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THE BUSINESS JUDGMENT RULE UNDER ATTACK

The business judgment rule (BJR) has served for decades as the single most important protection against personal liability for directors and officers. First developed by courts over a century ago, this common law defense prevents courts from second-guessing the quality of a business decision by directors and officers. The two primary underpinnings of the BJR are:

1. Courts should not substitute their inexperienced business decisions for the good-faith decisions of independent and diligent business executives, who have a far greater ability to make appropriate business decisions based on their extensive commercial knowledge, experience and training.

2. Executives should be encouraged to take prudent risks for the benefit of the company and its constituents, and should not be stymied by the fear of personal liability if a decision ultimately harms the company.

The BJR generally applies to business decisions made by disinterested and reasonably informed directors and officers who honestly and rationally believe their decision was in the best interest of the company. If the BJR applies, directors and officers should not be liable for the quality or results of their decisions, but only the process used to make the decision.

As summarized below, several recent cases and litigation tactics demonstrate this important defense for directors and officers is not fool proof, and suggest a disturbing trend (outside of Delaware) toward diluting the benefit of the BJR. At a minimum, these cases and tactics highlight the volatile liability exposure which directors and officers face despite the BJR and the need for strong D&O financial protections to address that exposure.

A. <u>BJR Inapplicable to Officers</u>

Most courts and commentators have assumed without much discussion or analysis that the BJR rule applies to both directors and officers. But, several recent decisions by federal district courts in California ruled that the BJR applies only to independent directors, not officers.

The Delaware Supreme Court[1] and federal courts in Florida,[2] New York,[3] Illinois[4] and Georgia[5] have made the BJR available to officers. But, more than two decades ago a federal court in Pennsylvania, applying Delaware law,[6] and a California appellate court[7] stated the BJR

[1] *Kelly v. Bell*, 266 A.2d 878, 879 (Del. 1970).
[2] *AmeriFirst Bank v. Bomar*, 757 F. Supp. 1365, 1376 (S.D. Fla. 1991).
[3] *Detwiler v. Offenbecher*, 728 F. Supp. 103, 149 (S.D.N.Y. 1989).
[4] *Selcke v. Bove*, 258 Ill. App. 3d 932, 196 Ill. Dec. 202, 629 N.E.2d 747 (Ill. App. 1st Dist. 1994).
[5] *FDIC v. Blackwell*, 2012 U.S. Dist. LEXIS 109676 (N.D. Ga. Aug. 3, 2012).
[6] *Platt v. Richardson*, 1989 U.S. Dist. LEXIS 7933 (M.D. Pa. June 6, 1989).

is not applicable to officers. Commentators Sparks and Hamermesh, in a 1992 article, suggested a somewhat limited applicability to officers:

> While there are no cases directly on point, the concept of an officer as the repository of delegated management authority by the board suggests that the availability of a business judgment rule defense may only be available to a corporate officer when that officer is operating within the scope of the delegated authority … As a result, officers face a dual risk. Liability may attach if the officer is adjudged in hindsight to have acted outside the scope of his or her delegated authority or to have failed to act on a matter that was not (sic) within his or her expected areas of responsibility.[8]

More recently, five decisions by federal district courts in California ruled that the business judgment rule applies only to independent directors, not officers.

Although these cases are arguably driven by a California statute which codifies the BRJ only for directors, these cases reflect the potential for a disturbing judicial abandonment of an important protection for officers. In *FDIC v. Perry*,[9] the FDIC alleged that the CEO of IndyMac Bank breached his fiduciary duties to the failed bank by allowing IndyMac to generate and acquire more than $10 billion in risky residential loans, resulting in more than $600 million in losses to the bank. The CEO argued the lawsuit should be dismissed based on the business judgment rule. The court ruled that under California law, both the common law and statutory business judgment rule applied only to directors, not officers, and therefore the court refused to dismiss the lawsuit.

With respect to the common law business judgment rule, the court found no prior decision in California which applied the business judgment rule to officers. The court noted one California case which held the business judgment rule did not apply to "interested directors who effectively were acting as officers," although the inapplicability of the business judgment rule in that prior case could be explained by the directors' "interested" status rather than the directors' de facto officer status. Without explanation, the court rejected the notion that the general judicial policy of deference to business decisions should apply to officers, which is obviously disturbing since courts are generally ill-equipped to substitute their business decisions (using the benefit of 20/20 hindsight) for the real-time business decisions of executives.

With respect to the California statutory business judgment rule, the court observed that the statute provides that directors who perform their duties as directors in accordance with the statutory standards have no liability for failing to properly discharge their duties as such. The statute, though, does not mention officers. In explaining the statute's omission of officers, the court cited to the legislative committee's comments to the statute, which seems to acknowledge that officers were intentionally excluded from the statute for the following reason:

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[7] *Gaillard v. Natomas Co.*, 208 Cal. App. 3d 1250, 256 Cal. Rptr. 702, 711 (1989).

[8] Sparks & Hamermesh, *Common Law Duties of Non-Director Corporate Officers*, 48 Bus. Law. 215, 234–35 (1992).

[9] 2011 U.S. Dist. LEXIS 143222 (C.D. Cal., Dec. 13, 2011).

> Although a non-director officer may have a duty of care similar to that of a director, his ability to rely on factual information, reports or statements may, depending upon the circumstances of the particular case, be more limited than in the case of a director in view of the greater obligation he may have to be familiar with the affairs of the corporation.

In *FDIC v. Hawker*,[10] a California district court likewise ruled that the California statutory business judgment rule does not apply to officers because the statute references only directors and because the legislative comments to that statute do not include officers. However, the court ruled that the common law business judgment rule did not justify a dismissal of the claim against officers because issues of fact existed as to the conduct of the officers. That ruling implicitly suggests that the common law business judgment rule can apply to officers if the subject conduct of the officers falls within the scope of the common law business judgment rule.

In an unreported August 1, 2011 ruling in *National Credit Union Administration v. Siravo*, Case No. CV-10-01597 (C.D. Cal.), a different Federal District Court judge in California also ruled that the business judgment rule did not apply to officers, based on the plain language of the California statutory business judgment rule which applies only to directors.

In *FDIC v. Van Dellen*,[11] a California Federal District Court again ruled that officers are not protected by the business judgment rule both because the codification of the rule in California Corporations Code Section 309 only refers to directors and because prior California authority did not extend to officers the judicial policy of deference to a director's exercise of good faith business judgment in management decisions.

In *FDIC v. Faigin*,[12] a California Federal District Court followed *FDIC v. Perry* and held that the business judgment rule does not apply to officers.

The wisdom of excluding officers from the BJR is certainly debatable. Officers are more knowledgeable and involved in the company's operations than independent directors, thereby suggesting a more rigorous standard of conduct than applicable to directors. But, the underlying justifications for the business judgment rule (i.e., courts are ill-equipped to second-guess business decisions and should encourage prudent risk-taking) equally apply to claims against directors and officers.

B. BJR Inapplicable to Bank Directors and Officers

The BJR generally applies to directors and officers of any non-profit, private or public company because the underpinnings of the BJR are not dependent upon the type of organization. However, a recent decision by a district court in Georgia concludes that the BJR should not apply in a lawsuit by the FDIC against directors and officers of a failed bank.[13] In denying the

[10] 2012 U.S. Dist. LEXIS 79320 (E.D. Cal. June 7, 2012).

[11] 2012 U.S. Dist. LEXIS 146648 (C.D. Cal. Oct. 5, 2012).

[12] 2013 U.S. Dist. LEXIS 94899 (C.D. Cal. July 8, 2013).

[13] *FDIC v. Laudermilk*, 2013 U.S. Dist. LEXIS 166924 (N.D. Ga., Nov. 25, 2013). Cf, *FDIC v. Adams*, 2013 U.S. Dist. LEXIS 168211 (N.D. Ga., March 21, 2013) (BJR applies to claims under Georgia law by FDIC against

defendant directors' and officers' motion to dismiss, the court concluded that the widespread impact of a bank failure justified a harsher standard on directors and officers of a failed bank than applicable to other types of organizations, and therefore directors and officers of the failed bank should not enjoy the protections of the BJR:

> [W]hen a bank, instead of a business corporation fails, the FDIC and ultimately the taxpayers bear the pecuniary loss. The lack of care of the officers and directors of banks can lead to bank closures which echo throughout the local and national economy. To some extent, the failure of bank officers and directors to exercise ordinary diligence lead to the financial crisis that continues to affect the national economy…. [T]his is not a case where shareholders are suing their own officers and directors, but instead it is a case where the FDIC as receiver is seeking damages following allegedly negligent banking practices. A case where the FDIC is receiver "is not simply a private case between individuals [but rather a case that] involves a federal agency appointed as a receiver of a failed bank in the midst of a national banking crisis."

Although the court recognized that federal courts in Georgia have "uniformly" applied the BJR to protect bank officers and directors, the court did not apply the BJR to a claim by the FDIC against the failed bank directors and officers. However, the court certified that question to the Georgia Supreme Court. One month later, the 11th Circuit Federal Court of Appeals certified the same question to the Georgia Supreme Court in a different lawsuit by the FDIC against directors and officers of a failed bank.[14]

C. BJR Inapplicable to Intimidated Directors

One of the key elements of the BJR is the requirement that the defendant director or officer must be disinterested (i.e., the business decision must be based on the corporate merits of the decision rather than extraneous considerations or influences). Courts most frequently find this requirement lacking, and thus the BJR inapplicable, where the director or officer has a conflict of interest with respect to the decision, such as a personal financial interest in the decision or a close familial or business relationship which may impact the decision.

A recent Delaware Chancery Court decision ruled that otherwise disinterested directors may be considered "interested" and thus lose the BJR protection by allowing another "interested" director to intimidate them into making a particular decision.

In *New Jersey Carpenters Pension Fund v. Info GROUP, Inc.*,[15] a director who owned 37% of the company's outstanding stock encountered a personal cash liquidity crisis and concluded that the best option to address that liquidity crisis was to promptly sell the company, regardless of whether the timing, price or process of the company sale was in the best interests of the company. The director lobbied the other directors to pursue a sale even though the rest of the

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directors and officers of failed bank).

[14] *FDIC v. Skow*, 2013 U.S. App. LEXIS 25490 (11th Cir. Dec. 23, 2013).

[15] 2011 Del. Ch. LEXIS 147 (Del. Ch., Sept. 30, 2011).

Board (consistent with the advice of an investment banker) believed the market conditions would make it difficult to obtain a good price for the company.

The conflicted director intensified his efforts to bring about a sale of the company by repeatedly threatening other directors with lawsuits if they failed to sell the company, being generally disruptive at board meetings and waging a public campaign to fire the CEO. Eventually, the Board was "overwhelmed" by the conflicted director and pursued a sale of the company. As explained in an email from one director to another, the majority of the directors apparently "just want to dump the company and run…based on the pain, trauma, time, and everything else." The conflicted director continued to disrupt the sale process by influencing the list of potential bidders, conducting unsupervised negotiations and leaking confidential information about the sale to various parties. Ultimately, the Board accepted an offer to purchase the company at a price per share below the then current market price.

In addition to finding the BJR inapplicable to the conflicted director, the court refused to dismiss the claims against the other directors based on the BJR because "it is reasonable to infer that [the conflicted director] dominated the Board Defendants through a pattern of threats aimed at intimidating them, thus rendering them non-independent for purposes of [applying the BJR to their] voting on the Merger."

Although the extreme facts of this case may explain the court's ruling, the notion that directors may lose their BJR protection by reason of a dominating or intimidating director or control person is disconcerting. The line between frank discussions/disagreements and intimidation/domination can become blurred. When dissenting views or disagreements arise, the Board should be extra cautious to create a clear and credible record that whatever decision is ultimately made is supported by legitimate and compelling business reasons and is not influenced by extraneous considerations.

D. BJR Inapplicable to Uninformed Directors

Another key element of the BJR is the requirement that the defendant directors and officers make an informed decision by conducting a reasonably diligent investigation before acting. Typically, this requirement is satisfied if the directors spend considerable time in making the decision and obtain advice from qualified experts. However, a recent federal Third Circuit Court of Appeals ruling reversed the dismissal of claims against directors of a bankrupt non-profit company based on the BJR even though the defendant directors received the advice of counsel, conducted several meetings and pursued various options before making the challenged decision to file for bankruptcy protection.

In *Official Committee of Unsecured Creditors v. Baldwin*,[16] the court of Appeals ruled that the District Court improperly granted a motion for summary judgment in favor of the defendant directors based on the BJR, notwithstanding the directors' apparent diligence. The Court of Appeals ruled that plaintiffs presented credible evidence that the Board (i) received numerous red flags that senior officers upon whom the Board relied in making its decision were neither competent nor diligent, (ii) eschewed a viability study prior to filing bankruptcy, and (iii)

[16] 2011 U.S. App. LEXIS 19312 (3d Cir., Sept. 21, 2011).

diverted assets to another charitable organization which had an interlocking Board with the bankrupt company. As a result, triable issues of fact existed which precluded summary judgment in favor of the defendant directors.

This decision demonstrates that all aspects of a Board's decision should be reasonable and thorough. Although it is unusual for a court to second-guess the adequacy of the directors' diligence, if any part of the decision-making process is less than robust, the BJR may not be available even if all other aspects of the decision-making process are proper.

E. Circumvent BJR

A more subtle way plaintiffs are now avoiding the applicability of the BJR is by bringing traditional D&O mismanagement claims as federal securities law claims. The BJR only applies to common law breach of fiduciary claims (which are usually asserted in shareholder derivative lawsuits), and does not apply to federal securities law claims (which are usually asserted in securities class action lawsuits).

Historically, plaintiffs have had little ability to remedy D&O mismanagement through a securities law claim. In 1977, the U.S. Supreme Court ruled that a federal securities law claim must be based upon deceptive conduct (i.e., misrepresentations and omissions of material facts), rather than on allegations of mismanagement.[17] For more than 30 years, that ruling effectively eliminated attempts by the plaintiffs' bar to circumvent the BJR through the assertion of mismanagement claims in the guise of a securities claim.

However, more recently plaintiffs are again testing the bounds of what is mismanagement and what is deceptive misconduct. In the aftermath of several high-profile incidents of sudden and accidental events (e.g., explosions, coal mine collapses and natural disasters), plaintiffs have tried to assert a securities class action in lieu of or in addition to a derivative lawsuit for mismanagement. If successful, this strategy both circumvents the powerful BJR defense and creates the potential for recovery of huge damages to a large class of shareholders.

An example of this strategy is the D&O litigation arising out of the 2010 Gulf of Mexico oil spill. Although the Deepwater Horizon rig explosion and resulting oil spill was sudden and unexpected, securities class actions were filed against the directors and officers of British Petroleum (BP), alleging that prior to the explosion and spill the defendants misrepresented and failed to disclose information regarding the adequacy of BP's safety programs and BP's resulting risk exposure. The defendant D&Os argued to the court, among other things, that the securities claims should be dismissed because the true nature of the alleged wrongdoing was merely mismanagement. With surprising ease and with little analysis, the court rejected the defendants' argument, noting that the plaintiffs alleged the defendants launched an ongoing public relations campaign before the Deepwater Horizon incident to improve BP's safety image with investors and that the subsequent alleged safety misrepresentations were not limited to the Deepwater Horizon catastrophe.[18]

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[17] *Santa Fe Industries, Inc. v. Green*, 430 U.S. 462 (1977).

[18] *In re BP p.l.c. Sec. Litig.*, 758 F. Supp. 2d 428 (S.D. Tex., Feb. 13, 2012).

The line articulated by the courts in these cases between mismanagement (which is subject to the BJR) and deception (which is not subject to the BJR) appears very thin. In almost any situation involving alleged mismanagement, plaintiffs now seem able to also successfully allege a securities claim based on deception. In other words, creative plaintiffs are more likely now to circumvent the protections of the BJR by converting a mismanagement claim into a securities law claim. If this litigation strategy continues, directors and officers will be facing an increasing number of securities claims arising out of unexpected events which harm the company and its shareholders.

F. Fewer Inexpensive Derivative Settlements

In response to the strong protection afforded by the BJR, shareholder derivative lawsuits are frequently settled by (i) the company agreeing to certain governance reforms and other corporate "therapeutics," and (ii) the defendant directors and officers (through their insurers) agreeing to pay a modest plaintiff attorney fee award. Although this type of settlement structure creates questionable benefit to the company and primarily benefits only the plaintiff attorneys, the fee payment by the D&O insurer can be justified in many cases in light of the potentially large defense costs which would be incurred absent the modest settlement.

The continued viability of this common settlement practice may be questionable in some jurisdictions in light of recent case law which refused to approve this type of settlement arrangement. For example, in one case the court refused to approve a $2.85 million plaintiff fee award in a derivative suit settlement involving only corporate reforms. The Court found the corporate reforms to be "cosmetic" and "far too meager" in light of the alleged wrongdoing. To justify these reforms, plaintiffs' counsel argued at the settlement approval hearing that after substantial discovery the plaintiffs are unable to prove the alleged wrongdoing. In a colorful summary of why the proposed plaintiff fee was rejected, the court stated:

> By approving this Stipulation of Settlement, the court would be compensating Plaintiffs' counsel handsomely and encouraging plaintiffs' attorneys in the future to go on fishing expeditions against corporations. Sometimes when an attorney goes fishing he catches a fish, and sometimes he does not – but when he does not, he should not eat filet mignon afterwards.[19]

In another recent case,[20] plaintiffs dismissed their derivative lawsuit because the company's Board took certain actions requested by the plaintiffs in their lawsuits. Plaintiffs' counsel requested a fee award from the court because they contended their derivative lawsuit was the catalyst for the Board's actions. The defendants disagreed, contending the Board's actions were taken independent of the derivative lawsuit. The Court found the derivative lawsuit was meritless and would have been dismissed by the court if plaintiffs had not voluntarily dismissed it. As a result, the court refused to award any fees to plaintiffs' counsel.

Likewise, the Seventh Circuit Court of Appeals ruled in 2012 that a derivative lawsuit should be dismissed because it "serves no goal other than to move money from the corporate

[19] *In re Cirrus Logic, Inc.*, 2009 U.S. Dist. LEXIS 131583 (W.D. Tex., Jan. 8, 2009).

[20] C*entral Laborers' Pension Fund v. Blankfein*, 2011 N.Y. Misc. LEXIS 4555 (Sup. Ct. NY, Sept. 21, 2011).

treasury to the attorneys' coffers." The derivative lawsuit alleged that two directors of the company also served on the boards of other companies that allegedly competed with the company, in violation of antitrust laws. The Court of Appeals noted that neither the Department of Justice, the Federal Trade Commission nor any consumer had complained about the interlocking directorships. As a result, the court concluded the lawsuit was a meaningless effort by the plaintiff lawyers to generate a fee and therefore should be rejected:

> The only goal of this suit appears to be fees for the plaintiffs' lawyers. It is impossible to see how the investors could gain from it—and therefore impossible to see how Sears' directors could be said to violate their fiduciary duty by declining to pursue it…. It is an abuse of the legal system to cram unnecessary litigation down the throats of firms whose directors serve on multiple boards, and then use the high cost of anti-trust suits to extort settlements (including undeserved attorneys' fees) from the targets.[21]

These cases suggest the ability to settle derivative suits by agreeing to corporate reforms and a plaintiff attorney fee payment may be increasingly limited in certain situations. That may result in plaintiffs litigating derivative suits longer, more aggressively attacking the BJR and insisting on a monetary component to the settlement in order to show greater benefit to the company and thus a larger plaintiff fee award. In other words, these seemingly pro-defendant rulings may ironically increase the erosion of the BJR and the defendants' loss payments in future derivative suits.

G. Parallel Derivative Lawsuits

As a result of a decrease in securities class action litigation in the last few years, the plaintiffs' bar is now pursuing other types of litigation against companies and their directors and officers (including shareholder derivative lawsuits) in an attempt to replace the lucrative fees which they would otherwise earn in large securities class action settlements. Although the settlement amounts in derivative lawsuits are usually far less than securities class action settlements, this increase in derivative litigation is resulting in an increase in court decisions analyzing the BRJ. Not surprisingly, some of those decisions apply the BJR broadly and some apply it narrowly. This risk of adverse BJR rulings is aggravated by an increase in parallel derivative lawsuits in different states asserting the same claims, as described below.

Because derivative lawsuits assert breaches of state law fiduciary duties, those lawsuits are typically filed in state courts. Unlike the MDL procedure in the federal court system where securities class actions are litigated, there is no defined procedure for consolidating or coordinating multiple derivative lawsuits in multiple states. Therefore, the same derivative lawsuit can be, and with increasing frequency is, prosecuted in multiple states. Defendants are forced to defend identical derivative lawsuits by different shareholders around the country, thereby significantly increasing the defense costs in those cases, creating the potential for inconsistent rulings in those lawsuits, and making it much harder for defendants to reach a global settlement in all of those multiple lawsuits.

[21] *Booth v. Crowley, et al.*, 2012 U.S. App. LEXIS 11927 (June 13, 2012).

A recent ruling by the Delaware Supreme Court[22] involving parallel derivative lawsuits in Delaware and California highlights the challenges and opportunities in defending these multi-jurisdictional derivative claims. In that case, nearly identical shareholder derivative lawsuits were filed in both California and Delaware. The California cases were dismissed by the court because the plaintiffs failed to first make a demand on the company's board of directors to pursue the claims. Defendants then sought to dismiss the nearly identical Delaware derivative lawsuit based upon the California court ruling. However, the Delaware Chancery Court ruled that it was not compelled to follow the California ruling and refused to dismiss the Delaware case. On April 4, 2013, the Delaware Supreme Court reversed that ruling and held that Delaware courts should follow the prior ruling in California if the two cases are essentially the same, even if the cases largely involve issues under Delaware law. As a result, plaintiffs do not get two-bites-at-the-apple if one case is dismissed or settled before the other case.

The *Pyott* decision does not eliminate or discourage plaintiff lawyers from filing overlapping derivative cases in multiple states. In fact, the Delaware Supreme Court in *Pyott* also rejected the Chancery Court's related ruling that the California shareholder plaintiffs were inadequate representatives of the company to prosecute the derivative suit due to their rush to file their complaint without conducting a reasonable investigation. But, the *Pyott* decision can help defendants to resolve those multiple-cases at one time whether or not all of the plaintiffs participate in the resolution. The Decision can also help defendants and their D&O insurers when negotiating a settlement in the multi-state lawsuits by creating a reverse auction negotiation environment. Consistent with this Decision, one plaintiff in one of the cases can settle the derivative suit with defendants, and once the settlement is approved by the court, the remaining derivative suits in other states will likely be dismissed. As a result, any one plaintiff is incentivized to settle for an amount less than the settlement demands of the competing plaintiffs, thereby potentially precluding the competing plaintiffs from sharing in the fee award.

H. Procedural Assertion of BJR

Even if the BJR otherwise applies, there is a question as to when during the course of the litigation a defendant director or officer can assert the defense. Courts have debated whether the BJR is an affirmative defense and therefore whether the rule can be raised in a motion to dismiss. As acknowledged by a district court in Florida, "courts that have considered this subject concur that it is 'debatable' whether a court should consider the protection of the business judgment rule on a motion to dismiss."[23] If the applicability of the rule appears on the face of the complaint and is not dependent on additional evidentiary facts, it is likely that a court will allow the rule to be asserted in the context of a motion to dismiss.[24] However, courts "traditionally disfavor application of the business judgment rule at the motion to dismiss stage because application of the rule generally requires a fact-intensive analysis that would be incompatible with notice pleading."[25]

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[22] *Pyott v. La Municipal Police Employees' Retirement System*, 2013 Del. LEXIS 179 (April 4, 2013).

[23] *Lancer Offshore, Inc. v. Citgo Group Ltd.*, 2008 U.S. Dist. LEXIS 25740 (S.D. Fla. Mar. 31, 2008).

[24] *FDIC v. Briscoe*, 2012 U.S. Dist. LEXIS 153603 (N.D. Ga. Aug. 14, 2012); *FDIC v. Spangler*, 2011 U.S. Dist. LEXIS 147188 (N.D. Ill. Dec. 22, 2011).

[25] *Data Key Partners v. Permira Advisors LLC*, 2013 Wisc. App. LEXIS 640 (Wisc. App. Aug. 1, 2013). See also,

I. Conclusions

The BJR remains an important and strong defense in Delaware and many other states. In the context of executive compensation, M&A transactions and other volatile D&O decisions, courts in those states continue to protect directors and officers from liability under most situations. However, as explained above, plaintiff lawyers in search of fees are assaulting this important liability shield with various tactics, and some courts in some states are supporting those efforts. Time will tell if these developments are long-term trends or short-term aberrations.

The recent erosion by some courts of the BJR may be a reaction, in part, to the recent economic environment and a sense that someone should be held responsible for causing or contributing to the credit crisis and related Great Recession. However, as explained by the Delaware Chancery Court in a recent derivative lawsuit against directors and officers of Citigroup relating to their alleged involvement in the subprime mortgage collapse, the justifications for the BJR equally apply regardless of the size of the losses in the derivative lawsuit or other external circumstances:

> Citigroup has suffered staggering losses, in part, as a result of the recent problems in the United States economy, particularly those in the subprime mortgage market. It is understandable that investors, and others, want to find someone to hold responsible for these losses, and it is often difficult to distinguish between a desire to blame *someone* and a desire to force those responsible to account for their wrongdoing. Our law, fortunately, provides guidance for precisely these situations in the form of doctrines governing the duties owed by officers and directors of Delaware corporations. This law has been refined over hundreds of years, which no doubt included many crises, and we must not let our desire to blame someone for our losses make us lose sight of the purpose of our law. Ultimately, the discretion granted directors and managers allows them to maximize shareholder value in the long term by taking risks without the debilitating fear that they will be held personally liable if the company experiences losses. This doctrine also means, however, that when the company suffers losses, shareholders may not be able to hold the directors personally liable.[26]

If this more balanced view (which continues to be endorsed by Delaware courts) is rejected with increased frequency by courts in other states, the liability exposure of directors, officers and their insurers will significantly increase over time, which could have a disturbing impact on the quality of corporate governance.

Colgate v. Disthene Group, Inc., 2013 Va. Cir. LEXIS 9 (Buck. Co. Cir. Ct., Feb. 4, 2013) (applicability of business judgment rule is an issue of proof for trial and is not properly addressed by demurrer).

[26] *In re Citigroup Ins. Shareholder Der. Lit.*, 964 A.2d 106, 139 (Del. Ch. 2009).

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