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Exposure to Light

A recent ruling proves the point: Transparency reigns supreme in today's business world. Which means shareholders have a right to know all.

By Brian J. Hunt

IF THERE WAS EVER A TIME WHEN SHAREHOLDERS WERE COMPLETELY passive investors whose only choice was to hold or sell, those days are long gone. The modern corporation, particularly in the wake of recent and well-publicized business scandals, is subject to increased scrutiny from its stakeholders (including customers, employees and shareholders), and from lawmakers and regulators. Shareholders in particular are legally entitled to demand access to the books and records of account, and that right will be enforced even over the corporation's protestation.

A recent example is *Corwin v. Abbott Laboratories*, 353 Ill.App. 3rd 848 (2nd Dist. 2005).

Corwin was a shareholder of Abbott Laboratories, a large publicly held pharmaceutical company that owned 50 percent of TAP Pharmaceutical Products. TAP manufactured and sold a prostate cancer drug, and was later accused by the federal government of illegally giving doctors free samples of the drug, and then seeking reimbursement from a government insurer. In connection with those charges, TAP entered into a settlement agreement that included a guilty plea and substantial fines and penalties.

After the settlement was announced, Corwin requested internal investigatory reports and any and all "documents received by any" Abbott board member relating to the federal investigation of TAP. When Abbott refused Corwin's request, he filed a mandamus action, pursuant to Section 7.75 of the Illinois Business Corporation Act. This section provides that a shareholder may obtain access to "books and records of account, minutes, voting trust agreements filed with the corporation and records of shareholders."

At trial, Abbott argued that any records to which Corwin was entitled were limited to those of a financial nature. Abbott also argued that Corwin had no proper

purpose in requesting the documents, and that his motive was not to protect his interest but to provide the information to his lawyer, who was separately suing Abbott for hundreds of millions of dollars on the same claims. Abbott asserted that Corwin was a professional plaintiff who owned only a tiny amount of Abbott stock.

Evidence was presented that 20 percent of Abbott's revenues were derived from TAP; that Abbott appointed TAP board members; that Abbott and TAP worked together in marketing certain products; and that Abbott itself received immunity for its cooperation in the federal investigation. Corwin testified to his concern that Abbott was directly involved in, or knew of, the illegal conduct.

The trial judge concluded that the purpose of Corwin's request was proper and not speculative, or inspired by curiosity or a desire to harass. The trial judge also stated that, even assuming the request was made with the intention of using the records in a derivative suit, and assuming that purpose would be improper, such a purpose was secondary to the primary purpose. The trial judge ordered the records to be produced.

On appeal, Abbott persisted in its argument that the requested records were not "books and records of account," that Corwin had no proper purpose for the request, and that consideration should be given to Corwin's motives, balanced against Abbott's interests. While noting that "books and records of accounts" are undefined in the statute, the Court stated that, once a proper purpose has been established, the shareholder's right to inspect extends to "all books and records necessary to make an intelligent and searching investigation" and "from which he can derive any information that will enable him to better protect his interests."

As to Abbott's challenge to Corwin's proper purpose, the Court stated that a proper purpose is shown when a shareholder has an honest motive, is acting in good faith and seeks to protect the interests of the corporation. The Court ruled that the trial judge's conclusions were supported by the evidence, and that the trial judge had considered Corwin's motives, balanced the interest of the parties and found that the plaintiff had a proper purpose.

Corwin stands for the proposition that, in terms of information requests, the shareholder will be given the benefit of the doubt. It is also an example of a broader trend to shed light on the relations between the corporation, its shareholders and those who serve it. This exposure is based on the concept that greater transparency will foster more circumspect conduct. Of course, this concept is not new. As future Supreme Court Justice Louis Brandeis said in 1913, "Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best disinfectant; electric light the most efficient policeman."

Ready or not, this increased transparency is the future.

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