

A photograph showing the silhouettes of three people in a brightly lit hallway. Two people in the center are shaking hands, while a third person is walking away from them in the foreground. The lighting is warm and creates a strong glow from the top of the frame.

Making Sense of New York's Corporate Opportunity Doctrine

By Jonathan Rosenberg and Kendall Burr

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New York, like Delaware and other states, recognizes the corporate opportunity doctrine, which derives from the duty of loyalty that fiduciaries owe corporations they serve. The doctrine forbids fiduciaries from diverting for their own benefit, without board approval, "any opportunity that should be deemed an asset of the corporation."¹ The key to the doctrine under New York law is whether the corporation had a "tangible expectancy" in the opportunity,² that is, an expectancy "more certain than a desire or hope."³ Although some courts have suggested that the doctrine applies only to deprivations that "threaten the viability of the enterprise,"⁴ New York courts have generally applied the doctrine more broadly. Thus, for example, fiduciaries – including those serving healthy businesses – have been found liable under the doctrine for drawing away their principal's existing customers, taking advantage of business offers made to the corporation, or purchasing property that the corporation needed or had contemplated acquiring.⁵

Fiduciaries sued under the corporate opportunity doctrine often rely on two defenses: third-party refusal-to-deal and financial inability. Both defenses go directly to the "tangible expectancy" determination. Under the former, the opportunity would be deemed fair game for the fiduciary where the third party providing that opportunity was unwilling to do business with the corporation. Under the latter, the fiduciary would not be deemed a disloyal usurper where the corporation did not have the financial wherewithal to capitalize on the opportunity. Each defense has at least surface appeal, because it tends to show that the corporation did not have a "tangible expectancy" of obtaining the business opportunity at issue. After all, what realistic expectation could a corporation have in an opportunity that (1) the third party was unwilling to give the corporation, or (2) the corporation had insufficient finances to exploit?

In late 2007, however, New York's First Department stated unequivocally, albeit in *dicta*, that neither defense is viable. It reached that conclusion in *Owen v. Hamilton*,⁶ with little analysis, no mention of the "tangible expectancy" requirement, and based on a questionable characterization of First Department precedent. And as the court acknowledged, its conclusion is at odds with several Third Department cases that recognize refusal-to-deal as a valid defense. Thus, *Owen* highlights the uncertainty of the contours of New York's corporate opportunity doctrine.

This article is an attempt to restore some order. We believe that New York's fact-intensive "tangible expectancy" test requires courts to consider both whether the third party refused to deal with the corporation and whether the corporation was financially able to capitalize on the opportunity. On the other hand, neither factor should be deemed dispositive, except in rare circumstances. Rather, both factors should be considered as part of a multi-factor analysis – eight factors are identified below – in which the court would weigh the respective competing interests of the corporation and its fiduciary, consistent with the duty of loyalty.

Owen v. Hamilton

Owen involved a dispute over *Sports Reporter*, a sports-betting publication that Richard Bomze owned and decided to sell in 2001. At the time, defendant Lindsay Hamilton was the president and 51% shareholder of Starpoint Publishing Corp., which published *Winning Points*, another sports-betting publication. Hamilton proposed to Starpoint's board of directors that he and his wife purchase *Sports Reporter* and operate it out of Starpoint's office, so that the two publications could share expenses and reduce operating costs. Recognizing that the arrangement could improve Starpoint's "precarious financial state," the board approved the \$450,000 purchase.⁷

Starpoint shareholder James Owen then sued Hamilton derivatively for usurping Starpoint's corporate opportunity and breaching his fiduciary duty. The trial court granted Owen's summary judgment motion on both claims. The First Department reversed and ordered that summary judgment be entered for Hamilton because he had obtained board approval for the purchase.⁸ But before reaching the board-approval issue, the court briefly addressed Hamilton's refusal-to-deal and financial inability defenses.⁹ Although that discussion must be considered *dicta* – because the board's approval of the transaction rendered the other defenses academic – New York courts will likely consider it in future corporate opportunity cases.

The court treated both defenses together, stating that the defense that "Starpoint itself was unable to purchase *Sports Reporter* . . . can be disposed of with dispatch."¹⁰ It noted that some authority supports a defense that the

corporation would have been unable to profit from the opportunity, citing two Third Department decisions that had recognized the third-party-refusal defense. But the court asserted that "we [in the First Department] have consistently held to the contrary."¹¹ It concluded that "neither Richard Bomze's unwillingness to sell *Sports Reporter* to Starpoint nor Starpoint's alleged financial inability to avail itself of the opportunity had it been offered is a valid defense to plaintiff's action."¹²

Thus, *Owen* suggests that the two defenses would be routinely rejected in the First Department. But New York precedent does not support this suggestion.

The Financial Inability Defense

Only two reported New York decisions have ruled on the financial inability defense. Each is more than 40 years old and each accepted the defense. The First Department held, in *Blaustein v. Pan American Petroleum & Transport Co.*, that the defendant did not usurp corporate opportunities, because the corporate opportunity doctrine "is not applicable if the opportunity is one which the corporation is financially unable to undertake."¹³ Consistent with *Blaustein*, a Bronx County trial court in *Nigro v. Caserta* dismissed a corporate opportunity claim because, in part, there were "no factual allegations showing that the corporation had the financial means with which to avail itself of the opportunities alleged to have been diverted."¹⁴

First Department decisions after *Blaustein* contain *dicta* that criticized the financial inability defense. *Owen* relied on four such cases, none of which actually involved a financial inability defense.¹⁵ *Owen* first cited *Foley v. D'Agostino*, including *Foley's* quote from a 1941 *Harvard Law Review* Note:

[T]he fact that the competing business undertaken presented itself in the form of a corporate opportunity which the corporation was financially unable or for other reasons unwilling to undertake should be no excuse for an officer undertaking it individually. Despite the corporation's inability or refusal to act it is entitled to the officer's undivided loyalty.¹⁶

The court in *Foley* quoted the Note for its critique of an "unwilling to undertake" defense. The claim in *Foley* was that the defendants – officers and directors of several affiliated companies that managed a supermarket chain – breached their fiduciary duties by setting up a rival supermarket chain. The defendants argued that they were free to establish and operate the competing business because they had previously presented the opportunity to the corporations, but their boards voted not to take it.¹⁷

Foley held that the complaint should not have been dismissed because the board's rejection of the opportunity did not release the fiduciaries of their duty of loyalty, and the fact finder could determine that they breached that duty by competing with their employer.¹⁸ Thus, because the claim at issue related to employees compet-

ing with their employer, *Foley* is irrelevant to New York’s corporate opportunity jurisprudence.

Two other First Department cases that *Owen* cited similarly did not discuss the financial inability defense. In *Robert N. Brown Assocs., Inc. v. Fileppo*, the defendant had redirected printing orders to his own company instead of his employer.¹⁹ The defendant asserted an “unwilling to undertake” defense, arguing that the corporation would have rejected those orders had they been offered to it. Citing *Foley*, the court hypothesized that “even if” the defendant had offered them to the corporation, “which [was] not the case,” the defendant would not have been free to take them for himself.²⁰

In *Bankers Trust Co. v. Bernstein*, the court quoted *Foley* and the *Harvard Law Review* Note for the principle that “[d]espite the corporation’s inability or refusal to act it is entitled to the officer’s undivided loyalty.”²¹ But *Bankers Trust* contained no other discussion of inability defenses. Instead, the court remanded for a new trial because the trial court had improperly instructed the jury that it must find that the corporation would have obtained the opportunity “but for” the defendant’s conduct.²²

Only one of the four cases *Owen* cited, *Alexander & Alexander of New York, Inc. v. Fritzen*, contained any substantive discussion of the financial inability defense. The defendant in *Alexander* had argued that the corporation was legally unable to take a life insurance business opportunity because it had no license to sell life insurance.²³ The First Department, quoting *Foley* and the *Harvard Law Review*,²⁴ criticized both the legal and financial inability defenses, even though only the former was at issue. The court noted that it would be “imprudent” to allow fiduciaries to exploit opportunities based “solely” on their company’s legal or financial inability, because information regarding any such inability is “generally within the unique knowledge of the diverting fiduciary.”²⁵ Thus, the court reasoned, permitting a dispositive inability defense would “reduce[] the incentive for executives to seek effective solutions to corporate problems,” and would “encourage employees and fiduciaries to divert corporate opportunities knowing that the diversion may not be effectively challenged.”²⁶

But *Alexander* stopped short of holding that the corporation’s legal inability to exploit the opportunity is irrelevant. To the contrary, the court noted that although the company’s legal inability to sell life insurance was not “determinative,” it was “significant.”²⁷ And relying in part on that legal incapacity, the First Department concluded that the life insurance business was *not* a corporate opportunity.²⁸

Thus, all the authority on which *Owen* relied in rejecting the financial inability defense – *Foley*, *Robert N. Brown Assocs.*, *Bankers Trust* and *Alexander* – was *dicta*. And *Owen* ignored two cases, albeit significantly older, that upheld that defense. Thus, the court’s back-of-the-hand treat-

ment of the financial inability defense was inappropriate. At the very least, the court should have considered the evidence of Starpoint’s financial inability as a non-determinative but relevant factor, just as the court in *Alexander* had considered the corporation’s legal inability.

The Refusal-to-Deal Defense

No reported New York decision before *Owen* had suggested, much less held, that a third party’s refusal to deal with the corporation would not be a valid defense to a corporate opportunity claim. To the contrary, the First Department itself had accepted the defense twice in cases that *Owen* did not cite, *Washer v. Seager*²⁹ and *Rafield v. Brotman*.³⁰

In *Washer*, the parties were the sole stockholders, officers and directors of Sportscloth, a sports apparel manufacturer. When Seager left Sportscloth to form a competing business, Sportscloth’s sole fabric supplier decided to move its business to Seager’s new company. The First Department reversed the trial court’s finding that Seager had usurped a corporate opportunity, holding that “[o]nce [the supplier] made its decision not to deal further with Washer or the corporation on Seager’s withdrawal, there no longer existed any corporate opportunity or expectancy.”³¹ A New York federal court noted in 1999 that “*Washer* is still good law in New York.”³²

The court should have considered the evidence of Starpoint’s financial inability as a non-determinative but relevant factor.

In *Rafield*, a data processing company’s sole client decided to phase out its relationship with the corporation and to create an in-house department to perform the data processing functions that the corporation had been providing. The plaintiff alleged that a director, who left shortly thereafter to work for the client, had usurped a corporate opportunity by taking that business with him. The trial court dismissed the claim, finding that by the time the defendant had taken the job, the client had already reached an independent decision to bring the business in-house. The First Department affirmed, concluding that because the client’s decision “deprived [the corporation] of any viable prospect for continuing its business,” the corporation had no “tangible expectancy” in a continuing relationship with the client.³³

Owen cited two Third Department decisions that it characterized as providing “some authority . . . that a director cannot be liable for usurping a corporate opportunity where the corporation would have been unable to avail itself of the opportunity.”³⁴ In *DiPace v. Figueroa*,³⁵ the plaintiff claimed that a director’s purchase of property constituted a corporate opportunity. The Third

Department affirmed the claim's dismissal because "the sellers unequivocally aver[red] that they would not have sold to the corporation, or to [the plaintiff], but only to [the defendant] individually."³⁶ And in *Moser v. Devine Real Estate, Inc.*,³⁷ the Third Department found that because the third party "unequivocally testified" that he would not have offered an investment opportunity to the corporation, the corporation had no "tangible expectancy" in that opportunity. Citing *DiPace*, the court noted, "Typically, such evidence that the third party would not have done business with the corporation . . . is sufficient to preclude the finding that a corporate opportunity existed."³⁸

In portraying *DiPace* and *Moser* as contrary to First Department precedent, *Owen* not only failed to cite *Washer* and *Rafield*, it relied solely on *Foley*, *Robert N. Brown Assocs.*, *Bankers Trust* and *Alexander*. As discussed above, those cases only tangentially support rejecting the financial inability defense. But they have no relevance to a third-party-refusal defense, because none of them referred to that defense, even in *dicta*.

Proposed Decisional Framework

New York's uncertain corporate opportunity doctrine is reflected in *Owen's* (1) questionable characterization of New York precedent, and (2) reasoning at odds with the "tangible expectancy" requirement. The New York Court of Appeals has not taken a corporate opportunity case since 1944, when it affirmed the First Department's rejection of a corporate opportunity claim because there was no evidence of tangible expectancy.³⁹ That decision did not clarify how courts should evaluate tangible expectancy. *Alexander* noted the uncertainty over the applicable standard,⁴⁰ and *Owen* did not mention the tangible expectancy test or any standard at all.⁴¹

Courts should consider both financial inability and third-party refusal-to-deal in the "tangible expectancy" analysis. To take an extreme example, let's say a billionaire businessman serves as a director for a small, insolvent company. During the period of his service, the director learns of an opportunity to buy a business for \$100 million, an amount that is multiples beyond the company's ability to pay. Perhaps on a strict duty-of-loyalty basis, the director would be criticized for not going through the motions of presenting the opportunity to the board. But breach of fiduciary duty claims require some level of causation.⁴² So if there were no doubt that the corporation would not have been financially able to acquire the business, the director should not be liable. It is hard to argue that the fact finder should blind itself to that economic reality.

Similarly, there will be instances when, despite the fiduciary's best efforts, the third party remains unwilling to deal with the corporation. Let's say, for example, the third party makes that clear in no uncertain terms and the fiduciary exhausts all avenues for the corporation's

getting the opportunity. If the fiduciary were thereafter to take advantage of the opportunity, the causation element arguably would not have been met for any harm the corporation was to claim in not profiting from the opportunity. At the very least, the fact finder should be able to take those circumstances into account.

On the other hand, there are good reasons why a court should not necessarily consider dispositive a company's insolvency or a third party's stated unwillingness to deal with that company. First, a bright-line rule could create perverse incentives. The law should encourage fiduciaries to be loyal, not to make a record that could insulate their disloyalty from liability. If, for example, a third party were to tell the fiduciary that it would not deal with the fiduciary's company, but would be happy to deal with the fiduciary individually, the fiduciary should be incentivized under the law to convince the third party that the fiduciary will not engage if the company he or she serves is not part of the deal. The law should also encourage the fiduciary to seek board approval; but a fiduciary would be less inclined to seek board approval if a bright-line dispositive defense were available. Second, even a third party's unequivocal expressions of refusal-to-deal can be inherently suspect. For example, the third party testifies that she would not have done business with the company had she not done the deal with the corporation's executive. That testimony is necessarily speculative and might even be inadmissible.⁴³ Third, even insolvent companies can sometimes acquire cash-generating businesses or obtain lucrative contracts. And sometimes that opportunity can make the difference between the insolvent company turning the corner to profitability or filing for bankruptcy. The law should incentivize fiduciaries to be the same loyal, unconflicted advocates even for the insolvent companies they serve.

The upshot of the above is that courts considering corporate opportunity claims should consider all the facts and circumstances – financial ability, third-party willingness to deal, and other facts – in conducting the tangible expectancy analysis. This is the approach articulated 66 years ago in *Turner v. American Metal*.⁴⁴ In *Turner*, New York County Justice Bernard L. Sheintag noted that in evaluating whether a corporation had a tangible expectancy in a given opportunity,

it is safer to rely upon the particular circumstances of a case than upon abstract principles or general language used in the decisions. It is unnecessary, indeed unwise, to attempt any preciseness of definition. Nevertheless, there are certain guides which point the way[;] . . . the following circumstances, among others, have to be considered.⁴⁵

Justice Sheintag went on to enumerate six factors he considered relevant to the tangible expectancy analy-

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sis.⁴⁶ Although the First Department reversed Justice Sheintag's finding that a corporate opportunity had been usurped, it did not address those factors.⁴⁷ But it quoted *Guth v. Loft*, a Delaware Supreme Court case that established a comparable four-factor test.⁴⁸

We agree with the approach in *Turner* and *Guth*, and propose that New York courts adopt a multi-factor test to evaluate whether a fiduciary's transaction should be deemed a corporate opportunity. Below are eight factors a court would consider in making this determination. This list is not meant to address all potentially relevant evidence, but reflects the types of issues and circumstances that typically come up in corporate opportunity cases.

Documented, contemporaneous evidence that the third party refused to do business with the corporation would weigh in favor of dismissal, and would be even more persuasive if the fiduciary had no involvement in creating it.

1. Whether the Opportunity Was Presented to the Fiduciary in His Individual or Corporate Capacity

A court should first consider how the fiduciary came to learn of the opportunity, a factor mentioned in both *Turner*⁴⁹ and *Guth*.⁵⁰ If it were presented to the fiduciary in his or her corporate capacity, this factor would weigh in favor of a corporate-opportunity finding. But if it were presented in the fiduciary's individual capacity, "[t]he burden imposed upon [the defendant] to show adherence to his fiduciary duties to [the corporation] would be thus lessened to some extent."⁵¹ Such evidence would not be dispositive and should be considered along with all other factors.⁵²

2. Whether the Corporation Understood That the Fiduciary Would Pursue Other Interests

The nature of the fiduciary relationship may also be significant. In some instances a fiduciary may be a director serving on several boards or involved in several ventures.⁵³ Such involvement "may negate the obligation which might otherwise be implied to offer similar opportunities to any one of [the corporations he or she represents], absent some contrary understanding."⁵⁴ Thus, courts sometimes "examine whether at the beginning of the employment or fiduciary relationship the parties understood, or it is reasonable to conclude that the parties understood, that the employee, officer or director would simultaneously pursue other interests, even ones related to or in direct competition with the business of the corporation."⁵⁵ Any such evidence would weigh against a finding that the fiduciary usurped a corporate opportunity.

3. Whether the Opportunity Would Have Been Offered to the Company

As discussed above, evidence that the third party would not have offered the opportunity to the corporation should weigh against a corporate opportunity finding. But the weight accorded this factor should depend on the type of evidence presented. For example, documented, contemporaneous evidence that the third party refused to do business with the corporation would weigh in favor of dismissal, and would be even more persuasive if the fiduciary had no involvement in creating it. But less (or in some circumstances no) weight would be appropriate if the only evidence were the third party's testimony that he or she would not have given the opportunity to the company. Such testimony would be inherently speculative

and often biased, because either the third party continues to have a business relationship with the fiduciary or faces exposure for aiding and abetting a fiduciary-duty breach. Similarly, the usurper's testimony in this regard, uncorroborated by contemporaneous documentary evidence, would be accorded little weight.

4. Whether the Opportunity Was Developed With Corporate Assets

This is one of the *Turner* factors.⁵⁶ Courts should treat differently an opportunity developed with corporate resources that the fiduciary swoops in to take at the 11th hour, as opposed to an opportunity that the company had not previously pursued. The weight accorded this factor depends on the type of corporate assets used to develop or pursue the opportunity. For example, the Michigan Court of Appeals, applying Delaware law, has noted that usurpation is more likely to be found "when 'hard' assets, such as cash, facilities, and contracts, are used rather than . . . 'soft' assets, such as good will, working time, and corporate information."⁵⁷ The amount of assets used when compared with the overall value of the opportunity would also affect the analysis.⁵⁸

5. The Company's Financial Ability to Take the Opportunity

This too is a *Turner* factor.⁵⁹ As discussed above, the case law does not support *Owen's* outright rejection of the financial inability defense, and many other states

consider a corporation's financial ability relevant in determining whether an opportunity should belong to the company. Delaware, for example, *requires* a corporate-opportunity plaintiff to show that the company was financially capable of entering into the transaction.⁶⁰ Other jurisdictions refer to a corporation's financial ability as either conclusive or relevant.⁶¹

The nature of the financial inability evidence should be closely scrutinized. As noted in *Alexander*, a corporation may not be able to rebut a financial inability defense raised by a fiduciary with unique knowledge of the company's finances.⁶² Thus, only objective, independently verified evidence of financial inability should weigh in the fiduciary's favor. And the court should also consider the fiduciary's role in the company's financial fortunes. Fiduciaries who view their company as a sinking ship should not be incentivized to relax their fiduciary obligations and more freely self-deal.⁶³

The severity of the company's financial woes should also affect the weight given this factor. The greater the company's insolvency, the less likely it would be that it would have successfully obtained the opportunity, and the more heavily the court should weigh this factor in the defendant's favor.

6. The Investment Required to Capitalize on the Opportunity, and the Revenue Projected From the Investment

This factor is distinguished from financial inability because it turns on the nature of the opportunity itself, rather than the company's resources. For example, if a given opportunity requires a one-time purchase that clearly exceeds the funds that the corporation has or could obtain, the corporate opportunity claim would be tenuous. On the other hand, even a distressed company may be capable of making the initial investment required to take the opportunity. If, for example, an opportunity can be financed over time, or consists of a contractual relationship, the opportunity's projected revenue could facilitate the investment's funding. Courts should therefore consider whether there is a reasonable chance that the opportunity would have helped the company turn the tide.

7. The Extent to Which the Opportunity Is Consistent With the Company's Past and Current Business Model

This is another *Turner* factor.⁶⁴ If an opportunity were consistent with a company's business model, the company's shareholders would be more likely to view it as an opportunity. And the fiduciary would be more likely to recognize it as belonging to the company. In that case, this factor would weigh in favor of a corporate-opportunity finding.

On the other hand, if the opportunity were not consistent with a company's past and current business model,

this factor would weigh in the fiduciary's favor. An exception may be appropriate if there were evidence that the fiduciary was aware of the corporation's intent to enter into the new business line. In *Alexander*, the court rejected the plaintiff's argument that the company intended to enter the life insurance business, in part, because there was no evidence that the defendants had been advised of that "undeclared intent."⁶⁵

8. Whether the Opportunity Was Unique or of Special Value to the Corporation

This too is a *Turner* factor.⁶⁶ If an opportunity has some special significance or unique value to the corporation, such as property adjacent to the corporation's property, the court would more likely consider it a corporate opportunity.

Conclusion

Corporate opportunity cases are infrequent because fiduciaries ordinarily seek board approval before capitalizing on a transaction that might arguably belong to the corporation. Board approval would normally insulate the fiduciary from liability, unless the directors were not fully informed or were dominated by or beholden to the fiduciary.⁶⁷ But in those situations in which board approval either was not sought or was defective, a viable corporate opportunity claim could be brought. Courts adjudicating such claims should read *Owen* critically, and should not rely on its *dicta* or that of other New York decisions to which *Owen* cites. Rather, they should consider all the factors potentially relevant to both the corporation's interests in having loyal executives, and the fiduciaries' legitimate interests in pursuing business opportunities that do not undermine the companies they serve. ■

1. *Alexander & Alexander of N.Y., Inc. v. Fritzen*, 147 A.D.2d 241, 246, 542 N.Y.S.2d 530 (1st Dep't 1989).

2. *Blaustein v. Pan Am. Petroleum & Transp. Co.*, 263 A.D. 97, 128, 31 N.Y.S.2d 934 (1st Dep't 1941) ("[O]ne primary requisite for the application of the [corporate opportunity] doctrine is the existence of a presently recognizable, tangible expectancy on the part of the corporation in the property."); *aff'd*, 293 N.Y. 281, 300, 56 N.E.2d 705 (1944) ("The lack in the present case is the essential proof that at the time the properties in question were acquired . . . they were recognized or identified as properties in which Pan Am had a tangible expectancy."); *Abbott Redmont Thinlite Corp. v. Redmont*, 475 F.2d 85, 88 (2d Cir. 1973) ("[T]he central questions for determination here are whether [the plaintiff] had a 'tangible expectancy' . . . and whether [the defendant] violated his fiduciary duty by diverting that expectancy to his own profit."); *Am. Fed. Group, Ltd. v. Rothenberg*, 136 F.3d 897, 906 (2d Cir. 1998) ("The doctrine's application is limited . . . to business opportunities in which a corporation has a 'tangible expectancy.'").

3. *Alexander*, 147 A.D.2d at 247-48 (defining tangible expectancy as "something much less tenable than ownership, but, on the other hand, more certain than a desire or a hope"); *see also Abbott Redmont*, 475 F.2d at 89 ("The degree of likelihood of realization from the opportunity is . . . the key to whether an expectancy is tangible."); *Blaustein*, 293 N.Y. at 300 (stating that tangible expectancy is "a right which in its nature was inchoate").

4. *Alexander*, 147 A.D.2d at 248; *see also In re Gupta*, 38 A.D.3d 445, 446-47, 834 N.Y.S.2d 23 (1st Dep't 2007).

5. *See Burg v. Horn*, 380 F.2d 897, 899-900 (2d Cir. 1967) (citing cases).

6. 44 A.D.3d 452, 843 N.Y.S.2d 298 (1st Dep't 2007).

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7. *Id.* at 453–54.
8. *Id.* at 455–57.
9. *Id.* at 454–55.
10. *Id.* at 454.
11. *Id.*
12. *Id.* at 454–55.
13. 263 A.D. 97, 128, 31 N.Y.S.2d 934 (1st Dep’t 1941).
14. 16 Misc. 2d 355, 358, 184 N.Y.S.2d 1001 (Sup. Ct., Kings Co. 1959).
15. *Foley v. D’Agostino*, 21 A.D.2d 60, 248 N.Y.S.2d 121 (1st Dep’t 1964); *Robert N. Brown Assocs., Inc. v. Fileppo*, 38 A.D.2d 518, 327 N.Y.S.2d 133 (1st Dep’t 1971); *Bankers Trust Co. v. Bernstein*, 169 A.D.2d 400, 563 N.Y.S.2d 821 (1st Dep’t 1991); *Alexander & Alexander of N.Y., Inc. v. Fritzen*, 147 A.D.2d 241, 246, 542 N.Y.S.2d 530 (1st Dep’t 1989).
16. *Foley*, 21 A.D.2d at 68 (quoting Note, *Fiduciary Duty of Officers and Directors Not to Compete With the Corporation*, 54 Harv. L. Rev. 1191, 1199 (1941)).
17. *Id.* at 67.
18. *Id.* at 66–69.
19. 38 A.D.2d at 519.
20. *Id.*
21. 169 A.D.2d 400, 401, 563 N.Y.S.2d 821 (1st Dep’t 1991).
22. *Id.* at 401–02.
23. 147 A.D.2d 241, 247–49, 542 N.Y.S.2d 530 (1st Dep’t 1989).
24. *Id.* at 247.
25. *Id.*
26. *Id.*
27. *Id.* at 249. *Accord Turner v. Am. Metal*, 36 N.Y.S.2d 356, 370 (Sup. Ct., N.Y. Co. 1942) (treating corporation’s financial ability to “acquire and exploit the enterprise” as a relevant factor), *rev’d on other grounds*, 268 A.D. 239, 50 N.Y.S.2d 800 (1st Dep’t 1944).
28. 147 A.D.2d at 249. The court permitted two fiduciary duty breach claims to go forward, but only to the extent that they did not seek damages for the alleged diversion of the life insurance business.
29. 272 A.D. 297, 71 N.Y.S.2d 46 (1st Dep’t 1947).
30. 261 A.D.2d 257, 690 N.Y.S.2d 263 (1st Dep’t 1999).
31. 272 A.D. at 303.
32. *Kuo v. Kuo*, 1999 WL 123379, *5 (S.D.N.Y. Mar. 4, 1999), *aff’d*, 216 F.3d 1072 (2d Cir. 2000).
33. 261 A.D.2d at 258.
34. *Owen v. Hamilton*, 44 A.D.3d 452, 454, 843 N.Y.S.2d 298 (1st Dep’t 2007).
35. 223 A.D.2d 949, 637 N.Y.S.2d 222 (3d Dep’t 1996).
36. *Id.* at 952.
37. 42 A.D.3d 731, 839 N.Y.S.2d 843 (3d Dep’t 2007).
38. *Id.* at 735–36.
39. *Blaustein v. Pan Am. Petroleum & Transp. Co.*, 293 N.Y. 281, 300, 56 N.E.2d 705 (1944).
40. *Alexander & Alexander of N.Y., Inc. v. Fritzen*, 147 A.D.2d 241, 247–48, 542 N.Y.S.2d 530 (1st Dep’t 1989) (“Various tests have been utilized to determine whether a venture should be considered a ‘corporate opportunity.’ . . . It appears that none of these tests alone is consistently sufficient to answer the question of what constitutes a ‘corporate opportunity.’ While the cases in this jurisdiction have generally announced reliance on the ‘interest or tangible expectancy’ test, in some instances consideration has been given to the other tests. Some cases refer to all relevant factors.”).
41. *See Owen*, 44 A.D.3d 452.
42. *R.M. Newell Co. v. Rice*, 236 A.D.2d 843, 844–45, 653 N.Y.S.2d 1004 (4th Dep’t 1997) (affirming dismissal where plaintiff failed to prove proximate causation, an “essential element” of its fiduciary duty claims); *Stoeckel v. Block*, 170 A.D.2d 417, 417, 566 N.Y.S.2d 625 (1st Dep’t 1991) (affirming jury award of no damages where causation not established); *see also Am. Fed. Group*, 136 F.3d at 907 n. 7; *LNC Invs., Inc. v. First Fid. Bank*, 173 F.3d 454, 465–66 (2d Cir. 1999).
43. Fed. R. Evid. 701(a) (testimony admissible only if “rationally based on the perception of the witness”); *Devaney v. Chester*, 1989 WL 52375, *5 (S.D.N.Y. May 10, 1989) (stating that “speculative testimony concerning what a party would have done” is generally not admissible); *Beatty v. Michelin Tire Corp.*, No. 3:94CV989 (DJS), 1999 U.S. Dist. LEXIS 21970 at **14–15 (D. Conn. Mar. 31, 1999) (excluding testimony because it was speculative and not based on the witness’s perception); *Frame v. Horizons Wine & Cheese, Ltd.*, 95 A.D.2d 514, 519, 467 N.Y.S.2d 630 (2d Dep’t 1983) (same).
44. 36 N.Y.S.2d 356, 370 (Sup. Ct., N.Y. Co. 1942), *rev’d on other grounds*, 268 A.D. 239, 50 N.Y.S.2d 800 (1st Dep’t 1944).
45. *Id.*
46. “1. The nature of the property involved, whether it was unique or of special value or something that could be acquired by anyone in the market. 2. Whether or not it was within the scope and line of business of the corporation. 3. The manner in which the opportunity came to the officer or director – whether in his official or in his individual capacity. 4. The financial ability and the adequacy of the facilities and resources of the corporation to acquire and exploit the enterprise. 5. The actual use of the funds and resources of the corporation in the acquisition and development of the corporation. 6. Whether or not the officer or director acted in good faith, in the interest of the corporation, or whether he was guided by his own personal advantage.” *Id.*
47. *See Turner*, 268 A.D. 239.
48. 23 Del. Ch. 255, 271, 5 A.2d 503 (1939) (a transaction is a corporate opportunity if it (1) is one that “the corporation is financially able to undertake;” (2) is “in the line of the corporation’s business and is of practical advantage to it;” (3) “is one in which the corporation has an interest or a reasonable expectancy;” and (4) “by embracing the opportunity, the self-interest of the officer or director will be brought into conflict with that of his corporation;”); cited by *Turner*, 268 A.D. at 252. *See also Broz v. Cellular Info. Sys.*, 673 A.2d 148, 155 (Del. 1995) (in applying the *Guth* test, “[n]o one factor is dispositive and all factors must be taken into account insofar as they are applicable”).
49. 36 N.Y.S.2d at 370.
50. 23 Del. Ch. at 271.
51. *Broz*, 673 A.2d at 155.
52. *Id.*
53. *See Johnston v. Greene*, 121 A.2d 919, 35 Del. Ch. 479 (1956); *Burg v. Horn*, 380 F.2d 897, 901 (2d Cir. 1967).
54. *Burg*, 380 F.2d at 901.
55. *Alexander & Alexander of N.Y., Inc. v. Fritzen*, 147 A.D.2d 241, 248, 542 N.Y.S.2d 530 (1st Dep’t 1989).
56. *See Turner*, 36 N.Y.S.2d at 370.
57. *Rapistan Corp. v. Michaels*, 203 Mich. App. 301, 315, 511 N.W.2d 918 (1994).
58. *See id.* at 316 (rejecting corporate opportunity claim in part because minimal company assets used to pursue opportunity).
59. *See Turner*, 36 N.Y.S.2d at 370.
60. *See Guth*, 23 Del. Ch. at 271; *Broz*, 673 A.2d at 155–56 (remanding for consideration of financial inability defense); *Odyssey Partners, L.P. v. Fleming Cos.*, 735 A.2d 386, 412 (Del. Ch. 1999) (“ABCO was insolvent and lacked the financial capacity to acquire the Chemical Bank loan itself. Thus, there was no ‘corporate opportunity’ to which it was entitled.”); *Yiannitsis v. Stephanis by Sterianou*, 653 A.2d 275, 277–78 (Del. 1995) (declining to follow Court of Chancery’s stricter standard requiring a finding of “insolvency-in-fact” to assert financial inability, holding that Chancery Court could even consider a temporary or practical insolvency standard).
61. *See Ellzey v. Fyr-Pruf, Inc.*, 376 So. 2d 1328, 1334–35 (Miss. 1979) (holding that balance-sheet insolvency is evidence of “unquestioned financial inability [and is] *conclusive* against a finding that a business opportunity is also a corporate one”) (emphasis added); *Jasper v. Appalachian Gas Co.*, 152 Ky. 68, 79, 153 S.W. 50 (1913) (dismissing corporate opportunity claim in part because corporation was financially unable to take it); *A.C. Petters Co. v. St. Cloud Enters., Inc.*, 301 Minn. 261, 267, 222 N.W.2d 83 (1974) (same); *Ostrowski v. Avery*, 243 Conn. 355, 374–75, 703 A.2d 117 (2005) (financial inability is affirmative defense to corporate opportunity claim); *Elec. Dev. Co. v. Robson*, 148 Neb. 526, 538–39, 28 N.W.2d 130 (1947) (recognizing that corporate opportunity claims are barred where corporation is financially incapable of continuing its business, but not for mere “technical insolvency”); *Nicholson v. Evans*, 642 P.2d 727, 731–32 (Utah 1982) (same); *Klinicki v. Lundgren*, 298 Or. 662, 675, 695 P.2d 906, 915 (1985) (holding that financial inability is non-dispositive but relevant factor); *Miller v. Miller*, 301 Minn. 207, 224–25, 222 N.W.2d 71 (1974) (same); *Racine v. Weisflog*, 165 Wis. 2d 184, 194, 477 N.W.2d 326 (Wis. Ct. App. 1991) (same).
62. 147 A.D.2d at 247.
63. *See id.*
64. *See Turner*, 36 N.Y.S.2d at 370.
65. *Alexander*, 147 A.D.2d at 249.
66. *See Turner*, 36 N.Y.S.2d at 370.
67. *See Marx v. Akers*, 88 N.Y.2d 189, 200, 644 N.Y.S.2d 121 (1996); *Park River Owners Corp. v. Bangser Klein Rocca & Blum, LLP*, 269 A.D.2d 313, 313, 703 N.Y.S.2d 465 (1st Dep’t 2000).