

House Bill 192

By: Representatives Beskin of the 54th, Williamson of the 115th, Hatchett of the 150th, Willard of the 51st, Powell of the 171st, and others

A BILL TO BE ENTITLED
AN ACT

1 To amend Part 12 of Article 2 of Chapter 1 of Title 7 and Article 8 of Chapter 2 of Title 14
2 of the Official Code of Georgia Annotated, relating to management of bank and trust
3 companies and directors and officers of corporations, respectively, so as to change provisions
4 relating to the responsibilities and standard of care of directors and officers of banks, trust
5 companies, and corporations; to clarify and expand the ability of directors and officers to rely
6 on other individuals in the performance of their duties; to shield directors and officers from
7 liability for monetary damages to the corporation, its shareholders, and certain other parties
8 in the absence of gross negligence; to provide for definitions; to clarify the burden of proof
9 applicable in civil proceedings brought against directors and officers; to change provisions
10 relating to the standards of conduct for directors and officers of corporations; to provide for
11 legislative findings; to provide for related matters; to provide for an effective date; to repeal
12 conflicting laws; and for other purposes.

13 BE IT ENACTED BY THE GENERAL ASSEMBLY OF GEORGIA:

14 style="text-align:center">**SECTION 1.**

15 The General Assembly finds that state law should overrule the Supreme Court's holding in
16 the case of *Federal Deposit Insurance Corporation v. Loudermilk, et al.*, 295 Ga. 579 (2014),
17 to the extent that it allows an action for personal liability to be brought against directors and
18 officers for ordinary negligence in carrying out their duties as directors and officers.

19 style="text-align:center">**SECTION 2.**

20 Part 12 of Article 2 of Chapter 1 of Title 7 of the Official Code of Georgia Annotated,
21 relating to management of bank and trust companies, is amended by revising Code Section
22 7-1-490, relating to the responsibilities of directors and officers, as follows:

23 "7-1-490.

24 (a) Directors and officers of a bank or trust company ~~shall discharge the duties of their~~
25 ~~respective positions in good faith and with that diligence, care, and skill which ordinarily~~

26 ~~prudent men would exercise under similar circumstances in like positions. In discharging~~
 27 ~~his duties, a director or officer, when acting in good faith, shall be entitled to rely upon~~
 28 ~~information, opinions, reports, or statements, including financial statements and other~~
 29 ~~financial data, in each case prepared or presented by~~ when discharging the duties of a
 30 director or officer, including as a member of a committee of the board, shall act in a
 31 manner the director or officer believes in good faith to be in the best interests of the bank
 32 or trust company.

33 (b) The members of the board of directors or a committee of the board, when becoming
 34 informed in connection with their decision-making function or devoting attention to their
 35 oversight function, shall discharge their duties with the care that a person in a like position
 36 would reasonably believe to be appropriate under similar circumstances.

37 (c) When discharging his or her duties, including as a member of a committee of the board,
 38 a director shall be entitled to rely on the performance by any of the persons specified in
 39 paragraph (1) or (3) of subsection (g) of this Code section to whom the board may have
 40 delegated, formally or informally by course of conduct, the authority or duty to perform
 41 one or more of the board's functions that are delegable under applicable law.

42 (d) When discharging his or her duties, an officer shall be entitled to rely on the
 43 performance by any of the persons specified in paragraph (1) of subsection (g) of this Code
 44 section of properly delegated responsibilities.

45 (e) When discharging his or her duties, including as a member of a committee of the board,
 46 a director shall be entitled to rely on information or data, opinions, and reports or
 47 statements, including financial statements and other financial data, prepared or presented
 48 by any of the persons specified in subsection (g) of this Code section.

49 (f) When discharging his or her duties, an officer shall be entitled to rely on information
 50 or data, opinions, and reports or statements, including financial statements and other
 51 financial data, prepared or presented by any of the persons specified in paragraph (1) or (2)
 52 of subsection (g) of this Code section.

53 (g) Pursuant to subsections (c) through (f) of this Code section, as applicable, a director
 54 or officer shall be entitled to rely upon:

55 (1) One or more officers, ~~or~~ employees, agents, or representatives of the bank or trust
 56 company whom the director or officer reasonably believes ~~believed~~ to be reliable and
 57 competent in the ~~matters presented~~ functions performed or the information or data,
 58 opinions, and reports or statements provided;

59 (2) ~~Counsel~~ Legal counsel, public accountants, investment bankers, or other persons as
 60 to matters which the director or officer reasonably believes to be involving skills,
 61 expertise, or knowledge reasonably believed to be within such person's professional or
 62 expert competence or as to which such person merits confidence; or

63 ~~(3) A committee of the board upon which the director or officer does not serve, duly~~
 64 ~~designated in accordance with a provision of the articles of incorporation or the bylaws,~~
 65 ~~as to matters within that committee's designated authority, which committee the director~~
 66 ~~or officer reasonably believes to merit confidence;~~
 67 ~~but such director or officer shall not be considered to be acting in good faith if he has~~
 68 ~~knowledge concerning the matter in question that would cause such reliance to be~~
 69 ~~unwarranted. A director or officer who so performs his duties shall have no liability by~~
 70 ~~reason of being or having been a director or officer of the bank or trust company With~~
 71 ~~respect to a director, a committee of the board of which he or she is not a member if he or~~
 72 ~~she reasonably believes the committee merits confidence.~~

73 (h)(1) A director or officer shall not be liable to the bank or trust company, its
 74 shareholders, or any conservator or receiver of or for the bank or trust company, or any
 75 assignee or successor-in-interest thereof, for any action or failure to take any action as a
 76 director or officer if:

77 (A) He or she fulfilled the duties of his or her office in compliance with this Code
 78 section; or

79 (B) Such action or failure to take action does not constitute gross negligence or give
 80 rise to liability for conduct described in subparagraphs (b)(4)(A) through (b)(4)(D) of
 81 Code Section 14-2-202.

82 (2) As used in this subsection, the term 'gross negligence' means a reckless indifference
 83 to or a deliberate disregard for the best interests of the bank or trust company and its
 84 shareholders.

85 (i) A party asserting liability in a proceeding that a director or officer is liable to the bank
 86 or trust company, its shareholders, or any conservator or receiver of or for the bank or trust
 87 company, or any assignee or successor-in-interest thereof, for any action or failure to take
 88 any action as a director or officer shall have the burden of establishing that liability is not
 89 precluded by any applicable bar to such proceeding by:

90 (1) Any provision in the articles of incorporation authorized by subsection (e) of Code
 91 Section 7-1-493;

92 (2) The protection afforded by subsection (h) of this Code section; or

93 (3) Any applicable protection afforded by Chapter 2 of Title 14.

94 (j) Nothing in this Code section shall:

95 (1) In any instance when fairness is at issue, such as consideration of the fairness of a
 96 transaction to the bank or trust company as evaluated under paragraph (3) of subsection
 97 (b) of Code Section 14-2-861, alter the burden of proving the fact or lack of fairness
 98 otherwise applicable;

99 (2) Alter the fact or lack of liability of a director or officer under the Official Code of
 100 Georgia Annotated, including Code Section 7-1-492 or 7-1-494;

101 (3) Affect any rights to which the bank or trust company or its shareholders may be
 102 entitled under another law of this state or of the United States; or

103 (4) Deprive a director or officer of the applicability, effect, or protection of the business
 104 judgment rule.

105 ~~(b)(k)~~ A bank, through its board of directors, may delegate to a correspondent bank the
 106 power to determine, within the limits set by law, the investments in which its assets,
 107 including reserve assets, may be held, provided that the bank must obtain the prior written
 108 approval of the department for such delegation."

109 **SECTION 3.**

110 Article 8 of Chapter 2 of Title 14 of the Official Code of Georgia Annotated, relating to
 111 directors and officers of corporations, is amended by revising Code Section 14-2-830,
 112 relating to general standards of conduct for directors, as follows:

113 "14-2-830.

114 ~~(a) A director shall discharge his duties~~ Each member of a board of directors, when
 115 discharging duties as a director, including ~~his duties~~ as a member of a committee:

116 ~~(1) In a manner he believes in good faith to be in the best interests of the corporation;~~
 117 ~~and~~

118 ~~(2) With the care an ordinarily prudent person in a like position would exercise under~~
 119 ~~similar circumstances~~ of the board, shall act in a manner he or she believes in good faith
 120 to be in the best interests of the corporation.

121 (b) The members of the board of directors or a committee of the board, when becoming
 122 informed in connection with their decision-making function or devoting attention to their
 123 oversight function, shall discharge their duties with the care that a person in a like position
 124 would reasonably believe to be appropriate under similar circumstances.

125 (c) When discharging his or her duties, including as a member of a committee of the board,
 126 a director shall be entitled to rely on the performance by any of the persons specified in
 127 paragraph (1) or (3) of subsection (e) of this Code section to whom the board may have
 128 delegated, formally or informally by course of conduct, the authority or duty to perform
 129 one or more of the board's functions that are delegable under applicable law.

130 ~~(b)(d)~~ In When discharging his or her duties, including as a member of a committee of the
 131 board, a director ~~is~~ shall be entitled to rely on information or data, opinions, and reports;
 132 or statements, including financial statements and other financial data, if prepared or
 133 presented by any of the persons specified in subsection (e) of this Code section.

134 (e) A director shall be entitled to rely upon:

- 135 (1) One or more officers, ~~or employees, agents, or representatives~~ of the corporation
 136 whom the director reasonably believes to be reliable and competent in the matters
 137 presented functions performed or the information or data, opinions, and reports or
 138 statements provided;
- 139 (2) Legal counsel, public accountants, investment bankers, or other persons as to matters
 140 involving skills, expertise, or knowledge the director reasonably believes are within ~~the~~
 141 such person's professional or expert competence; or as to which such person merits
 142 confidence; or
- 143 (3) A committee of the board of directors of which he or she is not a member if ~~the~~
 144 director he or she reasonably believes the committee merits confidence.
- 145 ~~(c) In the instances described in subsection (b) of this Code section, a director is not~~
 146 ~~entitled to rely if he has knowledge concerning the matter in question that makes reliance~~
 147 ~~otherwise permitted by subsection (b) of this Code section unwarranted.~~
- 148 ~~(d) A director is not liable to the corporation or to its shareholders for any action taken as~~
 149 ~~a director, or any failure to take any action, if he performed the duties of his office in~~
 150 ~~compliance with this Code section.~~
- 151 (f)(1) A director shall not be liable to the corporation, its shareholders, or any conservator
 152 or receiver of or for the corporation, or any assignee or successor-in-interest thereof, for
 153 any action or failure to take any action as a director if:
- 154 (A) He or she fulfilled the duties of his or her office in compliance with this Code
 155 section; or
- 156 (B) Such action or failure to take action does not constitute gross negligence or give
 157 rise to liability for conduct described in subparagraphs (b)(4)(A) through (b)(4)(D) of
 158 Code Section 14-2-202.
- 159 (2) As used in this subsection, the term 'gross negligence' means a reckless indifference
 160 to or a deliberate disregard for the best interests of the corporation and its shareholders.
- 161 (g) A party asserting liability in a proceeding that a director is liable to the corporation, its
 162 shareholders, or any conservator or receiver of or for the corporation, or any assignee or
 163 successor-in-interest thereof, for any action or failure to take any action as a director shall
 164 have the burden of establishing that liability is not precluded by any applicable bar to such
 165 proceeding by:
- 166 (1) Any provision in the articles of incorporation authorized by paragraph (4) of
 167 subsection (b) of Code Section 14-2-202;
- 168 (2) The protection afforded by subsection (f) of this Code section;
- 169 (3) The protection afforded by subsection (a) of Code Section 14-2-861;
- 170 (4) The protection afforded by Code Section 14-2-861 taken in compliance with Code
 171 Section 14-2-862 or 14-2-863; or

- 172 (5) The protection afforded by Code Section 14-2-870.
 173 (h) Nothing contained in this Code section shall:
 174 (1) In any instance when fairness is at issue, such as consideration of the fairness of a
 175 transaction to the corporation as evaluated under paragraph (3) of subsection (b) of Code
 176 Section 14-2-861, alter the burden of proving the fact or lack of fairness otherwise
 177 applicable;
 178 (2) Alter the fact or lack of liability of a director under the Official Code of Georgia
 179 Annotated, including the governance of the consequences of an unlawful distribution
 180 under Code Section 14-2-832 or a conflicting interest transaction under Code Section
 181 14-2-861;
 182 (3) Affect any rights to which the corporation or its shareholders may be entitled under
 183 another law of this state or of the United States; or
 184 (4) Deprive a director of the applicability, effect, or protection of the business judgment
 185 rule."

186 **SECTION 4.**

187 Said article is further amended by revising Code Section 14-2-842, relating to standards of
 188 conduct for officers, as follows:

189 "14-2-842.

190 (a) ~~An officer with discretionary authority shall discharge his duties under that authority~~
 191 when performing in such capacity has the duty to act:

192 (1) In a manner he or she believes in good faith to be in the best interests of the
 193 corporation; and

194 (2) With the care ~~an ordinarily prudent~~ that a person in a like position would reasonably
 195 exercise under similar circumstances.

196 (b) When ~~in~~ discharging his or her duties, an officer ~~is~~ shall be entitled to rely on
 197 information;

198 (1) The performance of properly delegated responsibilities by one or more officers,
 199 employees, agents, or representatives of the corporation whom the officer reasonably
 200 believes to be reliable and competent in performing the responsibilities delegated; and

201 (2) Information or data, opinions, and reports; or statements, including financial
 202 statements and other financial data, if prepared or presented by:

203 ~~(1)(A)~~ (A) One or more officers, ~~or~~ employees, agents, or representatives of the
 204 corporation whom the officer reasonably believes to be reliable and competent in the
 205 matters presented; or

206 ~~(2)(B)~~ (B) Legal counsel, public accountants, investment bankers, or other persons as to
 207 matters involving skills, expertise, or knowledge the officer reasonably believes are

208 within the such person's professional or expert competence or as to which such person
 209 merits confidence.

210 ~~(c) In the instances described in subsection (b) of this Code section, an officer is not~~
 211 ~~entitled to rely if he has knowledge concerning the matter in question that makes reliance~~
 212 ~~otherwise permitted by subsection (b) of this Code section unwarranted.~~

213 ~~(d) An officer is shall not be liable to the corporation or to, its shareholders for any action~~
 214 ~~taken as an officer, or any failure to take any action, if he performed the duties of his office~~
 215 ~~in compliance with this Code section, or any conservator or receiver of or for the~~
 216 ~~corporation, or any assignee or successor-in-interest thereof, for any action or failure to~~
 217 ~~take any action as an officer if:~~

218 (A) He or she fulfilled the duties of his or her office in compliance with this Code
 219 section; or

220 (B) Such action or failure to take action does not constitute gross negligence, give rise
 221 to liability for conduct described in subparagraphs (b)(4)(A) through (b)(4)(D) of Code
 222 Section 14-2-202, or give rise to liability for any transaction from which the officer
 223 received an improper personal benefit.

224 (2) As used in this subsection, the term 'gross negligence' means a reckless indifference
 225 to or a deliberate disregard for the best interests of the corporation and its shareholders.

226 (d) A party asserting liability in a proceeding that an officer is liable to the corporation, its
 227 shareholders, or any conservator or receiver of or for the corporation, or any assignee or
 228 successor-in-interest thereof, for any action or failure to take any action as an officer shall
 229 have the burden of establishing that liability is not precluded by any applicable bar to such
 230 proceeding by:

231 (1) The protection afforded by subsection (b) or (c) of Code Section 14-2-864;

232 (2) The protection afforded by subsection (c) of this Code section; or

233 (3) The protection afforded by Code Section 14-2-870.

234 (e) Nothing contained in this Code section shall:

235 (1) In any instance when fairness is at issue, such as consideration of the fairness of a
 236 transaction to the corporation as evaluated under paragraph (3) of subsection (c) of Code
 237 Section 14-2-864, alter the burden of proving the fact or lack of fairness otherwise
 238 applicable;

239 (2) Alter the fact or lack of liability of an officer under the Official Code of Georgia
 240 Annotated, including the governance of the consequences of a transactional interest under
 241 Code Section 14-2-864;

242 (3) Affect any rights to which the corporation or its shareholders may be entitled under
 243 another law of this state or of the United States; or

244 (4) Deprive an officer of the applicability, effect, or protection of the business judgment
245 rule."

246 **SECTION 5.**

247 This Act shall become effective upon its approval by the Governor or upon its becoming law
248 without such approval.

249 **SECTION 6.**

250 All laws and parts of laws in conflict with this Act are repealed.