IN THE SUPREME COURT OF GEORGIA

Federal Deposit Insurance Corporation, as Receiver for the Buckhead Community Bank,	)	
	)	**Appeal No.: S14Q0454**
Appellant,	)	
	)	**Certified Question from the Northern District of Georgia**
v.	)	
	)	
R. Charles Loudermilk, et al.,	)	**Civil Action File No. 1:12-cv-04156-TWT**
	)	
Appellees.	)	

BRIEF OF AMICUS CURIAE
GEORGIA CHAMBER OF COMMERCE IN SUPPORT OF
APPELLEES R. CHARLES LOUDERMILK, ET AL.

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I. INTEREST AND IDENTITY OF AMICUS CURIAE

The Georgia Chamber of Commerce exists to serve the interests of its members, including small businesses, banks, and Fortune 500 companies, which employ millions of Georgians and do business in every county in Georgia. One of the primary functions of the Georgia Chamber is to advocate on issues of concern to its members. In this instance, the Georgia Chamber's advocacy is in support of its nearly 100 member banks that would be affected if the FDIC's proposed standards for director and officer liability were adopted, and all the other non-bank Georgia businesses that could be impacted if the Court were to accept the FDIC's argument that Georgia's business judgment rule is displaced by statute. The FDIC's interpretation poses a risk to all Georgia directors and threatens the ability of our corporate boards to effectively manage the affairs of Georgia corporations. As such, the FDIC's interpretation presents a real threat to the economic development and competitive posture of business in Georgia.

Georgia courts, like their counterparts in other states, have long declined to second-guess business decisions with the benefit of hindsight. This deference, embodied in the business judgment rule as a standard of judicial review, allows Georgia businesses to attract highly qualified people to serve as board members and officers. This ability to attract capable directors and officers is especially important for banks, whose investing activities impact the breadth of business interests in which the Georgia Chamber's members participate. Indeed, the Georgia Chamber is principally interested in the outcome of this case because the FDIC's proposed rule imposing a simple negligence standard of liability would erode the established protections afforded to the directors and officers of the banks whose capital investments feed Georgia's growth – and could, given the breadth of the FDIC's argument, have lasting repercussions outside the banking sector for all Georgia businesses. The FDIC's simple negligence standard is inconsistent with established Georgia law and with the reality that business entails risk. To upset the balance between risk-taking and accountability struck by Georgia's business judgment rule would dramatically alter the landscape for business in Georgia.

II. ARGUMENT AND CITATION OF AUTHORITY

A. The Business Judgment Rule Recognizes that Business Entails Risk.

At its core, the business judgment rule is a public policy recognition that business (by banks or otherwise) entails risk, and that imposition in the business context of simple negligence principles – which are designed to minimize risk-taking – would have serious adverse consequences on business decision-making and, ultimately, the economy. A public policy that supports economic growth must also reasonably protect corporate directors who take appropriate risks. Directors should not unreasonably fear that their personal livelihoods will be endangered as a result of their business decisions being second-guessed, often in hindsight and almost always without the benefit of the same information or perspectives that were considered at the boardroom table. *See, e.g.*, *Gagliardi v. TriFoods Int'l*, 683 A.2d 1049, 1052 (Del. Ch. 1996) ("the first protection against a threat of sub-optimal risk acceptance is the so-called business judgment rule"); *In re UnitedHealth Grp. Inc. S'holder Derivative Litig.*, 754 N.W.2d 544, 551 (Minn. 2008) ("The business judgment rule is premised on . . . the notion that 'protecting directors' reasonable risks is . . . positive for the economy overall . . . .'") (quoting *Janssen v. Best & Flanagan*, 662 N.W.2d 876, 882 (Minn. 2003)). Seldom is there a single "right answer" where business decisions are concerned, and the business judgment rule from its earliest formulation – in an 1829 case involving claims against bank directors – has recognized the impossibility of "perfect wisdom in fallible beings." *Percy v. Millaudon*, 8 Mart. (n.s.) 68, 1829 WL 1592, at *4 (La. 1829).

Driven by that reality, courts in Georgia (and throughout the United States) have declined to second-guess business decisions made in good faith by corporate officers and directors. *See, e.g.*, *Brock Built, LLC v. Blake*, 300 Ga. App. 816, 823 (2009) ("'[T]he 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.'") (quoting *In re Bal Harbour Club, Inc.*, 316 F.3d 1192, 1194 (11th Cir. 2003)); *In re Friedman's, Inc.*, 336 B.R. 891, 895 (Bankr. S.D. Ga.

2005) (quoting *Int'l Ins. Co. v. Johns*, 874 F.2d 1447, 1458 n.20 (11th Cir. 1989)); *In re Fleming Packaging Corp.*, 351 B.R. 626, 633 (Bankr. C.D. Ill. 2006) ("[T]he business judgment rule attaches to protect corporate officers and directors and the decisions they make, and our courts will not second-guess these business judgments.") (citation omitted); *Minstar Acquiring Corp. v. AMF Inc.*, 621 F. Supp. 1252, 1259 (S.D.N.Y. 1985) ("The business judgment rule is a rule of judicial restraint which holds that courts will not inquire into the business judgment of directors who are acting without self-interest and in good faith."); *Evangelist v. Fid. Mgmt. & Research Co.*, 554 F. Supp. 87, 90-91 (D. Mass. 1982) ("[C]ourts will not second-guess [officers' and directors'] decisions if made honestly, in good faith and in pursuit of legitimate corporate purposes."); *Mueller v. Zimmer*, 124 P.3d 340, 351 (Wyo. 2005) ("'[T]he business judgment rule prohibits the court from going further and examining the merits of the underlying business decision' and 'prevent[s] a fact finder, in hindsight, from second-guessing the decisions of directors.'") (citation omitted); *Hollinger Int'l v. Black*, 844 A.2d 1022, 1078 (Del. Ch. 2004) ("The business judgment rule embodies that commitment to proper judicial restraint."), *aff'd*, 872 A.2d 559 (Del. 2005); *Hammonds v. Lumbee River Elec. Membership Corp.*, 631 S.E.2d 1, 11 (N.C. Ct. App. 2006) ("It is not the role of the Court to second-guess the business decisions of a private corporation."); *Orman v. Cullman*, 794 A.2d 5, 20 (Del. Ch. 2002)

("[T]he judgment of a properly functioning board will not be second-guessed and '[a]bsent an abuse of discretion, that judgment will be respected by the courts.'") (citation omitted); *St. James Capital Corp. v. Pallet Recycling Assocs. of N. Am., Inc.*, 589 N.W.2d 511, 515 (Minn. Ct. App. 1999) ("Under the business judgment rule, we do not "'second-guess the business decisions of corporate professionals.'") (citation omitted).

As a result, decision-makers can operate effectively and without excessive fear that personal liability may be imposed, with the benefit of hindsight, for good faith business decisions that turned out to be unprofitable. That in turn provides an incentive for talented women and men to serve as directors and officers of banks and other businesses, redounding again to the general good. *In re PSE & G S'holder Litig.*, 718 A.2d 254, 256 (N.J. Super. Ct. Ch. Div. 1998) ("The rationale behind the business judgment rule is to encourage qualified men and women to serve as directors and to motivate them to be willing to take entrepreneurial risks."), *aff'd*, 801 A.2d 295 (N.J. 2002); *Cuker v. Mikalauskas*, 692 A.2d 1042, 1046 (Pa. 1997) ("[The business judgment rule] encourages competent individuals to become directors by insulating them from liability for errors in judgment.").

B. <u>O.C.G.A § 7-1-490 Does Not Displace the Business Judgment Rule.</u>

The policy concerns animating the business judgment rule – and the benefits flowing from its application – depend on the rejection of a simple negligence standard for imposing liability for business decisions. This is entirely consistent with the statutory standard of conduct embodied in O.C.G.A. § 7-1-490 and with the General Assembly's stated objectives for regulating financial institutions, among which are to provide "[o]pportunity for management of financial institutions to exercise their business judgment." O.C.G.A. § 7-1-3(a)(8). To apply O.C.G.A. § 7-1-490 in a manner that undercuts the business judgment rule would frustrate one of the stated objectives of that very statute.

The FDIC's contrary argument – that section 7-1-490 defines the parameters of bank directors' and officers' potential liability – confuses the standard of care for directors and officers (set forth in the statute) with the standard of review applied where liability for allegedly "wrong" decisions is claimed (the business judgment rule). "The former is an ex-ante measuring stick by which directors' decisions are guided; the latter is a presumption of correctness and a safe harbor that protects business decisions from ex-post review in the courts." Fred W. Triem, Comment, *Judicial Schizophrenia in Corporate Law: Confusing the Standard of Care with the Business Judgment Rule*, 24 Alaska L. Rev. 23, 23 (June 2007); *see also* William T. Allen, Jack B. Jacobs & Leo E. Strine, Jr, *Realigning* *the Standard of Review of Director Due Care with Delaware Public Policy: A Critique of Van Gorkom and Its Progeny as a Standard of Review Problem*, 96 Nw. U. L. Rev. 449, 451 (Winter 2002) ("Standards of conduct are sometimes referred to as 'conduct rules' that are addressed to corporate directors and officers, whereas standards of review are 'decision rules' that are addressed to judges.").

The distinction between the standard of care and the standard for liability in the corporate law context is rooted in the inherent riskiness of business and the public policy in favor of incentivizing directors and officers to take sufficient risk: "even the best of us will occasionally make a lapse in judgment or a factual error that a judge could later second-guess as 'unreasonable' or 'negligent.'" Allen *et al.*, 96 Nw. U. L. Rev. at 452; *see also* Christopher M. Bruner, *Good Faith, State of Mind, and the Outer Boundaries of Director Liability in Corporate Law*, 41 Wake Forest L. Rev. 1131, 1134 (Winter 2006) ("In corporate law, this divergence between the standard of care, on the one hand, and the standard of review for care breaches, on the other, has rested on the straightforward policy rationale that the benefits (entrepreneurial risk taking) exceed the costs (a monetary remedy foregone)").

The distinction is also expressly drawn by the Official Comments to O.C.G.A. § 14-2-830, which is based on the ABA's Model Business Corporation Act and is nearly identical in its wording to section 7-1-490: "[The statute] does not try to codify the business judgment rule or to delineate the differences, if any, between that rule and the standards of director conduct set forth in this section. That is a task left to the courts." O.C.G.A. § 14-2-830 cmts. (1984).

And courts in Georgia and elsewhere have long recognized that the business judgment rule must be employed alongside the statutory standard of care in assessing liability. *See Brock Built, LLC v. Blake*, 300 Ga. App. 816, 821 (2009) ("In determining whether a corporate officer has fulfilled his or her statutory duty, Georgia courts apply the business judgment rule."); *Flexible Prods. Co. v. Ervast*, 284 Ga. App. 178, 182 (2007) ("Georgia's business judgment rule relieves officers and directors from liability for acts or omissions taken in good faith compliance with their corporate duties."); *Yost v. Early*, 589 A.2d 1291, 1298 (Md. Ct. Spec. App. 1991) (Maryland's statutory standard of care, essentially identical to Georgia's, "and the business judgment rule differ in that the former is the code of conduct for corporate directors, while the latter is an aid to judicial review."); *Rosenthal v. Rosenthal*, 543 A.2d 348, 352-53 (Me. 1988) (contrasting *proper* jury instruction on fiduciary duties as requiring "diligence, care and skill which ordinarily prudent persons would exercise," with *improper* jury instruction that "the business judgment rule would come into play *only* if defendants had not otherwise violated the duty of due care").

To accept the FDIC's argument that liability turns on a simple negligence standard under O.C.G.A. § 7-1-490 would render the business judgment rule a nullity. Business decisions, in the banking context and otherwise, involve weighing risk, and in those calculations, reasonable minds may differ. The FDIC's significantly more stringent simple negligence standard would discourage talented people from board service, induce excessive and expensive risk-avoidance by officers and directors, and would reward hindsight bias—the natural tendency to judge prior actions harshly with the benefit of knowing how everything turned out. The business judgment rule exists to lessen these deterrents to entrepreneurial risk-taking and is worthy of protecting from the FDIC's proffered simple negligence standard. Georgia's banks, businesses, and citizens all benefit from the rational balance struck by the business judgment rule, and any aberration in the application of the business judgment rule that drives business away from Georgia should be rejected.

Respectfully submitted this 18th day of April, 2014.

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CERTIFICATE OF SERVICE

The undersigned certifies that on April 18, 2014, I electronically filed the foregoing with the Supreme Court of Georgia, and that prior to filing, I served true and correct copies upon all counsel of record by United States mail, first-class postage prepaid, addressed as follows:

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