

EXAMINERS' ANALYSIS OF QUESTION NO. 2

1. Does Peter have a viable claim against VSM for breach of fiduciary duty?

Directors of a corporation owe fiduciary duties to stockholders and are bound to act in good faith for the benefit of the corporation. *Wallad v Access BIDCO*, 236 Mich App 303, 306-307 (1999). The directors of VSM are required to discharge their fiduciary duties to the corporation (1) in good faith; (2) with the care that an ordinarily prudent person in a like position would exercise under similar circumstances; and (3) in a manner he or she reasonably believes to be in the best interests of the corporation. MCL 450.1541a(1)(a)-(c).

In exercising their business judgment, the directors are entitled to rely upon "information, opinions reports, or statements," including financial statements and financial data, if the information is prepared by an assortment of entities. Relevant to this question, MCL 450.1541a(2)(b) provides that a director or officer is entitled to rely on information provided by "[l]egal counsel, public accountants, engineers, or other persons as to matters the director or officer reasonably believes are within the person's professional or expert competence." (Emphasis added.) In this case, the directors relied on a public accounting firm to assess the viability of VSM's retiree pension plan. As a public accounting firm has professional or expert competence in financial matters, it is likely that the directors' reliance on the public accounting report will be deemed reasonable. There are no facts indicating anything other than good faith on the part of the directors, and it is certainly in the best interests of the corporation to prevent the insolvency of their pension plan. See *In re Butterfield Estate*, 418 Mich 241, 254-255 (1983) quoting *Hunter v Roberts, Throp & Co*, 83 Mich 63, 71 (1890) ("It is a well-recognized principle of law that the directors of a corporation, and they alone, have the power to declare a dividend of the earnings of the corporation, and to determine its amount."). Because the directors acted with the care that an ordinarily prudent person in a like position would exercise under similar circumstances, it is unlikely that Peter has a viable claim against the directors for failing to issue dividends to the shareholders. See *Butterfield*, 418 Mich at 255 ("In the absence of bad faith or fraud, a court should not substitute its judg-

ment for that of corporate directors concerning dividend policies," as "directors are in a far better position than a judge to evaluate" the needs of the corporation.)

Some applicants may address the procedural question of whether this could be brought as a direct claim, as opposed to a derivative one on behalf of the corporation. As explained in *Michigan Nat'l Bank v Mudgett*, 178 Mich App 677, 679-680 (1989):

In general, a suit to enforce corporate rights or to redress or prevent injury to the corporation, whether arising out of contract or tort, must be brought in the name of the corporation and not that of a stockholder, officer or employee

The general rule is inapplicable where the individual shows a violation of a duty owed directly to him This exception does not arise, however, merely because the acts complained of resulted in damage both to the corporation and to the individual, but is limited to cases where the wrong done amounts to a breach of duty owed to the individual personally Thus, where the alleged injury to the individual results only from the injury to the corporation, the injury is merely derivative and the individual does not have a right of action against the third party.

With respect to this procedural issue, applicants could conclude that both claims should be brought as derivative claims, because the injuries are to the corporation rather than to Peter just himself.

2. Can Peter be sued for tort as an officer?

A plaintiff may pursue an action against a corporate official in his or her personal capacity when the plaintiff alleges that the official's own tortious conduct harmed the plaintiff. *Department of Agriculture v Appletree Marketing, LLC* 485 Mich 1, 17-18 (2010). Here, Smith was clearly in his role as an officer of VSM when he allegedly embezzled money from VSM. Because "corporate officials may be held personally liable for their individual tortious acts done in the course of business, regardless of whether they were acting for their personal benefit or the corporation's benefit," *id.* at 17, Smith could be sued by Peter for the tort.