 - (c) Janice:
 - i. No scier, therefore should not have civil or criminal liability under 10b-5
 - (d) Bill
 - i. intended to and did trade on material, non-public information
 - (e) Martha
 - i. Liability of a tippee depends on motivation of tipper
 - ii. Did the tipper pass the information for his gain?
 - A. Doing a favor is sufficient
 - (f) Rick
 - i. liability for insider trading based on breach of fiduciary duty?
 - ii. Did Rick breach such a duty by taking the note?
 - iii. Who did Rick owe the duty to? His employer.
 - (g) Tammy
 - i. Hasn't misappropriated information from anyone she owes a fiduciary duty
 - ii. Not a tippee
2. Do any of the traders have liability for short-swing transactions under Rule 16-b?
 - (a) Jurisdiction: Corporations with at least 500 shareholders and \$10 million in assets.
 - (b) Covers
 - i. owners of 10% of stock and officers and directors
 - (c) Rule: Must disgorge any profits on any purchase and sale or sale and purchase within six months of each other
 - (d) Match lowest purchase price with highest selling price
 - (e) Bill: Match 50,000 June 15 sale at \$100 with 50,000 from July 15 purchase at \$50.
 - i. Match remaining 50,000 purchase at \$50 from July 15 with 50,000 from July 24 sale at \$90.
 - (f) Other traders not subject to 16b.