Protecting Florida's Corporate Officers as D&O Suits Increase

Florida corporate officers are not statutorily protected to the same extent as corporate directors by the Business Judgment Rule.

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Directors and officers face increasing liability created by corporate laws that continue to expand their duties and shareholder rights. This move to increase accountability of officers and directors was largely initiated by the Sarbanes-Oxley Act, which was signed into law in 2002 to overhaul corporate governance requirements, federal disclosure laws and oversight of public accounting firms. Sarbanes-Oxley requires CEOs and CFOs to certify the accuracy of periodic reports containing financial statements filed with the Securities and Exchange Commission (SEC).

Last year, the Florida Legislature passed a law requiring the CEO or CFO of a property insurer to certify the company's annual rate filing.[1] Similar to CEOs and CFOs who certify financial statements to the SEC that they rely on other qualified personnel to prepare, most CEOs and CFOs of property insurers are not experts in actuarial science. As a result, the certifying officer is caught between having to rely on actuary staff to prepare the filing while certifying that based on his or her personal "knowledge," the filing is accurate. Certifying officers are justifiably concerned regarding the potential liability to corporate shareholders and regulators in certifying a filing, whether it is an insurance rate filing or financial filing with the SEC, wherein the officer must rely on the expertise of others. But what, exactly, is the standard of knowledge an officer must have to certify a filing and what is the potential liability in relying on others preparing the filing?

[1] The rate filing certification in Section 627.062, Florida Statutes, requires the CEO or CFO to certify under oath and subject to penalty of perjury, that (i) the signing officer reviewed the rate filing; and (ii) based on the signing officer's knowledge, the rate filing does not contain any untrue statements, any omissions, or misleading statements, (iii) based on the signing officer's knowledge, the rate filing fairly represents the basis of the rate filing; and (iv) also based on the signing officer's knowledge, the rate filing reflects all premium savings reasonably expected to result from legislative enactments and are in accordance with generally accepted and reasonable actuarial techniques.

Officers, Directors and the Business Judgment Rule in Florida

In researching the standard of "knowledge" a CEO or CFO must have to certify a filing, it was discovered that there is a disparity in the law in Florida with respect to officers and directors. Directors are statutorily protected by the Business Judgment Rule. Officers, however, are not.

The Business Judgment Rule applies to directors who use due care in the exercise of business judgment and protects them from liability, unless they act fraudulently, illegally, oppressively or in bad faith. The Florida Statutes codifies the Business Judgment Rule and provides that a director is not liable for any action taken as a director, or any failure to take any action, if he or she performed the duties of his or her office in compliance with the statute.

The Business Judgment Rule provides that a director is entitled to rely on information, opinions, reports, or statements, including financial statements and other financial data, if prepared or presented by:

> (a) one or more officers or employees of the corporation whom the director reasonably believes to be reliable and competent in the matters presented;
> (b) legal counsel, public accountants, or other persons as to matters the director reasonably believes are within the persons' professional or expert competence; or
> (c) a committee of the board of directors of which he or she is not a member if the director reasonably believes the committee merits confidence.

A director is not protected, however, if he or she had knowledge concerning the matter that makes reliance on others unwarranted.[2]

Notwithstanding this limitation on director liability, directors are required to educate themselves prior to making business decisions of all material information that is reasonably available to them and having become so informed to act with requisite care in discharge of their duties in order to avail themselves of the protections of the rule.[3]

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[2] Section 607.0830, Fla. Stat.
[3] Section 285, *Business Relationships*, Vol. 8A Florida Jurisprudence, 2d Ed.

There is no provision in the Florida Statutes applying the protection of the Business Judgment Rule to officers. Instead, the Florida Statutes merely provide that each officer has the authority and shall perform the duties set forth in the bylaws or, to the extent consistent with the bylaws, the duties prescribed by the board of directors or by direction of any officer authorized by the bylaws or the board of directors to prescribe the duties of other officers.[4]

Because officers are not afforded the same protection from liability under the Business Judgment Rule that directors are, all Florida corporations should include language from the Business Judgment Rule in their bylaws. Although language in the bylaws may not provide as much protection to officers as it would if contained in a statute, it is better than leaving the issue completely unaddressed.

Recommendations for CEOs and CFOs in Certifying Filings

The following recommendations are for CEOs and CFOs certifying filings, either in compliance with Sarbanes-Oxley or for insurance companies certifying rate filings in Florida. These recommendations also should be adopted for any annual or quarterly reports that require certification.

- The CEO/CFO should act with utmost good faith.
- The corporation's bylaws should include language that officers are entitled to rely upon information, documents, etc. prepared by those people whom the officer reasonably believes to be reliable and competent in the matter presented.
- Filings to be certified should be prepared by competent, credentialed professionals with active licenses. The CEO/CFO should be confident in, and able to articulate, the qualifications of his or her professional staff to support the argument that the CEO/CFO is reasonable in his or her reliance on the professional staff.
- The CEO/CFO and professional staff should meet to discuss the filing, including the basis for the filing. These do not have to be lengthy tutorial sessions; rather they should be more along the lines of a narrative summary explanation.
- The CEO/CFO should review the filing and thoroughly review any explanatory memoranda and other supporting narrative documentation filed in support of the filing.

[4] Section 607.0841, Fla. Stat.

- The professional staff should send drafts of the filing documents well in advance of when they are filed in order to allow the CEO/CFO ample time to review them. CEOs/CFOs should not accept receipt of a filing at the last minute; a CEO/CFO who is forced to certify the filing without adequate time to review it will have difficulty establishing that he or she was able to give critical thought to its contents.
- CEOs/CFOs should ask questions about any uncertainties or concerns, and keep a record of the fact that they asked questions and commented on the documents.

If these recommendations are followed, the CEO/CFO will be in a better position to argue that he or she (1) reasonably relied on professional staff that has the appropriate experience and credentials to justify the reliance; and (2) took necessary and reasonable steps to familiarize themselves with the filing such that the certification is made in good faith.