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PROFESSIONAL LIABILITY BLOG

CEOs Beware!

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On a list of jobs likely to engender little sympathy in the United States today, chief executive officer (CEO) perhaps is up there with trial lawyers and Internal Revenue Service auditors in the category of "most reviled." Nonetheless, this blog entry offers a primer for CEOs on how to more effectively watch their backs and keep their jobs (or at least how to more effectively sue after losing them).

On the flip side, if warning CEOs isn't your cup of tea or you happen to serve as a board member looking to change leadership, consider this entry a partial how-to on canning your CEO effectively and without warning.

A recent Delaware Supreme Court case (*Klaassen v. Allegro Dev. Corp.* 2014 WL 996375, Del. Mar. 14, 2014) addressed whether a corporation's board of directors needed to notify the CEO in advance of considering (and ultimately voting on and approving) his removal at a regularly-scheduled board meeting. After noting Delaware law does not require corporate directors to provide notice of regularly scheduled board meetings, the Supreme Court held no default requirement exists that the directors provide notice of the specific agenda items to be addressed. Additionally, the particular corporation involved did not have any separate requirement of such advance notice.

- Warning to CEOs: The directors at your company may be planning on firing you at a regularly-scheduled meeting! The directors in this case had held special meetings before firing the CEO (the board, not surprisingly, did not invite the CEO to those meetings). The Supreme Court held these actions did not invalidate the dismissal, because the directors had not taken any official board action until the regularly-scheduled meeting.
- Advice for boards of directors looking to fire a CEO: If you're going to surprise him or her, do it at a regularly-scheduled meeting!

The CEO in this particular case did (as expected) have a number of arguments against his removal, chiefly: (1) the board used deceptive tactics to reschedule the regular board meeting; and (2) the board provided a false explanation for an attorney's presence at that meeting.

- Further advice for a board: Avoid rescheduling the meeting at which you're going to fire the CEO.

Despite the board's actions, the CEO lost his ability to argue the above two issues, because the high court found he "equitably acquiesced" to his removal. In particular, the CEO (1) helped his replacement "transition" into the CEO role; (2) attempted to negotiate a consultation agreement to assist the new CEO; and (3) while continuing as a board member for the corporation, served on a committee on which he ordinarily would not have been allowed to serve as CEO.

The Court held the removed CEO did not need to "consciously" intend to approve his removal; rather, it was sufficient he'd acted in a manner inconsistent with repudiating the dismissal, leading the board to believe he approved of its act (i.e., "equitable acquiescence").

- Bottom line on acquiescence for CEOs: If you're going to fight, fight early.
- Bottom line on acquiescence for corporate boards: "Playing nice" is advantageous.

Ultimately, in this case the board toed the line of acceptable behavior: though the Court indicated Delaware does not approve of deception as a means of conducting a corporation's affairs (specifically referring to rescheduling the meeting and the deceptive reason offered for the attorney's presence), and though this deception could have potentially rendered the dismissal voidable, the CEO here lost his chance to fight that fight through his decision to continue in his capacity as a board member.

- CEOs, if you end up with a knife in your back at a regularly-scheduled board meeting and you want to fight it, don't keep serving as a board member (or working in another capacity) with the knife sticking out of your back. It won't kill you, but it might kill your case.

By Tyler Thompson

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