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HB 192 - Banking and Finance


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BANKING AND FINANCE

Financial Institutions: Amend Part 12 of Article 2 of Chapter 1 of Title 7 and Article 8 of Chapter 2 of Title 14 of the Official Code of Georgia Annotated, Relating to Management of Bank and Trust Companies and Directors and Officers of Corporations, Respectively, so as to Change Provisions Relating to the Responsibilities and Standard of Care of Directors and Officers of Banks, Trust Companies, and Corporations; Clarify the Ability of Directors and Officers to Rely on other Individuals in the Performance of Their Duties; Provide for a Rebuttable Presumption when Directors and Officers are Acting in Good Faith; Provide for Related Matters; Provide for Applicability; Repeal Conflicting Laws; and for Other Purposes

CODE SECTIONS:	O.C.G.A. §§ 7-1-490 (amended); 14-2-830 (amended), -842 (amended)
BILL NUMBER:	HB 192
ACT NUMBER:	248
GEORGIA LAWS:	2017 Ga. Laws 693
SUMMARY:	The Act changes the provisions relating to the responsibilities and standard of care for directors and officers of banks, trust companies, and corporations. The Act codifies the business judgment rule. The operative liability standard for directors and officers is gross negligence, as opposed to simple negligence, and directors and officers may rely on other individuals in the performance of their duties. A rebuttable presumption exists that directors and officers act in good faith.
EFFECTIVE DATE:	July 1, 2017

History

On July 11, 2014, in the wake of the Great Recession and a national banking crisis, the Supreme Court of Georgia delivered a “highly-anticipated decision” in *FDIC v. Loudermilk*.¹ In *Loudermilk*, the United States District Court for the Northern District of Georgia acknowledged an ambiguity in Georgia law.² Accordingly, it certified the following question to the Supreme Court of Georgia: whether Georgia’s business judgment rule “preclude[s] as a matter of law a claim for ordinary negligence against the officers and directors of a bank in a lawsuit brought by the FDIC as receiver for the bank.”³

In both *Loudermilk* and *FDIC v. Skow*, the federal courts identified a tension between the plain language of former Code section 7-1-490(a) and Georgia’s common law business judgment rule.⁴ Former Code section 7-1-490(a), before the General Assembly’s changes, provides that bank officers and directors must exercise a duty of care that “ordinarily prudent men would exercise under similar circumstances in like positions.”⁵ However, the Georgia Court of Appeals held in *Brock Built, LLC v. Blake* that “[i]n determining whether a corporate officer has fulfilled his or her statutory duty, Georgia courts apply the business judgment rule.”⁶ The court further stated that “[t]he business judgment rule affords an officer the presumption that he or she acted in good faith, and absolves the officer of personal liability unless it is established that he or she engaged in fraud, bad faith or an abuse of discretion.”⁷ Finally, in *Flexible Products Co. v. Ervast*, the Georgia Court of Appeals had concluded that the business judgment rule “forecloses

1. *FDIC v. Loudermilk*, 295 Ga. 579, 596, 761 S.E.2d 332, 345 (2014); J. Timothy Mast & Mary M. Weeks, *Rule for Directors and Officers of Georgia Corporations and Banks*, TROUTMAN SANDERS (July 16, 2014), <https://www.troutmansanders.com/georgia-supreme-court-clarifies-business-judgment-rule-for-directors-and-officers-of-georgia-corporations-and-banks-07-16-2014>.

2. *FDIC v. Loudermilk*, 984 F.Supp.2d 1354, 1359–60 (N.D. Ga. 2013).

3. *Loudermilk*, 295 Ga. at 579, 761 S.E.2d at 334; Ryan Scarborough & Richard Olderman, *Why Does the FDIC Sue Bank Officers? Exploring the Boundaries of the Business Judgment Rule in the Wake of the Great Recession*, 20 FORDHAM L. REV. 367, 381–84 (2015).

4. *Loudermilk*, 295 Ga. at 587, 761 S.E.2d at 339; *FDIC v. Skow*, 741 F.3d 1342, 1346 (11th Cir. 2013); *FDIC v. Skow*, 295 Ga. 747, 748, 763 S.E.2d 879, 881 (2014); Scarborough, *supra* note 3, at 382.

5. O.C.G.A. § 7-1-490 (2016).

6. *Brock Built, LLC v. Blake*, 300 Ga. App. 816, 822, 686 S.E.2d 425, 430 (2009).

7. *Id.*

liability in officers and directors for ordinary negligence in discharging their duties.”⁸ To confuse matters even further, although “no Georgia state court [had] explicitly extended the business judgment rule to protect the officers and directors of a bank,” many “[f]ederal courts in [the] district [. . . had] uniformly applied the business judgment rule to protect bank officers and directors.”⁹ Nevertheless, in *Loudermilk*, Judge Thrash of the Northern District of Georgia “was not convinced that Georgia law affords [bank directors and officers] the protection of the business judgment rule in a lawsuit by the FDIC[,]”¹⁰ and he certified the question to the Supreme Court of Georgia.

The Supreme Court of Georgia reconciled the tension between the common law and the statute by bifurcating Georgia’s former business judgment rule into two standards: the final decision and the decision-making process.¹¹ The Court held:

From our precedents, we conclude that the business judgment rule is a settled part of our common law in Georgia, and it generally precludes claims against officers and directors for their business decisions that sound in ordinary negligence, except to the extent that those decisions are shown to have been 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. Put another way, the business judgment rule at common law forecloses claims against officers and directors that sound in ordinary negligence when the alleged negligence concerns only the wisdom of their judgment, but it does not absolutely foreclose such claims to the extent that a business decision

8. *Flexible Products Co. v. Ervast*, 284 Ga. App. 178, 182, 643 S.E.2d 560, 564 (2007).

9. *FDIC v. Loudermilk*, 984 F.Supp.2d 1354, 1358 (2013); *see, e.g.*, *FDIC v. Blackwell*, No. 1:11-CV-03423-RWS, 2012 WL 3230490, at *4 (N.D. Ga. Aug. 3, 2012); *FDIC v. Skow*, 955 F.Supp.2d 1357, 1367 (N.D. Ga. 2012); *FDIC v. Briscoe*, No. 1:11-cv-02303-SCJ, 2012 WL 8302215, at *4–5 (N.D. Ga. Aug. 14, 2012); *FDIC v. Miller*, No. 2:12-cv-42-WCO, 2012 WL 949409, at *8 (N.D. Ga. Dec. 26, 2012).

10. *Loudermilk*, 984 F.Supp.2d 1354, 1359 (2013).

11. Telephone Interview with Rep. Beth Beskin (R-54nd) at 2 min., 30 sec. (Apr. 13, 2017) (on file with Georgia State University Law Review) [hereinafter Beskin Interview].

did not involve “judgement” because it was made in a way that did not comport with the duty to exercise good faith and ordinary care. We note as well that the business judgment rule applies equally at common law to corporate officers and directors generally and to bank officers and directors.¹²

The Court concluded that Georgia’s business judgment rule protects bank and corporate officers and directors from ordinary negligence claims that question the wisdom of their final decisions, but does not “absolutely foreclose” ordinary negligence claims challenging the officers’ and directors’ decision-making process.¹³ The Court observed that Code section 7-1-490(a) largely addressed “the process by which an officer or director is to become informed about the matters as to which he is to exercise judgment.”¹⁴ The Court reasoned that the holdings in *Flexible Products* and *Brock Built* were inconsistent with the implication in Code section 7-1-490(a) “that bank officers and directors may be liable for a failure to exercise ordinary care with respect to the way in which business decisions are made[.]”¹⁵ Therefore, the *Flexible Products* and *Brock Built* standard had no statutory support.¹⁶

As a result of *Loudermilk*, both *Flexible Products* and *Brock Built* were overruled and Georgia’s business judgment rule no longer provided a complete shield to liability for claims regarding the business decisions of directors and officers.¹⁷ The decision instead permitted claims of ordinary negligence based upon “whether the directors and officers had a reasonable process to evaluate the facts and circumstances in making business decisions.”¹⁸ It protected the wisdom of director and officer decisions unless those decisions “[were] shown to be made without deliberation, without the requisite

12. *Loudermilk*, 295 Ga. at 586, 761 S.E.2d at 338.

13. *Id.*

14. *Id.* at 589, 761 S.E.2d at 340.

15. *Id.*

16. *Id.* at 593, 761 S.E.2d at 342–43.

17. *Id.* at 594, 761 S.E.2d at 343.

18. *Georgia Supreme Court Confirms Business Judgment Rule Protection*, ALSTON & BIRD (Jul. 15, 2014), <https://www.alston.com/-/media/files/insights/publications/2014/07/isecurities-litigation-advisory-i-georgia-supreme-c/files/view-advisory-as-pdf/fileattachment/14581-ga-supreme-court-confirms-business-judgment.pdf>.

diligence to ascertain and assess the facts and circumstances upon which the decisions are based, or in bad faith.”¹⁹

The ruling created confusion within Georgia’s business community by blurring the line between what constitutes a final decision and the decision-making process.²⁰ In the subsequent trial, the jury returned a verdict of nearly five million dollars against the individual defendant bank directors and officers.²¹ Some legislators and business leaders felt the jury’s verdict was a direct product of the Court’s interpretation of the business judgment rule, and many wanted a return to the *Flexible Products* and *Brock Built* standard.²² House Bill (HB) 192 was drafted in direct response to the Supreme Court’s decision in *Loudermilk*.²³

Bill Tracking of HB 192

Consideration and Passage by the House

Representatives Beth Beskin (R-54th), Bruce Williamson (R-115th), Matt Hatchett (R-150th), Wendell Willard (R-51st), Jay Powell (R-171st), and Christian Coomer (R-14th) sponsored HB 192 in the House.²⁴ The House read the bill for the first time on February 1, 2017, and committed it to the House Judiciary Committee.²⁵ The House read the bill for the second time on February 2, 2017.²⁶ On March 1, 2017, the House Judiciary Committee amended the bill in part and favorably reported the bill by substitute.²⁷

19. *Loudermilk*, 295 Ga. at 585, 761 S.E.2d at 338.

20. See Beskin Interview, *supra* note 11, at 10 min., 18 sec.; Recording of Senate Banking and Financial Committee at 2 min., 40 sec. (Mar. 15, 2017) (remarks by Rep. Beth Beskin (R-54th) (on file with the Georgia State University Law Review) [hereinafter Senate Recording].

21. Michael P. Carey, 2016 GEORGIA CORPORATION & BUSINESS ORGANIZATION CASE LAW DEVELOPMENTS 1–2, 10 (Bryan Cave LLP ed., 2016). The jury awarded damages of \$4.98 million. *Id.*

22. Beskin Interview, *supra* note 11, at 3 min., 35 sec.

23. *House Bill 192: Amending the Business Judgment Rule to a Gross Negligence Standard*, JAMES BATES, http://www.cbaofga.com/uploads/4/1/3/7/41371065/cba_e-newsletter_business_judgment_rule_3.28.17.pdf (last visited Sept. 23, 2017).

24. Georgia General Assembly, HB 192, Bill Tracking, <http://www.legis.ga.gov/Legislation/en-US/display/20172018/HB/192>.

25. State of Georgia Final Composite Status Sheet, HB 192, May 11, 2017.

26. *Id.*

27. *Id.*

The Committee substitute included most of the introduced bill's text, but the Committee removed or changed the text of a few subsections.²⁸ The Committee removed the legislative findings in Section 1.²⁹ The original language expressed the intent of the legislature to overrule the Georgia Supreme Court's holding in *Loudermilk*,³⁰ which allowed personal liability to attach to corporate officers and directors for ordinary negligence in the course of carrying out their duties.³¹ The Committee then reformatted sections accordingly.³²

The Committee modified the language in Section 2 of the bill by removing the subjective good-faith standard and restoring it to the objective standard that was already in the code.³³ The Committee chose to reformat the subsections to allow a director or officer to rely on various sources of information "reasonably believed to be reliable"³⁴ The new language also allows directors and officers to rely upon "[o]ther officers, employees, or agents" and "[i]nformation, data, opinions, reports, or statements provided by other officers, employees" on matters "involving the skills, expertise, or knowledge reasonably believed to be reliable."³⁵

The Committee also added subsections creating a rebuttable presumption of good faith regarding directors' and officers' decision-making processes.³⁶ The presumption may be "rebutted by evidence that such process constitutes gross negligence by being a

28. Compare HB 192, as introduced, 2017 Ga. Gen. Assemb., with HB 192 (HCS), 2017 Ga. Gen. Assemb.

29. Compare HB 192, § 1, as introduced, 2017 Ga. Gen. Assemb., with HB 192 (HCS), § 1, 2017 Ga. Gen. Assemb.

30. Compare HB 192, § 1, as introduced, 2017 Ga. Gen. Assemb., with HB 192 (HCS), § 1, 2017 Ga. Gen. Assemb.

31. HB 192, as introduced, § 1, p. 1, ll. 14–18, 2017 Ga. Gen. Assemb.

The General Assembly finds that state law should overrule the Supreme Court's holding in the case of *Federal Deposit Insurance Corporation v. Loudermilk* . . . to the extent that it allows an action for personal liability to be brought against directors and officers for ordinary negligence in carrying out their duties as directors and officers.

Id.

32. Compare HB 192, § 1, as introduced, 2017 Ga. Gen. Assemb., with HB 192 (HCS), § 1, 2017 Ga. Gen. Assemb.

33. Compare HB 192, as introduced, § 2, pp. 1–2, ll. 24–32, with HB 192 (HCS), § 1, p.1, ll. 15–22.

34. HB 192 (HCS), § 1, pp. 1–2, ll. 19–30, 2017 Ga. Gen. Assemb.

35. HB 192 (HCS), § 1, pp. 1–2, ll. 23–27, 2017 Ga. Gen. Assemb.

36. HB 192 (HCS), § 1, p. 2, ll. 39–43, 2017 Ga. Gen. Assemb.

gross deviation of the standard of care of a director or officer in a like position under similar circumstances.”³⁷ These changes did not affect the substance of the subsection and maintained the gross negligence standard and the plaintiff’s burden of proof.³⁸

The Committee similarly modified Section 3, which deals with corporate directors.³⁹ An “ordinarily prudent person” standard replaced language which required corporate directors to act in subjective good faith.⁴⁰ Section 3 was also revised to allow corporate directors to rely on information “reasonably believed to be reliable”⁴¹ Finally, the Committee added that although there is a presumption that officers and directors act in good faith when following decision-making processes, that presumption can be rebutted by evidence of gross negligence.⁴²

The Committee amended Section 4 in the same manner as Sections 2 and 3.⁴³ This section applies to corporate officers.⁴⁴ Again, the Committee replaced the subjective good faith language with an “ordinarily prudent person” standard and extended corporate officers the same standards and protections afforded to bank directors, officers, and corporate directors, as outlined in Section 2 and Section 3.⁴⁵

37. *Id.*

38. *Compare* HB 192, as introduced, § 2, p. 3, ll. 70–93, 2017 Ga. Gen. Assemb., *with* HB 192 (HCS), § 1, p. 3, ll. 61–68, 2017 Ga. Gen. Assemb.; *compare* HB 192, as introduced, § 3, p. 4, ll. 118–133, 2017 Ga. Gen. Assemb., *with* HB 192 (HCS), § 2, p. 3, ll. 64–69, 2017 Ga. Gen. Assemb.; *compare* HB 192, as introduced, § 4, p. 7, ll. 213–33, 2017 Ga. Gen. Assemb., *with* HB 192 (HCS), § 3, p. 4, ll. 127–131, 2017 Ga. Gen. Assemb.

39. *Compare* HB 192, as introduced, § 2, 2017 Ga. Gen. Assemb., *with* HB 192 (HCS), § 2, 2017 Ga. Gen. Assemb.

40. *Compare* HB 192, as introduced, § 3, p. 4, ll. 119–20, 2017 Ga. Gen. Assemb., *with* HB 192 (HCS), § 2, p. 3, ll. 68–69, 2017 Ga. Gen. Assemb.; *compare* HB 192, as introduced, § 4, p. 6, ll. 192–93, 2017 Ga. Gen. Assemb., *with* HB 192 (HCS), § 3, p. 4, ll. 114–15, 2017 Ga. Gen. Assemb.

41. *Compare* HB 192, as introduced, § 3, pp. 4–5, ll. 121–44, 2017 Ga. Gen. Assemb., *with* HB 192 (HCS), § 2, p. 3, ll. 70–82, 2017 Ga. Gen. Assemb.; *compare* HB 192, as introduced, § 4, pp. 6–7, ll. 196–209, 2017 Ga. Gen. Assemb., *with* HB 192 (HCS), § 3, p. 4, ll. 116–26, 2017 Ga. Gen. Assemb.

42. *Compare* HB 192, as introduced, § 3, pp. 5–6, ll. 151–72, 2017 Ga. Gen. Assemb., *with* HB 192 (HCS), § 2, p. 3, ll. 83–87, 2017 Ga. Gen. Assemb.; *compare* HB 192, as introduced, § 4, p. 7, ll. 213–33, 2017 Ga. Gen. Assemb., *with* HB 192 (HCS), § 3, p. 4, ll. 127–31, 2017 Ga. Gen. Assemb.

43. *Compare* HB 192, as introduced, § 3, p. 4, ll. 119–20, 2017 Ga. Gen. Assemb., *with* HB 192 (HCS), § 2, p. 3, ll. 68–69, 2017 Ga. Gen. Assemb.; *compare* HB 192, as introduced, § 4, p. 6, ll. 192–93, 2017 Ga. Gen. Assemb., *with* HB 192 (HCS), § 3, p. 4, ll. 114–15, 2017 Ga. Gen. Assemb.

44. HB 192 (HCS), § 3, p. 4, ll. 107–08, 2017 Ga. Gen. Assemb.

45. *Compare* HB 192, as introduced, § 3, pp. 4–5, ll. 121–44, 2017 Ga. Gen. Assemb., *with* HB 192 (HCS), § 2, p. 3, ll. 70–82, 2017 Ga. Gen. Assemb.; *compare* HB 192, as introduced, § 4, pp. 6–7, ll. 196–209, 2017 Ga. Gen. Assemb., *with* HB 192 (HCS), § 3, p. 4, ll. 116–26, 2017 Ga. Gen. Assemb.;

Finally, the Committee substitute clarified the “Act shall apply only to causes of action arising on or after July 1, 2017.”⁴⁶

The House read the bill for the third time on March 3, 2017.⁴⁷ The House passed the Committee substitute of HB 192 on March 3, 2017, by a vote of 128 to 40.⁴⁸

Consideration and Passage by the Senate

Senator John F. Kennedy (R-18th) sponsored HB 192 in the Senate.⁴⁹ The Senate first read HB 192 on March 3, 2017.⁵⁰ HB 192 was assigned to the Senate Committee on Banking and Financial Institutions, and the Senate made no amendments to the bill.⁵¹ The Senate Committee on Banking and Financial Institutions favorably reported the bill on March 16, 2017.⁵² The Senate read the bill for the second time on March 20, 2017, and for a third time on March 24, 2017.⁵³ No Senate floor amendments were introduced, and, on March 24, 2017, the Senate passed HB 192 without objection by a vote of 41 to 10.⁵⁴

The House sent the bill to Governor Nathan Deal (R) on April 3, 2017.⁵⁵ The Governor signed the bill into law on May 9, 2017, and the bill became effective July 1, 2017.⁵⁶

The Act

The Act amends the following portions of the Official Code of Georgia Annotated: Part 12 of Article 2 of Chapter 1 of Title 7,

compare HB 192, as introduced, § 3, pp. 5–6, ll. 151–72, 2017 Ga. Gen. Assemb., *with* HB 192 (HCS), § 2, p. 3, ll. 83–87, 2017 Ga. Gen. Assemb.; *compare* HB 192, as introduced, § 4, p. 7, ll. 213–33, 2017 Ga. Gen. Assemb., *with* HB 192 (HCS), § 3, p. 4, ll. 127–31, 2017 Ga. Gen. Assemb.

46. HB 192 (HCS), § 4, p. 5, l. 150, 2017 Ga. Gen. Assemb.

47. State of Georgia Final Composite Status Sheet, HB 192, May 11, 2017.

48. Georgia House of Representatives Voting Record, HB 192, Vote #190 (Mar. 3, 2017).

49. Georgia General Assembly, HB 192, Bill Tracking, <http://www.legis.ga.gov/Legislation/en-US/display/20172018/HB/192>.

50. State of Georgia Final Composite Status Sheet, HB 192, May 11, 2017.

51. *Id.*

52. *Id.*

53. *Id.*

54. Georgia Senate Voting Record, HB 192, Vote #239 (Mar. 3, 2017).

55. State of Georgia Final Composite Status Sheet, HB 192, May 11, 2017.

56. *Id.*; O.C.G.A. § 1-3-4.

relating to management of bank and trust companies and directors, Part 3 of Article 8 of Chapter 2 of Title 14, relating to corporate directors, and Part 4 of Article 8 of Chapter 2 of Title 14, relating to corporate officers.⁵⁷ The purpose of the Act is to alleviate the tension addressed by the Georgia Supreme Court in *Loudermilk* by restoring Georgia's business judgment rule to the standard that "all Georgia practitioners thought it was"⁵⁸ and to provide directors and officers of banks and corporations a reasonable level of protection from personal liability during their service.⁵⁹ The Act clarifies and codifies Georgia's business judgment rule by defining the ability of directors and officers of banks and corporations to rely on other individuals in the performance of their duties and to provide for a rebuttable presumption in favor of those directors and officers.⁶⁰ The legislation mandates that the appropriate standard of care is gross negligence and provides presumptions in favor of directors and officers.⁶¹

Section 1

Section 1 of the Act revises Code section 7-1-490, relating to the responsibilities of directors and officers of bank and trust companies.⁶² Section 1 of the Act makes three substantive changes to the Code section.⁶³ First, the Act bifurcates subsection (b) into subsections (1) and (2).⁶⁴ Second, the Act redefines which individuals and what information directors and officers may rely upon.⁶⁵ Importantly, the Act creates a rebuttable presumption that directors and officers acted in good faith and exercised ordinary care in executing their duties.⁶⁶

57. 2017 Ga. Laws 693, at 693.

58. Beskin Interview, *supra* note 11 at 3 min., 5 sec.

59. *GBAN Legislative Update – February 24, 2017*, GA. CHAMBER (Feb. 24, 2017), <https://www.gachamber.com/gban-legislative-update-february-24-2017>.

60. Beskin Interview, *supra* note 11 at 3 min., 5 sec.

61. *Id.*

62. 2017 Ga. Laws 693, § 1, at 693–94.

63. *Id.*

64. *Id.*

65. O.C.G.A. § 7-1-490(b) (Supp. 2017).

66. O.C.G.A. § 7-1-490(c).

The Act clarifies that directors and officers of a bank or trust company have a duty of ordinary care.⁶⁷ The Act amends some of the language in subsection (a) but makes no substantive changes.⁶⁸ Language is omitted from Code section § 7-1-490(a) and relocated to subsection (b).⁶⁹ The section also makes minor changes to the language delineating when a director or officer may be entitled to rely upon the decisions or actions of other officers, employees, or agents, or “information, data, opinions, reports, or statements” provided by those individuals.⁷⁰

The Act clarifies which individuals and information bank and trust company directors and officers may rely on when carrying out their duties.⁷¹ Subsection (b)(1) enumerates who directors and officers may rely on when discharging their duties.⁷² Directors and officers may rely on other officers, employees, or agents as long as the officer “reasonably believed” such person to be “reliable and competent in the functions performed.”⁷³ Subsection (b)(2) provides what content directors and officers may rely upon in making their decisions.⁷⁴ Directors may rely on information provided by officers, employees, and agents, as well as investment bankers, accountants, legal counsel, or “other persons” if two conditions are met.⁷⁵ First, such information must employ the provider’s “skills, expertise, or knowledge reasonably believed to be reliable,” and second, the information must be “within such person’s professional or expert competence.”⁷⁶ The

67. O.C.G.A. § 7-1-490(a) (Supp. 2017) (“Directors and officers of a bank or trust company shall discharge the duties of their respective positions in good faith and with the degree of diligence, care, and skill which an ordinarily prudent person would exercise under similar circumstances.”). The changes merely added the phrases “the degree of” before “diligence,” struck “in like positions” from the end of the sentence, and changed “ordinarily prudent men” to “an ordinarily prudent person.” Compare O.C.G.A. § 7-1-490(a) (Supp. 2017), with O.C.G.A. § 7-1-490(a) (2016).

68. 2017 Ga. Laws 693, § 1, at 693. The revision omits, in part, “[i]n discharging his duties, a director or officer, when acting in good faith, shall be entitled to rely upon information, opinions, reports, or statements, including financial statements and other financial data . . .” *Id.*

69. *Id.* at 693–94.

70. O.C.G.A. § 7-1-490(b)(2).

71. O.C.G.A. § 7-1-490(b).

72. O.C.G.A. § 7-1-490(b)(1) (“[o]ther officers, employees, or agents of the bank or trust company whom the director or officer reasonably believed to be reliable and competent in the functions performed . . .”).

73. *Id.*

74. O.C.G.A. § 7-1-490(b)(2) (Supp. 2017).

75. *Id.*

76. *Id.*

Act removed language that allowed a director or officers to rely upon a committee of board members when the officer or director reasonably believed the committee's decision merited confidence.⁷⁷

The new language in subsection (c) creates a rebuttable presumption in favor of directors and officers.⁷⁸ However, this presumption can be overcome by evidence demonstrating a director or officer acted with gross negligence in their decision-making process.⁷⁹ Gross negligence requires a showing of a "gross deviation of the standard of care of a director or officer in a like position under similar circumstances."⁸⁰

Section 2

Section 2 of the Act revises Code section 14-2-830.⁸¹ Code section 14-2-830 relates to the general standards of conduct for directors of corporations.⁸² Section 2 amends Code section 14-2-830 in the same fashion by which Section 1 amended Code section 7-1-490.⁸³ The new language regulating the conduct of directors and corporations is identical to the new language applicable to the directors and officers of banks and trust companies.⁸⁴ Thus, directors of corporations are held to the same duty of ordinary care as bank and trust company directors and officers. Additionally, corporate directors possess the same liability for gross negligence and are afforded an identical rebuttable presumption of good faith and ordinary care.⁸⁵

Section 3

Section 3 of the Act revises Code section 14-2-842.⁸⁶ Code section 14-2-842 relates to the standards of conduct for officers of

77. 2017 Ga. Laws 693, § 1, at 693–94.

78. O.C.G.A. § 7-1-490(c) (Supp. 2017).

79. *Id.*

80. *Id.*

81. 2017 Ga. Laws 693, § 2, at 694–95.

82. O.C.G.A. § 14-2-830 (Supp. 2017).

83. 2017 Ga. Laws 693, § 1–2, at 693–95.

84. *Compare* 2017 Ga. Laws 693, § 2, at 695–96, *with* 2017 Ga. Laws 693, § 1, at 693–94.

85. *Compare* O.C.G.A. § 7-1-490(c), *with* O.C.G.A. § 14-2-830(c).

86. 2017 Ga. Laws 693, § 3, at 695–96.

corporations.⁸⁷ Section 3 extends the duty of ordinary care established in Section 1 and Section 2 of the Act.⁸⁸ Thus, corporate officers are subject to the same standards and regulations as corporate directors and officers and directors of banks and trust companies.⁸⁹ The Act similarly extends the presumption of good faith and ordinary care, rebuttable by evidence of gross negligence, to corporate officers.⁹⁰

Analysis

In *Loudermilk*, the Court noted, “[t]o the extent that more protection for officers and directors is desirable, the political branches may provide it.”⁹¹ And provide it they did.⁹² The Act purportedly reinstates Georgia’s business judgment rule as previously applied by the Georgia Court of Appeals in *Brock Built* and *Flexible Products*.⁹³ However, the Act may in fact go a step further by expanding the scope of material and resources that a director or officer may rely on when performing his or her duties.⁹⁴ Initially, opponents of the bill voiced concerns that HB 192 would “lower” the standard of care for officers and directors and would negatively affect the level of care and due diligence exercised by officers and directors in their decision-making processes.⁹⁵ However, proponents of the bill countered that HB 192 limits the unfairness, or “Monday morning quarterbacking,” inherent in allowing third parties to judge officers’ and directors’ decision-making processes with the benefit of hindsight, while still providing accountability where gross negligence

87. O.C.G.A. § 14-2-842 (Supp. 2017).

88. *Compare* O.C.G.A. § 7-1-490(a), *with* O.C.G.A. § 14-2-842(a); *compare* O.C.G.A. § 14-2-830(a), *with* O.C.G.A. § 14-2-842 (a).

89. *Compare* O.C.G.A. § 7-1-490(a), *with* O.C.G.A. § 14-2-842(a); *compare* O.C.G.A. § 14-2-830(a), *with* O.C.G.A. § 14-2-842(a).

90. *Compare* O.C.G.A. § 7-1-490(c), *with* O.C.G.A. § 14-2-842(c); *compare* O.C.G.A. § 14-2-830(c), *with* O.C.G.A. § 14-2-842(c).

91. *FDIC v. Loudermilk*, 295 Ga. 579, 596, 761 S.E.2d 332, 345 (2014).

92. *See* O.C.G.A. § 7-1-490; O.C.G.A. § 14-2-830; O.C.G.A. § 14-2-842.

93. *See* HB 192, as introduced, § 1, p. 1, ll. 15–18, 2017 Ga. Gen. Assemb.; Senate Recording, *supra* note 20 at 2 min., 40 sec.; *see also* *Flexible Products Co. v. Ervast*, 284 Ga. App. 178, 182, 643 S.E.2d 560, 565 (2007); *Brock Built, LLC v. Blake*, 300 Ga. App. 816, 824, 686 S.E.2d 425, 432 (2009).

94. O.C.G.A. § 7-1-490(b)(2).

95. Video Recording of Georgia Senate Day 38, Mar. 24, 2017 at 2 hr., 38 min., 29 sec. (remarks by Sen. Joshua McKoon (R-29th)) [hereinafter Senate Day 38 Video].

is evident.⁹⁶ The Act's proponents wanted banks and corporate officers and directors to have the same protections they believed they had prior to *Loudermilk* and wanted to give the Georgia business community reassurance and clarity in the wake of the *Loudermilk* decision.⁹⁷

The Act also amends both the Corporate and Banking Codes to ensure that directors and officers will be held to the same standard of care regardless of industry and to promote a uniform application of Georgia's freshly codified business judgment rule.⁹⁸ Further, since the Court left intact the gross negligence standard with respect to the merits of the decision, the bill addresses only the bank and corporate officers' decision-making processes.⁹⁹

Going forward, Georgia courts will not have to attempt the *Loudermilk* bifurcation analysis in order to distinguish the decision-making process of a director or officer from the wisdom of the director or officer's final decision.

Alleviating the Tension between the Common Law and the Code

The Act directly addresses and alleviates the tension between former Code section 7-1-490(a) and Georgia's common law business judgment rule by creating the statutory presumption that the director or officer's *decision-making process* was executed in good faith and with due care.¹⁰⁰ The presumption may only be overcome by showing "evidence that such process constitute[d] gross negligence."¹⁰¹ Gross negligence is "a gross deviation of the standard of care of a director or officer in a like position under similar circumstances."¹⁰² This rebuttable presumption forecloses claims of ordinary negligence and unequivocally raises the standard to the level of gross negligence.¹⁰³ Additionally, the presumption effectively

96. Senate Day 38 Video, *supra* note 95 at 3 hr., 3 min., 6 sec. (remarks by Sen. John Kennedy (R-164th)).

97. *Id.*

98. *See, e.g.*, O.C.G.A. § 7-1-490(c).

99. Beskin Interview, *supra* note 11 at 3 min., 55 sec.

100. O.C.G.A. § 7-1-490(c); O.C.G.A. § 14-2-830(c); O.C.G.A. § 14-2-842(c).

101. O.C.G.A. § 7-1-490(c); O.C.G.A. § 14-2-830(c); O.C.G.A. § 14-2-842(c).

102. O.C.G.A. § 7-1-490(c) (relating to bank directors and officers); O.C.G.A. § 14-2-830(c) (relating to directors of corporations); O.C.G.A. § 14-2-842(c) (relating to officers of corporations).

103. O.C.G.A. § 7-1-490(c) (relating to bank directors and officers); O.C.G.A. § 14-2-830(c) (relating

reunites the decision-making process with the final decision by directly addressing the standard of care necessary to challenge the “process directors and officers followed.”¹⁰⁴ Thus, the Act seemingly reinstates the business judgment rule as understood and applied by the Georgia Court of Appeals in *Brock Built* and *Flexible Products*, and Georgia courts will apply a standard of gross negligence going forward.¹⁰⁵

Expanding the Scope of Protection for Directors and Officers

In addition to reinstating the former understanding of Georgia’s business judgment rule, the Act goes a step further in broadening the information and resources on which a director or officer may rely.¹⁰⁶ As amended, the statutes allow a director or officer to rely on the performance of other officers, employees, or agents reasonably believed to be reliable and competent.¹⁰⁷ The amendments clarify the information a director or officer is permitted to rely upon and include information provided by bank officers, employees, agents, legal counsel, public accountants, investment bankers, or any other person reasonably believed to have the necessary skills, expertise, and knowledge.¹⁰⁸ Proponents of the bill assert that clarifying Georgia’s business judgment rule in this way directly relates to the attraction and retention of businesses in Georgia.¹⁰⁹

Prior to the Act, the statutes expressly disallowed directors and officers to rely on the advice of personnel or outside consultants if they had knowledge concerning the matter that made the reliance

to directors of corporations); O.C.G.A. § 14-2-842(c) (relating to officers of corporations).

104. O.C.G.A. § 7-1-490(c) (relating to bank directors and officers); O.C.G.A. § 14-2-830(c) (relating to directors of corporations); O.C.G.A. § 14-2-842(c) (relating to officers of corporations).

105. *See Flexible Products Co. v. Ervast*, 284 Ga. App. 178, 182, 643 S.E.2d 560, 564 (2007) (holding that the business judgment rule relieves officers and directors from liability for acts or omissions taken in good faith compliance with their corporate duties and forecloses liability for ordinary negligence in discharging their duties); *Brock Built, LLC v. Blake*, 300 Ga. App. 816, 822, 686 S.E.2d 425, 430 (2009) (holding the business judgment rule affords a corporate officer the presumption that he acted in good faith and thus is absolved of personal liability unless it is established that he engaged in fraud, bad faith, or an abuse of discretion).

106. O.C.G.A. § 7-1-490(b) (relating to bank directors and officers); O.C.G.A. § 14-2-830(b) (relating to directors of corporations); O.C.G.A. § 14-2-842(b) (relating to officers of corporations).

107. O.C.G.A. § 7-1-490; O.C.G.A. § 14-2-830; O.C.G.A. § 14-2-842.

108. O.C.G.A. § 7-1-490.

109. Beskin Interview, *supra* note 11, at 7 min., 44 sec.

unwarranted.¹¹⁰ The statutes replace this language with a reasonableness standard and expand the scope of information and the number of individuals that directors and officers may rely on, subject to a reasonably reliable standard and the same presumption of good faith.¹¹¹ Representative Beth Beskin (R-54th), the bill's sponsor, feared that without these amendments to the Code, Georgia would lack the necessary competitive edge in attracting businesses.¹¹² Individuals will be more likely to serve as directors and officers of banks and corporations where their personal liability is clearly and statutorily defined.¹¹³

Conclusion

Though Georgia courts must now follow a seemingly new standard of review when evaluating process-related duty of care claims, the analysis will more closely resemble that undertaken by the Georgia Court of Appeals in the *Brock Built* and *Flexible Products* cases. Proponents of the bill also argue that the bill removes the unfairness of third parties judging directors and officers with the “benefit of perfect hindsight.”¹¹⁴ HB 192 undoubtedly provides much needed clarity and reassurance for the Georgia business and banking communities in the wake of the *Loudermilk* decision.

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110. Compare O.C.G.A. § 7-1-490 (2015), with O.C.G.A. § 7-1-490 (Supp. 2017); compare O.C.G.A. § 14-2-830 (2003), with O.C.G.A. § 14-2-830 (2017); compare O.C.G.A. § 14-2-842 (2003), with O.C.G.A. § 14-2-842 (2017).

111. Compare O.C.G.A. § 7-1-490 (2015), with O.C.G.A. § 7-1-490 (Supp. 2017); compare O.C.G.A. § 14-2-830 (2003), with O.C.G.A. § 14-2-830 (2017); compare O.C.G.A. § 14-2-842 (2003), with O.C.G.A. § 14-2-842 (2017).

112. *Id.* at 8 min., 35 sec.

113. *Id.*

114. *House Bill 192: Amending the Business Judgment Rule to a Gross Negligence Standard*, *supra* note 23.

