

Business Judgment Rule in the Amendment of the State-Owned Enterprises Law

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Abstract

The third amendment to the BUMN Law marks a new paradigm in BUMN management, adopting the Business Judgment Rule (BJR) doctrine. The material of the amendment is that BUMN directors cannot be held legally responsible for losses that occur if it is proven that the loss was not caused by error or negligence, decisions were taken in good faith and caution, there was no conflict of interest, and preventive measures were taken to prevent or stop losses. This BJR changes the pattern of directors' accountability, BUMN losses are no longer considered state financial losses so that they are not included in the realm of corruption based on the Corruption Law, this study uses a normative legal method through a doctrinal and conceptual approach, and uses secondary data. The analysis used uses the deductive method. With the amendment to the Law, it provides guidance for directors to be more careful in carrying out BUMN business processes. Providing certainty to corporate directors professionally without being overshadowed by fear of criminalization.

Keywords: state losses, criminalization, corruption

Abstrak

Perubahan ketiga UU BUMN menandai paradigma baru dalam pengelolaan BUMN, mengadopsi doktrin Business Judgment Rule (BJR). Materi perubahan tersebut yang mana direksi BUMN tidak dapat dimintai pertanggungjawaban hukum atas kerugian yang terjadi jika terbukti bahwa kerugian bukan disebabkan oleh kesalahan atau kelalaian, keputusan diambil dengan itikad baik dan kehati-hatian, tidak adanya konflik kepentingan, dan mengambil langkah pencegahan untuk mencegah atau menghentikan kerugian. BJR ini mengubah pola pertanggungjawaban direksi, kerugian BUMN tidak lagi dianggap sebagai kerugian keuangan negara sehingga bukan termasuk dalam ranah korupsi berdasarkan UU Tipikor, penelitian ini metode yuridis normatif melalui pendekatan doktrinal dan konseptual, serta menggunakan data sekunder. Analisis yang digunakan menggunakan metode deduktif. Dengan adanya perubahan UU tersebut memberikan panduan bagi direksi untuk lebih hati-hati dalam menjalankan proses bisnis BUMN. Memberikan kepastian kepada direksi korporasi secara profesional tanpa dibayangi rasa takut akan kriminalisasi.

Kata kunci: kerugian negara, kriminalisasi, korupsi

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1. INTRODUCTION

BUMN have unique characteristics where the orientation is not on profit alone, but rather carrying out social responsibility and public services. BUMN, whose capital is mostly or wholly controlled by the state, in this case puts BUMN in a strategic position to support national development and ensure the availability of basic services for the community. In their commercial role, BUMN operate like private companies that are required to be competitive, efficient and able to generate profits that can contribute to state revenue. However, unlike pure business entities, BUMN are also tasked with serving the public interest, such as maintaining price stability, providing infrastructure, or reaching remote areas that are commercially unattractive. This dual function creates its own challenges as BUMN management must be able to balance the achievement of financial targets with the fulfillment of social obligations. Therefore, the management of BUMN requires a strong and flexible governance framework that avoids conflicts of interest, encourages professionalism, and provides legal protection for decision-makers.

The board of directors is responsible for managing state-owned enterprises that are not only profit-oriented but also carry out public service functions. In carrying out these tasks, the board of directors often faces strategic decision-making that involves high business risks. In practice, not all business decisions will yield profits, and there is a risk of losses. This risk of loss is a common occurrence in the business world. However, in the context of state-owned enterprises (BUMN), losses are interpreted as a form of deviation or potential loss to the state, even tho decisions have been made professionally and in good faith.

Legal protection for directors becomes a primary focus to encourage their courage in making strategic business decisions. Without adequate legal protection, the board of directors will tend to be conservative and avoid the innovations or business expansions that are actually needed to enhance the company's competitiveness. One form of relevant legal protection is the implementation of the Business Judgment Rule (BJR), which can provide legal immunity for business decisions made rationally, based on adequate information, without conflicts of interest, and in good faith. This principle is important to ensure that the management of state-owned enterprises (BUMN) remains dynamic,

professional, and in line with sound business logic, without being overshadowed by an unreasonable fear of legal risks.

In the era of global competition and rapidly changing economic dynamics, the professionalism of BUMN management becomes the key to enhancing the competitiveness and performance of state-owned enterprises. Professional management is required to make business decisions quickly, accurately, and with a focus on business sustainability. However, the reality on the ground shows that BUMN directors often get trapped in the fear of criminalization if a business decision does not yield the expected results or causes losses. In fact, in the business world, losses are part of the risks inherent in every strategic decision. That fear can hinder innovation, slow down decision-making, and reduce the courage to explore new business opportunities.

For that reason, it is very important to create a legal climate and corporate governance that supports the courage of SOE management in making business decisions responsibly. A legal framework is needed that provides certainty, that as long as business decisions are made based on the principle of prudence, adequate information, and without conflicts of interest, management cannot be criminally prosecuted. The BJR principle becomes relevant in this context as a legal instrument that protects management's freedom to act rationally without the threat of criminalization. With such protection in place, professionalism within state-owned enterprises (BUMN) can grow healthily, creating more innovative and progressive management, and steering the company toward a competitive and sustainable direction.

The amendment of the BUMN Law has become an urgent necessity in the development of the business world, given the complexity of managing state-owned enterprises amidst free market competition. For two decades, this regulation has been the legal foundation in the management of state-owned enterprises (SOEs), but it has not yet fully addressed the challenges of the times that demand adaptive, professional, and politically neutral corporate governance. One of the main weaknesses of the current BUMN Law is the lack of accommodation for the BJR principle, which puts the board of directors in a vulnerable position to criminalization when a business decision results in a loss, even if it was made fairly and professionally.

The integration of the BJR principle in the revision of the State-Owned Enterprises Law is very important to protect the board of directors and management from potential misuse of law enforcement against business decisions. With the explicit recognition of this principle in the law, legal certainty will be created that as long as decision-making is conducted in good faith, based on sufficient information, without conflicts of interest, and in the interest of the company, the board of directors cannot be held criminally or civilly liable for the consequences of those decisions. This will encourage the courage of BUMN management to be more innovative and progressive in addressing business challenges, without being overshadowed by the fear of disproportionate legal risks.

The transactions carried out must be based on the principles of prudence and good faith. As for making a director a suspect, the act must be thoroughly investigated to determine whether it falls within the realm of criminal activity or not. If not, then every decision made by the board of directors that results in a loss will lead to acts of corruption.¹ From the background, there are the following issues: What is the position and application of the BJR principle in the management of state-owned enterprises (BUMN)? What is the urgency of applying the BJR principle in the amendment of the BUMN Law?

2. RESEARCH METHODS

The research method used is normative juridical, which involves analyzing legislation in relation to legal theories and doctrines. The approaches used in this research are the statute approach and the comparative approach. The statute approach in this will involve a comprehensive inventory of various laws and regulations related to the research subject. The comparative approach in this research involves comparing the concept of BJR in Indonesia with the concept of BJR in the United States to formulate an appropriate BJR concept for application in Indonesia. The data used consists of secondary data comprising primary legal materials in the form of legislation (Law No. 40 of 2007 on Limited Liability Companies, Law No. 19 of 2003 on State-Owned Enterprises as

¹ Dhaifina Fitriani, "Perlindungan Direksi Melalui Business Judgment Rule (Studi Analisis Kasus Karen Agustiawan Mantan Dirut Pertamina)," *Jurnal Hukum & Ekonomi Syariah* 5, no. 2 (2020): 70–87, <https://doi.org/https://doi.org/10.32505/muamalat.v5i1.1444>.

amended by Law No. 1 of 2025 on the third amendment to Law -Law No. 19 of 2003 on State-Owned Enterprises, Law No. 17 of 2003 on State Finance), secondary legal materials (journals, theses, dissertations, and others), and tertiary legal materials (encyclopedias). The data collection method is literature review. Analysis uses a deductive method based on the data obtained, from which conclusions are drawn the data.

3. RESULTS AND DISCUSSION

BJR is a legal principle that provides protection to the board of directors or company management from legal claims arising from business decisions made fairly and in good faith. This principle acknowledges that in the business world, every business decision carries risks and the outcomes cannot always be accurately predicted. Therefore, as long as the board of directors acts in good faith, has a rational basis for their considerations, is free from conflicts of interest, and aims for the best interests of the company, they cannot be held legally accountable, either criminally or civilly, if the decision results in losses.

In this context, the interests of the company must be prioritized, and the decisions made by the board of directors should reflect good faith and a focus on the common business interests. If a director is proven to have taken business opportunities for themselves without giving the company a chance, then the director can be considered to have violated their fiduciary duty and can be held legally accountable both civilly and criminally.

In practice, this doctrine is very important to apply, especially in the environment of state-owned enterprises (BUMN), where the board of directors not only manages state assets but is also responsible for public trust. The application of this principle becomes an inseparable part of good corporate governance, ensuring that the company's strategic decisions are not contaminated by the personal interests of the management. By upholding the Doctrine of Corporate Opportunity, the company will be better protected from the abuse of power and potential losses due to unethical practices by its internal management.

Bismar Nasution and Erman Rajagukguk argue that the principle of the business judgment rule has been adopted in Law No. 40 of 2007 concerning Limited Liability Companies (LLC Law), particularly in Article 97 paragraph (5), which essentially states

that the board of directors is exempted from personal liability for company losses if such losses occur not due to their mistakes or negligence, but are carried out in good faith and with caution, aligned with the company's objectives and purposes, and without any direct or indirect conflict of interest. The same is also regulated in Article 115 paragraph (5) of the Company Law, which applies to members of the Board of Commissioners.²

BJR aims to create a balance between protecting the company and managerial freedom. Without this principle, the directors would be reluctant to make strategic or innovative decisions due to the fear of potential criminalization or legal lawsuits if the outcomes do not meet expectations. With the existence of BJR, the management has the space to act decisively and adaptively in facing market changes or taking legally permissible business risks. BJR also strengthens the position that business failure is not automatically a legal violation if the decision-making process adheres to standards of prudence.

In the context of state-owned enterprises (BUMN), the application of the Business Judgment Rule (BJR) becomes highly relevant because BUMN managers often find themselves trapped by the fear of legal abuse by law enforcement agencies, especially when business decisions result in state losses. The regulations mentioned are governed by Article 97 paragraphs (3, 4), Article 104 paragraphs (2, 3), Article 108 (1), Article 114 paragraphs (2, 3, 4), Article 115 paragraphs (1, 2) of the 2007 Company Law.

Therefore, the integration of the BJR principle into the legal system and regulations of state-owned enterprises (BUMN) is crucial to ensure fair legal protection and promote managerial professionalism. With the presence of the BJR, BUMN management can focus more on taking strategic steps without being burdened by excessive fear of the potential criminalization of legitimate and rational business decisions. The implementation of the BJR principle normatively begins to be seen in several legal provisions, particularly in the Company Law, specifically in Article 92 and Article 97 of

² Gatut Priyo Sembodo, Arman Nefi, and Efa Laela Fakhriah, "Urgensi Penerapan Prinsip Business Judgment Rule Dalam Peraturan Pemerintah Nomor 63 Tahun 2019 Tentang Investasi Pemerintah," *Jurnal Poros Hukum Padjadjaran* 3, no. 2 (May 25, 2022): 185–208, <https://doi.org/10.23920/jphp.v3i2.789>.

the Company Law. Although not explicitly mentioned with the term "Business Judgment Rule," the substance of this principle, which is the protection of rational and reasonable business decisions, is reflected in these provisions. This principle then developed through judicial practice and legal doctrine, particularly in corporate cases involving losses due to board decisions.

However, in practice, the implementation of the BJR principle in the management of state-owned enterprises (BUMN) faces many obstacles and challenges. Many business decisions made by BUMN directors are misinterpreted as actions detrimental to state finances, even though they were made with rational business considerations. Law enforcement agencies such as the Prosecutor's Office and the Corruption Eradication Commission (KPK) sometimes use a criminal approach to losses that are actually legitimate business risks, not the result of abuse of authority. This causes fear in decision-making and makes many BUMN managers defensive or stagnant in carrying out their strategic roles.

To strengthen the implementation of the BJR in Indonesia, it is necessary to affirm this principle in more specific regulations, especially in the amendment of the BUMN Law. Additionally, there needs to be a broader understanding among law enforcement officials and the public regarding the difference between reasonable business losses and acts of corruption. Socialization, legal education, and strengthening the role of the board of commissioners in internal supervision are also important steps to ensure that the BJR principle can be applied fairly and consistently, in order to promote professional state-owned enterprise governance.³

The characteristic of state-owned enterprises (BUMN) is the separation of the legal entity's assets from the assets of its owners and managers. Therefore, a legal entity in the form of a Limited Liability Company has assets that are separate from the assets of the Board of Directors (as managers), the Board of Commissioners (as supervisors), and the Shareholders (as owners). This applies to Foundations and Cooperatives. The BUMN Law explicitly incorporates the BJR principle into the legal framework of BUMN. Article

³ Erman Rajaguguk, "Pengertian Keuangan Negara Dan Kerugian Negara, "Pengertian Keuangan Negara Dalam Tindak Pidana Korupsi" (UIN Sunan Kalijaga, 2006).

3Y (and previously proposed Article 3Z) states that BUMN officials, including Ministers and directors, cannot be held liable for investment decisions as long as those decisions are made professionally according to the BJR principle, namely good faith, prudence, without conflict of interest, and based on adequate information. In addition, the revision of Article 9F paragraph (1) emphasizes that board members who can prove their actions meet the BJR criteria cannot be held accountable for BUMN's losses.

The paradigm shift in this law transforms state-owned enterprises (BUMN) from entities fully subject to the state financial regime into corporate entities that prioritize business logic and modern governance. The phrase "separated state wealth" has been removed, and the management of SOEs is considered a corporate matter, not a state fiscal administration. The losses of state-owned enterprises (SOEs) caused by the board of directors do not automatically become state losses but rather business risks for the shareholders, and therefore cannot be immediately subject to criminal corruption sanctions.⁴

International comparison, namely BJR in America, is a product of case law that has been applied by courts in America. This emphasizes the duties of directors, particularly the duty to act with full care and in good faith and in the best interest of the company, as well as other duties of directors formulated in the MBCA 2016, which are more the result of a long journey of efforts to formulate BJR as a legal obligation. MBCA (The Model Business Corporation Act) is a codification that has been implemented in America since 2016. The MBCA 2016 regulates two main duties of directors, namely the duty of care and the duty of loyalty (terms used for fiduciary duties in America). In the duty of care, directors must act with full caution, concern, and attention, and these actions must be supported by accurate information.

The regulation of directors' responsibilities in managing and representing the company, related to the BJR doctrine, is approached differently in various legal systems. America adheres to a common law system, where the business judgment rule is not

⁴ Ruslan Efendi, "Kajian Ontologi: UU 1 Tahun 2025 BUMN, Keuangan Negara Atau Bukan?," Kumparan, 2026, <https://kumparan.com/cakrush/kajian-ontologi-uu-1-tahun-2025-bumn-keuangan-negara-atau-bukan-250B268aKBC>.

codified but based on jurisprudence. Australia was the first country within the common law tradition to explicitly incorporate the Business Judgment Rule (BJR) in its 1999 Company Law amendments, which was then retained in the 2001 Company Law amendments (The Australia Corporations Act 2011). If examined closely, BJR is actually a minor improvement to the duty of care that originated from common law rules or has been codified in statutory law. Indonesia has adopted BJR in the Company Law, which protects directors and commissioners. Regarding the accountability of directors and commissioners, it is explicitly regulated that both are personally liable or jointly liable if the director is negligent or not careful in performing their duties in good faith and full responsibility, or if the commissioner is negligent and not careful in performing their supervisory duties, causing losses or bankruptcy for the company. The principles related to the BJR doctrine include the principles of good faith, prudence, utility, and legal certainty.⁵

The regulation of directors' responsibilities in managing and representing companies, in relation to the BJR doctrine, is approached differently in various legal systems. The United States follows the common law system, where the business judgment rule is not codified but is based on case law.⁶ Australia was the first country within the common law tradition to explicitly incorporate the BJR into its Companies Act amendments in 1999, which were subsequently retained in the 2001 Companies Act amendments (The Australia Corporations Act 2011). Upon closer examination, the BJR is actually a minor improvement to the duty of care that originated from common law rules or those codified in legislation.

Indonesia has adopted the BJR in the Company Law, which protects directors and commissioners. Regarding the liability of directors and commissioners, it is clearly stipulated that both are personally liable or jointly liable if a director is negligent or fails to exercise due care in performing their duties with good faith and full responsibility, or

⁵ Yafet Yosafet Wilben Rissy, "Ketentuan Dan Pelaksanaan Business Judgement Rule Di Amerika, Australia Dan Indonesia," *Masalah-Masalah Hukum* 49, no. 2 (April 30, 2020): 160–71, <https://doi.org/10.14710/mmh.49.2.2020.160-171>.

⁶ Viator Harlen Sinaga et al., "Responsibilities of the Board of Directors in Limited Liability Companies," *Justice Voice* 3, no. 1 (April 21, 2025): 17–28, <https://doi.org/10.37893/jv.v3i1.1134>.

if a commissioner is negligent and fails to exercise due care in performing their supervisory duties, resulting in losses or bankruptcy for the company. The principles related to the BJR doctrine include the principles of good faith, due diligence, benefit, and legal certainty.

The characteristics of BJR in Indonesia, as outlined in legislation and court rulings, emphasize the mechanism of the board of directors before making decisions. This involves prioritizing aspects that include understanding the decision to be made and aspects that encompass the desire and understanding of the potential consequences of that decision. Additionally, the characteristics of BJR in Indonesia emphasize that the BJR doctrine applies if corporate decisions by the board of directors do not involve fraud, intentional errors, legal violations, or conflicts of interest.⁷

BUMN is a business entity whose entire or most of its capital is owned by the state thru direct capital participation derived from separated state wealth. The application of BJR is not merely a business judgment but involves rules or regulations that must be adhered to by the BUMN board of directors in managing the BUMN Persero business.

The rules that must be adhered to by the BUMN Board of Directors are strictly regulated in the BUMN Law, the Company Law, and various other implementing regulations. Specifically, Article 5 paragraph (3) of the BUMN Law states that in carrying out their duties, the board of directors must adhere to the BUMN's articles of association and applicable laws and regulations, as well as implement the principles of good corporate governance (GCG), namely professionalism, efficiency, transparency, independence, accountability, responsibility, and fairness. Therefore, in every business decision-making, the board of directors is not only required to pursue profit but also must ensure that every strategic step taken aligns with legal provisions and GCG principles. This research views that the integration of legal compliance, consistency with the articles of association, and

⁷ Faisal Santiago, "Reconstruction of the Business Judgment Rule Doctrine in Indonesia: Legal Comparison with England, Canada, the United States, and Australia," *Jurnal IUS Kajian Hukum Dan Keadilan* 12, no. 1 (April 29, 2024): 107–21, <https://doi.org/10.29303/ius.v12i1.1371>.

the application of GCG principles are the main foundations for the board of directors in carrying out a responsible, integrity-driven, and sustainable managerial role.⁸

Satjipto Rahardjo and Philipus M. Hadjon, as quoted by Luthvi Febryka Nola, state that legal protection is a systematic effort to organize and balance various interests in society to prevent conflicts, so that every individual can obtain and enjoy the rights guarantyd by law. This idea is in line with Fitzgerald's thinking on the purpose of law, which is to integrate and coordinate various social interests thru regulatory mechanisms that provide both protection and limitation to those interests.

In this context, legal protection is classified into two main forms: preventive legal protection and repressive legal protection. Preventive legal protection aims to prevent disputes from occurring in the first place and encourages the government to be more cautious and prudent in exercising discretionary powers, while repressive legal protection focuses on resolving disputes that have already occurred thru legal channels to restore the violated rights and provide justice for the aggrieved party.

The legal position of Persero, which lies at the intersection of public law, particularly state financial law and anti-corruption law, and private law in the form of corporate law, creates conceptual and practical problems, especially in interpreting the losses experienced by Persero. From the perspective of state financial law and anti-corruption law, the losses suffered by Persero are often viewed as state financial losses. This results in every loss arising from Persero's business activities being classified as a corruption crime and resolved thru anti-corruption legal instruments, without considering the business dynamics and inherent business risks in corporate management.

On the contrary, from the perspective of limited liability company law, a Persero is a private legal entity subject to corporate law principles, including the principle of corporate legal independence and the application of the BJR principle. Within this framework, the losses incurred by a Persero are considered corporate losses due to business risks, which should be resolved thru internal mechanisms and corporate law, not

⁸ Eko Priyono, Agus Surono, and Sadino Sadino, "Doktrin Business Judgment Rule Dalam Memberikan Perlindungan Hukum Kepada Direksi Bumh (Studi Kasus PT. PLN)," *Jurnal Magister Ilmu Hukum* 7, no. 2 (July 7, 2022): 29, <https://doi.org/10.36722/jmih.v7i2.1264>.

thru a repressive criminal law approach. Therefore, when the status of state assets has been transferred to the assets of the Persero as an independent legal entity, such losses are no longer classified as state financial losses. The implication is that the resolution of losses in a Persero should ideally follow the principles of accountability in limited liability company law, rather than adopting a criminal corruption law approach that disregards managerial discretion in business decision-making.

In principle, a Limited Liability Company (Perseroan Terbatas) is an entity that is entirely within the realm of private law, even in the context of State-Owned Enterprises (BUMN), where the majority or entire ownership is held by the state. As an independent legal entity, a Limited Liability Company (LLC) is subject to the regime of limited liability company law, not state administrative law. Therefore, the basis for the regulation and operation of PT, including State-Owned Enterprises (BUMN), should not be mixed with the principles of public law that govern state institutions or public officials. In this context, the presence of the state as a shareholder does not automatically change the private legal character of the company itself.

However, there are often misunderstandings in interpreting the concepts of discretion and responsibility of directors in running a company. The position of director in a limited liability company is often mistakenly perceived as a form of discretionary authority similar to that of a state administrative official, even though the two have very different scopes. Discretion in public administration law is subject to strict limits and intensive oversight, whereas in a corporate context, board decisions are more appropriately analyzed through the BJR principle. The BJR principle provides legal protection for directors regarding business decisions made in good faith, with reasonable care, and solely in the best interests of the company, even if such decisions later result in losses. Therefore, a proper understanding of the limits of discretion in public law and the scope of decision-making in private law is crucial to prevent the criminalization of business decisions that are actually lawful and rational.⁹

⁹ W Darmawangsa, "Interpretasi Yang Salah Mengenai Business Judgment Rule Pada Substansi Dan Struktur Hukum Di Indonesia," *UNES Law Review* 5, no. 3 (2023): 1356–68, <https://doi.org/https://doi.org/10.31933/unesrev.v5i3.451>.

The issues in question may include planning, budgeting, promoting the company's business, and obtaining credit. Second, there should be no personal interest or bias on the part of the board of directors in making decisions. This means that the board of directors should not derive personal financial gain from business decisions that conflict with the interests of the company. Third, the board of directors should have obtained information and demonstrated efforts to obtain it when making decisions.¹⁰

CONCLUSION AND SUGGESTION

The Business Judgment Rule principle serves as an important bridge between management's courage in taking business risks and the legal accountability requirements inherent in the position of director. In a business world full of uncertainty, strategic decision-making often requires the courage to act quickly and innovatively, even though there is no guarantee of success. On the other hand, especially in state-owned enterprises (SOEs), directors must remain legally accountable for their actions. This is where the BJR principle comes into play, providing legal protection for directors as long as decisions are made in good faith, with rational consideration, based on adequate information, and without conflicts of interest. Thus, BJR enables the creation of a dynamic and progressive managerial climate without compromising the principles of transparency and accountability in corporate governance.

Amendments to the State-Owned Enterprises Law should be aimed at ensuring reasonable legal protection for business decision-makers, particularly directors and management, so that they can perform their corporate functions professionally without fear of criminalization. In the dynamic and high-risk business environment, not every strategic decision will yield profits, but this does not mean it should be the basis for criminal liability as long as the decision-making process is conducted in good faith, based on adequate information, and without conflicts of interest. Therefore, changes to the SOE Law need to explicitly incorporate the BJR principle as a legal safeguard, so that the

¹⁰ Berry Gunawan and Ariawan Gunadi, "Doctrin Business Judgment Rule Analysis as an Effort to Protect the Law of Directors of Limited Liability Companies in Indonesia and the United States," *Educity Kajian Ilmu Sosial Dan Pendidikan* 2, no. 10 (October 25, 2023): 1198–1209, <https://doi.org/10.57096/edunity.v2i10.160>.

courage to act remains in line with the principle of accountability. With strong legal guarantees, SOE management will be encouraged to be more innovative, responsive to change, and focused on achieving corporate goals without being hindered by fear of disproportionate legal sanctions.

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