NORTH CAROLINA SUPREME COURT ADDRESSES DUTIES OF CORPORATE DIRECTORS

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On November 8, 2013, the North Carolina Supreme Court issued a rare opinion addressing the duties of corporate directors and reaffirming that those duties are generally owed only to the corporation itself rather than the individual shareholders.

In *Green v. Freeman*, the court considered claims brought by investors in a failed business venture. The court reversed a jury verdict for the plaintiffs on their breach of fiduciary duty claims, explaining that corporate directors owe a fiduciary duty to the corporation, not directly to shareholders. As a result, shareholders generally cannot bring direct actions against directors for breach of fiduciary duty, but are limited to bringing derivative claims on behalf of the corporation.

This distinction is important because under North Carolina law derivative claims are subject to more stringent requirements than direct claims face. Specifically, plaintiffs seeking to bring derivative claims must, prior to filing suit, make a demand on the company's board of directors asking the company to assert the claim directly. Following such demand, if an independent committee of the board determines in good faith after conducting a reasonable inquiry that the claim should not be pursued, then the plaintiff cannot bring a derivative action asserting the claim.

The court acknowledged two exceptions to this general rule, noting that shareholders, creditors and guarantors may bring an individual action for breach of fiduciary duty when (i) the wrongdoer owed them a special duty or (ii) they suffered a personal injury distinct from that sustained by the corporation. The court found, however, that neither exception was met in *Green* because there was no evidence that the plaintiffs ever became shareholders (either no shares were issued or the shares never vested) or that the plaintiffs as creditors were owed a special duty or suffered any distinct personal injury.

The court's opinion is consistent with a recent opinion from the North Carolina Business Court, *Gusinsky v. Flanders Corp*., in which the Business Court dismissed a shareholder's challenge to a merger transaction on the grounds that the shareholder's claim was derivative, and the shareholder had not satisfied the procedural requirements for bringing a derivative claim. The *Gusinsky* case Client Alert is available here. It is significant that the North Carolina Supreme Court, which rarely has occasion to address corporate law issues, has reaffirmed the basic principles governing duties of directors. The North Carolina Supreme Court's opinion in *Green v. Freeman* is available here.

PROFESSIONALS

Donald H. Tucker, Jr.

Clifton L. Brinson

Isaac A. Linnartz

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