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Georgia Supreme Court Refines the Business Judgment Rule for Directors and Officers

On July 11, 2014, the Supreme Court of Georgia confirmed in *Fed. Deposit Ins. Corp v. Loudermilk*, No. S14Q0454, 2014 WL 3396655 (Ga. July 11, 2014), that claims of ordinary negligence against corporate directors and officers are foreclosed by the business judgment rule when the alleged negligence concerns only "the wisdom of their judgment." *Id.* at *5. The unanimous *Loudermilk* opinion expressly rejected a formulation of the rule urged by a bank's officers and directors that would have insulated them from *all* ordinary negligence claims. *Id.* The Supreme Court instead held that officers and directors can be subject to claims assailing the process by which they arrived at their business decisions. *Id.*

Background

The FDIC, as receiver for the failed Buckhead Community Bank, sued nine former officers and directors of the bank in federal district court in Atlanta, alleging that the defendants were negligent in making certain loans, which led the bank to sustain nearly $22 million in losses. *Id.* at *1. The defendants moved to dismiss, arguing that Georgia's version of the business judgment rule relieves officers and directors of liability for ordinary negligence. *Id.* The FDIC argued that the business judgment rule either was not a part of Georgia law or, alternatively, that the rule does not apply to bank officers and directors because it has been statutorily overruled by the enactment of Georgia's Banking Code.

Unable to determine a clear answer from Georgia law, the federal district court certified the question of whether Georgia's business judgment rule precludes a claim by the FDIC for ordinary negligence against bank officers and directors as a matter of law. *Id.*

Holdings

Citing over a century of its own precedent, the Georgia Supreme Court held that the business judgment rule is a part of Georgia common law. *Id.* at 5. Nevertheless, the court carefully noted that Georgia's formulation of the rule differentiates between two types of claims made against business leaders: it generally prohibits claims that dispute the merit of a business decision but permits claims that assail the process by which the decision was made. *Id.* Specifically, the court concluded that the business judgment rule "generally precludes claims against officers and directors for their business decisions that sound in ordinary negligence, except to the extent that those decisions are shown to have been made without deliberation, without the requisite diligence to ascertain and assess the facts and circumstances upon which the decisions are based, or in bad faith." *Id.* The court also determined that the provision of the Georgia Banking Code describing the standard of care for bank directors and officers did not overrule the common law business judgment rule, but rather codified and reaffirmed it. *Id.* at *7-11.

The *Loudermilk* court also overruled two recent Georgia Court of Appeals opinions suggesting that the business judgment rule bars *all* ordinary negligence claims against officers and directors. *Id.* at *11 (overruling *Flexible Prods. Co. v. Ervast*, 284 Ga. App. 178, 643 S.E.2d 560 (2007), and *Brock Built, LLC v. Blake*, 300 Ga. App. 816, 686 S.E.2d 425 (2009)). The *Loudermilk* court stated that the formulation of the business judgment rule suggested in those cases — which would bar negligence claims against directors and officers even when it was alleged that a business decision was "uninformed or unreasoned"

— finds no support in Georgia common law, which "reflects a more modest business judgment rule." *Id.* at *6.

Implications

Although the *Loudermilk* opinion provides some clarification of the scope of the business judgment rule in Georgia, the deliberative process used by directors and officers remains subject to attack. Thus, to help minimize their potential liability, directors and officers should carefully document the process used to arrive at business decisions.

Loudermilk also serves as a timely reminder for directors and officers to confirm that they are adequately protected under their Directors' and Officers' (D&O) insurance policies. Given *Loudermilk*'s explicit refusal to afford blanket protection for the decision process employed by corporate directors and officers, it is important that businesses — and individual insureds — have appropriate D&O insurance in place, with coverage extending to the deliberative processes utilized by the company's directors and officers.

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