



Explaining the Concept of Corporate Opportunities and Strategy to Prevent Them from Appropriating by Directors (A Comparative Study of the Legal System of the United States, England and Iran)

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Abstract

Companies' directors as a large group of fiduciaries, not only for the protection of physical assets, but also, they have fiduciary duties towards the companies under their management in pursuing the conclusion of commercial transactions. However, relationships between company members are not always harmonious and the motivation to prioritize personal interests may motivate a director to put his own interests or those around him before the interests of the company which in this situation, the company will experience a vulnerable situation. Therefore, it is vital to impose certain obligations on directors that can limit the instinctive tendency of humans towards personal interests.

With these explanations, it should be said that basically two types of conflicts related to commercial transactions can be identified in the relationship between the legal entity and the directors working in it: One is the transactions concluded by the beneficial director with the company and the other one is the subject of corporate opportunities.

While the first-type conflict is clear, in the case of corporate opportunity, the director commits a breach of duty by not providing a specific business opportunity to the company under management and instead by taking it over for his own account or for another company in which he has significant financial interests. In other words, in corporate opportunity transactions, Principally, directors expropriate business opportunities for their own benefit that could have been pursued or exploited by the company under their management.

In the United States, corporate directors are subject to fiduciary duties of loyalty, care, good faith, and disclosure whose regulations are well established in this country. The duty of loyalty prohibits the company's directors from self-interested actions and inappropriate use of the company's interests and Instead, it emphasizes the issue of acting or not acting in good faith and based on the honest belief that whatever the



outcome will be for the benefit of the company and its shareholders. The duty of care requires making informed decisions and based on all information that is reasonably available to the directors and ensures that corporate directors exercise informed business judgment in their management so that if they commit an act or omission without sufficient information, will entail responsibility for them. The duty of good faith and the necessity of disclosure are other fiduciary duties that encompass the underlying principles of the two main duties of loyalty and care.

At the end of the 19th century, the English legal system created a strict concept that was characterized by the rules prohibiting the acquisition of profit and the prohibition of conflict between actions and interests and then the legislator of this country kept its traditional concept in the Companies Law 2006. In fact, the English legislator has imposed high standards of behavior on company directors, according to which they should prefer the interests of the company over their own interests. Also, the company law of this country includes a comprehensive list of the duties of managers, which Article 175 of this law specifically mentions the duty to avoid conflict of interest, especially in the case of exploiting business opportunities and it makes it clear that if an opportunity is used, the director's interests are in conflict with the company's interests.

In Iranian law, regarding the doctrine of corporate opportunities, the regulations do not have enough clarity. Also, no written law does not exist with the exception of corporate governance guidelines for listed and over-the-counter companies that indirectly contains this doctrine.

However, Despite the fact that the corporate governance law targets only stock exchange companies, but with the investigations carried out, it can be claimed that the main fiduciary duties of business directors such as restrictions on directors dealings with the company, prohibition of competition with the company, obtaining incorrect profit from the situation along with the solutions and sanctions of the relevant executions has been in the focus of our legislator's attention from the beginning and therefore, from the induction in these laws, it is possible to infer the duty of loyalty of directors.

In the United States, various tests have been developed to answer the question of whether an opportunity "belongs" to the company. Four traditional tests which is used to determine a business opportunity as a corporate opportunity, 'Interest or Expectancy Test', 'Line of Business Test', 'Fairness Test' and 'Combined Tests' that the line of business test is mostly cited by the courts.

In the England legal system, by studying the historical record, two flexible and strict approaches can be identified, each of which has gone through different stages. Currently, the legislator of this country has adopted a strict approach in such a way that, unlike the legal system of the United States, which is limited to various matters during various tests, in this country it is not limited to anything and all potential opportunities are considered corporate and as a result, directors are not allowed to take advantage of corporate assets, information or opportunities without obtaining the company's consent.

In Iran's legal system, due to the silence of the legislator, it is better to adopt a two-factor test to check whether the business opportunity is corporate or not. As the first



factor, the degree of compatibility of the opportunity with the current type of business of the company should be considered, and the second factor is to examine whether the opportunity was unique or had a special value for the company.

Corporate opportunities such as information are considered as company assets. Of course, this is not absolute ownership, and in some cases, companies cannot claim the right to the created opportunity. It should be noted that the corporate opportunity should be included in the list of new types of valuable assets, and because it is an abstract thing that can be converted into profit, and at the same time, the company and its directors have expectations for its benefits, as a right, to be considered valuable. In terms of property characteristics, a corporate opportunity would clearly be considered an intangible asset.

Keywords: Corporate opportunity, fiduciary, Business opportunity, disclosure, conflict of interest, loyalty.



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