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GEORGIA SUPREME COURT CONFIRMS BUSINESS JUDGMENT RULE

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The Georgia Supreme Court issued its long-awaited decision in FDIC v. Loudermilk on Friday, addressing whether the FDIC's ordinary negligence claims against former directors and officers of failed banks are precluded by the business judgment rule. There is a lot to digest in the Court's 34-page opinion, but here are our initial thoughts.

The upshot for bank directors and officers in Georgia is that the business judgment rule is very much alive, and applies to banks to the same extent as other corporations. That itself is big news—the Georgia Supreme Court had never addressed whether the business judgment rule exists in any context, and the FDIC had argued that if the rule existed at all, it did not apply to banks because the Banking Code imposes an ordinary negligence standard of care. Much of the Court's opinion is devoted to explaining how the business judgment rule developed as a common law principle and refuting the argument that the statute trumps the rule.

The Court explained, however, that the business judgment rule does not automatically rule out claims that sound in ordinary negligence. It distinguished claims alleging negligence in the decision-making process from claims that do no more than question the wisdom of the decision itself. A claim that a directors disregarded their duties by failing to attend meetings, for instance, could survive a motion to dismiss. A claim that the decision itself was negligent, without any allegation relating to the process leading to the decision, will not survive.

This emphasis on process is not altogether surprising. It has long been the law in Georgia and elsewhere that bank directors cannot abdicate their responsibilities and expect to be protected by the business judgment rule. It is less clear where the line will be drawn. Since the Court was addressing a certified question from a federal district court in one of those actions, it spoke only in broad strokes and did not specifically discuss the FDIC's complaint in the underlying case. The FDIC will surely argue that its allegations relate to the decision-making process, and the defendants will just as surely argue that the FDIC is only claiming that the decisions themselves were unwise in hindsight. Ultimately, it will be up to the trial courts to resolve these issues.

On the subject of line-drawing, the Court's discussion starting on page 30 is especially interesting, as it appears to recognize the practical reality that a bank director cannot be expected to devote his

or her full attention to the business of the bank. The Court repeated a statement it first wrote 95 years ago in Woodward v. Stewart:

> "A business man generally understands the details of his own business, but a bank director cannot grasp the details of a large bank without devoting all his time to it, to the utter neglect of his own affairs. A director is expected to attend the meetings of the board with reasonable regularity, and to exercise a general supervision and control." The Court also recognized the director's statutory right to rely on reports from officers, advice of counsel, and similar statements, holding that when an officer or director who relies on such information in good faith, "the reasonableness of his reliance cannot be questioned in court."

MEET THE TEAM

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