

From: Weiler, Todd
To: David Irvine; Kim Burningham
Sent: Fri Jan 15 14:35:48 2010
Subject: UEG's shifting of the burden of proof

Gentlemen:

I was impressed by your willingness to appear and answer Mr. Mero's questions yesterday at the Southerland Institute's forum. However, I felt that my question was given short shrift and wanted to give you another opportunity to respond.

All politics aside, I am deeply troubled by this sentence in your proposal: "Once a prima facie case has been established against an accused legislator, however, then as with fiduciary standards in the law of partnerships and corporations, the burden of proof and risk of non-persuasion in relation to such case shall shift to such legislator, and such legislator must show by a preponderance of evidence that the legislator did not commit the violation or violations charged in the formal complaint." (Emphasis added.)

The UEG asserts on its website that "Once the complainants have offered enough evidence to establish all the necessary elements of a claimed breach . . . THEN the legislator must show, by a preponderance, that there was no inappropriate conduct. That's the same burden corporate directors and officers or partners in partnerships carry under current business law."

I wholeheartedly disagree with this assessment, and believe it misstates the law in at least two respects.

The "business judgment rule" is a legal concept where corporate directors are presumed to be motivated by a bona fide regard for the interests of the corporation. See *Gimbel v. Signal Cos.*, 316 A.2d 599, 608 (Del. Ch. 1974). The presumption is that "in making business decisions not involving direct self-interest or self-dealing, corporate directors act on an informed basis, in good faith, and in the honest belief that their actions are in the corporation's best interest." *Sinclair Oil Corp. v. Levien*, 280 A.2d 717, 720 (Del. 1971). Accordingly, courts will refuse to review the actions of a corporate board unless there it violated its duty of care to manage to the best of its ability. The burden of proof is on the party challenging a decision to establish facts rebutting the heavy presumption. Courts will not interfere with directors unless it is clear that they are guilty of something akin to fraud. See *Dodge v. Ford Motor Co.*, 170 N.W. 668 (1919) (holding that "courts of equity will not interfere in the management of the directors unless it is clearly made to appear that they are guilty of fraud or misappropriation of the corporate funds. . . .")

UEG has turned the Business Judgment Rule on its proverbial head. Under it, "the party attacking a board decision as uninformed must rebut the presumption that its business judgment was an informed one." *Smith v. Van Gorkom*, 488 A.2d 858 (Del. 1985). The plaintiff has the burden of showing something akin to a director lining her own pockets with the company's money before the burden will shift to the

defendant to show that the action meets the burden of good faith/rational decision. With the courts using the business judgment rule, most cases are readily dismissed. Unlike what is being proposed in UEG's initiative, the business judgment rule protects and shields corporate directors from shareholders accusing them of wrongdoing.

Not only has the Initiative misstated the "fiduciary standards in the law of partnerships and corporations" but it also undermines the American principle of being presumed innocent, as follows: "the burden of proof and risk of non-persuasion in relation to such case shall shift to such legislator, and such legislator must show by a preponderance of evidence that the legislator did not commit the violation . . ." (Emphasis added.) This language is deeply disturbing, as well as unconstitutional.

Even the Utah Supreme Court has recognized that "the terminology covering evidentiary burdens can be highly confusing." Generally speaking, there are two evidentiary burdens: a burden of persuasion and a burden of production. See *Koesling v. Basamaklis*, 539 P.2d 1043, 1046 (Utah 1975). "Burden of persuasion" refers to "[a] party's duty to convince the fact-finder to view the facts in a way that favors that party." Black's Law Dictionary 190 (7th ed.1999). "Burden of production" refers to "[a] party's duty to introduce enough evidence on an issue to have the issue decided by the fact-finder, rather than decided against the party in a peremptory ruling." *Id.* Finally, "burden of proof" is a catchall term that encompasses both the burden of persuasion and the burden of production and generally refers to "[a] party's duty to prove a disputed assertion or charge." *Id.* See *Searle V. Milburn Irr. Co.*, 2006 UT 16,133 P.3d 382 n.2.

The "burden of persuasion" (or "risk of non-persuasion") is an obligation that remains on a single party for the duration of the claim. But the UEG seeks to change that! Once the burden has been entirely discharged to the satisfaction of the trier of fact, the party carrying the burden will succeed in its claim. For example, the presumption of innocence in a criminal trial places a legal burden upon the prosecution to prove all elements of the offense, usually beyond a reasonable doubt, and to disprove all the defenses (except affirmative defenses).

The burden of production is an obligation that shifts between parties over the course of the hearing or trial. A party may submit evidence that the court will consider *prima facie* (Latin for "on its first appearance", or "by first instance; at first sight") evidence of some state of affairs.

If passed, the Ethics Initiative will shift both burdens to the accused legislator. This is unprecedented, and contrary to an express ruling of the Utah Supreme Court. In *Kartchner v. Horne*, 262 P.2d 749, 751 (Utah 1953), the court recognized that "The party having the risk of non-persuasion is naturally the one upon whom first falls this duty of going forward with the evidence. Upon meeting their duty of going forward with evidence that all authorized stock had been issued before the issuance of plaintiffs' stock certificate, plaintiffs made out a *prima facie* case. Thereupon, the burden, in the second meaning of the phrase, shifted to the defendants, but the risk of non-persuasion, which never shifts, remained with plaintiffs." (Emphasis added.)

Likewise, in *Fretz v. Anderson*, 300 P.2d 642, 650 (Utah 1956), the Utah Supreme Court stated, “only the burden of going forward with the evidence is shifted to the estate of the deceased and the burden of proof, or risk of non-persuasion, remains with the plaintiff as a part of his cause of action.” “The burden of persuasion requires that the fact finder must be convinced by the evidence that the existing facts are in favor of the party who has such burden in order to find the issue of facts on that question in his favor.” *Id.* The United States Supreme Court has also ruled that mandatory presumptions are unconstitutional because they shift the burden of persuasion to the accused. *Sandstrom v. Montana*, 442 U.S. 510, 99 S. Ct. 2450, 61 L.Ed.2d 39 (1979) (stating “as the burden of persuasion must always remain on the state in a criminal proceeding, the shifting of the burden of persuasion to [the accused] to prove his innocence was unconstitutional”).

I recognize that the proposed ethics commission is not a criminal tribunal, and would only be making recommendations to the Legislature. Unlike most people, I have actually read and studied all 21 pages. But I am still gravely concerned that your Initiative seeks to shift a burden that has never been allowed to shift before. I would appreciate a reasoned response to this concern. If you are unable to make one, then I politely ask that you remove the misleading statements and legal misrepresentations from both UEG's website and your script in future public meetings.

Thank you.

Todd Weiler
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