

# Fiduciary Duties of Former Directors of Delaware Corporations

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It is well understood that directors of Delaware corporations are subject to the fiduciary duties of care and loyalty. In general, the duty of care requires directors to base their decisions on all material information reasonably available, and the duty of loyalty requires directors to act in good faith on an independent and disinterested basis to advance the best interests of the corporation and its stakeholders.

What is less discussed are the fiduciary duties owed to a corporation by its former directors. While former directors generally owe no fiduciary duties once they resign from the board of directors of a corporation, there are some notable exceptions to this rule. Directors looking to step down from their director position should keep such exceptions in mind.

In *BelCom, Inc. v. Robb*, the defendant was a former director and major shareholder of a Delaware corporation. The corporation sued the defendant director for, among other things, breach of his fiduciary duties by submitting for reimbursement millions of dollars in frivolous expenses and, when the corporation refused to pay, initiating a campaign of harassment to coerce payment from the corporation, including by encouraging key employees at the corporation to demand indemnification agreements because of litigation that the defendant himself threatened to bring against the corporation.

The court held that the defendant breached his duty of loyalty to the corporation. In holding that the defendant could be liable for breaches of the duty of loyalty that occurred both before and after his removal as a director, the court explained that a “former director, of course, breaches his fiduciary duty if he engages in transactions that had their inception before the termination of the fiduciary relationship or were founded on information acquired during the fiduciary relationship” (*BelCom, Inc. v. Robb*, Civil Action No. 14663, 1998 Del. Ch. LEXIS 58, \*9, (Del. Ch. April 28, 1998)).

*BelCom* demonstrates that a former director of a Delaware corporation may have liability for breach of fiduciary duties where the underlying actions and damages result from a transaction that began during the time the defendant was a director.

The rule in *Belcom* has been upheld a few times. For example, and importantly, in *Neurvana Med., LLC v. Balt USA*, a former director was found to have “breached his fiduciary duties by using confidential information and knowledge that he acquired before his resignation” to harm a corporation. (*Neurvana Med., LLC v. Balt USA*, C.A. No. 2019-0034-KSJM, 2020Del. Ch. LEXIS 77, \*26 (Del. Ch. Feb. 27, 2020)). Additionally, in *Leased Access Pres. Ass’n v. Thomas* the court held a former corporate director was not entitled to dismissal of the corporation’s action against him for breach of his fiduciary duties because the director used information that he learned while he was a director of the corporation to later compete with such corporation in bidding for a contract with a city. (*Leased Access Pres. Ass’n v. Thomas*, C.A. No. 2019-0310-KSJM, 2020 Del. Ch. LEXIS 227, \*9, (Del. Ch. Jan. 8, 2020)).

Former directors of Delaware corporations should be aware that actions taken during their directorship (or even after their directorship, if using information obtained while a director) can carry with them breach of fiduciary duty exposure even after they cease to be a director of such corporation.

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