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RECENT DEVELOPMENT

PLANK v. CHERNESKI: MARYLAND NOW RECOGNIZES THAT BREACH OF FIDUCIARY DUTY MAY BE BROUGHT AS AN INDEPENDENT CAUSE OF ACTION.

By: Curtis Paul

The Court of Appeals of Maryland held that breach of fiduciary duty may be brought as an independent cause of action, and that the remedy for the breach will be dependent on the particular fiduciary relationship. *Plank v. Cherneski*, 469 Md. 548, 625, 231 A.3d 436, 481-82 (2020). The court also affirmed precedent and held that managing members of an LLC owe a common law fiduciary duty to the LLC and its members. *Id.* at 625, 231 A.3d at 481-82.

This case arose from a dispute between the minority and managing members of a Maryland LLC. Following a series of financial and operational struggles, William H. Plank and Sanford R. Fisher, Minority Members (“Trusox Minority Members”) of Trusox, LLC (“Trusox”), filed an action against the Trusox President and CEO, James P. Cherneski (“Cherneski”), alleging violations of the Trusox Operating Agreement and breach of contractual and fiduciary duties. The Trusox Minority Members alleged that Cherneski breached his fiduciary duties by: (1) frequently paying employees late in violation of Maryland wage law; (2) refusing to provide Minority Members access to Trusox books and records; and (3) generally violating securities, trademark, and right to publicity laws.

The lawsuit proceeded as an expedited bench trial in the Circuit Court for Anne Arundel County. The circuit court found in favor of the Trusox Minority Members on several of the breach of contract claims. However, regarding the breach of fiduciary duty claim, the circuit court stated that Maryland does not recognize an independent tort for a breach of fiduciary duty. Regardless, the court ultimately found that there was not enough evidence to show that Cherneski had breached any fiduciary duties to the LLC or the Trusox Minority Members.

The Trusox Minority Members appealed to the Court of Special Appeals of Maryland. After hearing oral arguments, the Court of Special Appeals submitted two certified legal questions to the Court of Appeals of Maryland. The certified legal questions were whether the Trusox Minority Members could bring a stand-alone cause of action for a breach of fiduciary duty, and if so, whether the cause of action was limited to allegations supporting other causes of action, or if the cause of action could be wholly independent from similarly alleged conduct.

The Court of Appeals of Maryland first reviewed Maryland's LLC statutory framework. *Plank*, 469 Md. at 570, 231 A.3d at 449. The court stated that the governing principles for a Maryland LLC are derived from the Maryland Limited Liability Company Act ("LLC Act") and the individual LLC's operating agreement. *Id.* at 570-71, 231 A.3d at 449. The court noted that the LLC Act was silent on fiduciary duties, and therefore any fiduciary duties imposed on Cherneski would need to derive from the Trusox operating agreement. *Id.* The court found that the operating agreement imposed no such duty, thus any implied fiduciary duties would need to exist under common law. *Id.* at 571-72, 231 A.3d at 449-450.

The court noted that while it had not previously decided whether there is a common law fiduciary duty for managing members of an LLC, the Court of Special Appeals had recognized such a duty in prior cases. *Plank*, 469 Md. at 572, 231 A.3d at 450. (citing *George Wasserman & Janice Wasserman Goldsten Family LLC v. Kay*, 197 Md. App. 586, 14 A.3d 1193 (2011)). The court followed the analysis of common law agency principles in *Wasserman* and held that managing members of an LLC owe a common law fiduciary duty to the LLC and its members. *Plank*, 469 Md. at 572, 231 A.3d at 450.

The court then conducted an extensive review of Maryland's case law concerning breach of fiduciary duty. *Plank*, 469 Md. at 574, 231 A.3d at 451. Central to the court's inquiry was *Kann v. Kann*, a case which involved a dispute between a trustee and a beneficiary. *Plank*, 469 Md. at 574, 231 A.3d at 451 (citing *Kann v. Kann*, 344 Md. 689, 690 A.2d 509 (1997)). The primary question in *Kann* was whether breach of fiduciary duty could be brought as an independent action in tort. *Plank*, 469 Md. at 574, 231 A.3d at 451 (citing *Kann*, 344 Md. at 697-98, 690 A.2d at 513 (1997)). The *Kann* court answered in the negative and held that "there is no universal or omnibus tort for the redress of breach of fiduciary duty by any and all fiduciaries." *Plank*, 469 Md. at 576, 231 A.3d at 452 (quoting *Kann*, 344 Md. at 713, 690 A.2d at 521 (1997)). The *Kann* court added however, without further clarification, that while there is no universal cause of action for breach of fiduciary duty, "[it] does not mean that there is no claim or cause of action available for breach of fiduciary duty." *Plank*, 469 Md. at 576, 231 A.3d at 452 (quoting *Kann*, 344 Md. at 713, 690 A.2d at 521 (1997)).

The court then examined its jurisprudence post-*Kann*, in ten cases which cited to *Kann's* unclear holding concerning breach of fiduciary duty. *Plank*, 469 Md. at 577-84, 231 A.3d at 453-57. The court summarized that it had recognized independent claims for breach of fiduciary duty in these ten cases. *Plank*, 469 Md. at 583-84, 231 A.3d at 457. However, the court noted that it subsequently penned two footnotes stating that "[M]aryland does not recognize a separate tort action for breach of fiduciary duty" and conversely, that "[b]reach of fiduciary duties is a cognizable tort in Maryland." *Plank*,

469 Md. at 583-84, 231 A.3d at 457 (quoting *Int'l Bhd. of Teamsters v. Willis Corroon Corp. of Md.*, 369 Md. 724, 727 n.1, 802 A.2d 1050, 1052 (2002)); (quoting *Schenker v. Laureate Educ., Inc.*, 411 Md. 317, 351 n.16, 983 A.2d 408, 428 (2009)).

The court reviewed the inconsistent effects of *Kann* in the Court of Special Appeals of Maryland, and the Federal District Court for the District of Maryland. *Plank*, 469 Md. at 585-91, 231 A.3d at 458-61. The court found that the Court of Special Appeals had arrived at three various holdings regarding breach of fiduciary duty: (1) recognizing a stand-alone claim for breach of fiduciary duty; (2) allowing the stand-alone claim, but only for equitable relief; and (3) finding that the stand-alone claim is unrestricted by the type of relief available. *Id.* at 585, 231 A.3d at 458. The court also recognized that Maryland federal judges have been equally unable to reconcile “a split of authority . . . as to whether the Court of Appeals rejected breach of fiduciary duty as an independent tort.” *Plank*, 469 Md. at 589, 231 A.3d at 460 (quoting *Froelich v. Erickson*, 96 F. Supp. 2d 507, 526 n.22 (D. Md. 2000)).

The court concluded its examination of *Kann*'s jurisprudential effect and proceeded to answer the certified questions presented by the Court of Special Appeals. *Plank*, 469 Md. at 592, 231 A.3d at 462. The court stated three possible interpretations of the certified legal questions: (1) that breach of fiduciary duty can only be brought if it gives rise to a secondary or separate cause of action; (2) that breach of fiduciary duty can only be brought as an independent cause of action if it is the most appropriate option; or (3) that breach of fiduciary duty can only be brought as an independent action when seeking equitable relief. *Id.* at 592-93, 231 A.3d at 462.

The court considered each interpretation, but first stated that its own pronouncements in *Kann*, and subsequent footnotes, created a “ripple effect” causing “big confusion” on whether Maryland recognizes an independent cause of action for breach of fiduciary duty. *Plank*, 469 Md. at 593-94, 231 A.3d at 463. The court decided that the two footnotes were non-controlling dicta and rejected interpretation one, as it relied primarily on those footnotes. *Id.* at 596, 231 A.3d at 464. The court also rejected interpretation three as it “interprets *Kann* too narrowly.” *Id.* at 597, 231 A.3d at 464-65. The court thus adopted interpretation two, arriving at a more balanced approach. *Id.* The court held that “breach of fiduciary duty may be actionable as an independent cause of action” and that the relief “will be determined by the historical remedies provided by statute, common law, or by contract.” *Id.* at 597, 231 A.3d at 465.

The court reasoned that because a fiduciary relationship can arise out of common law, statute, or contract, it was appropriate to make the remedy dependent on the specific fiduciary relationship at issue. *Plank*, 469 Md. at

598, 231 A.3d at 465-66. The court held that going forward, Maryland courts should permit an independent cause of action for breach of fiduciary duty to proceed if the plaintiff: (1) describes a fiduciary relationship; (2) identifies a breach; and (3) requests relief that is applicable to the specific fiduciary relationship and breach. *Id.* at 599, 231 A.3d at 466.

Returning to the dispute at hand, the Court of Appeals of Maryland upheld the trial court in finding that there was not enough evidence to show that Cherneski had breached his fiduciary duties to the LLC or the Trusox Minority Members. *Plank*, 469 Md. at 602-09, 231 A.3d at 468-72. While the court did not find in favor of the Trusox Minority Members in this case, it maintained that managing members of an LLC owe a common law fiduciary duty to the LLC and its members. *Id.* at 625, 231 A.3d at 481.

The Court of Appeals of Maryland ended twenty-three years of jurisprudential uncertainty by definitively holding that a breach of fiduciary duty may be brought as an independent cause of action. The court further held that managing members of an LLC owe a common law fiduciary duty to the LLC and its members. These two holdings are a monumental development for Maryland law generally, and more specifically to corporations and associations practice. The court's holding now allows all Maryland plaintiffs who are harmed by a fiduciary relationship to bring a single cause of action for that harm, regardless of parallel injuries or claims. The holding further affirms an important requirement for LLC managers by formally imposing a common law fiduciary duty on the managers to the LLC and other members; a holding which will have long lasting ripple effects on corporations and associations practice in Maryland.