



Fiduciary Failings: The Case Against Reckless Symphony Orchestra Boards

By: Kevin Case, Case Arts Law LLC

In light of the current assault against wages, benefits and working conditions of symphony orchestra musicians (and accompanying cuts to season length and orchestra size), many players have raised the question of what legal duties the members of an orchestra's board of directors owe to their organizations. Without a doubt, the concessions and cuts sought by some managements and boards would have a significant detrimental impact on artistic quality. If such moves effectively destroy the orchestra – the very reason for the organization's existence – then can (and should) the board members who chose to embark on such a reckless and destructive path somehow be held legally responsible?

It's a good question. Members of the board of directors of non-profits, like directors of for-profit business corporations, are fiduciaries. That means they are held (theoretically at least) to the strictest standards of good faith, honesty, and fair dealing.¹ In the for-profit context, the nature of fiduciary duties is clear: directors owe a "duty of care" – essentially, an obligation to act in good faith and for the best interests of the corporation, as would an "ordinarily prudent" person in that position; and a "duty of loyalty," which prohibits self-dealing (i.e., transactions benefiting the director personally).²

Importantly, corporate directors also receive the protection of the "business judgment rule." That is a doctrine under which a court, faced with a challenge to a director's conduct, will presume that the director "acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests" of the organization.³ Unless the challenger can rebut that presumption by showing something like fraud, self-dealing, or "gross negligence," the court will not second-guess the director's acts.⁴ It is not enough, therefore, to show merely that "what [the director] did was unwise or inexpedient."⁵

The law is not so clear in the non-profit context. Legal scholars have long argued (and some courts have recognized) that in light of the fundamental differences between non-profits and business corporations, a non-profit director's conduct should be evaluated differently.⁶ Corporations exist to make money. Non-profits, in contrast, exist because of the recognition that the provision of certain services is *not* profitable, yet is valuable to society.⁷ A non-profit is thus defined entirely by its objective; its mission typically is the perpetuation of a particular activity.⁸

In that respect, a non-profit is more akin to a public trust than a corporation – and the board members' roles are more like those of trustees.⁹ A trustee is held to the strictest fiduciary standards, and is not entitled to the protection of the business judgment rule.¹⁰

Prior to the 1970s, some courts were willing to hold non-profit boards to the standards of a trustee.¹¹ Unfortunately, the modern trend is to treat non-profit directors just like their corporate counterparts. That is, most courts apply the corporate standard and the business judgment rule – not the trustee standard – when evaluating the conduct of non-profit board members.¹² In the words of the Delaware Supreme Court: “A court cannot second-guess the wisdom of facially valid decisions made by charitable fiduciaries, any more than it can question the business judgment of the directors of a for-profit corporation.”¹³

It is often a bad fit. To accommodate the wholly different purpose and function of a non-profit, some have advocated for the recognition of a third duty owed by directors of non-profits: a “duty of obedience.”¹⁴ Broadly stated, the duty of obedience “requires the director of a not-for-profit corporation to be faithful to the purposes and goals of the organization.”¹⁵ This approach acknowledges that unlike corporate directors, who owe their duties to the shareholders, non-profit directors’ duties are owed squarely to the *mission* of the non-profit.¹⁶

Some courts have explicitly recognized this duty. In one New York case, a nonprofit hospital, citing declining revenues, asked the court for permission (as required by state law) to close facilities and sell nearly all of its assets. The court reasoned that the differences between non-profits and for-profit corporations justified imposing a duty of obedience. It denied the request on grounds that the proposed actions failed to “promote the purposes” for which the hospital was chartered.¹⁷

To those who have spent their careers in and around symphony orchestras, it makes perfect sense to hold board members to some kind of version of this duty of obedience. Contrary to what we hear from some managers and board members these days, the “purposes and goals” of an orchestra do not include making money, cutting labor costs, chasing outside revenue-generating projects, or achieving a balanced budget every year. It is most emphatically *not* the mission of a symphony orchestra to have a “sustainable business model.” The mission, simply put, is the provision and perpetuation of symphonic music in the public sphere. Arguably, when a board seeks or imposes such draconian cuts to wages and benefits that quality musicians leave, or slashes the season drastically, or decides to put on nothing but pops concerts and run-outs, it breaches its duty of obedience to that mission.

Whether a board can be held liable in a court of law for breaching that duty is another matter. As noted, modern courts do not apply the more-stringent trustee standard; and while a few have recognized the duty of obedience, the scope and extent of that duty is yet unclear. The business judgment rule remains a powerful defense. Another hurdle concerns the issue of legal standing – i.e., who is allowed to sue. Often, only state attorneys general have the legal authority to bring suit against a non-profit.¹⁸ Some states allow “dissident” directors to sue;¹⁹ that would be quite interesting, but probably unlikely. In other instances, a court will exercise discretion and grant “special interest standing” to a particular group of interested parties.²⁰ But that is a rare exception, and it would be a real challenge to obtain standing for, say, a group of musicians, donors, or audience members.²¹ Finally, because so much occurs in the context of collective bargaining, claims for breach of fiduciary duties might be preempted by federal labor law.

As a practical matter, therefore, an actual lawsuit against symphony directors would face significant obstacles. Nonetheless, it is absolutely worthwhile to shine a bright light on the recent actions of some symphony orchestra boards, and examine the duties their members owe – legal *and* moral – to their organizations. Non-profit directors are insulated from the kind of scrutiny applied to corporate directors, who have a powerful incentive to police their own conduct: if they don't make money for the shareholders, they get voted out. No such internal check exists in a non-profit.²² It is up to those most affected – musicians, donors, and audiences – to speak up and demand accountability.

Such scrutiny is well warranted today, as some symphony boards truly seem to have lost sight of the mission of their organizations. In their quest for balanced budgets and “sustainability” – goals inappropriately borrowed from the for-profit corporate world – those boards run the risk of destroying their orchestras under the guise of saving them. Members of such boards must recognize that they operate under a serious – some would say sacred – obligation, one that is *not* rooted in the bottom line of a balance sheet. Failure to heed that obligation can, and should, have consequences.

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CASE ARTS LAW LLC

The Monadnock Building
53 West Jackson Blvd., Suite 209

Chicago IL 60604

P 312.234.9926

F 312.962.4908

www.caseartslaw.com

¹ Fiduciaries are “held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior.” *Meinhard v. Salmon*, 249 N.Y. 458 (1928).

² See Rev. Model Nonprofit Corp. Act §§ 8.30, 8.31 (1987).

³ *In re Citigroup Inc. Shareholder Derivative Litigation*, 964 A.2d 106, 124 (Del. Ch. 2009).

⁴ *Id.*

⁵ *Auerbach v. Bennett*, 47 N.Y.2d 619, 629 (N.Y. 1979).

⁶ See JAMES J. FISHMAN, *THE FAITHLESS FIDUCIARY AND THE QUEST FOR CHARITABLE ACCOUNTABILITY 1200-2005* (2006); Denise Ping Lee, Note, *The Business Judgment Rule: Should It Protect Nonprofit Directors?*, 103 COLUM. L. REV. 925, 943-45 (2003).

⁷ Burton A. Weisbrod, *The Pitfalls of Profits*, STANFORD SOCIAL INNOVATION REVIEW, Winter 2004, at 42.

⁸ *Manhattan Eye, Ear & Throat Hospital v. Spitzer*, 186 Misc. 2d 126, 152 (N.Y. Sup. Ct. 1999).

⁹ See *Lynch v. John M. Redfield Foundation*, 9 Cal. App. 3d 293, 298 (2d Dist. 1970) (“Members of the board of directors of [a non-profit] corporation are essentially trustees”); *Manhattan Eye, Ear & Throat Hosp.*, 186 Misc. 2d at 151 (board is “essentially a caretaker of the not-for-profit corporation and its assets”).

¹⁰ *Stern v. Lucy Webb Hayes Nat’l Training School for Deaconesses & Missionaries*, 381 F. Supp. 1003, 1013 (D.D.C. 1974).

¹¹ See, e.g., *Lynch*, 9 Cal. App. 3d at 298.

¹² See *Stern*, 381 F. Supp. at 1013; *Consumers Union of U.S., Inc. v. State*, 5 N.Y.3d 327, 360 (2005).

¹³ *Oberly v. Kirby*, 592 A.2d 445, 462 (Del. 1991).

¹⁴ See Jeremy Benjamin, Note, *Reinvigorating Nonprofit Directors’ Duty of Obedience*, 30 CARDOZO L. REV. 1677 (2009).

¹⁵ *Manhattan Eye, Ear & Throat Hospital*, 186 Misc. 2d at 152.

¹⁶ *Shorter College v. Baptist Convention*, 279 Ga. 466, 474 (2005) (Fletcher, C.J., dissenting).

¹⁷ *Manhattan Eye, Ear & Throat Hospital*, 186 Misc. 2d at 151-57.

¹⁸ See *Hooker v. Edes Home*, 579 A.2d 608, 612 (D.C. 1990).

¹⁹ See, e.g., Cal. Corp. Code 5142(a); N.Y. Not-for-Profit Corp. Law 720(b).

²⁰ See, e.g., *Hooker*, 579 A.2d at 612; *Alco Gravure, Inc. v Knapp Foundation*, 64 N.Y.2d 458, 465 (1985).

²¹ See *Consumers Union*, 5 N.Y.3d at 351 (declining to find special-interest standing where the non-profit’s mission “inures to the public as a whole, not to a particular group of people with a special interest in funds held for a charitable purpose”).

²² See Lee, *supra* n.5, at 956-58; *Manhattan Eye, Ear & Throat Hospital*, 186 Misc. 2d at 151.