

# PUBLICATION

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## Business Judgment Rule in Georgia: Not a "Get Out of Jail Free Card" for Officers and Directors

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The Georgia Supreme Court has adopted the Business Judgment Rule with a very important nuance that requires officers and directors to not only be prepared when making their decisions but to document their preparations in order to protect against potential liability. This is something every officer and director should put into practice now.

Although officers and directors of Georgia's companies have been relying on the Business Judgment Rule for years, if not decades, to protect them from personal liability when their business decisions are called into question, until recently, the Business Judgment Rule has not been explicitly approved by the Georgia Supreme Court.

The Business Judgment Rule, a creation of case law, presumes that, in making business decisions or taking corporate action, directors and officers acted in a good-faith, informed manner, and that a business action was taken in the best interest of the company even if the decision ultimately resulted in company losses. Under this presumption, an officer or director is protected from personal liability unless it is proven that he or she acted in bad faith, showed disloyalty, engaged in self-dealing or abused his or her discretion.

Rather than second-guessing the business decisions of officers and directors, Georgia's lower courts have regularly invoked the Business Judgment Rule. However, the Federal Deposit Insurance Corporation (FDIC) has repeatedly claimed in court filings that, despite the Business Judgment Rule, officers and directors of failed banks may be liable for simple negligence (i.e., failure to exercise the care of an ordinary prudent person under the same or similar circumstances).

This year, in *FDIC v. Loudermilk*, the Federal District Court for the Northern District of Georgia held that, absent a clear statutory reference or an explicit ruling from the Georgia Supreme Court, Georgia law does not mandate application of the Business Judgment Rule to preclude as a matter of law ordinary negligence claims in the banking context.

On July 11, 2014, the Supreme Court provided the explicit ruling sought by the Federal District Court, holding that while the Business Judgment Rule ordinarily insulates the wisdom of a business decision from judicial review and presumes officers and directors have acted in good faith and exercised ordinary care, such presumption can be rebutted. According to the Court, the Business Judgment Rule is not intended to "insulate mere dummies or figureheads from liability." Although the Court's decision was narrowly tailored to apply to bank officers and directors, the decision is likely to have broader implications, especially given the sound reasoning of the Court. While the plaintiff has the burden of rebutting the presumptions of the Business Judgment Rule, officers and directors of banks and other companies can reduce their risk of liability by documenting the care and diligence they exercise when making business decisions.

### Practice Tip

Under the Court's ruling, it is clear that officers and directors must make informed and deliberate decisions and cannot simply "call an audible" without knowing all of the plays. And, for practical purposes, it may not be

enough for directors and officers to exercise care and diligence in their decision making process; they should document their preparations.

It is reasonable for officers and directors to rely upon certain information as part of their diligence. So long as he or she does so in good faith, an officer or director may rely upon information, opinions, reports or statements prepared by (i) officers or employees whom the officer or director reasonably believes to be reliable and competent in the matters presented; (ii) legal counsel, public accountant or other advisors as to matters which the officer or director reasonably believes to be within such person's professional or expert competence; or (iii) a duly designated committee of the board, of which the officer or director is not a member, if the officer or director reasonably believes the committee merits confidence.

It is important for officers and directors to document whether the information relied on is of the sort described above. Further, if the officer or director has knowledge concerning the matter in question that would cause his or her reliance on such information to be unwarranted, then he or she should investigate further and proceed only when such doubts are resolved. Officers and directors should take detailed notes during their meetings with experts on whom they are relying. Further, boards of directors should keep thorough meeting minutes summarizing discussions by the directors in reaching a final decision, the results of the vote, and all reports and other information provided to the Board, attaching such reports to the meeting minutes. Officers and directors who suspect their decisions will be challenged should be especially careful to keep a log of what they did to prepare for making the decision and, of course, should actually take such steps to prepare.

For more information, please contact your Baker Donelson attorney or a member of our Mergers & Acquisitions group.