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Client Alert

Corporate Practice Group

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Georgia House Bill 192 – Codifying and Clarifying the Business Judgment Rule in Georgia

Georgia Legislature Acts to Nullify Georgia Supreme Court's Decision in FDIC v. Loudermilk

After passing both the Georgia House of Representatives and the Georgia Senate, House Bill 192 is awaiting the signature of the Governor to become law. House Bill 192 will amend the Georgia Corporate Code to codify the business judgment rule applicable to directors and officers of Georgia corporations, including financial institutions. In addition, the language of House Bill 192 provides that the operative liability standard for directors and officers is *gross* negligence (as opposed to *simple* negligence under *FDIC v. Loudermilk*).[1] These changes, if signed into law, will confirm that the business judgment rule is alive and well in Georgia.

Amendment Language

Among other changes, House Bill 192 will insert language into the Georgia Corporate Code codifying that "[t]here shall be a presumption that the process [a director/an officer] followed in arriving at decisions was done in good faith and that such [director/officer] has exercised ordinary care; provided, however, that this presumption may be rebutted by evidence that such process constitutes gross negligence by being a gross deviation of the standard of care of [a director/an officer] in a like position under similar circumstances."[2]

Effect on the Business Judgment Rule in Georgia

The most obvious and impactful change of the language set forth above will be to overrule and render moot the Georgia Supreme Court's 2014 decision in *Loudermilk*. In *Loudermilk*, the Georgia Supreme Court confirmed the applicability of the business judgment rule in Georgia, but ruled that "the business judgment rule at common law forecloses claims against officers and directors that sound in ordinary negligence when the alleged negligence concerns only the wisdom of their judgment, but it does not absolutely foreclose such claims to the extent that a business decision did not involve 'judgment' because it was made in a way that did not comport with the duty to exercise good faith and ordinary care."[3]

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Stated differently, under *Loudermilk*, the business judgment rule insulated directors and officers from claims of negligence concerning the *wisdom* of their judgment, but it did not foreclose negligence claims alleging that decisions were made based on an inadequate *process*. As such, directors and officers could, as a result of *Loudermilk*, be held liable for a breach of their duty of care for acts of *ordinary* negligence with respect to claims alleging an inadequacy in the process by which a decision was reached. Recognizing this substance vs. process distinction, the Georgia Supreme Court went on to note that "[t]o the extent that more protection for officers and directors is desirable, the political branches may provide it."[4]

House Bill 192 is a direct response to the Georgia Supreme Court's invitation to provide greater legislative protection for directors and officers. The Bill codifies the business judgment rule and eliminates the *Loudermilk* substance/process distinction by providing a statutory presumption that directors and officers acted with due care. As a practical matter, the Bill should make it easier for directors and officers to obtain early dismissal of duty of care claims by ensuring that both the *decision-making process* and the *decision itself* will be judged against a gross negligence standard.

Takeaways

In passing House Bill 192, the Georgia Legislature aims to provide via statute that the business judgment rule is alive and well in Georgia and should be applied in the same manner as other jurisdictions, including Delaware, that require *gross* negligence (not just *ordinary* negligence) in order to impose liability for a breach of the duty of care.[5] While it remains to be seen how Georgia courts will interpret and apply the gross negligence standard, we believe the Bill will provide strong protection for directors and officers against duty of care claims.[6]

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[1] *FDIC v. Loudermilk*, 761 S.E.2d 332 (Ga. 2014).
[2] HB 192, 2017-2018 Reg. Sess. (Ga. 2017).
[3] *FDIC v. Loudermilk* at 338.
[4] *Id.* at 345.
[5] *See, e.g., Brehm v. Eisner*, 746 A.2d 244, 259 (Del. 2000) ("[I]n making business decisions, directors must consider all material information reasonably available, and … the directors' process is actionable only if grossly negligent.").
[6] *See, e.g., In re Lear Corp., S'holder Litig.*, 967 A.2d 640, 651-52 & nn. 44-45 (Del. Ch. 2008) (explaining that "[t]he definition of gross negligence used in [Delaware's] corporate law jurisprudence is *extremely stringent*," equivalent to "reckless" or even wanton conduct).