

## Maryland Steps Toward Certainty Regarding Board Member Duties



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Shareholder derivative suits against directors and officers of companies are commonplace. Boards are increasingly called upon to defend the propriety and independence of their actions. This unpleasant component of corporate citizenship frequently begs the question: What duties do corporate directors owe to shareholders or members?

**Maryland recently answered that question, finally providing certainty to those companies incorporated under its laws and those that wish to do so. As now fully codified by statute, and consistent with the duties owed under Delaware case law, directors in Maryland owe both a duty of care and a duty of loyalty.**

In 2009, the Maryland Court of Appeals held that Maryland common law could supply additional, undefined duties for corporate directors. Unlike Delaware, which has robust case law that analyzes the scope of a director's duties under its common law, Maryland's relative dearth of on-point precedent was unsettling to directors. Consequently, Maryland law lacked certainty, which may have caused businesses to hesitate to incorporate under Maryland law even if it was more convenient to do so.

But, Maryland's legislature recently fixed this uncertainty by amending its corporate

code in 2016 and 2017. The legislature exhaustively listed a director's obligations: directors must act (1) in good faith; (2) in a manner reasonably believed to be in the best interests of the corporation; and (3) with the care that an ordinarily prudent person in a like position under similar circumstances would use. MGCL § 2-405.1. Corporate directors may rest easier now, as the protections largely mirror those in neighboring states like Delaware (with the increased benefit of being transparent in the statute as opposed to being derived from common law).

More recently, the Court of Appeals considered the Business Judgment Rule and whether its impact should be diminished for certain decisions by a corporate board. Under the Business Judgment Rule, the law presumes that a company's leadership acted in good faith, on an informed basis, and in the company's best interests. In litigation where the Business Judgment Rule is relevant, courts will defer as a matter of law to the company's judgment unless a plaintiff effectively rebuts those presumptions. In *Oliveira v. Sugarman*, the Maryland Court of Appeals reviewed the Business Judgment Rule and validated its protection of directors where, as in that case, decisions are rendered by those board members free of conflicts of interest.

**The upshot of these developments is clear. Companies residing in Maryland can now take comfort that Maryland law regarding fiduciary duties is well settled.** Maryland directors owe similar duties in Maryland as they hold in Delaware, meaning that companies are able to incorporate under the laws of Maryland if and when preferable for them to do so. And, absent an un-ratified conflict of interest, Maryland courts apply the Business Judgment Rule to protect the decisions of boards governed by Maryland law.

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