



## Responsibilities of Officers, Directors, and Trustees of Cemetery Corporations

The Not-for-Profit Corporation Law (N-PCL) and case law govern the rights, responsibilities and duties of the directors of a not-for-profit corporation, including a cemetery corporation formed pursuant to the N-PCL and regulated by the State Cemetery Board in accordance with N-PCL Article 15. Generally, a cemetery corporation must be managed by its board of directors (N-PCL §701), who are elected by its members (N-PCL §603); for a cemetery corporation, the members are the lot owners [N-PCL §1512(g)]. A duly-elected director should conduct himself/herself in accordance with all provisions of N-PCL Article 7. As a general rule, "directors and officers shall discharge the duties of their respective positions in good faith and with that degree of diligence, care and skill which ordinarily prudent men would exercise under similar circumstances in like positions." N-PCL §717(a).

When a director or officer acts in good faith and in accordance with the degree of care required by the prudent director standard, N-PCL §717(b) allows a director or officer to rely upon "information, opinions, reports or statements including financial statements and other financial data" provided by certain corporate persons (set forth in the statute).

A director/officer may be liable to a corporation for breach or neglect of duties to the corporation, unauthorized acts or contracts, failure to act to redress a wrong to the corporation, violation of fiduciary duties, placing of one's own interests over those of the corporation, waste of corporate assets, fraud and other acts. Some examples of potential pitfalls for a director/officer may include unlawful and inappropriate self-dealing or contracting, failure to accommodate corporate records to the Year 2000 problem, failure to conduct annual meetings, issuance of a loan to a director (N-PCL §716), the distribution of the corporation's cash or assets to directors, or violation of law.

N-PCL §715 establishes that a contract or other transaction between an interested director or officer and the cemetery corporation is not automatically void or voidable under the following circumstances:

(a)(1) where the material facts are disclosed to the board, and the interested director does not vote on the action; and

(a)(2) where the material facts are disclosed to the members (not just the board) of the cemetery corporation, and the members vote on the action.

Nevertheless, any such contract or transaction must comply with N-PCL §715 and §717 (discussed above) and also should be based on fairness and on the best interests of the corporation.

As to the acts of prior directors, the treatise New York Jurisprudence 2d, volume 14A, section 680, states, in pertinent part:

## "§680. Liability for acts of others

As a general rule, a corporate director or officer is not liable for loss or damage to the corporation other than what was proximately caused by his own acts or omissions in breach of his duty. Directors are not insurers of the acts of corporate officers, knowledge of which they do not have and are not chargeable with, and they are not liable for the wrongful acts of the officers or of their codirectors if they do not participate therein, nor connive at them, and if ordinary care on their part would not have averted the loss. ... A fortiori, directors are only liable for mismanagement during the period of their term of office and not for acts committed prior or subsequently thereto. However, directors of a corporation may be compelled to account for money improperly paid out with their consent while they were directors, although the payments were made under resolutions adopted before they became such.

Directors are obligated to attempt to prevent wrongdoing by their fellow directors, and, if wrong is committed, to seek to rectify it. In this respect it is the duty of directors to keep informed as to the affairs of the corporation and as to the acts of its officers, and they are chargeable for acquiescing in or confirming the wrongdoing of other officers or agents. Moreover, ignorance of the performance of illegal acts which is the result of inattention does not exculpate the directors."

In Blaustein v Pan American Petroleum & Transport Co., 263 App.Div 97., 31 N.Y.S. 934 (1<sup>st</sup> Dept., 1941), aff'd 293 N.Y. 281, 56 N.E. 705 (1944), it is stated:

"A director is liable for his own wrong. ... The policies attacked had been made long before Wilson became a director. He would be liable only if his failure to act...resulted from his own negligence or fraud and was a concurring proximate cause in the damage." 263 App.Div. 97, 129, 31 N.Y.S.2d 934, 964-965.

Interestingly, in 1986 the State Legislature enacted N-PCL §720-a, which provides that "no person serving without compensation as a director, officer or trustee" of a non-profit corporation shall be liable for his conduct in the execution of his corporate duties unless the conduct is grossly negligent or intentional wrongdoing. However, N-PCL §720-a applies only to 26 USCA §501(c)(3) organizations, which includes many non-profit corporations, but not cemetery corporations which are 26 USCA §501(c)(13) organizations. Thus, the additional protections of N-PCL §720-a do not apply to the officers and directors of cemetery corporations.

In conclusion, directors/officers must be ever mindful of the dual duties owed to the corporation: the duty of care and the duty of loyalty. The prudent director standard of N-PCL §717 continues to apply.