

Meeting of the Corporations, Securities and Financial Services Committee
January 25, 2017

DISCUSSION TOPIC – SECTION 8.42 OF THE RMBCA

QUESTION:

Should the Subcommittee's proposal include s. 8.42 of the RMBCA dealing with standards of conduct for officers?

Materials for Discussion

RMBCA Section 8.42 – Standards of Conduct for Officers

This section, which first became part of the RMBCA in 1984 and was amended in 1999 and again in 2005, relates to standards of conduct for officers and largely parallels Section 607.0830 of the Florida Statutes and Section 8.30 of the RMBCA related to standards of conduct for directors. Section 8.42 was intentionally not included in Florida's 1989 corporate statute. The 1989 Commentary to Chapter 607 adopted explained the rationale for the omission as follows:

"Currently, Florida does not have a statute dictating standards of conduct for officers. These standards are currently imposed under common law and general contract law. Although Georgia has recently adopted a statute that is similar to RMBCA Section 8.42, the Committee believes there is no need to adopt a similar statute at this time".

As of today, 28 of the 34 model act jurisdictions, including Georgia, Massachusetts, North Carolina, Oregon, Pennsylvania, Washington DC, and Washington State, have adopted either the 1984 or updated versions of this RMBCA provision. As this section has been adopted by the vast majority of Model Act jurisdictions, it should be considered anew by this Subcommittee.

What follows is the current version of the s. 8.42 of the RMBCA; however, it should be noted that, if the Subcommittee determines that it is in the state's best interest to add this section to the FBCA, the changes previously proposed to be made to Section 607.0830 should probably be mirrored into this section. A proposed draft of s. 607.0830 as previously adopted by the subcommittee is at the end of this memorandum.

Section 8.42 of the RMBCA

§8.42 STANDARDS OF CONDUCT FOR OFFICERS

(a) An officer, when performing in such capacity, has the duty to act:

(1) in good faith;

(2) with the care that a person in a like position would reasonably exercise under similar circumstances; and

(3) in a manner the officer reasonably believes to be in the best interests of the corporation.

(b) The duty of an officer includes the obligation:

(1) to inform the superior officer to whom, or the board of directors or the committee to which, the officer reports of information about the affairs of the corporation known to the officer, within the scope of the officer's functions, and known to the officer to be material to such superior officer, board or committee; and

(2) to inform his or her superior officer, or another appropriate person within the corporation, or the board of directors, or a committee, of any actual or probable material violation of law involving the corporation or material breach of duty to the corporation by an officer, employee, or agent of the corporation, that the officer believes has occurred or is likely to occur.

(c) In discharging his or her duties, an officer who does not have knowledge that makes reliance unwarranted is entitled to rely on:

(1) The performance of properly delegated responsibilities by one or more employees of the corporation whom the officer reasonable believes to be reliable and competent in performing the responsibilities delegated; or

(2) Information, opinions, reports or statements, including financial statements and other financial data, prepared or presented by one or more employees of the corporation whom the officer reasonably believes to be reliable and competent in the matters presented or by legal counsel, public accountants, or other persons retained by the corporation as to matters involving skills or expertise the officer reasonably believes are matters (i) within the particular person's professional or expert competence or (ii) as to which the particular person merits confidence.

(d) An officer shall not be liable to the corporation or its shareholders for any decision to take or not to take action, or any failure to take any action, as an officer, if the duties of the office are performed in compliance with this section. Whether an officer who does not comply with this section shall have liability will depend in such instance on applicable law, including those principles of section 8.31 that have relevance.

Discussion of s. 8.42 from summary of May 28, 2015 subcommittee meeting

Section 8.42 of the RMBCA (Standards for conduct of officers)

The subcommittee members in attendance at the meeting discussed whether to add RMBCA s. 8.42 to the FBCA at this time. Following such discussion, it was the consensus of those participating in the meeting not to add this section to the FBCA, based on the continued belief that common law already covers the duties of officers and that it is not necessary to proscribe standards for conduct of officers, particularly given that there does not appear to be confusion in the law about the duties of officers.

Notwithstanding, the subcommittee decided that before a final decision is made, the co-chairs will discuss this issue with Stu Ames (the Florida representative on the Corporations Laws Committee of the ABA Business Law Section) to see if he has any different and strongly held thoughts on whether this section should be added to the FBCA.

Stu Ames' e-mail to subcommittee on June 2, 2015 at 6:01 PM

All:

I regret that I was unable to join your discussion last week, particularly with respect to the point on which Phil has solicited my views – namely, §607.0842 (Standards of conduct of officers).

I wish my memory was sharp enough, which it isn't, to recall why, in 1988-89, the 607 drafting committee decided not to adopt the 1984 MBCA counterpart of §607.0842 and, instead, decided to rely on common law rules of agency. I gather the four other members of our current committee who were also on the original committee do not have a better recollection (which may have something to do with our advanced age ☺).

We should keep in mind that the version of the MBCA we are looking at now is quite a bit more robust than the 1984 version that our original committee considered but did not recommend. Moreover, the Official Comment to the 1984 MBCA predecessor to §8.42 was a short paragraph, which simply likened the standard of conduct applicable to officers to the standard applicable to directors under §8.30. As you know, the current Official Comment is very lengthy and quite detailed, which I believe is a result of an excellent article (copy attached) in *The Business Lawyer*, 48 Bus. Law. 215 (1992), "Common Law Duties of Non-Director Corporate Officers" by Gil Sparks and Larry Hamermesh (Gil is a recent past Chair of Corporate Laws Committee, and Larry currently serves on the CLC as the Reporter for the MBCA Annotated). Although the entire MBCA is continuously reviewed by various task forces of the CLC, the CLC has not shown any inclination to amend either §8.42 or its Official Comment.

My view has changed over the last 25 years. Having sat on the CLC for the last nine years and observed first-hand how much hard work, thought and debate goes into amending provisions of the MBCA, by some of the best corporate lawyers in the country (I don't count myself among them), I believe we in Florida should have a very good reason not to follow that Committee's lead when considering amendments to the FBCA. I admit to some degree of bias in that regard.

It seems to me that a statute should provide clear guidance to its audience (i.e., we as counselors to corporate officers and directors) with as little as possible left to interpretation. I believe that the current

version of §8.42 and its Official Comment do that, and do it well, particularly the implicit adoption of the BJR as applicable to corporate officers. §607.0842 does not.

I also think that the more specific guidance provided by §8.42 could be helpful in determining an officer's entitlement to indemnification and in providing offensive and defensive arguments when an officer is named as a defendant in litigation (derivative or otherwise). Other aspects of §8.42 that I like are the specific requirements for "up the line" reporting and transparency, and very specific (and corporate structure-related) definitions of reasonable "reliance", something that I am not sure would be a part of traditional agency rules.

Delaware does not have a counterpart to §8.42. And, as we all know, Florida follows Delaware case law where our respective statutes are similar or where our statute does not provide an answer and Delaware's case law does. But the fact that Delaware has not chosen to include a provision like §8.42 (or any other MBCA provision for that matter) should not be taken as an indication that it is not worthwhile. The Delaware Bar derives a significant part of its corporate business because it has a terrific judiciary (the Chancery Court) which is well-versed in corporate law. I know from speaking to prominent Delaware lawyers that they are very reluctant to change the DGCL. Sparks and Hamermesh (who are among the best corporate lawyers in Delaware and very involved in the GCL legislative process) in their article speak highly of the MBCA provision we are discussing.

I hope my thoughts are of some assistance. Best regards, Stu

Stuart D. Ames

Lou Conti's e-mail to Stu Ames and subcommittee on June 3, 2015 at 9:32 AM

Stu,

Thank you for your comments, which are indeed insightful and constructive in considering the duties applicable to corporate officers.

I have not had time to recently examine Florida case law on corporate officers duties, but I am not aware of any recent opinions which created any controversy. We have relied, without obvious adverse consequences, on common law agency fiduciary duties for officers; however, I believe perhaps it is time to change.

The statutory construct is helpful for practitioners and the courts. I like the RMBCA provisions and believe they reflect a consensus which seeks to stay in harmony with common law, and which are an improvement over leaving it to the courts to get it right.

However, I would appreciate hearing from other members of the drafting committee who have contrary views, particularly if they believe there are any significant adverse consequences which might arise from the RMBCA statutory framing of duties for officers.

Co-Chairs note to subcommittee members about s. 8.42 in e-mail transmitted on June 3, 2015 at 4:09 PM

Finally, at the last meeting of the subcommittee, a decision was made by those participating in the meeting not to include s. 8.42 of the RMBCA (Standards of conduct of officers) in the subcommittee's proposal. Following our circulation of the summary of the matters discussed and decisions made at that meeting, we received thoughtful comments on this subject from Stu Ames and Lou Conti (who were not in attendance at the last meeting) suggesting reasons why they believe this RMBCA section should be included in our draft (as more particularly set forth in their respective e-mails that you all received). In light of the questions raised by Stu and Lou, we intend to put back on the table for further discussion the question of whether or not to include s. 8.42 in our proposal (and if we decide to include this RMBCA provision in our proposal, whether we should adopt it in the RMBCA form or make changes to the RMBCA provision). Because of scheduling and our desire to focus our attention at the upcoming meeting on the indemnification provisions to be included in the proposal, we will not take this issue up at next week's meeting. However, we intend to put this issue on the agenda for a future meeting of the subcommittee.

Stu Cohn's e-mail to Phil Schwartz on Sunday, June 7, 2015 at 1:57 PM about this issue

Phil,

I am sorry that I am so far out of it, although I have no regrets visiting family and finally enjoying a true vacation.

I have my doubts as to the advisability of setting forth officer duties. Spelling out officer duties may be unnecessary and could lead to issues that are better left to executive decision-making and agency law. As agents officers are subject to the full panoply of agency duties, including fiduciary duties and other obligations that arise under agency law. Moreover, to the extent that officer obligations are spelled out it might be more difficult for boards or senior officers to discharge officers who could argue that they have satisfied the statutory mandates and therefore have been improperly treated. Detailing director duties makes sense because there is no higher check on directors. The same is not true for officers, who are under the direction and control of the board and senior officers.

But, I also have no strong feelings on this issue and as I noted before, I have full confidence in whatever direction the group decides.

E-Mail from Stu Ames to Phil Schwartz and Gary Teblum on June 22, 2015 about this issue

Phil and Gary:

At the Corporate Laws Committee meeting this past weekend, I spoke to a couple of the members who were involved in drafting 8.42 many years ago (prior to 1984) and asked them why the Committee thought it necessary to include that section. The best answer they could give me was that the Committee wanted to include a roadmap for courts as to the duties of officers, rather than rely on common law principles of agents' duties.

Regards, Stu