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Georgia Supreme Court Confirms Business Judgment Rule Protection

In a landmark decision, *FDIC v. Loudermilk*,[1] the Georgia Supreme Court confirmed that the business judgment rule protects Georgia's directors and officers, including bank directors and officers, from second-guessing of the wisdom of business decisions. With this ruling, scattershot allegations regarding the business decisions of directors and officers will not survive, and plaintiffs, such as the FDIC, must instead focus on the very narrow issue of whether the directors or officers, in making the business decisions, did so either without deliberation, without assessing the facts upon which the decision was based, or in bad faith.[2]

Background

Over the past four years, the FDIC, in its role as receiver of closed banks across the country, has brought nearly 100 lawsuits against former directors and officers, with claims resting upon the approval process of certain loans by the banks. Georgia has been a key battleground for such FDIC litigation because it suffered a high number of bank closures.

Nearly every director and officer in Georgia sued by the FDIC has argued that Georgia has a business judgment rule and that it affords substantial protection from challenges to the business decisions made by the directors and officers. In a string of decisions in the Northern District of Georgia, most courts agreed and dismissed the FDIC's claims of ordinary negligence.[3]

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1 *FDIC v. Loudermilk*, S14Q0454 (Ga. July 11, 2014). Alston & Bird LLP is counsel of record for the defendants in *FDIC v. Loudermilk*.

2 *Id.* at 13.

3 *FDIC v. Skow*, No. 1:11-cv-111 (N.D. Ga. Feb. 27, 2012) (J. Jones) (applying the business judgment rule to protect directors and officers), *reconsideration denied* (N.D. Ga. Aug. 14, 2012) *interlocutory appeal docketed* No. 12-15878-E (11th Cir. Nov. 26, 2012); *FDIC v. Blackwell*, No. 1:11-cv-3423 (N.D. Ga. Feb. 27, 2012) (J. Story) (applying business judgment rule); *FDIC v. Briscoe*, No. 1:11-cv-2303 (N.D. Ga. Aug. 14, 2012) (J. Jones) (applying business judgment rule); *FDIC v. Whitley*, No. 2:12-cv-170 (N.D. Ga. Dec. 10, 2012) (J. O'Kelley) (applying business judgment rule); *FDIC v. Miller*, No. 2:12-cv- 00042 (N.D. Ga. Dec. 26, 2012) (J. Story) (applying business judgment rule).

In late 2012, the FDIC brought suit against former directors and officers of The Buckhead Community Bank of Atlanta, Georgia.[4] The FDIC's factual allegations in *Loudermilk* are substantially similar to many of the other cases filed by the FDIC against directors and officers in Georgia, and the defendants in *Loudermilk* moved to dismiss certain claims based on the business judgment rule's protections. Judge Thomas Thrash of the Northern District of Georgia determined, however, that the extent to which the business judgment rule applied to bank directors and officers was unsettled under Georgia law, and thus certified a question to be decided by the Georgia Supreme Court.[5]

The *Loudermilk* Ruling

In the *Loudermilk* opinion, the Georgia Supreme Court initially observed that the "business judgment rule is a fixture in American law," and a "settled part of our common law in Georgia."[6] As summarized by the Court, "[i]f an officer or director has honestly exercised 'judgment' with respect to a business matter – that is, if her decision was made in a deliberative way, was reasonably informed by due diligence, and was made in good faith – the wisdom of the judgment cannot ordinarily be questioned in court."[7] The Court confirmed that the business judgment rule continues to be part of Georgia law and that it "generally precludes claims against officers and directors for their business decisions that sound in ordinary negligence,"[8] basing this ruling on the traditionally "strong judicial reluctance to question the business judgments of" corporate and bank directors and officers.[9]

The Court rejected the FDIC's argument that O.C.G.A. § 7-1-490(a) "supersedes" the common law business judgment rule and that "if a bank officer or director fails to exercise ordinary care, he is liable, period."[10] The Court held that the statute was intended to retain the common law and that it is consistent with the Court's interpretation of the business judgment rule, i.e. that "the implication of liability [as set forth in the statute] means only that an officer or director who acts in bad faith or fails to exercise such ordinary care with respect to the *process* for making a decision is liable."[11]

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4 First Amended Complaint, *FDIC v. Loudermilk*, No. 1:12-cv-4156, ECF 10 (N.D. Ga. Feb. 19, 2013).

5 *FDIC v. Loudermilk*, No. 1:12-cv-4156, ECF 26 (N.D. Ga. Nov. 25, 2013); *FDIC v. Loudermilk*, No. 1:12-cv-4156, ECF 27 (N.D. Ga. Nov. 25, 2013) (order certifying question). The Eleventh Circuit certified a similar question of law to the Georgia Supreme Court in *FDIC v. Skow*, 741 F.3d 1342 (11th Cir. 2013). The Georgia Supreme Court heard oral argument in the *Skow* case but has not yet issued a separate opinion in that case.

6 *FDIC v. Loudermilk*, S14Q0454, at 2, 13 (Ga. July 11, 2014).

7 *Id.* at 4.

8 *Id.* at 13.

9 *Id.* at 11.

10 *Id.* at 16-17.

11 *Id.* at 24 (emphasis added).

Under this decision, Georgia's business judgment rule is not a complete shield to liability for all claims regarding business decisions, but business decisions of bank directors and officers may form the basis of an actionable claim if – and only if – those decisions "are shown to be 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."[12] It is significant to note, however, that decisions made "without deliberation" or in "bad faith" are not, by their nature, claims of ordinary negligence. Thus, as a practical matter, ordinary negligence claims will be limited to those based upon whether the directors and officers had a reasonable process to evaluate the facts and circumstances in making business decisions.

The Court also offered further guidance regarding the practical application of the business judgment rule. First, "the standard of ordinary care for bank officers and directors is less demanding than the standard of 'ordinary diligence' with which most ordinary negligence claims are concerned."[13] In considering whether directors and officers' decision making processes were appropriate, the processes should be compared to the standard in the banking industry because "bank officers and directors are only expected to exercise the same diligence and care as would be exercised by 'ordinarily prudent' officers and directors of a similarly situated bank."[14] Second, the Court held that O.C.G.A. § 7-1-490(a) conclusively presumes the reasonableness of a director or officers' reliance on information presented by certain enumerated third-parties in making a business decision.[15] Third, the Court held that, even with respect to claims of negligence in the process involved in reaching a business decision, directors and officers are always presumed to have exercised ordinary care, and "the plaintiff bears the burden of putting forward proof sufficient to rebut it."[16]

Conclusion

With the *Loudermilk* decision, the Georgia Supreme Court has brought much-needed clarity to the protection afforded by the business judgment rule in Georgia. The Georgia Supreme Court has not yet issued a decision in the *FDIC v. Skow* case, which presented a closely related certified question from the Eleventh Circuit. As a result, it is unclear whether *Loudermilk* is the final word from the Georgia Supreme Court on the business judgment rule in Georgia.

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12 *Id.* at 13.

13 *Id.* at 30.

14 *Id.* at 31.

15 *Id.* at 31-32.

16 *Id.* at 33.

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