



Canada-United States Law Journal

Volume 13 | Issue

Article 12

January 1988

The Doctrine of Corporate Opportunity: An Economic Analysis

Stuart M. Turnbull

Follow this and additional works at: <https://scholarlycommons.law.case.edu/cuslj>

 Part of the [Transnational Law Commons](#)

Recommended Citation

Stuart M. Turnbull, *The Doctrine of Corporate Opportunity: An Economic Analysis*, 13 Can.-U.S. L.J. 185 (1988)

Available at: <https://scholarlycommons.law.case.edu/cuslj/vol13/iss/12>

This Article is brought to you for free and open access by the Student Journals at Case Western Reserve University School of Law Scholarly Commons. It has been accepted for inclusion in Canada-United States Law Journal by an authorized administrator of Case Western Reserve University School of Law Scholarly Commons.

The Doctrine of Corporate Opportunity: An Economic Analysis

Stuart M. Turnbull*

I. INTRODUCTION

The market value of a firm is primarily determined by the present value of the cash flows generated by assets in place and the present value of future investment opportunities, assuming that such opportunities belong to the firm.¹ The generation of future investment opportunities will depend upon many factors: the firm's technology, its research and development policy, and the firm's incentive policy to encourage its employees to contribute ideas which may be of use to the firm.

This paper addresses the issue of appropriation by executives² of corporate opportunities for their own account. The first part of the paper examines the economic issues. In attempting to define whether a business opportunity is a corporate one, a new form of test is described: the market value test. This embraces the interest or expectancy test, the "line of business" test, the fairness test, and the two-stage procedure described in *Miller v. Miller*.³ If an executive appropriates a business opportunity for private account which had been anticipated as belonging to the firm, and the appropriation affects or could be expected to affect the market value of the firm, then the opportunity is a corporate one. Consideration of the impact upon the market value of a firm allows identification of windfall gains and a determination whether different legal remedies would unduly restrict competition. The second part of the paper reviews some Anglo-Canadian and American legal cases.

II. ECONOMIC ANALYSIS

The key issue is the ownership of property rights over ideas generated by employees, where the ideas may be of use to the firm. If employees are unable to appropriate the full benefits of their ideas within the corporate framework, then there is an incentive for them to take such investment opportunities for their own account. For example, consider

* Associate Professor, Department of Economics, University of Toronto.

¹ In the absence of taxation, the market value of a firm will equal the present value of the cash flows generated by assets in place and the present value of future investment opportunities. See generally R. Brealey & S. Myers, *Principles of Corporate Finance*, 2d ed. (New York: McGraw-Hill, 1984), at 10-63, 117-39, 164-92.

² The term "executives" is used to describe directors and corporate officers.

³ *Miller v. Miller* (1974), 301 Minn. 207 at 224, 222 N.W.2d 71 at 81 [hereinafter *Miller* cited to Minn.].

the case of a single entrepreneur running a firm where there is no external financing. In this case the manager/entrepreneur is able to appropriate all of the benefits arising from any investment. If the manager/entrepreneur owns less than a hundred percent of the equity, then not all the benefits arising from an investment accrue to the entrepreneur. As the percentage decreases, the incentives increase for the manager/entrepreneur to appropriate investment opportunities for his own account away from the firm.⁴

A. *The Implicit Contract*

Since the market value of a firm depends upon the present value of future investment opportunities, the owners of a firm will want to ensure that the firm receives the full benefits from corporate investment opportunities, and that they are not siphoned off by corporate executives for their own accounts. At one extreme, the firm could ask all its employees to sign a contract stating that the firm has ownership over all corporate investment opportunities. There are at least two difficulties with this.

The first difficulty is the question of what constitutes a corporate investment opportunity. For example, consider the case of an employee working for a computer software company which specializes in customizing existing software for corporate use. The employee, in her own time, develops a new computer language and sets up her own company to sell the product. Is this employee appropriating a corporate investment opportunity, given that it is within the same line of business—computer software? The second difficulty arises in providing the necessary incentives for the generation of corporate investment opportunities by employees. If the corporation appropriates all of the benefits without providing sufficient incentives, then employees will have no motivation to inform the corporation of their ideas.

For the moment, ignore the difficulty of unambiguously identifying a corporate investment opportunity. If it was possible to write a labor contract for each employee covering all possible contingencies, then, assuming rational behavior, an equilibrium wage rate would be determined and the contract would provide the necessary incentives to each employee. Furthermore, the firm would be assured of appropriating the investment opportunities generated by its employees, given that the contract could be enforced. Because of the transaction costs of writing such a detailed contract and the difficulties of enforcing the contract, such contracts do not exist. As a consequence, various types of rules have been developed to govern the behavior of corporate executives.

⁴ For further development of this argument, see Jensen & Meckling, "Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure" (1976) 3 J. Fin. Econ. 305.

B. *Fiduciary Duties*

The fiduciary duties of corporate executives come under this rubric. In corporate law, there is usually a statement of the responsibilities governing directors and officers; they are expected to act honestly, prudently, and in good faith with a view to the best interests of the corporation.⁵ The strength and weakness of such a statement is its generality. It is a broad statement about what is expected from the directors and officers of a corporation. Its weakness arises from the difficulty of defining what constitutes prudent behavior, good faith, and the best interests of the corporation. In the case of investment opportunities, if it were possible to unambiguously establish property rights, then acts by directors or corporate officers which violated these rights could be interpreted as acts of bad faith.⁶

A strict interpretation of fiduciary duties would be that those who make a profit by use of a fiduciary position should be liable to account for that profit. Any person in a fiduciary position would be liable for the profit arising from an investment opportunity, even though the corporation may not have been able or willing to undertake such an investment.⁷ Such an interpretation is unduly restrictive.⁸ If the corporation is unwilling or unable to undertake an investment, and provided there is no conflict of interest, the firm is no worse off if the investment is taken up by a corporate official on private account.

1. Tenure of Fiduciary Duties

If an executive resigns from a corporation, at what point does the implicit contract with respect to obligations between the corporation and the executive terminate? At what point is a former employee free to capitalize on information gleaned while in the services of the corporation? The implicit contract will, in general, extend beyond the termination of employment because of the longevity of investment projects. It takes

⁵ See, e.g., *Canadian Business Corporations Act*, S.C. 1974-75-76, c. 33, s. 117(1).

⁶ What constitutes (a) "prudent behavior," and (b) "in the best interests of the firm" are issues which have not been clearly defined in law. For example, if the "best interests of the firm" is interpreted as meaning actions which maximize the market value of a firm, then in a world characterized by uncertainty, this must mean actions which, ex ante, are expected to be value maximizing. The ex post results may be quite different from those expected ex ante, raising the question of whether it was reasonable to have held such expectations.

In a similar vein, actions involve a risk-return trade off; thus, what constitutes prudent behavior must be interpreted in terms of a risk-return trade off. Adding to the complexity is the necessity of distinguishing between systematic risk and non-systematic risk, which is firm specific. See R. Brealey & S. Myers, *supra*, note 1 at 117-63.

⁷ In *Keech v. Sandford* (1726), [1762] Sel. Cas. Ch. 61, [1559-1774] All E.R. 230, Lord King, L.C., stated: "This may seem hard, that the trustee is the only person of all mankind who might not have the lease; but it is very proper that the rule should be strictly pursued, and not in least relaxed. . . ."

⁸ Such a strict interpretation would make sense if the transaction costs of either monitoring executive behavior or the ex post determination of executive actions is prohibitively high.

time to bring an investment project on stream and the success of any project will depend upon the degree of competition and market conditions.

Within a corporation, information is continuously being generated about current future investment projects. If an individual who has access to such information leaves the corporation, then use by that individual of such information may result in the appropriation of corporate opportunities. The pertinent issue is the establishment of property rights over business opportunities. The severity of the problem will depend upon the level of access to information.

To grant property rights over all "company information" would tend to restrict competition. If an independent competing firm—not the former employee—could reasonably be expected to obtain the information after a certain period, then this provides, at least in theory, a natural termination date for the cessation of fiduciary responsibilities that would not restrict competition. In many cases "company information" is in fact common knowledge. For example, the identity of a firm's customers may be common knowledge throughout an industry, or knowledge which can easily be obtained. To treat this information as confidential and to bar a former employee from contacting the firm's customers restricts competition.⁹

2. Agents and Servants

The responsibilities of agents and servants (employees) of a corporation with respect to the owners of a firm is a question of degree. It is argued that responsibilities of mere employees, unless enlarged by contract, relate only to trade secrets; they have no fiduciary duties to the owners of the firm. Executives do have a stated fiduciary responsibility, a reflection of the fact that executives will, in general, have greater access to information than servants.

The different treatment in law between agents and servants is a reflection of the difference in the access to information. For certain types of positions, employees may be in a position which allows them access to valuable information. If this type of contingency can be anticipated, then the employment contract—and the level of compensation—can be altered accordingly, provided it is possible to ensure compliance. Similarly contracts for executives can be altered to provide increased protection to the corporation.¹⁰

The statement of fiduciary duties in corporate law reduces transaction costs by eliminating the need for such a statement in individual employment contracts. It provides the owners of the firm with an explicit

⁹ But see *Canadian Aero Service Ltd. v. O'Malley* (1973), [1974] S.C.R. 592, at 613-14, Laskin, J. (customer lists may be treated as confidential) [hereinafter *Canadian Aero Service*].

¹⁰ For example, a corporation could put in a two-year conflict of interest clause in an employment contract.

contract governing the responsibilities of the firm's executives. Difficulties of enforcement arise because of the difficulties of establishing property rights over business opportunities.

C. Appropriation of Investment Opportunities

The ramifications of an investment opportunity being appropriated by an executive for private account will depend upon the employment contract and the implicit obligations. Did the project belong to the corporation? Was the project offered to the corporation? Will the undertaking of the project result in a conflict of interest?

The market value of the firm reflects the present value of future investment opportunities. If the corporation has property rights over the investment, and this is reflected in the market value of the firm, then the appropriation by an executive for private account will result in a loss to the owners of the firm. Any type of appropriation which alters the market value of the firm affects the wealth of the firm's owners.

Before appropriating an investment for private account, an executive may offer the corporation the opportunity to undertake the investment. However, the executive has a conflict of interest: in order for the corporation to make a rational decision about the investment, it requires full and honest information about the project. It may not be in the personal interests of the executive to reveal such information. The economic incentives for the executive to provide less than full and honest information will exist if the executive receives less than one hundred percent of the economic rents generated by the project, especially if the firm does not have ambiguous property rights over the investment.

From modern corporate finance theory, it is known that if an investment with negative net present value is undertaken, then the price per share of equity can be expected to drop, implying a decrease in the wealth of the firm's owners.¹¹ Thus, a sufficient condition for an investment to be rejected is that it has negative net present value. To reject an investment because of difficulty in financing implies the existence of some type of capital market imperfection. If the investment has positive net present value, then the firm should be able to raise capital in some form to undertake the investment.

If the executives making the investment decision have a conflict of interest, this may result in the investment being rejected by the firm when it is undertaken, either because the executives argue that it is not expected to increase price per share of equity or it is not possible to finance the investment. The first difficulty can be ameliorated by using external consultants, assuming that they are provided with full and honest infor-

¹¹ See T. Copeland & J. Weston, *Financial Theory and Corporate Policy* (Menlo Park, Cal.: Addison-Wesley, 1983) at 17-25. In calculating the net present value, the effect of transaction costs and any financial effects such as the change in the present value of tax shelters should be considered. See R. Brealey & S. Myers, *supra*, note 1 at 14-22.

mation. Second, to reject an investment because of financing difficulties, it is not sufficient to show that it was not possible to raise capital via one particular means. If an investment has positive present value, then it should be possible to find financing unless there are major capital market imperfections. To reject an investment because of financing difficulties requires a demonstration of the existence of capital market imperfections which prevent the undertaking of the investment.

In the case of a conflict of interest involving fiduciary responsibilities of executives, it is essential that external and independent consultants should be able to reach the same conclusion as that reached through the analysis to recommend acceptance or rejection of the opportunity. Also, disinterested directors and/or shareholders should be able to vote on the opportunity. Note that verification is a necessary, but not a sufficient, condition to absolve the executive(s) from conflict of interest charges. If external consultants do not have access to full and honest information, then the ability to verify is of little value.

D. Identifying Property Rights

When does a business opportunity belong to a corporation and what set of criteria can the courts use to identify the correct ownership of property rights? The market value of a corporation is determined by the present value of cash flows generated by assets currently in place plus the present value of future investment opportunities. The market value of the firm will also, in general, reflect the possible consequences arising from the actions of competitors in the different markets in which the firm operates. If an executive appropriates an investment opportunity for private account which had been anticipated by participants in capital markets as belonging to the firm, then the market price of equity will fall, resulting in a loss to shareholders.¹²

This provides an important insight into identifying whether an opportunity belongs to the corporation: if the business opportunity could be reasonably anticipated as belonging to the firm and the appropriation affects or could be expected to affect the market value of the firm, then the opportunity is a corporate one. Practical implementation of such a test is not easy because it is necessary to quantify what is meant by reasonable. For example, the generation of corporate investment opportunities may be expected from the undertaking of research and development by the corporation, though the exact nature of the individual opportunities may not be known by capital market participants. Thus, if such an opportunity is appropriated by an employee, when information about the appropriation is disseminated, it is reasonable to expect that this will

¹² It is only necessary that some capital market participants know of such opportunities and that their trading activities cause such knowledge to be impounded in the price of the firm's shares. See Grossman & Stiglitz, "On the Impossibility of Informationally Efficient Markets" (1980) 70 *Am. Econ. Rev.* 393.

have an effect on the firm's share price due to the change in expectations about the benefits arising from the research and development, even though the exact nature of the appropriated opportunity was not known *ex ante* by individuals outside the firm.

The courts, in attempting to clearly delineate property rights over business opportunities, have experimented with a number of tests.¹³ The first is the "interest" or "expectancy" test, which precludes acquisition by corporate officers of the property of a business opportunity in which the corporation has a "beachhead" in the sense of a legal or equitable interest or expectancy growing out of a pre-existing relationship. This test alone has been rejected as being too restrictive.

A second two-stage procedure has been proposed. The first part of the procedure is a "line of business" test, which characterizes an opportunity as corporate whenever a managing officer becomes involved in an activity intimately or closely associated with the existing or prospective activities of the corporation. The identification of a business opportunity as a corporate opportunity is a necessary condition for proving corporate property rights. The second part of the procedure is a "fairness" test. It must be demonstrated that fiduciary duties of loyalty, good faith, and fair dealing towards the corporation have been violated.

The "line of business" test, though closely related to the "market value" test, is not equivalent to it. In *Southeast Consultants v. McCrary Engineering Corp.* it is argued that: "insofar as former officers are concerned, adoption of the 'line of business' test could preclude a former officer from competing with his former employer. Therefore, as to former officers we adopt the 'interest or expectancy' test as the threshold inquiry or first step in former officer cases."¹⁴ Under the market value test, the market value of the firm will in general reflect the possibility that there will be entry into the industry. If entry occurs, then the increased competition may have a detrimental effect on the price per share of equity. This is one of the risks that shareholders face and it is factored into the share price. Whether the entrant is a former officer is relevant only if the former officer has used information not publicly available and learned while being in the services of the former company, or has used the former company's assets in setting up the rival firm, as in *Chelsea Industries, Inc. v. Gaffney*.¹⁵ The market value test also implies that, in cases where a former officer appropriates information and/or assets from the corporation in setting up a rival firm, it is necessary to look at the marginal impact of such appropriation and not the total change in price per share of equity resulting from the entry of a rival when assessing liability.

¹³ For references to leading cases, see *Miller, supra*, note 3; *Southeast Consultants, Inc. v. McCrary Engineering Corp.* (1980), 246 Ga. 503, 273 S.E.2d 112 [hereinafter *Southeast Consultants* cited to Ga.].

¹⁴ *Southeast Consultants, supra*, note 13 at 509.

¹⁵ See *Chelsea Industries, Inc. v. Gaffney* (1983), 389 Mass. 1, 449 N.E.2d 320 [hereinafter *Chelsea Industries* cited to Mass.].

III. LEGAL DEVELOPMENT

One of the major cases in Anglo-Canadian law is that of *Regal (Hastings), Ltd. v. Gulliver*.¹⁶ In this case Viscount Sankey described what is now referred to as the "conflict" test: "[T]he general rule of equity is that no one who has duties of a fiduciary nature to perform is allowed to enter into engagements in which he has or can have a personal interest conflicting with the interests of those whom he is bound to protect."¹⁷ A second form of test, the test of accountability, was enunciated by Lord Russell of Killowen: "[D]irectors standing in a fiduciary relationship to Regal in regard to the exercise of their powers as directors, and having obtained those shares by reason and only by reason of the fact that they were directors of Regal and in the course of the executions of that office, are accountable for the profits which they have made out of them."¹⁸ Interestingly, Lord Greene, M.R., stated that a decision adverse to the directors in the case involved the proposition that, if bona fide directors decide not to invest their company's funds in some proposed investment, a director who thereafter invests his own money therein is accountable for any profit which he may derive therefrom.¹⁹

In *Phipps v. Boardman*,²⁰ a ruling similar to that in *Regal (Hastings)* was made. In order to get certain pieces of information, the defendant represented himself as the agent for the trustees. Using this information, the defendant undertook a business opportunity. The defendant was held accountable, even though the trustees could not undertake the business opportunity. The plaintiff had property rights over the access to information which the defendant appropriated. To summarize Lord Denning, M.R., if knowledge of information is not property of the principal, then an agent is free to take advantage of an opportunity, even though it is an opportunity which comes in consequence of his employment, so long as the principal's property is not used.²¹

The strict application of the conflict rule and the test of accountabil-

¹⁶ *Regal (Hastings), Ltd. v. Gulliver* (1942), [1942] 1 All E.R. 378 (H.L.) [hereinafter *Regal (Hastings)*].

¹⁷ *Ibid.* at 381.

¹⁸ *Ibid.* at 389.

¹⁹ *Ibid.* at 385-86.

²⁰ *Phipps v. Boardman* (1965), [1965] 1 All E.R. 849 (C.A.), aff'd (1966), [1967] 2 A.C. 46 (H.L.) [hereinafter *Phipps*].

²¹ Laskin, J., in *Canadian Aero Service*, describes *Phipps* as supporting the view that "liability to account does not depend on proof of an actual conflict of duty and self-interest." *Supra*, note 9 at 609. This obfuscates the fact that the key issue was the appropriation of information by the defendant.

However, it could be argued that access to the information—the names of shareholders—should be freely available to any party, as this would reduce transaction costs in any type of takeover bid. A frequent motivation for takeovers is the removal of inefficient management. Hence, to provide the correct incentives, property rights over the access of information should not be recognized by the court.

ity are relaxed in *Peso Silver Mines Ltd. v. Cropper*.²² The court held that though the defendants had fiduciary responsibilities, they did not violate the conflict rule because of a bona fide vote of the directors. They did not fail the test of accountability because the facts of the case were held to be in all material respects identical with those in the hypothetical case stated by Lord Greene.²³

In *Canadian Aero Service*, Judge Laskin, reflecting on the conflict test and test of accountability, stated: "These should not be viewed as the touchstones of liability."²⁴ In updating the conflict test, Laskin stated: "The general standards of loyalty, good faith, and avoidance of a conflict of duty and self-interest to which the conduct of a director or senior officer must conform, must be tested in each case by many factors."²⁵ A list—not exhaustive—is given of the relevant factors to be considered: (i) the position or office held, (ii) the nature of the corporate opportunity, its ripeness, specificity, and the director's or managerial officer's relation to it, (iii) the amount of knowledge possessed, the circumstances in which it was obtained, and whether it was special, or even private, (iv) the factor of time in the continuation of the fiduciary duty and whether the alleged breach occurs after the termination, and (v) the circumstances under which the relationship was terminated, i.e., whether by retirement or resignation or discharge.²⁶

The strict application of the conflict rule and test of accountability stems from a narrow and restrictive interpretation of property rights over investment opportunities. This would make economic sense if the transaction costs of either the monitoring director's (or corporate officer's) behavior or the ex post determination of their actions are prohibitively high. Until the *Canadian Aero Service* case, there had been a reluctance to recognize the complex nature of defining property rights over business opportunities. There has also been a reluctance to use economics as an aid in analyzing the nature of property rights.

The shopping list presented by Judge Laskin in *Canadian Aero Service* represents an important step in recognizing some of the many factors that must be considered in deciding the ownership of business opportunities. A more structured approach has been taken in the U.S. courts. In *Miller*, three tests are identified²⁷ and a two-stage procedure is adopted.²⁸

²² *Peso Silver Mines Ltd. v. Cropper* (1966), 56 D.L.R. (2d) 117 (B.C.C.A.), aff'd (1966), [1966] S.C.R. 673.

²³ *Ibid.* at 140; see also *Regal (Hastings)*, *supra*, note 16 at 390.

²⁴ *Canadian Aero Service*, *supra*, note 9 at 592.

²⁵ *Ibid.* at 620.

²⁶ *Ibid.*

²⁷ *Miller*, *supra*, note 3 at 222-26.

²⁸ This two-stage procedure follows from *Guth v. Loft, Inc.* (1939), 23 Del. Ch. 255 at 271, 5 A.2d 503 at 510, and is defined and stated:

[I]f there is presented to a corporate officer or director a business opportunity which the corporation is financially able to undertake, is, from its nature, in the line of the corporation's business and is of practical advantage to it, is one in which the corporation has an

The three tests are: the "interest" or "expectancy" test; the "line of business" test; and the "fairness" test. The two-stage procedure first establishes whether a business opportunity is a corporate opportunity, using the "line of business" test, and second, if the opportunity is a corporate opportunity, it establishes whether fiduciary responsibilities have been honoured using the "fairness" test.²⁹

The two-stage procedure represents a clear recognition of the complex nature of property rights with respect to business opportunities. The existence of a corporate opportunity is a necessary, but not a sufficient, condition to determine whether a corporate opportunity has been appropriated. "If . . . the opportunity is found to be a corporate one, liability should not be imposed upon the acquiring officer if the evidence establishes that his acquisition did not violate his fiduciary duties. . . ."³⁰

In using the "line of business" test, as set forth in *Guth v. Loft, Inc.*³¹ (the opportunity bears a logical or reasonable relation to the existing or prospective business opportunities of the corporation and it can finance the investment), the courts are provided with a list of some of the relevant factors to consider. In *A.C. Peters v. St. Cloud Enterprises*³² and in *Nicholson v. Evans*,³³ a major issue is whether the corporation was financially able to undertake an investment. To argue that an opportunity is not a corporate one because the corporation is unable to finance the opportunity, it is necessary to show that the firm does not have access to *any* sources of capital and not just capital to be raised by a particular means. In *Nicholson*, Judge Oaks stated: "Instead of working to preserve their corporation's most valuable assets by exhausting every means to pay off the creditor's claim and to secure the subsidiary's imperiled control, these defendants made only one attempt to obtain the needed finances for the corporation. . . ."³⁴

The criterion of an opportunity bearing a logical or reasonable relation to the existing or prospective business opportunities is used in *Farber v. Servan Land Co.*, when Chief Justice Tjoflat stated: "These facts make it clear that the opportunity to acquire the Farquhar land was an advantageous one that fit into a present significant corporate purpose, as well as an ongoing corporate policy, and that the corporation had an active interest in it."³⁵ In *Zidell v. Zidell* it was held that the opportunity was

interest or a reasonable expectancy, and, by embracing the opportunity, the self-interest of the officer or director will be brought into the conflict with that of his corporation, the law will not permit him to seize the opportunity for himself.

Miller, supra, note 3 at 221.

²⁹ The fairness test is whether the fiduciary duties of loyalty, good faith, and fair dealing toward the corporation have been honoured. This is equivalent to the Anglo-Canadian conflict test.

³⁰ *Miller, supra*, note 3 at 226.

³¹ *Guth v. Loft, Inc.* (1939), 23 Del. Ch. 255, 5 A.2d 503.

³² *A.C. Peters Co. v. St. Cloud Enterprises* (1974), 301 Minn. 261, 222 N.W.2d 83.

³³ *Nicholson v. Evans* (1982), 642 P.2d 727 (Utah).

³⁴ *Ibid.* at 731.

³⁵ *Farber v. Servan Land Co.* (1981), 662 F.2d 371 at 378 (5th Cir.).

not a corporate one as it did not bear a logical relation to the existing business opportunities of the corporation.³⁶

In most types of markets there is always the possibility of entry of a rival firm, and this contingency is incorporated in the firm's share price. If entry then occurs due to the possible detrimental effects of increased competition upon the firm, share price may fall. While this is unfortunate, it is one of the risks that shareholders face and it is factored into the share price. Entry will occur when a former employee sets up a rival firm and this may have a negative effect upon share price. Shareholders will suffer an unanticipated loss if the former employee has appropriated any of the firm's assets or investments.³⁷ In *Chelsea Industries*, the defendants used the firm's assets in setting up a rival corporation.³⁸ In *Southeast Consultants*, the court decided that the defendant, a former employee, had appropriated a business opportunity. The court ruled that the defendant's interest in the business opportunity arose during the period of employment with the plaintiff and the defendant violated his fiduciary responsibilities.³⁹

In such cases it is necessary to establish whether the former employee used information which could have been gleaned only through employment with the former employer and, further, after what point fiduciary responsibilities to the former employer terminate. If the information could be obtained outside the corporation, then to grant property rights over such information to the former employer restricts competition. This is consistent with the *Taylor Freeze* rule of allowing freedom of competition under which customer lists are not property of the employer.⁴⁰

³⁶ *Zidell v. Zidell, Inc.* (1977), 277 Or. 423 at 427, 560 P.2d 1091 at 1093. The opportunity was that of purchasing the company's own shares. The company had no stated policy toward share repurchase.

³⁷ It is important to distinguish between anticipated and unanticipated events. If an event is anticipated, such as entry, then it will be incorporated in the price.

³⁸ *Chelsea Industries*, *supra*, note 15 at 2. See also *Southeast Consultants*, *supra*, note 13 at 509.

³⁹ *Southeast Consultants*, *supra*, note 13 at 509.

⁴⁰ *Taylor Freeze Sales Co. v. Sweden Freezer E. Corp.* (1968), 224 Ga. 160 at 165, 160 S.E.2d 356 at 360. But see *Canadian Aero Service*, *supra*, note 9 at 592.

