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Corporate Opportunities in the US and in the UK

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The authors thank Christopher Bruner for comments on this chapter.

Abstract

Fiduciary duties are often today held out as typical instruments of shareholder protection in the common law of both the US and the UK, which are sometimes held out as examples for a consensus model for what is considered good corporate law conducive to good capital market development. However, fiduciary duties in these two jurisdictions often operate in strikingly different ways. This chapter looks at the specific example of corporate opportunities, with which the UK and the US deal in remarkably different ways. Each of them focuses on a starting point: avoiding conflicts of interest in the UK approach versus identifying the correct owner of the opportunity in the US approach. While the US relies on an open-ended standard, the UK corporate opportunities doctrine effectively constitutes a rule. In this chapter, we suggest an explanation for why the two core jurisdictions of the common law world have developed so differently in this respect. We argue that only in the US fiduciary duties are typically enforced by the courts, whereas in the UK, corporate law enforcement is typically left to ex ante monitoring by outside directors and institutional investors. Only courts, in applying an ex post substantive assessment, are capable of implementing a complex "standard" for corporate opportunities. Institutional enforcement, as in the UK, lends itself better to a hard-and-fast rule. We suggest that this distinction is only an example of a larger distinction between the corporate laws of these two jurisdictions, and indicative of a broader difference in how corporate fiduciary duties operate.

Keywords: Delaware, Guth v. Loft, Broz v. Cellular, Siegman v. Tristar, DGCL, Conflict Avoidance, Convergence, Bhullar v. Bhullar, Foss v. Harbottle, Fairness Test

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Forthcoming
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Corporate Opportunities in the US and in the UK

How differences in enforcement explain differences in substantive fiduciary duties

MARTIN GELTER* & GENEVIÈVE HELLERINGER**

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1. Introduction

Consider a director with limited shareholding of a building company, who hears at a private party about a development site that will soon be available for sale. It is an opportunity that the building

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company might have exploited but instead the director purchases the site via a new company wholly owned by himself, and builds a house for himself on it. Has he wrongfully taken for his private benefit an opportunity that belonged to the company? Can a self-interested director lawfully exclude the company from a transaction it could have exploited without breaching his fiduciary duties? Rules and practices regarding the handling of directors' personal interest in certain business opportunities encompass an economic as well as a moral dimension. The balance that is reached may differ from one jurisdiction to another, depending on the weight accorded to the duty of loyalty of directors.

Corporations, as legal institutions, have developed in a series of innovations from partnership and trust law.[1] In these areas, shareholders tend to entrust delegates with their interest and the corporation's, and fiduciary duties are key elements in the relationship. As a corollary, the director has been primarily seen as a trustee or an agent,[2] and in any case a fiduciary that is expected to display absolute integrity when dealing with the property or other interests of the beneficiaries.[3] There are various strategies for handling 'corporate opportunities' understood as opportunities to make investments, or otherwise profitably use information or property, which arise to the director (or other fiduciary) of a corporation and might create a conflict between the fiduciary's interests and the corporation's. And there is more than one model to look to for inspiration. Strikingly, the US and the UK approaches are not identical. Each of them focuses on a specific starting point: avoiding conflicts of interest in the UK approach versus identifying the correct owner of the opportunity in the US approach.

The development of the doctrinal as well as judicial conversation on business opportunity displays an interesting geography and chronology. Fiduciary duties are often today held out as typical instrument of shareholder protection in the common law of both the US and the UK, and even civil

[1] *See* RONALD RALPH FORMOY, THE HISTORICAL FOUNDATION OF MODERN COMPANY LAW (1923); BISHOP CARLETON HUNT, THE DEVELOPMENT OF THE BUSINESS CORPORATION IN ENGLAND, 1800-1867 (1936).
[2] *See* Julian Velasco, *Delimiting Fiduciary Status*, at note 25 and accompanying text (in this volume) (stressing that directors are usually considered as sui generis fiduciaries).
[3] *See* Bray v Ford, [1896] A.C. 44, 51 (H.L.).

law countries to which fiduciary duties have not traditionally been native, such as France, are increasingly looking toward developments in these countries, which are held by some of us as best examples for a consensus model for what is considered good corporate law conducive to good capital market development. However, strikingly, the two models of how the UK and the US deal with the corporate opportunity phenomenon are remarkably different.

The UK model developed at the end of the 19th century a strict conception based on the figure of the fiduciary and characterized by the no-conflict/no-profit rules, which are still at the heart of the current rule. Though the rules were codified in 2006,[4] and despite the statutory introduction of a procedure of *ex ante* authorization by the board of directors in addition to the authorization by shareholders, the traditional conception remains entrenched. Being strictly rooted in the conflict-of-interest paradigm, the UK strategy could be called the "status approach." By contrast, the US doctrine, after a century of development in the case law, could be dubbed the "ownership approach." There, the main question asked by courts is whether an opportunity "belongs" to the corporation because it is one that shareholders would typically expect the corporation to pursue, for which the courts have developed various tests. The US approach also facilitates ex ante opt-outs, and ex post defenses for directors seeking to take an opportunity

In this chapter, we suggest an explanation for why the two core jurisdictions of the common law world have developed so differently in this respect. We argue that only in the US fiduciary duties are typically enforced by the courts, whereas in the UK, corporate law enforcement is typically left to ex ante monitoring by outside directors and institutional investors. Only courts, in applying an ex post substantive assessment, are capable of implementing a complex "standard" for corporate opportunities. Institutional enforcement, as in the UK, lends itself better to a hard-and-fast rule. We suggest

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[4] That is while the company is solvent, *see* COMPANIES ACT 2006 (UK), Ch. 2, ss. 170-181.

that this distinction is only an example of a larger distinction between the corporate laws of these two jurisdictions, and indicative of a broader difference in how corporate fiduciary duties operate.[5]

2. The function of the corporate opportunities doctrine

The corporate opportunities doctrine can generally be understood within the context of the duty of loyalty in general. Corporate law is typically analyzed within the framework of agency theory and incomplete contracts. Within the agency theory framework, shareholders invest in a corporation for the purpose of achieving a certain goal, typically understood as maximization of profit. Directors and officers of the corporation, however, will rationally pursue their own goals and engage in opportunistic behavior, specifically by activities that draw resources from the corporation, for which they will often have the opportunity because of information asymmetries. To keep down the cost of capital, shareholders will rationally monitor them, while directors and officers may sometimes be in the position to signal their good intention to those who are – in economic terms – considered their principals.

In this framework, the duty of loyalty is a mechanism that either incentivizes fiduciaries to reveal information *ex ante*, for example by creating incentives to inform shareholders about potentially opportunistic transactions,[6] or that imposes penalties in the form of damages and/or the disgorgement of profits made ex post, thus deterring opportunistic conduct. However, in the context of corporate opportunities, the question is subtler: The duty of loyalty always protects the corporation (and its shareholders) relative to a certain baseline. In the case of self-dealing transactions, that baseline is that directors and officers will not siphon any corporate resources out of the corporation through self-dealing transactions.[7] For the corporate opportunities doctrine, that baseline is that they

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[5] For a US vs. UK comparison on the elimination of corporate fiduciary duties, *see* Christopher M. Bruner, *Opting Out of Fiduciary Duties and Liabilities in U.S. and U.K. Business Entities* (in this volume).

[6] One example would be the consequences of approval of transactions either by fully informed disinterested directors or by a fully informed majority of the disinterested minority shareholders, in which case courts will apply a standard more favorable to the fiduciaries if the transactions is challenged in court.

[7] Following the Coase Theorem, in world free of transaction cost, bargaining between the principal and the agent would result in the choice of the efficient by agreement. *See, generally,* R.H. Coase, *The Problem of Social Cost,* 3 J. L. & ECON. 1-44 (1960). With transaction cost, e.g. because of information asymmetry or coordination cost among shareholders, there might be a stronger case for

will not appropriate to themselves any profitable business opportunities going to the corporation. The difficulty here is, however, to determine which opportunities are *ex ante* assumed to belong to the corporation. In other words, to protect the legitimate expectations of shareholders,[8] we first have to determine what these expectations are, something which is often ambiguous in the business opportunity context. The corporate opportunity doctrine thus fulfills an important function in assigning potential business opportunities either within the corporation or to the free-wheeling "morals of the marketplace" where they are up for grabs.[9] Since there is no obvious baseline assumption (as in the case of self-dealing), the delineation developed in rules or by the courts may rather shape the expectations of the party than vice versa.[10] There are two main competing ways to analyze the issue. First, it might be conceptualized in terms of ownership: One could see the corporate opportunities doctrine as a default assignment of property rights.[11] This is the US law approach. Second, one could see the corporate opportunities regulation as a means to avoiding any actual or potential conflict of interest. This is the UK law approach.

In a broad political economic perspective, a weak protection of corporate opportunities, or "elasticity" in their legal protection,[12] may foster innovation by permitting fiduciaries to take innovations with them and employ them for their highest value use. A widely-cast net in the definition of opportunities and strong property rights protection may thus at times reduce innovation and prevent

mandatory law to reach the most efficient outcome. In the case of corporate opportunities, it is not at all obvious how the entitlement should be set.

[8] *See* Victor Brudney & Robert Charles Clark, *A New Look at Corporate Opportunities*, 94 HARV. L. REV. 997, 1010-1012 (1981) (discussing rational expectations of shareholders as a test for corporate opportunities in close corporation).

[9] Unless those potentially "grabbing" the opportunity are subject to further limitations, e.g. a contractual or legal duty not to compete, as are e.g. members of the management board in Germany under § 88 AKTG.

[10] A context-specific baseline may develop as a result of bargaining between founders or shareholders of a corporation, which is illustrated by the widespread use of opt-outs for specific types of opportunities under DGCL 122(17). *See infra* notes 39-49 and accompanying text.

[11] Eric Talley, *Turning Servile Opportunities to Gold: A Strategic Analysis of the Corporate Opportunities Doctrine,* 108 YALE L. J. 277, 280 (1998).

[12] *Compare* in the financial context an account of 'law's elasticity', i.e., "the probability that ex ante legal commitments will be relaxed or suspended in the future", Katharina Pistor, *A Legal Theory of Finance*, 41 J. COMP. ECON. 315, 320 (2013).

desirable market entry ex post when an opportunity arises. Ex ante, it may also deter fiduciaries from seeking out new business opportunities, thus reducing the vitality of the economy overall.[13]

The other side of the coin is, however, the protection of investors, which may be more likely to invest ex ante if they are protected from fiduciary opportunism. Protection of a property right in corporate opportunities, and of behaviors favoring a personal interest over the firm's, thus contributes to a stronger base of external financial investment. This seems particularly important in firms or industries where a high level of specific investment in information by the firm is necessary to develop business opportunities, strong enforcement may be necessary to preserve incentives to invest.[14] Investors would likely want to be protected from a fiduciary departing from the firm with innovation worth 10 years of corporate expenditures in his pockets. On the other hand, when innovation and the detection of opportunities requires less capital-intensive investment by the corporation, but rather individual creativity on the part of the fiduciary, strong protection is more likely to deter innovation.

3. The US corporate opportunities doctrine: delineating the "ownership approach"

The US approach has developed through case law over the decades and has not been codified. After a period of expansion over the course of the 20th century, the doctrine has culminated in a broad conception of fairness, as shown by the most recent case considered to be seminal.[15] This has in practice led to attempts to opt out of the corporate opportunity doctrine, either *ex post* – by submitting the question to the board – or *ex ante* – by attempting to eliminate corporate opportunities in the corporate charter, or by specifying what opportunities belong to the corporation.

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[13] For the comparable case of non-compete clauses, see Ronald J. Gilson, *The Legal Infrastructure of High Technology Industrial Districts: Silicon Valley, Route 128, and Covenants not to Compete*, 74 NYU L. REV. 575-629 (1999).

[14] *See* Marco Claudio Corradi, *Corporate Opportunities Doctrines Tested in the Light of the Theory of the Firm – a European (and US) Comparative Perspective*, forthcoming 2016 EUR. BUS. L. REV..

[15] Broz v. Cellular Information Systems, 673 A.2d 148 (Del. 1996).

A. The development and contours of the corporate opportunities doctrine

In the United States, the corporate opportunity doctrine can be traced to the early decades of the 20th Century, when it gradually coalesced in the case law.[16] The most famous duty of loyalty case, *Meinhard v. Salmon*, dealing with a joint venture, sweepingly established that a party to a joint venture must share an opportunity with their joint adventurer, without, however, establishing particularly clear criteria what opportunities are captured by this obligation.[17] Similarly, in the well-known 1934 corporate opportunities case of *Irving Trust*, the Federal Court of Appeals for the Second Circuit defended a principle "that fiduciaries should not be permitted to assume a position in which their individual interests might be in conflict with those of the corporation" and, in doing so, found that the corporation's inability to pursue an opportunity does not provides a defense for the director taking it.[18]

However, today, the corporate opportunities doctrine is generally understood to be more permissive. The focus is on the threshold question: Which opportunities "belong" to the corporation?[19] Textbooks generally cite three tests – namely the interest or expectancy test, the line-of-business test, and the fairness test,[20] although these often, if not typically, operate in conjunction with each other. In applying these tests, the courts' focus seems to have shifted away from more formalistic toward

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[16] In the US, fiduciary duties are assumed to pre-exist in the background common law, and as such they are typically left to the courts to develop. Consequently, the corporate opportunity doctrine is not codified in Delaware corporate law, but developed over the decades before the courts. True, some acts provide that managers or members may not take opportunities of the business entity. *E.g.* REV. UNIFORM LIMITED LIABILITY COMPANY ACT § 409(b)(1)(C), (g)(1) (providing that members in a member managed LLC and managers in a manager-managed LLC must account to the company and hold as a trustee for it any property, profit or benefit derived from the appropriation of a LLC opportunity). However, even in those cases, business opportunities are not legislatively defined.
[17] Meinhard v. Salmon, 164 N.E. 545 (N.Y. 1928). According to the court, the new lease fell into Meinhard's reasonable expectations because it was "an extension and enlargement of the subject-matter of the old one". *Meinhard*, *id.*, at 548. However, it is not entire clear why this should be the case, given that the new project was considerable more extensive than the original one, which had been entered into for a limited time.
[18] Irving Trust Co. v. Deutsch, 73 F.2d 121, 124 (2d. Cir.1934).
[19] *E.g.* David Kershaw, *Lost in Translation: Corporate Opportunities in Comparative Perspective*, 25 OX. J. LEG. STUD. 603, 608 (2005) (comparing US to UK law); *In re* Digex, 789 A.2d 1176, 1188 (Del. Ch. 2000) (analyzing to whom an opportunity "belongs").
[20] *E.g.* ROBERT CHARLES CLARK, CORPORATE LAW 225-229 (1986).

less formalistic definitions, thus expanding the application of the doctrine. The oldest and most narrow "interest or expectancy test" asks whether a corporation already has established a tentative claim to the opportunity.[21]

The most famous corporate opportunity case from Delaware, *Guth v. Loft*[22] of 1939 is often cited for establishing the "line-of-business test", which asks whether an opportunity relates "to the business the corporation engages in."[23] In *Guth*, the defendant was the director and controlling shareholder of a chain of candy stores who was approached by the controlling shareholder of the bankrupt Pepsi Cola Corporation and offered the majority of shares in a new corporation to continue Pepsi's business and purchase its recipe. The Supreme Court of Delaware found that "Loft had no interest or expectancy in the Pepsi-Cola opportunity,[24] but it was (maybe somewhat questionably) within its line of business, given its "reasonable needs and aspirations for expansion."[25]

A general reading of the case should lead to the conclusion that the case was not only focused on the perceived line of business, even if it was clearly a major factor. The court also looked at whether the opportunity came to the fiduciary in his official or individual capacity, and whether the corporation was financially capable of taking it.[26] The court was concerned by the fact that the person who had approached the director had probably expected the firm – and not the director – to take the opportunity, and that Guth controlled the corporation, thus compromising the other directors' ability to independently assess the situation. Thus, a good argument can be made that the case should rather be seen as an example of a broader "fairness test",[27] in which the line of business is just one major

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[21] *See* Lagarde v. Anniston Lime & Stone Co., 126 Ala. 496 (1900) (a corporation holding 1/3 of a stone quarry has an expectancy in purchasing the other shares); Pike's Peak Co. v. Pfunter, 123 N.W. 19 (Mich. 1909) (a corporation having leased property has an expectancy to purchase it when it is available); Nebraska Power Co. v. Koenig, 139 N.W. 839 (Neb. 1913) (a corporation has an expectancy to purchase rights to divert a river upstream from its power plants).
[22] Guth v. Loft, 5 A.2d 503 (Del. 1939).
[23] *E.g.* CLARK, *supra* note 20, at 227; b*ut see* FRANKLIN A. GEVURTZ, CORPORATION LAW 384-5 (2nd ed. 2010) (noting that this characterizing of the case is likely incorrect).
[24] *Guth*, 5 A.2d. at 514.
[25] *Guth*, *id.*
[26] *Guth*, *id.* at 511.
[27] GEVURTZ, *supra* note 23, at 385.

factor alongside the origin of the information and its relationship to the corporate functions of the executive.

We can see a progression in the case law that revolves – with respect to all of these tests – around the question of rational expectations,[28] the question being what opportunities a (minority) shareholder in the corporation can expect it to take. The doctrine starts out with a narrow test based on an existing interest or right in the earliest cases, but then swiftly expends to a broader test in *Guth.* While the Delaware court employed a relative expansive and malleable definition of what constitutes a corporate opportunity, and while it continued to use language indicating an "uncompromising rigidity" of the duty, at the same time it created a "way out" for directors that at least would give them an argument that some opportunities are not inherently tied to the corporation.

The emphasis on rational expectations can be seen also in the ALI Principles of Corporate Governance, according to which there are two possibilities of an opportunity to be considered "corporate." First, there is the case when either a director or executive became aware in connection with the performance of his functions and expected to be offered to the corporation, or he became aware of it through use of corporate information and should reasonably have believed it to be of interest to the corporation. Second, an opportunity is "corporate" when the senior executive knew that it would be closely related to a business of the corporation.[29] Even if these tests rest in part on the reasonable belief or knowledge of the executive, the decisive question is always whether the corporation could reasonably have been expected to take it in the future.

The most frequently discussed recent case is *Broz* of 1996,[30] which largely follows *Guth* in its delineation of what qualifies as a corporate opportunity. Summarizing the test developed by the Delaware courts in *Guth* and its progeny, the *Broz* court finds that a director is not allowed to take an opportunity if

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[28] *See* Brudney & Clark, *supra* note 8, at 1010.
[29] ALI PRINCIPLES OF CORPORATE GOVERNANCE (1994) § 5.05(b).
[30] *Broz*, 673 A.2d at 148.

"(1) the corporation is financially able to exploit the opportunity;

(2) the opportunity is within the corporation's line of business;

(3) the corporation has an interest or expectancy in the opportunity; and

(4) by taking the opportunity for his own, the corporate fiduciary will thereby be placed in a position inimicable to his duties to the corporation."[31]

Along with other recent case law, it rests with in a "fairness" paradigm that combines the factors of both traditional tests.[32] The court summarized the subsequent development of the doctrine by emphasizing that "[n]o one factor is dispositive and all factors must be taken into account insofar as they are applicable. Cases involving a claim of usurpation of a corporate opportunity range over a multitude of factual settings. Hard and fast rules are not easily crafted to deal with such an array of complex situations."[33] With this case law, the determination of what qualifies as a corporate opportunity doctrine is treated as an open-ended standard,[34] in other words a legal duty to which texture is given only in an ex post assessment by the courts.

Broz, as a widely-discussed case re-enunciating the corporate opportunity doctrine, is also emblematic for its erosion in practice. Within the confines of the traditional doctrine, parties have attempted to delineate the scope within which directors can take corporate opportunities with the assent of the board, thus further hollowing out the doctrine. *Broz* illustrates practical problems resulting from the corporate opportunities doctrine. The defendant was the 100% owner of a corporation in the cell phone business (RFBC), and served on the board of CIS, a competitor. After learning of the opportunity to purchase a cell phone license, he took it for RFBC and not CIS. PriCellular, which subsequently acquired troubled CIS, sued him and argued that he should have prioritized the interests of CIS and PriCellular as its acquiring shareholder. Often it is difficult to avoid being subject to dual

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[31] *Broz*, *id.*, at 155.
[32] *E.g.* Talley, *supra* note 11, at 293 (noting that a small number of jurisdiction have adopted the fairness test in the past 25 years).
[33] *Broz*, 673 A.2d at 155.
[34] *E.g.* Jens C. Dammann, *Indeterminacy in Corporate Law: A Theoretical and Comparative Analysis,* 48 STAN. J. INT'L L. 54, 83 (2013).

loyalties, especially when there are interlocking directorships in a particular industry, and when ownership of firms is to some extent fluid. The conflict of interest would have even been more difficult to resolve if Broz had not been the sole owner of another firm, but merely RFBC's director and CEO, and thus exposed to second set of fiduciary duties within RFBC.

Not only did the Delaware Supreme Court reverse the Court of Chancery on its finding that Broz had been required to present the opportunity to the CIS board (even though he had learned it in his case in his role at RFBC), given that CIS did not have the capacity to take the opportunity. The court also further stated that submission to the board creates an *ex ante* safe harbor for a fiduciary that would otherwise be potentially faced with an uncertain *ex post* determination by a court as to whether the requirements of the corporate opportunities doctrine are met.[35] As the court explained, "presentation avoids the possibility that an error in the fiduciary's assessment of the situation will create future liability for breach of fiduciary duty."[36] While superficially reaffirming the corporate opportunity doctrine as applied in Delaware, Broz thus points toward a larger problem in this context – and in fiduciary law in general – namely the difficulty for decision-makers in business life to plan around it.

B. Corporate opportunities and the restriction or elimination of fiduciary duties

The difficulties created by the corporate opportunities doctrine were evident in *Siegman v. TriStar*[37] of 1989, where the Delaware Court of Chancery dealt, among other things, with the validity of an amendment to TriStar's certificate that attempted to eliminate liability of its directors for breaches of fiduciary duty under specified circumstances that could be construed as corporate opportunities. While the actual issue underlying the case was a combination of TriStar's and Coca-Cola's entertainment division and the ensuing restructuring of corporate holdings, a number of its directors

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[35] *Broz*, 673 A.2d at 157.
[36] *Broz*, *id.*
[37] Siegman v. Tri-Star Pictures, 1989 WL 48746, *reprinted in* 15 DEL. J. CORP. L. 218 (1990).

were representatives of major shareholders such as Coca-Cola and HBO, who had sometimes related and sometimes competing interests with TriStar. In an amendment to the certificate, the parties had essentially attempted to define those circumstances *not* falling within the business interest of TriStar, thus creating a carve-out from the corporate opportunity doctrine. Vice Chancellor Jacobs, however, expressed concern that a Coca-Cola nominee director on the TriStar board could direct an opportunity to Coca-Cola. Since DGCL § 102(b)(7) only permits the elimination of liability in cases of breaches of the duty of care, the Vice Chancellor refused to grant the motion to dismiss.[38]

The dot.com area of the late 1990s led to an increasing number of firms for with overlapping ownership structures, which led to a push for a legislative overhaul of *Siegman*.[39] This eventually resulted in the enactment of a statute in 2000, which permits corporations to "[r]enounce, in its certificate of incorporation or by action of its board of directors, any interest or expectancy of the corporation in, or in being offered an opportunity to participate in, specified business opportunities or specified classes or categories of business opportunities that are presented to the corporation or one or more of its officers, directors or stockholders" (DGCL § 122(17)). The objective of the reform was to permit "the corporation to determine in advance whether a specified business opportunity or class or category of business opportunities is a corporate opportunity of the corporation rather than to address such opportunities as they arise."[40] Other states have followed the Delaware model in recent years and permitted corporate opportunity waivers.[41]

While DGCL § 122(17) does not permit the flat-out elimination of the corporate opportunities doctrine, the provision is part of a larger pattern that can maybe traced back to the introduction of § 102(b)(7) and continued with the trend toward the elimination of fiduciary duties in LLCs and other

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[38] *Siegman*, 15 DEL. J. CORP. L. 235-236 (1990).
[39] Gabriel Rauterberg & Eric Talley, *Contracting Out of the Fiduciary Duty of Loyalty: An Empirical Analysis of Corporate Opportunity Waivers*, WORKING PAPER 14 (2016), at http://ssrn.com/abstract=2822248.
[40] 2000 DEL. LAWS Ch. 343 (S.B. 363), section 3; *see also* Lawrence E. Hamermesh, *The Policy Foundations of Delaware Corporate Law*, 106 COLUM. L. REV. 1749, 1780-81(2006) (noting that *Siegman* was the cause for the enactment of the statute).
[41] Rauterberg & Talley, *supra* note 39, at 3, 20-21.

"unincorporated" business organizations in the 2000s.[42] In corporations, it is now possible to narrow down and specify which opportunities are protected, while in LLCs it has become possible to eliminate them entirely alongside the remainder of the duty of loyalty. Critics have decried the watering down of fiduciary duty in the past thirty years[43] and criticized the contractual view of fiduciary duty as rhetorical ploy.[44] Anecdotal evidence and the presence of significant amounts of case law on LLCs suggest that transactional lawyers often attempt to eliminate fiduciary duties in closely-held firms.[45] Specifically, the corporate opportunity doctrine creates problems most of all when an individual serves on the board of multiple corporations in the same or related industries, as seen in the *Broz* case. Investors increasingly attempt to put "constituency directors" on boards to represent their interests. This is particularly evident in the venture capital industry.[46] Courts typically find that such special interest directors have the same fiduciary duties as all other corporations.[47] With corporate opportunities conflicting between different firms, a venture capitalist firm might find itself in a difficult position as it is trying to protect its investment in different firms.[48] The problem might even lead to a situation where a director or venture capitalist might *inevitably* become responsible to one of two

[42] Under Delaware law, in interpreting LLC and LP law, "maximum effect" will be given "to the principle of freedom of contract and to the enforceability of limited liability company agreements. 6 DEL. C. § 18-1101(b) (regarding LLCs); 6 DEL. C. § 17-1101(c) (regarding LPs). A 2004 amendment, explicitly stated that "[t]o the extent … a member or manager or other person has [fiduciary duties], [these] may be expanded or restricted or eliminated by provisions in the limited liability company agreement; provided, that the limited liability company agreement may not eliminate the implied contractual covenant of good faith and fair dealing." 6 DEL. C. § 18-1101(c); for the amending legislation *see* 2004 DELAWARE LAWS CH. 275 (H.B. 411); Larry A. DiMatteo, *Policing Limited Liability Companies Under Contract Law*, 46 AM. BUS. L.J. 279, 279 (2009); *see also* Brent J. Horton, *Modifying Fiduciary Duties in Delaware: Observing Ten Years of Decisional Law*, 40 DEL. J. CORP. L. 921 (2016) (analyzing the effects of the 2004 amendment on the case law). On the debate whether fiduciary duties apply by default under Delaware LLC law, *see* Myron T. Steele, *Freedom of Contract and Default Contractual Duties in Delaware Limited Partnerships and Limited Liability Companies*, 46 AM. BUS. L.J. 221, 222-223 (2009); LARRY E. RIBSTEIN, THE RISE OF THE UNCORPORATION 176 (2010); Auriga Capital Corp. v. Gatz Properties, 40 A.3d 839, 849-856 (Del. Ch. 2012) (Strine, V.C. suggesting that fiduciary duties exist by default); Gatz Properties LLC v. Auriga Capital Corp., 59 A.3d 1206, 1218-1220 (Del. 2012) (Steele, C.J. criticizing the Court of Chancery for even raising the issue); 6 DEL. C. § 18-1104, as amended by 2013 DELAWARE LAWS CH. 74 (H.B. 126) (resolving the debate by legislating that "the rules of law and equity, including the rules of law and equity relating to fiduciary duties and the law merchant, shall govern").
[43] Joshua Getzler, *Understanding the Operation of Consent*, in PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW 39, 46 (Andrew Gold & Paul Miller eds. 2014)..
[44] Tamar Frankel, *Watering Down Fiduciary Duties*, in PHILOSOPHICAL FOUNDATIONS, *id.*, at 242, 244-49.
[45] *E.g.* Sandra K. Miller, *The Role of the Court in Balancing Contractual Freedom with the Need for Mandatory Constraints on Opportunistic and Abusive Conduct in the LLC*, 152 U. PA. L. REV. 1609, 1617-18 (2004) (noting that practitioners attempt to limit their client's exposure to liability through contractual arrangements).
[46] *E.g.* Martin Gelter & Geneviève Helleringer, *Lift not the Painted Veil! To Whom are Directors' Duties Really Owed?* 2015 U. ILL. L. REV. 1069, 1072.
[47] *In re* Trados Shareholder Litigation, Inc., No. Civ. A. 1512-CC, 2009 WL 2225958 (Del. Ch. July 24, 2009).
[48] Terence Woolf, *The Venture Capitalist's Corporate Opportunity Problem*, 2001 COLUM. BUS. L. REV. 473, 489-496.

firms, namely the one that does not end up taking to the opportunity. Recent empirical evidence suggests that corporate opportunity waivers have in fact become common, and probably for good business reasons.[49] In the end, the corporate opportunities doctrine, as it has been enforced with considerable seriousness by the courts, may have reached a stage in its development where its costs often exceed its benefits, thus creating incentives for parties to opt out.

4. The UK conflict avoidance doctrine: the "status approach"

In the UK, since 1854[50] a large number of cases have shaped two twin applicable principles: the no-conflict and the no-profit principles.[51] The level of contractual flexibility to restrict fiduciary duties in general or corporate opportunities law specifically is not available in the UK:[52] there are strict limits to ex ante authorizations[53] to manage conflicts of interest, as the main rationale is to avoid such conflicts, thus effectively making an opt-out impossible.

A. The development and contours of the conflict avoidance approach

As we have seen, US corporate law has over time developed a pragmatic definition of corporate opportunities – focusing on the impact on the corporation – and in this development has trended toward greater permissiveness. UK law provides a stark contrast: It requires fiduciaries to prophylactically avoid any *potential* conflict of interest.[54] Based on the status of a director as a fiduciary, UK

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[49] Rauterberg & Talley, *supra* note 39, at 34-36.
[50] Aberdeen Ry. v. Blaikie Bros., 1 Eng. Rep. (Macq) 461 (H.L. 1854).
[51] *See e.g.*, Kershaw, *supra* note 19, at 607-8; Irit Samet, *Guarding the Fiduciary's Conscience – A Justification of a Stringent Profit-stripping Rule*, 28 OX. J. LEG. STUD. 763-781 (2008).
[52] *See* Christopher M. Bruner, *Opting Out of Fiduciary Duties and Liabilities in U.S. and U.K. Business Entities*, at 13 (in this volume).
[53] Typically, the duty of loyalty ban on a conflict of interest can under no circumstances be contracted out of in advance in the company's articles: "[a]ny provision that purports to exempt a director of a company (to any extent) from any liability that would otherwise attach to him in connection with any negligence, default, breach of duty or breach of trust in relation to the company is void" COMPANIES ACT 2006, c. 46, § 232(1). However, the general duties of directors, which include the duty to avoid conflicts, "have effect, subject to any rule of law enabling the company to give authority, specifically or generally, for anything to be done (or omitted) by the directors, or any of them, that would otherwise be a breach of duty." COMPANIES ACT 2006, c. 46, § 180 (4). Nevertheless the safe-harbor remains narrow. Any shareholders' authorization that is designed to deprive the company of a valuable business opportunity is likely to be invalid (see PAUL DAVIES & SARAH WORTHINGTON, GOWER & DAVIES' PRINCIPLES OF MODERN COMPANY LAW ¶¶ 16-69 (10th ed. 2016), so is any shareholders', or disinterested directors' authorization (as introduced by COMPANIES ACT 2006, c. 46, § 175(5)-(6)) that is not specific enough, a defect that may affect any ex ante authorization).
[54] Matthew Conaglen, *The Nature and Function of Fiduciary Loyalty*, 121 L.Q. REV. 425, 468 (2005) ("it 'operates to make a wrong less likely, by attempting to avoid situations where that wrong is more likely to occur'").

law therefore neither allows a director a way around the strict prohibition by limiting the scope of what opportunities belong to the company, nor does it create the option for a defendant director to argue that the company could not or would not have taken the opportunity.

The equitable principles shaping the opportunities problem for those entrusted with the affairs and assets of others, be they trustees, executors, agents, or directors, were stated by the court in cases going back to *Keech v Sandford* in 1726[55] and *Bray v Ford* in 1896:[56] A person in a fiduciary position is neither allowed to make a profit nor put himself in a position where his interest and his duty conflict.[57] These "two negative principles that are universal to the fiduciary doctrine of loyalty"[58] provide for twin lines of authority delineating corporate opportunities law and operating in parallel. One is known as the "no profit" rule, pursuant to which a director must not make a profit out of property acquired by reason of his relationship to the company of which he is a director".[59] The criterion is objective, and the approach appears strict, seeking not only to prevent directors from abusing their position but also to prevent directors from being tempted.[60] The second principle is the "no conflict" rule: an opportunity must be reserved to the company if exploiting it would create a conflict of interest between the interest of the director and his duties to the company (or to third parties). The "no conflict" rule guided the judgment of Lord Hodson and the dissenting opinion of Lord Upjohn in the much commented on[61] House of Lords case *Boardman v Phipps*.[62] The no-conflict approach also dictated the solution in more recent corporate opportunity cases such as *Bhullar v Bhullar,*[63] and *O'Donnell v Shanahan*[64]. In contrast to the "no profit" rule, no assessment of how the director became aware of the opportunity is required. Here, it is the content of the opportunity that is scrutinized rather

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[55] Keech v. Sandford, (1726) 25 Eng. Rep. 223 (C.A.).
[56] Bray v. Ford, [1896] A.C. 44 (H.L.).
[57] *See* Gareth Jones, *Injust enrichment and the fiduciary's duty of loyalty*, 84 L.Q. Rev. 472, 472-4 (1968).
[58] ANDREW STAFFORD QC & STUART RITCHIE QC, FIDUCIARY DUTIES: DIRECTORS AND EMPLOYEES 32 (2nd ed, 2015).
[59] Regal (Hastings) Ltd v Gulliver [1967] 2 AC 134, 159 (H.L.) (Porter, L.J.).
[60] Simon Witney, *Corporate Opportunity Law and the Non-Executive Director*, 16 J. CORP. L. STUD. 145, 149 (2016).
[61] *See* Michale Bryan, Annotations, *in* LANDMARK CASES IN EQUITY 581-610 (Charles Mitchell & Paul Mitchell eds. 2012).
[62] *Regal (Hastings) Ltd*., [1967] 2 A.C. at 134.
[63] Bhullar v. Bhullar, [2003] 2 Brit. Comp. L. Cases 241 (C.A.).
[64] *In re* Allied Business and Financial Consultants Ltd, sub nom O'Donnell v Shanahan and another, [2009] 2 Brit. Comp. Law Cases 666 (C.A.).

than its source. As a general rule, judges try to avoid creating temptation for directors, and will prefer to define the company's interest broadly, using an *in abstracto* approach rather than taking into account the limits to the company's ability to act. As a consequence there is little defense for the interested director. This is a point of distinction with the way case law has evolved in the United States: while in the earliest cases the US doctrine relied upon a narrow test based on existing interests or right, it expanded to a broader test based on "rational expectations" in *Guth*,[65] and to an even broader assessment based on "fairness" starting with *Broz*[66] that leaves a large discretion to ex post assessment by the courts.

In any case, it is striking that there is considerable overlap between the two lines of authorities and 'no profit' cases would usually receive the same solution in a 'no conflict' approach, both providing for a strict conflict avoidance approach. This strict conflict avoidance approach is characteristic of UK corporate opportunities law and reveals a policy decision: the outcome of various debates and attempts to balance efficient transactions and conflicts of interest theories,[67] is a preference for erring on the side of safeguarding the directors' duty of loyalty[68] rather than giving directors the benefit of the doubt and permitting them to engage in entrepreneurial activities,[69] as in the US. In particular, disregarding the existing or expected line of business to assess the existence of a conflict may play as a disincentive for business people to take non-executive directorships. While the Companies Act 2006 codified the directors' duties for the first time, it can be said that it did not alter the logic of the law on this matter.[70] Courts have remained in a position to develop the principles of fiduciary duty

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[65] *Guth*, 5 A.2d at 503.
[66] *Broz*, 673 A.2d at 148.
[67] John Hynes Farrar & Susan Watson, *Self-Dealing, Fair Dealing and Related Party Transactions – History, Policy and Reform*, 11 J. CORP. L. STUD. 495 (2011).
[68] Kershaw, *supra* note 19, at 603.
[69] John Lowry & Ron Edmunds, *The Corporate Opportunity Doctrine: The Shifting Boundaries of the Duty and its Remedies*, 61 MOD. L. REV. 515, 521 (1998).
[70] *Contra* Witney, *supra* note 60, at 153. For recent contributions on the academic debate regarding the scope of directors' duty as to corporate opportunities, see David Gibbs, *The Absolute Limit of Directors' Fiduciary Liability for Conflicts of Interest: The Director's Perspective*, 36 COMP. LAW. 231 (2015); Sarah Worthington, *Fiduciary Duties and Proprietary Remedies: Addressing the Failure of Equitable Formulae*, 72 CAMBRIDGE L.J. 720 (2013); Shue Sing Churk, *Just Abolish the No-Profit Rule*, 7 INT'L COMP. & COMM. L. REV. 244 (2015).

as they generally apply and to favor the integrity of the director's duty of loyalty over the promotion of a more entrepreneurial culture.[71] If having multiple capacities creates potential conflicts for directors, then section 175 of the 2006 Companies Act requires that additional capacities should be disclosed and authorized.[72] Such authorizations can be regarded as part of the factual matrix that permits a delineation of the scope of the fiduciary duty owed to the company:[73] There is no need to give an exemption from a duty[74] if there is no duty.[75] This means that as a practical matters, venture-capitalists and non-executive directors more generally are well-advised to make full disclosure and get informed consent for outside capacities that they wish to maintain during their directorship.

B. Failed formal convergence towards the US corporate-centered approach

The UK loyalty-centered approach received at times influences towards a reasoning evolving around the considered opportunity's ownership. The rationale of the strict approach has therefore been questioned, at the court level and at the legislative level, in light of a more flexible approach resembling the corporate-centered one adopted in the US[76], pursuant to which a director is in a position to assess whether the nature of the interesting business opportunity is such that, in fairness, its private exploitation would even require an authorization.[77]

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[71] *Regal (Hastings) Ltd.*, [1967] 2 AC at 159 (Porter, L.J.) ("directors, no doubt, are not trustees, but they occupy a fiduciary position towards the company whose board they form").

[72]Typically, it is possible for articles of incorporation to acknowledge that directors, and non-executive directors in particular, have other directorships: articles sometimes permit these other roles, in other cases, a directors' approval is required for the potential conflict that may follow For an empirical assessment of the content of articles in relationship with corporate opportunities, see Witney, *supra* note 60, at 169.

[73] Witney, *id.*, at 169.

[74] Which has little chance to be effective since 2006 Companies Act section 232(1) bans anticipatory contracting out of conflicts of interest.

[75] Courts do recognize that the existence and scope of a duty, and therefore whether exploitation of a particular opportunity or the withholding of information in relation to which the director owes a duty of confidence to a third party, depends on the specific circumstances. *See* Witney, *id.*, at 184 ("in most cases, the court is likely to find that there is no duty to avoid conflicts of interest (or indeed any other duty – including, importantly, the duty to promote the success of the company) while a director is very clearly acting in that other (fully disclosed and accepted) capacity. Just as it is clear that there is no duty upon a director to vote any shares that she holds in the company in accordance with her fiduciary duties as a director, because she is acting qua shareholder, so a director who has an acknowledged separate capacity outside the company is likely to have no duty to the company, or very limited duties, when acting in that capacity. No exemption has been given by the company from the duty; it is simply that the law will not impose a duty in those circumstances").

[76] *See* Kershaw, *supra* note 19, at 622-4.

[77] *See above* section 3.A.

In the 1970s, some first instance cases directly paralleled US law as they referred to the logic at play beyond fiduciary duties and explored the implications framing the issues in terms of allocation of ownership. In *Industrial Development Consultants Ltd v Cooley*, the director was responsible for seeking out opportunities of the company of the same sort as the one he kept for himself after he had resigned.[78] The identity of the line of business prevailed in the court's reasoning over the observation that there was little chance that the opportunity could have been pursued by the company: "nonetheless, the opportunity was there and could not be taken because the plaintiffs never knew about it owing to the defendant's conduct".[79] In another case, *Island Export Finance v Umunna*, the use of the opportunity occurred after the termination of the director's appointment, the plaintiff company stressed that the director should be held liable because "the opportunity fairly belongs to the company, for example if the company was actively pursuing the opportunity through the director before the termination".[80]

The US inspiration has also thereafter made its way at the legislative level. In its final report leading to the 2006 Companies Act, the Company Law Review Steering Group[81] indicated a preference for an approach focused on the 'ownership' of opportunities, often referred to as a corporate opportunities doctrine. It suggested that the new codified rule should enable courts to first focus on the issue of whether the considered opportunity belongs to the company. The government's White Paper on Modernising Company Law[82], published in 2002, had adopted the same approach.

The language used in the described case law and in legislative reform projects signaled a formal opening in the direction of an ownership approach to corporate opportunities. A convergence towards the US model would have offered increased flexibility on these issues, including a potential waiver of the applicable constraints.

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[78] Industrial Development Consultants Ltd v Cooley, [1972] 1 Weekly L.R. 443 (Birmingham Assize 1971).
[79] *Id.*, at 454.
[80] Island Export Finance v Umunna, [1986] Brit. Comp. L. Cases 460 (Ch.), at 478.
[81] THE COMPANY LAW REVIEW STEERING GROUP, FINAL REPORT, MODERN COMPANY LAW FOR A COMPETITIVE ECONOMY (2001).
[82] HOUSE OF COMMONS TRADE AND INDUSTRY COMMITTEE, THE WHITE PAPER ON MODERNISING COMPANY LAW, SIXTH REPORT OF SESSION 2002-03 (2003).

However, this dynamic toward convergence has faded away both on the legislative and on the case law levels: the no-conflict approach remains firmly applicable and the duty not to conflict cannot be waived. First, while the 2006 Companies Act includes one of the most comprehensive regulations of opportunities in Europe, it provides for the traditional regulatory lens and focuses on the conflict avoidance approach.[83] The integrity of the fiduciary relationship and the moral structure of the market place were the arguments invoked to maintain the status quo and to refuse the adoption of the corporate opportunities approach, usually described as the American more flexible and undetermined model.[84] Section 175 provides that a director of a company must avoid a situation in which he has, or can have, a direct or indirect interest that conflicts, or possibly may conflict, with the interests of the company. This provision applies in particular in connection with the use of property, information or opportunity. Thereafter, the Act sets forth the procedure by which a director may be authorized by the board to exploit the opportunity personally, but does not define which business opportunities shall be deemed "corporate." The common law remains the reference for deciphering the criteria identifying a corporate opportunity.

Second, the Court of Appeal has constantly and strictly re-affirmed since the early 2000's, and the *Bhullar v Bhullar* case of 2003 in particular,[85] the preeminence of the avoidance of conflict approach. On the whole, the UK strict model creates a disincentive for directors to even consider exploiting an opportunity. Doing so, it recognizes how difficult it is to hold in one's mind two interests. So far as possible, it is aimed at preventing temptation. Directors are fiduciaries, and are very different from partners. This was stressed in *O'Donnel:*[86] "trustees' and directors' fiduciary duties

[83] Section 175 of the UK 2006 Companies Act provides that "A director of a company must avoid a situation in which he has, or can have, a direct or indirect interest that conflicts, or possibly may conflict, with the interests of the company" (s 175(1)) and that "this applies in particular to the exploitation of any property, information or opportunity" (s 175(2)). Section 175 provides a rule that is general for all conflicts of interest but transactions and arrangements with the company (s 175 (3)), which are dealt with by other statutory provisions.
[84] *See* David Kershaw, *Does It Matter How the Law Thinks about Corporate Opportunities?*, 25 LEG. STUD. 533, 541 (2005). *See also* Kershaw, *supra* note 19, at 625-26.
[85] *Bhullar*, [2003] 2 Brit. Comp. L. Cases at 241.
[86] *Allied Business*, [2009] 2 Brit. Comp. Law Cases at 824.

were not so similarly circumscribed by the terms of a contract". The extent of partners' fiduciary duties is determined by the nature of the partnership business and is limited by the partnership agreement.[87] By contrast, the nature of directors' fiduciary duties is unlimited. It is analogous to a general trusteeship. Even in circumstances in which it is improbable that the company will want or be able to take it for itself, the opportunity is there for the company to consider – and potentially reject. It remains no answer to a claimed breach that the opportunity could not be enjoyed by the company, either practically or legally. [88]

5. Explaining the difference between the US and the UK

As we have seen, the US and UK approaches differ significantly, with the US following a more flexible corporation-centric vision, whereas the UK approach can be characterized as director--centric and prioritizes concerns about potential conflicts of interests affecting fiduciaries, thus not permitting defenses for the interested director, even if, in practical terms, no harm is caused to the company.[89] In the following two subsections, we attempt to provide a tentative explanation for the difference.

A. Regulatory competition and the lifecycle of a legal doctrine

While it is difficult to make a causal claim about why the two core common law jurisdictions developed so differently in this respect, conceivably, the difference between UK and US doctrine on corporate opportunities might be explained by regulatory competition. David Kershaw has argued that the effects-based approach of US law creates more possibilities for directors to take corporate opportunities, e.g. by arguing that the corporation would not have been able to take it, because the corporate opportunities doctrine is more managerial due to regulatory competition.[90]

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[87] *See* Aas v. Benham, [1891] 2 Ch. 244 (C.A.).
[88] Boardman v. Phipps, [1967] 2 A.C. 46 (H.L. 1966).
[89] Samet, *supra* note 51, at 765-767.
[90] Kershaw, *supra* note 19, at 609, 610-615.

This perspective indeed matches the general perception that US (and specifically Delaware) corporate law has is more "enabling" in comparison to European corporate laws. Facilitating both an ex ante and an ex post possibility to opt out of the corporate opportunities doctrine would thus seem to be in line with US corporate law's enabling character. One might argue that Delaware corporate law tends to favor those in control of the firm, for which regulatory competition is a standard explanation. Unlike areas such as takeover law, where arguably the possibility of federal intervention influences regulatory competition,[91] the development of the corporate opportunities doctrine is likely driven mainly by closely-held entities and thus truly limited to state corporate law. The possibility to severely curtail or eliminate fiduciary duty in general, or the corporate opportunities doctrine specifically, may in part explain the attractiveness of Delaware law. Empirically, the evidence for such a tendency is mixed. Dammann and Schündeln show different results for closely-held corporations and LLCs, with stronger fiduciary protections of minority shareholders being disfavored in the former,[92] but favored in the latter.[93] Rauterberg and Talley find considerable use of corporate opportunity waivers, as well as often positive market reactions to them, but a high degree of diversity among companies.[94]

Arguably, the corporate opportunities doctrine as a line of case law with a long pedigree in the US may have reached a point in its life cycle where its marginal cost exceeds its marginal benefit.[95] As open-ended, standard-type doctrines develop over time, courts often have a tendency allowing them to expand as new fact patterns arise. On ever-broadening doctrine may then expose its weaknesses and costs, thus triggering attempts to opt out in practice and creating pressures for legislatures

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[91] *See generally* Mark J. Roe, *Delaware's Competition,* 117 HARV. L. REV. 588 (2003) (emphasizing that the federal government – through legislation, regulation and case law – provides an important constraint that prevents Delaware corporate law from deviating too far from (federal) public policy preferences).
[92] Jens Dammann & Mathias Schündeln, *The Incorporation Choices of Privately Held Corporations,* 27 J. L. ECON. & ORG. 79, 95-96, 99, 107 (2011).
[93] Jens Dammann & Matthias Schündeln, *Where are Limited Liability Companies Formed? An Empirical Analysis,* 55 J. L. & ECON. 741, 772 (2012) (finding that while most LLCs are formed locally, Delaware captures by far the largest part of the out-of-stake market).
[94] Rauterberg & Talley, *supra* note 39, at 34-44.
[95] *Compare* Dammann & Schündeln, *supra* note 93, at 772 (explaining the less favorable perception of fiduciary duties in corporations relatively to LLCs.

to permit opt-outs. Regulatory competition may advance this process. Regardless of the prominence of Delaware, given the ability to opt-out of mandatory law by incorporating in another state, almost any mandatory rule can be circumvented.[96]

The trend towards the contractual erosion of fiduciary duty could also be explained with larger trends in the business environment. The trend toward opt-outs may be linked to a development where larger shareholders that take a greater role in corporate governance even in publicly traded firms,[97] while an increased use of interlocking ownership structures in closely-held and controlled firms increases the risk of fiduciaries being exposed to dual loyalties. In combination, both trends may have contributed to the chipping away of the doctrine.

B. Differences in enforcement driving legal differences

For the difference between the US and the UK only, we thus suggest that there is another important piece to the story, and indeed one that reflects a general pattern of differences between the two systems, namely the style and frequency of enforcement of fiduciary duties.[98] Generally speaking, the US relies on litigation to police the conduct of board of directors much more so than the UK. While US corporate governance (compared to the UK) has long been thought to been director-centric,[99] fiduciary duties of directors, and their enforcement through shareholder litigation, has been

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[96] Bernard S. Black, *Is Corporate Law Trivial? A Political and Economic Analysis,* 84 NW. U. L. REV. 542, 589 (1990).

[97] Some scholars are speaking of a "reconcentration of share ownership." Ronald J. Gilson & Jeffrey N. Gordon, *The Agency Costs of Agency Capitalism: Activist Investors and the Revaluation of Governance Rights,* 113 COLUM. L. REV. 873, 886 (2013).

[98] *E.g.* ALESSIO M. PACCES, RETHINKING CORPORATE GOVERNANCE 283 (2012) (noting that the enforcement of rules against self-dealing in the UK "is not based on private litigation, but, rather, on a combination of public enforcement and (threat of) ouster by institutional investors").

[99] *E.g.* Deborah M. DeMott, *Corporate Litigation in the US and the UK,* 51 AM. J. COMP. L. 229, 233 (2003); Christopher M. Bruner, *Power and Purpose in the "Anglo-American" Corporation,* 50 VA. J. INT'L L. 580, 593-611 (2010); CHRISTOPHER M. BRUNER, CORPORATE GOVERNANCE IN THE COMMON-LAW WORLD 37-42 (2013) (comparing shareholder powers in the US, where they take the role of "spectators" with powers of shareholders in the UK, where they are "stewards"); *see generally* Luca Enriques, Henry Hansmann & Reinier Kraakman, *The Basic Governance Structure: The Interests of Shareholders as a Class,* in THE ANATOMY OF CORPORATE LAW 56, 73-74 (2nd ed., Reinier Kraakman et al 2009) (comparing shareholder powers in different jurisdictions); Lucian A. Bebchuk, *The Myth of the Shareholder Franchise,* 93 VA. L. REV. 675 (2007) (criticizing the lack of shareholder power in US corporate governance).

thought to be a major factor keeping managers in line.[100] There are a relatively large number of shareholder derivative lawsuits every year, as well as an even larger number of direct shareholder class actions.[101] Only few of them actually concern corporate opportunities, but the doctrine in the US is firmly embedded in the duty of loyalty more generally understood. The threat of shareholder litigation has thus had an impact on how courts deal with corporate opportunities.

By contrast, in the UK derivative lawsuits, which would be the most appropriate way of dealing with breaches of directors' fiduciary duties in the given context, are considered to be very rare.[102] Traditionally, the well-known restrictive rule of *Foss v. Harbottle* limited derivative litigation by shareholders.[103] While the Companies Act of 2006 has to some extent liberalized these requirements,[104] shareholder litigation continues to remain rare, probably because the incentives set by the "English rule" in litigation cost have not been conducive to minority shareholder lawsuits,[105] and consequently the development of an entrepreneurial plaintiff bar. And arguably, there has traditionally been no great need for shareholder litigation in the UK because other instruments were available. First, institutional share ownership has been strong since the UK developed dispersed share ownership.[106] British institutional investors, which have traditionally been concentrated in the City of London, have been able to monitor management quite effectively,[107] in part because they had the right to

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[100] Alessio M. Pacces, *Controlling the Corporate Controller's Misbehavior,* 11 J. CORP. L. STUD. 177, 203-204 (2011) (discussing Delaware courts' enforcement of fiduciary duties).

[101] For an empirical assessment, *see* Robert B. Thompson & Randall S. Thomas, *A New Look at Shareholder Litigation: Acquisition-Oriented Class Actions*, 57 VAND. L. REV. 133, 169 (2004); Jesssica Erickson, *Corporate Governance in the Courtroom: An Empirical Analysis,* 51 WM. & MY. L. REV. 1749, 1764 (2010).

[102] For data, *see e.g.* John Armour, *Enforcement Strategies in UK Corporate Governance,* in RATIONALITY IN COMPANY LAW 71, 83 (John Armour & Jennifer Payne eds. 2009); *see also* Andrew Keay, *Assessing and rethinking the statutory scheme for derivative actions under the Companies Act 2006,* 16 J. CORP. L. STUD. 39, 39 (2016) (noting that there have been equally few derivative suits since the Companies Act of 2006 was passed).

[103] Foss v. Harbottle, [1843] 67 E.R. 89. (Ch.). *See, e.g.* Arad Reisberg, *Shareholders' Remedies: The Choice of Objectives and the Social Meaning of Derivative Actions,* 6 EUR. BUS. ORG. L. REV. 227, 232-233 (2005).

[104] COMPANIES ACT 2006, s. 262*; see, e.g.* DAVIES & WORTHINGTON, *supra* note 53, ¶¶ 17-4, 17-7.

[105] *See, e.g.* Armour, *supra* note 102, at 80-81, 113-114; Marc T. Moore, *United Kingdom,* in COMPARATIVE CORPORATE GOVERNANCE 913, 944-946 (Andreas Fleckner & Klaus Hopt eds. 2013).

[106] *E.g.* Armour, *supra* note 102, at 108 (noting the unusual level of institutional share ownership in the UK).

[107] PACCES, *supra* note 98, at 286 ("non-pro-rata distributions by controlling shareholders are ultimately policed by institutional investors via their influence on the board of directors").

call a meeting and were empowered to remove directors.[108] To that end, boards of directors, comprised of independent individuals trusted by these institutions, have been a rather effective instrument without outside investors needing to resort much to litigation.[109] This stands in sharp contrast to the US, where boards have traditionally been – at least in the most extreme cases – self-perpetuating governing bodies of corporations often thought to be beholden to top management, which necessitated litigation to keep both in line.[110]

There are two links between these two mechanisms of keeping management in check and the respective shape of the corporate opportunities doctrine. First, only in a system with considerable litigation is it even possible for a fine-tuned doctrine such as the American one to develop. The UK may not have had this opportunity, not even as an offshoot of a more general doctrine of managerial self-interest.

Second, in the parlance of legal theory, the US doctrine is a typical "standard", while the UK one is a typical "rule."[111] For a standard to be enforced, typically litigation and a system with developed and active courts is needed. A court must be in the position to assess a fact pattern, it must be exposed to evidence, and it must be in the position to apply the doctrine it developed to the facts. In system where courts never even have the opportunity to assess a fact pattern in light of a particular doctrine, a standard such as "fairness" would lack any meaningful content. With its reliance on a general prohibition, the UK does not need courts to get involved. If a director or officer must simply abstain from certain actions, then litigation and disputes about complex facts will never arise, thus obviating the need for a court. To be sure, if activist investors take the position the court in reducing

[108] Armour, *supra* note 102, at 108; Moore, *supra* note 105, at 925-926, 929 (discussing the relatively larger powers of UK shareholders).
[109] The main mechanism for directors to pursue the interests of institutional investors seems to be reputational concerns within the tightly-knit British business community and the City. *E.g.* PACCES, *supra* note 98, at 287 ("non-transparent directors would never be forgiven by institutional investors and likewise by the business community of the London Stock Exchange").
[110] *Similarly*, DeMott, *supra* note 99, at 234 (suggesting that greater board power in the US may have made the US more receptive toward shareholder litigation); *see also* ARAD REISBERG, DERIVATIVE ACTIONS AND CORPORATE GOVERNANCE 36-44 (2007) (discussing derivative actions and the market for corporate control as possible function substitutes).
[111] Arguably, this contrasts with regulatory style in securities regulation and financial accounting, where the US is said to favor rules, while the UK prefers standards. BRUNER, *supra* note 99, at 150-151.

agency cost, then arguably a manager could enter into a negotiation with shareholders regarding corporate opportunities. However, institutional shareholders are not going to be neutral in this, as a court would be, given their financial stake in the firm. While institutional shareholders may thus be able to keep managerial opportunism down, they do not have the incentives to act analogously to a court, which may in certain circumstances favor the director's position under a fairness test. And given how strongly UK directors are beholden to institutional investors, transactions that might favor one shareholder or director are never eve put forward.[112]

6. Conclusion

In summary, our survey of corporate opportunity law in the two core common law jurisdictions has revealed two models. While the US relies on a standard and enforcement by the courts, the UK corporate opportunities doctrine constitutes a rule that is enforced primarily by boards of directors and activist institutional investors. Overall, while we are probably not in the position to assert a causal link between litigation and the development of the corporate opportunity doctrine the US, and the absence of such a relationship in the UK, it is clear that the two doctrines match the respective general culture of corporate law enforcement. A standard provides a good fit only for a system where fiduciary duty is frequently enforcement by a court, whereas when courts play no significant role, an outright prohibition provides a better match.

Corporate opportunity law thus constitutes an example for a larger distinction between the enforcement of the duty of loyalty between the two jurisdictions. The US has long relied on legal enforcement of the duty of loyalty in the form of shareholder litigation, with plaintiff lawyers acting as a "private attorney general" on behalf of shareholders, which in the US have since the days of

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[112] PACCES, *supra* note 98, at 287. Arguably, in accounting the threat of litigation has resulted in US GAAP becoming more rules-based over time, as it helped accounting professionals to shield themselves from litigation. *See, e.g.* Martin Gelter & Zehra G. Kavame Eroglu, *Whose Trojan Horse? The Dynamics of Resistance against IFRS,* 89 U. PA. J. INT'L L.89, 122-130 (2014). However, accounting differs from fiduciary duties in that accounting standard setting is dominated by the concentrated interest group of accountants, who likely benefit from a particular regulatory style.

Berle and Means been very dispersed, and often retail investors with no capability to exercise in any kind of monitoring or ex ante enforcement. By contrast, in the UK, where shares have for decades been typically held by institutional investors, but has not had a widely used derivative suit mechanism, enforcement has fallen on institutional investors and their representatives on boards, who have taken a strict rules-based approach to a logical conclusion. While courts, as in the US, may have been in the position to take an intermediate position between the interests of fiduciaries and outside investors, in the UK the latter have dominated the development and enforcement of the duty of loyalty, thus retaining a stricter approach was has been abandoned in the US in decades ago.

In the future, we can expect this distinction to persist. Even after the Companies Act 2006, the UK cannot be expected to develop widespread shareholder litigation and enforcement by specialized law firms taken the role of a "private attorney general". Likewise, even with more concentrated share ownership and institutional investor activism in the US, we cannot expect a reversal on corporate opportunity, given that a particular understanding of the duty of loyalty has been entrenched for many decades. In other words, we can expect corporate opportunity law to remain path dependent, even if the economic context is no longer what it once was.

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