

The Tension Between Corporate Opportunity And Innovation

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An important new federal district court decision^[1] addresses the relationship between fiduciary duties and the ingenuity and innovation of a corporate director. *AngioScore v. TriReme Medical* holds that while a director's fiduciary duties can in certain situations coexist with his "drive to innovate," his duties to the corporation must predominate.^[2] Thus, a director of "Company A," who invents a technology while simultaneously an employee of "Company B" that competes with the technology of Company A, breaches his fiduciary duty when he fails to offer such technology first to Company A before commercializing the technology through Company B.

In so ruling, the district court articulates the principles of the corporate opportunity doctrine in a manner that should serve as a valuable resource for general counsel to life sciences companies, academic medical centers and other entities that often seek to commercialize health-related technology.



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The underlying allegations were styled in state law claims for breach of fiduciary duty by the medical device company *AngioScore*, against one of its founders and former directors, Eitan Konstantino. The specific allegations were that Konstantino developed a medical device that fell within *AngioScore*'s line of business and exploited the opportunity for his personal gain without first presenting the opportunity to *AngioScore*. *AngioScore* also brought claims against Konstantino's then-current employer, alleging that it aided and abetted the breach.

AngioScore designs and manufactures specialty angioplasty balloon catheters used for the treatment of cardiovascular disease. Konstantino, an engineer, co-founded *AngioScore* and developed these specialty angioplasty balloon catheters. After the passage of time, Konstantino left his employee position at *AngioScore* in order to serve as President and CEO of *TriReme Medical Inc.*, another company he founded, to develop bifurcation stents. Notably, Konstantino remained on the *AngioScore* board while serving as *TriReme*'s President.^[3] *AngioScore*'s board granted Konstantino limited permission to pursue this technology and waived *AngioScore*'s interest in the bifurcation stent technology. At *TriReme*, Konstantino developed a specialty catheter called "Chocolate;" a product in direct competition with the balloon catheters sold by *AngioScore*.

The doctrine of corporate opportunity is one of the least known of the three essential elements of the fiduciary duty of loyalty; the other elements being the duty to avoid conflict of interest wherever possible, and the duty to preserve the confidentiality of proprietary corporate information.^[4] As applied

in Delaware (as in most states), the principle applies the duty of loyalty to identify those circumstances in which a director must obtain the board's approval before taking a business opportunity of the company for himself or herself.[5] It seeks to define the bounds of this duty in situations where a director may be inclined to take a business opportunity for himself or herself.[6] The essence of the corporate opportunity principle demands that "directors not undertake any activity that would work harm to the corporation they serve and prioritize the interests of those corporations above their own."[7]

The district court observed that while Konstantino owed fiduciary duties to AngioScore by virtue of his board membership, those duties did not entitle the corporation to an outright ownership of his Chocolate technology. Rather, having chosen to remain on AngioScore's board, Konstantino's fiduciary duty required that he offer AngioScore the opportunity to acquire the rights to Chocolate.[8] By offering that opportunity to AngioScore, Konstantino would have satisfied the corporate opportunity requirements under Delaware law.[9] The court concluded from the record that Konstantino's conduct usurped AngioScore's legitimate corporate opportunity.

Konstantino's credibility was particularly undermined by substantial evidence, cited by the district court, that he had deliberately misled the AngioScore board concerning the circumstances of his Chocolate-related activity. In a series of responses to expressions of increasing Chocolate-related concerns from the AngioScore board, he "unequivocally and unambiguously den[ie]d that any such activity had taken place".[10] Given what was actually taking place at that time, the court characterized Konstantino's statements as "obvious affirmative, misleading representations ... [an] 'actual artifice' he constructed to prevent AngioScore from gaining knowledge of the facts" (i.e., that a fiduciary breach had, indeed, occurred).[11]

"Whether a corporate opportunity has been usurped is 'a factual question to be decided by reasonable inferences from objective facts.'"[12] To the AngioScore court, the facts indicated that the development of "Chocolate" fell within the four elements of a "misappropriation of opportunity" claim under Delaware law. In particular, the court determined that (i) Chocolate was a "concrete business opportunity" when Konstantino ultimately resigned from the AngioScore board; (ii) Chocolate fell within AngioScore's line of business of designing, manufacturing and marketing angioplastic balloon catheters[13]; (iii) AngioScore would likely have been interested in Chocolate because of the financial implications to the company were it to be developed by a competitor (given the "relatively small specialty balloon catheter market"); (iv) AngioScore had the financial ability to exploit Chocolate, had it been given the opportunity to do so; and (v) by taking the Chocolate opportunity for himself and for his affiliated companies without a knowing waiver from AngioScore, Konstantino became a competitor to AngioScore. Or, as the traditional case law provides, Konstantino placed himself in a position "inimicable to his duties to the corporation." [14]

The record was also "replete with evidence" that Konstantino's current employer provided substantial assistance in the design and modeling process for Chocolate and therefore was liable for aiding and abetting Konstantino's breach of fiduciary duty.[15] The court ordered Konstantino to disgorge the benefits he obtained as a result of his breach and found the defendants liable for AngioScore's past and future lost profits, totaling \$20 million.

The focused significance of AngioScore is its application of the corporate opportunity doctrine to a director who is also an inventor. By its ruling in favor of AngioScore, the court sought to balance competing public policies — the legitimate interests of the corporation with respect to a bona fide "opportunity" and the legitimate interest of inventors in favor of fostering innovation.[16] These are

increasingly critical issues where “innovators” serve in a fiduciary capacity for companies that support the development of “innovation.” The AngioScore decision makes clear that “the fact of inventorship does not absolve a director of his fiduciary obligations with respect to inventions he may develop that compete with the company he serves.”[17] Of course, a director can leave the company and thus dissolve the duties he owes.[18] Konstantino’s error (among many, it would appear) was that he did not leave the AngioScore board when his employment relationship with AngioScore terminated.

The broader significance of AngioScore is the extent to which it highlights the corporate opportunity doctrine — and the costs associated with its violation — for governing boards across industry sectors and their general counsel. The application of the doctrine is not limited to life sciences or other industry sectors involved in technology. It extends to protect the broader, strategic interests and opportunities that present real value to a company. AngioScore is a useful reminder for boards and their general counsel to give closer consideration to those steps that can be taken to clearly articulate, and protect from unauthorized fiduciary diversion, the organization’s credible and valuable opportunities.

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[1] AngioScore Inc. v. TriReme Medical Inc., No. 12-CV-03393, (N.D. Cal. July 1, 2015).

[2] Id. at *1.

[3] Id. at *2.

[4] See id. at *8 (citing Guth v. Loft, Inc., 5 A.2d 503 (Del. 1939)).

[5] Id. at *8.

[6] Id.

[7] Id. at *10.

[8] Id.

[9] Id.

[10] Id. at *7.

[11] Id. at *20; see also Eric Talley, When Fiduciary Duties and Entrepreneurial Innovation Collide: AngioScore v. TriReme, The CLS Blue Sky Blog (July 13, 2015).

[12] Id. at *9 (citing Guth, 5 A.2d at 513).

[13] Id. at *12 (“AngioScore had ‘fundamental knowledge and practical experience’ to pursue Chocolate.”)

[14] Id. at *16 (citing Broz v. Cellular Information Systems Inc., 673 A.2d 148, 155 (Del. 1996)).

[15] Id. at *21.

[16] Id. at *10.

[17] Id. at *9.

[18] Id.