

The “Leaving the Board” Roadmap: What Are My Fiduciary Duties?

Director behavior is at the essence of a director's fiduciary duties. This is what Delaware courts love to write about in their opinions. That's easy for all the lawyers in the room to understand. But the notion of "fiduciary duties" is not a topic typically foremost on a director's mind. At least not until something like a director wanting to leave the board comes along. That they want out if they can pull it off (see [my earlier blog](#) about 4 things a director should consider when mulling a departure). There is no easy answer for this type of situation. And it's raised more often than you might think. If you sit on a particular board long enough, it's only a matter of time before a crisis makes an appearance. It will just depend then on whether a director thinks the company is handling the crisis responsibly and in a way they're comfortable with. One of the key considerations here is to spot the issues that arise from a director's behavior in the face of a crisis. Of course, no one knows how a court would ultimately rule upon any given situation – but it's important to know what are the actions and deliberations that a court might wind up being intrigued about. What might lead a court to find that a director's fiduciary duties have been breached due to their behavior in the wake of a crisis? Here's a roadmap to consider:

1. Starting place: the duty of oversight:

- Defined as the *Caremark* standard: only "sustained or systematic failure of the board to exercise oversight—such as an utter failure to attempt to assure a reasonable information and reporting system exists—will establish the lack of good faith that is a necessary condition to liability."
- The duty in troubled situation: show good faith in continuing to establish a reporting system, and addressing issues that arise under that system.
- Particularly acute obligation for a committee chair or board chair.

2. Technical issues in charter documents to consider:

- Is there anything unusual in the company's policies and procedures regarding director resignations, including any limitations in the company charter and/or bylaws?
- Do the charter, bylaws or corporate governance guidelines make the director entitled to consult independent legal counsel or other advisors at the company's expense, including for advice as to resignation and director's duties, obligations and responsibilities? Often the answer will be "not clearly so" so it may be time to speak to the general counsel or your own outside governance counsel for advice.

3. Independence considerations:

- Is there any risk that the director could be alleged to be dependent on the income from the directorship, to the point that the compensation could compromise independence in decision-making?

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