CASE NO. 12-15878-EE

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

FEDERAL DEPOSIT INSURANCE CORPORATION, AS RECEIVER OF INTEGRITY BANK OF ALPHARETTA, GEORGIA
PLAINTIFF-APPELLANT,

v.

STEVEN M. SKOW, ALAN K. ARNOLD, DOUGLAS G. BALLARD, CLINTON M. DAY, JOSEPH J. ERNEST, DONALD C. HARTSFIELD, JACK S. MURPHY, AND GERALD O. REYNOLDS,
DEFENDANTS-APPELLEES,

On Interlocutory Appeal from the
U.S. District Court for the Northern District of Georgia,
Case No., 11-cv-0111-SCJ (Jones, J.)

AMICUS BRIEF OF GEORGIA BANKERS ASSOCIATION AND COMMUNITY BANKERS ASSOCIATION OF GEORGIA IN SUPPORT OF APPELLEES

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and 11th Cir. R. 26.1-1, 26.1-2, and 26.1-3, the undersigned counsel of record for *Amici Curiae* Georgia Bankers Association and Community Bankers Association of Georgia hereby certifies that to the best of his knowledge, the certificate of interested persons and corporate disclosure statement submitted by the FDIC with its brief, as supplemented by the Appellees with their brief, is accurate. The undersigned counsel further certifies that the following persons should be added as interested persons in this matter:

Bielema, John R. - counsel for *Amici Curiae*

Bryan Cave LLP - counsel for *Amici Curiae*

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Community Bankers Association of Georgia – *Amicus Curiae*

Georgia Bankers Association – *Amicus Curiae*

The Georgia Bankers Association and Community Bankers Association of Georgia are non-profit organizations. They have no parent corporation, and no publicly held corporation owns 10% or more of their stock.

Pursuant to Fed. R. App. 26 and 29 the undersigned counsel hereby certifies that (a) no party's counsel authored the amicus brief in whole or in part; (b) no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and (c) no person other than the *amici curiae* and their members contributed money that was intended to fund preparing or submitting the brief.

Respectfully submitted this 24th day of April, 2013.

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STATEMENT OF THE ISSUES

Whether Georgia's business judgment rule, which insulates corporate directors from liability except for actions involving bad faith, fraud, disloyalty, or an abuse of discretion, bars claims for ordinary negligence against former or current directors of Georgia banks.[1]

STATEMENT OF FACTS: INTEREST OF *AMICI*

The Georgia Bankers Association is a trade and professional organization founded in 1892 to represent the interests of all banks and thrift institutions in the State of Georgia. Virtually every Georgia bank and thrift institution is a member. One of the GBA's objectives is to be the principal industry voice on banking issues to members, the media, policy makers and the public. The GBA has an interest in this appeal because it addresses a fundamental question of Georgia corporate governance law that directly affects its member banks.

The Community Bankers Association of Georgia was founded in 1969 to serve as a principal voice for Georgia's community banks. The CBA of Georgia's membership consists of approximately 230 community banks, most of which are small, local banks. As an advocate for the interests of community banks, the CBA of Georgia frequently weighs in on issues affecting community banks. The CBA

[1] This brief addresses only the first issue presented in the parties' briefs.

of Georgia, like the GBA, has an interest in this appeal because the fundamental corporate governance question raised significantly impacts its members.

Since the onset of the financial crisis in 2008, 85 banks in Georgia have closed. The FDIC in its receivership capacity has filed at least 14 lawsuits to date against former directors and officers of Georgia banks that failed during the financial crisis. In each case, the FDIC has alleged both gross negligence and ordinary negligence. The decision below was the first among these cases to decide whether the FDIC could pursue ordinary negligence claims in light of Georgia's business judgment rule. Since then, several other decisions have agreed with the reasoning of the decision below that, under established Georgia law, the business judgment rule bars ordinary negligence claims. See FDIC Br. at 2.

Amici have moved for leave of court to file this brief, pursuant to Federal Rule of Appellate Procedure 29.

SUMMARY OF ARGUMENT

The trial court correctly held that the business judgment rule mandates the dismissal of any and all claims against bank directors and officers that are based solely on allegations of ordinary negligence. This holding follows two recent Georgia Court of Appeals decisions that are directly on point, holding that directors and officers cannot be personally liable for mere ordinary negligence. *See Flexible Products, Inc. Ervast*, 284 Ga. App. 178, 643 S.E.2d 560 (2007);

Brock Built, LLC v Blake, 300 Ga. App. 816, 686 S.E.2d 425 (2009). Moreover, it is consistent with the decades-old rule that "courts will not interfere in matters involving merely the judgment of the majority in exercising control over corporate affairs." *Bartow Lumber Co. v Enwright*, 131 Ga. 329, 62 S.E.2d 233 (1908).

A healthy banking system requires talented and well-qualified bank directors and officers. That need has never been more important than it is today, with Georgia and the nation now in the long process of recovering from the worst financial crisis in over 70 years. For banks to be able to recruit and retain directors and officers effectively, those individuals must know that they will have the freedom and autonomy to consider and make difficult decisions affecting the bank, occasionally including decisions that carry risk, without fear of personal liability for innocent mistakes every time they approve a loan or exercise judgment.

In Georgia, and many other states, the business judgment rule provides a clear standard of judicial review that gives directors and officers the assurance they need to perform their tasks effectively. This rule not only allows directors and officers to make decisions without fear of judicial interference and personal liability, but also ensures that courts will not retrospectively assess the validity of a director's exercise of business judgment, which they are poorly equipped to do.

A ruling in the FDIC's favor would effectively write Georgia's business judgment rule out of existence. Since a plaintiff in the FDIC's position already bears the burden of proof, and since a complaint that fails to allege facts showing ordinary negligence is already subject to dismissal under any standard of review, saying that the business judgment rule's presumption can be overcome by alleging ordinary negligence is akin to saying that there is no business judgment rule at all. Adopting the FDIC's position would also inject uncertainty into what is currently settled law, lead to more costly and often dubious litigation, make it more difficult for banks to recruit and retain well-qualified directors, and make those directors who do serve on bank boards unnecessarily risk-averse.

Amici therefore support the decision of the trial court and the position of the Appellees, and believe that this court should affirm that the business judgment rule insulates corporate directors and officers, including bank directors and officers, from liability for ordinary negligence.

ARGUMENT

A. The Trial Court's Application of the Business Judgment Rule Was Correct Under Settled Georgia Law

As this court has previously recognized, Georgia courts adhere to the business judgment rule. *See Matter of Munford, Inc.*, 98 F.3d 604, 611 (11th Cir. 1996) ("In determining whether directors and officers have satisfied their statutory duty, Georgia courts apply the business judgment rule.") (*citing Millsap v. American Family Corp.*, 208 Ga. App. 230, 430 S.E.2d 385, 388 (1993)). The business judgment rule is as simple as it is familiar: it presumes that a director or officer acted in good faith and with the honest belief that the action or decision undertaken was in the best interest of the corporation. *See Brock Built*, 300 Ga. App at 821-822. To overcome the presumption, a plaintiff must establish that the director or officer "engaged in fraud, bad faith or an abuse of discretion." *Id.*

Amici agree with the Appellees that the specific question of whether the business judgment rule insulates directors and officers from ordinary negligence claims is a matter of settled Georgia law. In *Flexible Products, Inc. v. Ervast*, the Georgia Court of Appeals held in no uncertain terms that the rule "forecloses liability in officers and directors for ordinary negligence in discharging their duties." *Flexible Prods.*, 284 Ga. App. at 182. The Court of Appeals reaffirmed this holding in *Brock Built, LLC v. Blake*, holding in clear terms that "[a]llegations amounting to mere negligence, carelessness, or 'lackadaisical performance' are insufficient as a matter of law." *Brock Built*, 300 Ga. App. at 821-22.

The FDIC has cited no Georgia case, nor are amici aware of any such case, in which a director or officer's decision or action subjected the director or officer to personal liability for ordinary negligence. As the Appellees explain and as the district court has now held on several occasions, the FDIC's reliance on *FDIC v. Stahl*, 89 F.3d 1510 (11th Cir. 1996), is unavailing for the simple reason that Georgia's substantive law on the business judgment rule differs from Florida law (under which *Stahl* was decided). The FDIC's reliance on pre-business judgment rule Georgia decisions as well as *Boddy v. Theiling*, 129 Ga. App. 273, 199 S.E.2d 379 (1973) and *Rosenfeld v. Rosenfeld*, 286 Ga. App. 61, 648 S.E.2d 399 (2007) is similarly unavailing. The early caselaw is at best vague in that negligence and gross negligence tend to be referred to interchangeably and no meaningful distinction is drawn between the two.[2] Since none of the cases actually resulted in a defendant being held liable for ordinary negligence, these cases ultimately lend no support to the FDIC's argument.[3] *Boddy* and *Rosenfeld* are physical precedent only, and neither case squarely addresses the issue before this Court. *Boddy* dealt with a director who had completely abdicated his duties,[4] while *Rosenfeld* involves duty of loyalty claims.[5] Here, the FDIC is not alleging abdication or a breach of the duty of loyalty but instead is challenging conduct that clearly triggers the protections of the business judgment rule.

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[2] *See, e.g.*, *McEwen v. Kelly*, 140 Ga. 720, 79 S.E. 777, 779 (1913) ("the failure of directors to use ordinary care in supervision has been treated as amounting to gross negligence."); *Woodward v. Stewart*, 149 Ga. 620, 101 S.E. 749, 752 (1919) (same).

[3] *Boddy, supra,* involved claims under the Georgia Securities Act, not common law negligence claims. *See Boddy*, 129 Ga. App. at 273. In *McEwen, supra*, and *Woodward, supra*, the defendants are ultimately held to have no liability under any standard.

[4] *See Boddy*, 129 Ga. App. at 273-74. While Georgia courts have not addressed the question, Delaware courts have held that complete abdication of a director's duties falls outside of the scope of the business judgment rule. *See Aronson v. Lewis*, 473 A.2d 805, 813 (Del. 1984).

[5] *See Rosenfeld*, 286 Ga. App. at 64.

To the extent that the FDIC's position suggests that Georgia's business judgment rule is solely derived from the Georgia Court of Appeals' decisions in *Flexible Products* and *Brock Built*, and therefore would not be followed by the Georgia Supreme Court, that is clearly incorrect. While those two cases address the precise question before the Court, they are only two of many Georgia decisions, including Supreme Court decisions, adhering to the basic principle that courts will not review a corporation's internal decisions and policies absent a showing of fraud, bad faith or abuse of discretion. "No principle of law is more firmly fixed in our jurisprudence than the one which declares that the courts will not interfere in matters involving merely the judgment of the majority in exercising control over corporate affairs." *Bartow Lumber Co.*, 131 Ga. at 235; *Regenstein v. J. Regenstein Co.*, 213 Ga. 157, 159, 97 S.E.2d 693, 695 (1957). The requirement that a plaintiff demonstrate bad faith, fraud or an abuse of discretion in order to invoke the action of a court is decades old. *See, e.g., Smith v. Albright-England Co.*, 171 Ga. 544, 156 S.E. 313, 315 (1930) ("[T]he internal management of the corporation will not be interfered with by the court at the instance of a minority stockholder unless the majority stockholders are acting without the charter powers, or a strong case of mismanagement or fraud is shown.").

Finally, *amici* disagree with the FDIC's argument that the business judgment rule is at odds with the statutory standard of care applicable to bank directors.[6] That is because, as the Appellees address in their brief, the business judgment rule is a standard of *review*, not a standard of conduct. *See McMullin v. Beran*, 765 A.2d 910, 917 (Del. 2000). The statutory standard of care, which relates to expectations, and the business judgment rule, which directly relates to civil liability, serve different purposes. Consequently, they are not necessarily identical in scope. Nor does it matter that the statutory standard in question is derived from Georgia's Banking Code or that the defendants are bank directors. As the Appellees observe, O.C.G.A. § 7-1-490, which applies to bank directors, is essentially the same as O.C.G.A. §§ 14-2-830 and 14-2-842, which apply to directors and officers of business corporations.[7] Moreover, O.C.G.A. § 7-1-490 evidences a clear intent to protect directors who act deliberately and upon information, by stating that directors are entitled to rely on officers, legal counsel, public accountants and other experts who are reasonably believed to be reliable

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[6] As the Appellees observe, O.C.G.A. § 7-1-490, which applies to bank directors, is essentially the same as O.C.G.A. § 14-2-830 and § 14-2-842, which applies to directors and officers of business corporations generally.

[7] The Financial Institutions Reform, Recovery and Enforcement Act (FIRREA) establishes a national gross negligence standard of liability for bank directors and officers, which is not at issue in this appeal. This appeal deals solely with a question of Georgia law; namely, the application of Georgia's business judgment rule, which applies to any plaintiff challenging a corporate decision.

and competent in the matters for which they are consulted. The business judgment rule gives force to this director's statutory right of reliance.

B. The Trial Court's Holding Furthers The Objectives Of The Business Judgment Rule

The principal justification for the business judgment rule is that it encourages qualified persons to serve on corporate boards by eliminating the risk that innocent mistakes will lead to personal liability. Additionally, the rule affords directors and officers the freedom to make decisions affecting the company, both great and small, without interference from the courts or other outside forces. Courts often state that the rule exists as "a judicial acknowledgment of a board of directors' managerial prerogatives." *Stepak v. Addison*, 20 F.3d 398, 403 (11th Cir. 1994) (applying Delaware law).

As one court observed in a lawsuit involving a highly publicized merger between two banks:

> Directors must have the freedom to take risks and the power to manage the business without undue interference from shareholders or the courts. That freedom is achieved by protection from liability for good faith errors in judgment and deference from the courts in business decisions. In today's environment where outside directors must serve on audit, compensation and other committees requiring substantial time commitments and legal exposure, potential directors must carefully weigh the decision to serve. If corporate value is to be enhanced, the courts must not discourage qualified and capable people from serving as directors and taking risks.

First Union Corp. v. SunTrust Banks, Inc., 2001 WL 1885686, *4 (N.C. Super Aug. 10, 2001). Other courts and commentators have expressed the same view. *See Granada Invs., Inc. v. DWG Corp.*, 823 F.Supp. 448, 454 (N.D. Ohio 1993) ("If management were liable for mere good faith errors in judgment, few capable individuals would be willing to incur the financial and emotional risk of serving as a director or officer."); ALI, Principles of Corporate Governance § 4.01(c) cmt. c (2012) ("For efficiency reasons, corporate decisionmakers should be permitted to act decisively and with relative freedom from a judge's or jury's subsequent second guessing.").

The concerns voiced by these courts and commentators are true for any corporation, but they are especially true of banks, which face uniquely difficult challenges in attracting well-qualified directors. Georgia banks are required by statute to have no less than five directors, *see* O.C.G.A. § 7-1-482 (2013), unlike other types of business organizations that are subject to no such requirement. Banks that are based in Georgia, including the vast majority of its community banks, are also subject to strict geographic limitations that require a majority of their directors to reside either in Georgia or within 40 miles of a bank branch. *See* O.C.G.A. § 7-1-480(b) (2013). Once constituted, a bank board is required to meet at least once during ten different calendar months every year, unless it has received authorization to meet less frequently; even with authorization, a bank board must meet at least once a quarter. *See* O.C.G.A. § 7-1-483(a) (2013). In addition to the full board, bank directors (and particularly outside directors) are typically required to serve on audit committees, loan committees, investment committees, and other sub-committees. *See* Georgia Department of Banking and Finance, The Bank Director Handbook, pp. 3-4 (2012). Bank directors must also familiarize themselves with myriad laws and regulations at both the federal and state levels that do not apply to other types of businesses.

Moreover, risk is inherent in the banking business. An essential part of the banking business is the identification, assessment and management of risk. That risk is naturally magnified for the larger loans that are required to be approved by a bank's loan committee, and the major strategic decisions that a board of directors makes, such as whether to expand to a particular location, whether to sell the bank, or whether to acquire another bank. Because of this, the potential liability that would be faced by a bank director if ordinary negligence claims were permitted, even in the context of a small community bank, is massive. The FDIC's negligence claim appears to focus on the "risky" nature of the Appellees' growth strategy, but risk is simply not equivalent to negligence in the corporate governance context. As the American Law Institute's *Principles of Corporate Governance* recognize, "It is desirable to encourage directors and officers to enter new markets, develop new products, innovate, and take other business risks." ALI, Principles of Corporate

Governance § 4.01(c) cmt. c (2012). *See also In re Massey Energy Co.,* 2011 WL 2176479, *22 (Del. Ch. May 31, 2011). ("An essential purpose of the business judgment rule is to free fiduciaries making risky decisions in good faith from the worry that if those decisions do not pan out in the manner they had hoped, they will put their personal net worths at risk.").

The business judgment rule thus strikes an appropriate balance between the need to allow directors and officers to make business decisions decisively and without fear, and the need to protect shareholders and other constituencies against serious misconduct. *See Gagliardi v. TriFoods Intern., Inc.,* 683 A.2d 1049, 1052 (Del. 1996) (observing that the business judgment rule offers needed protection to directors "who act in good faith and meet minimal proceduralist standards of attention" by insulating them from the risk of personal liability). Without it, conscientious loan officers and directors would become de facto loan guarantors so long as a plaintiff could find an expert who will characterize their actions as satisfying the relatively low bar for a negligence action. Georgia's business judgment rule recognizes the severely inhibiting effect that this would have on banks and other companies.

The rule also prevents courts and other outside parties from becoming entangled in corporate decisionmaking. Judges and juries sitting in hindsight are poorly suited to decide on matters of business judgment, and should generally refrain from doing so. *See Brock Built*, 300 Ga. App. at 821-22 (explaining that the business judgment rule "is a policy of judicial restraint born of the recognition that [officers] are, in most cases, more qualified to make business decisions than are judges."); *see also Potter v. Pohlad*, 560 N.W.2d 389, 392 (Minn. 1997) (recognizing that “courts are ill equipped to second-guess the business decisions of corporate professionals").

The business judgment rule promotes both corporate efficiency and judicial economy by weeding out dubious cases while permitting cases alleging serious misconduct to proceed. This is more important now than it has ever been, given the considerable expense of time and effort involved in defending a lawsuit. The business judgment rule would be of little use at all if it did not provide directors and officers with a clear means to dispose of weak cases in which nothing more than the wisdom of their judgment is being challenged. While it may be true that a board that acts in good faith and with a proper motive should be able to defeat a negligence claim on the merits following discovery and a full trial, that offers little comfort to directors and officers if they still have to defend the claim. The business judgment rule is designed to prevent that undesirable result.

C. The FDIC's Position, If Adopted, Would Eviscerate The Business Judgment Rule

The FDIC's position, if adopted, would render the business judgment rule devoid of any meaning. As the Appellees correctly point out in their brief, a plaintiff in a negligence action already bears the burden of proving the absence of ordinary care. The defendant in such an action has no need for a hollow presumption that can be overcome by the plaintiff simply by alleging the very same facts that the plaintiff already must allege in order to state a claim. If Georgia recognizes the business judgment rule, as this Court and the FDIC itself have acknowledged it does, then it surely must consist of something more than a tautological requirement that a plaintiff be able to state a claim.

Notably, the FDIC has admitted that the business judgment rule is recognized in Georgia. There is not one Georgia case that mentions a legislative abolishment of the business judgment rule. *Rosenfeld*, the principal case upon which the FDIC relies, does not mention the rule. If that longstanding principle of Georgia law, shared with many other jurisdictions, is to be eradicated, it should come from Georgia state courts. Far from this, the Georgia Court of Appeals has twice reaffirmed the continuing vitality of the rule. The FDIC's speculation that the Georgia Supreme Court would rule to the contrary is ultimately based on nothing other than the arguments that it advances in stating its disagreement with the existing Court of Appeals rulings. That surely does not provide this Court with a sufficient basis to overturn Georgia precedent.

Finally, the FDIC's position would also put Georgia law at odds with other jurisdictions that recognize the business judgment rule, most significantly that of

Delaware,[8] which has the most robust body of law on the business judgment rule of any jurisdiction, the courts have repeatedly stated that "under the business judgment rule director liability is predicated upon concepts of gross negligence." *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984); *see also Smith v. Van Gorkom*, 488 A.2d 858, 873 (Del. 1985) ("We think the concept of gross negligence is also the proper standard for determining whether a business judgment reached by a board of directors was an informed one.").

CONCLUSION

Adopting the FDIC's position in this appeal would subject directors of Georgia banks to liability for ordinary negligence despite clear, unequivocal and settled Georgia law to the contrary. Such a result would render Georgia's business judgment rule a dead letter. It would also cause great harm to all Georgia banks, and thus all Georgians, by severely impeding the ability of Georgia banks to recruit and retain well qualified boards of directors. For these reasons, the Court should affirm the trial court's ruling.

Respectfully submitted this 24th day of April, 2013.

_/s/ John R. Bielema_____________
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[8] Like many states, Georgia courts look to Delaware law for guidance in matters of corporate law. *See, e.g., Phoenix Airline Svcs., Inc. v. Metro Airlines, Inc.*, 260 Ga. 584, 585-86, 397 S.E.2d 699 (1990).

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation set forth in Fed. R. App. P. 32(a)(7)(B).

Respectfully submitted this 24th day of April, 2013.

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