

**STATE OF TENNESSEE
OFFICE OF THE ATTORNEY GENERAL**

June 3, 2025

Opinion No. 25-012

Redress Against Wayward Directors of Mutual Benefit Nonprofit Corporations Without Members

Question 1

If the directors of a mutual benefit nonprofit corporation without members breach their fiduciary duties or engage in unlawful actions, how—and by whom—can they be held accountable?

Opinion 1

A court may hold accountable the memberless corporation’s director or directors in a derivative action brought by another director on behalf of the corporation. Additionally, the Attorney General may ask a court in a direct action to dissolve the corporation or to provide other remedies in connection with claims that the corporation lacks or lacked the power to act.

Question 2

If affected individuals do not have standing to bring legal action, how are the fiduciary duties of good faith, loyalty, and care imposed upon directors under Tennessee law enforced in practice?

Opinion 2

See response to Question 1.

Question 3

Can the Attorney General and Reporter intervene in cases involving alleged illegal actions or abuse of authority by a mutual benefit nonprofit corporation without members?

Opinion 3

Yes, the Attorney General may intervene as of right in any proceeding brought by others under the Nonprofit Corporation Act if he was required to be provided notice of the proceeding or if he was statutorily authorized to commence the proceeding.

ANALYSIS

The Nonprofit Corporation Act, Tenn. Code Ann. §§ 48-51-101 through 48-68-105, divides Tennessee nonprofit corporations into (1) mutual benefit nonprofits, which act to benefit the members of the corporation; (2) public benefit nonprofits, which act to benefit the public at

large; and (3) religious nonprofits, which act like public benefit nonprofits but with a religious mission. *Summers v. Cherokee Child. & Fam. Svcs., Inc.*, 112 S.W.3d 486, 500 (Tenn. Ct. App. 2002); *see also* Tenn. Code Ann. §§ 48-52-102(a)(2)-(3), 48-58-601(b), 48-67-101 – 102, 48-68-104; Tenn. Corp. § 13:1 (2d ed. Nov. 2024 update) (“A mutual benefit corporation is one organized for the mutual benefit of its members and it may make distributions to members upon dissolution.”); Dana Brakman Riser, *Dismembering Civil Society: the Social Cost of Internally Undemocratic Nonprofits*, 82 Or. L. Rev. 829, 839 (2003) (same). Nonprofit corporations are legally permitted not to have members, Tenn. Code Ann. 48-56-103, though it would seem unusual for a mutual benefit corporation *organized for the mutual benefit of its members* to not actually have members. In any case, a mutual benefit nonprofit, like any other nonprofit, must have a board of at least three directors. Tenn. Code Ann. § 48-58-101(a), (d). Directors have a fiduciary duty, including duties of loyalty and care, to their corporation and to the members of their corporation. Tenn. Code Ann. § 48-58-301(a); *Keller v. Estate of McRedmond*, 495 S.W.3d 852, 880 (Tenn. 2016); *State ex rel. Oliver v. Soc’y for the Pres. of the Book of Common Prayer*, 693 S.W.2d 340, 343 (Tenn. 1985); *Summers*, 112 S.W.3d at 503.

There are two mechanisms for challenging the actions of a nonprofit: derivative actions and direct actions. A derivative action is a suit brought on behalf of the corporation to redress an injury sustained by, or to enforce a duty owed to, the corporation. *Keller*, 495 S.W.3d at 867-68. A direct action, by contrast, is brought by a plaintiff on his own behalf, not on behalf of the corporation. *Id.* at 868. The viability of each type of action depends on the nature of the alleged wrongdoing and the party bringing suit.

“[A] claim based on directors’ or officers’ breach of fiduciary duty to the corporation through mismanagement of the corporation, waste of corporate assets, or self-dealing is usually considered derivative in nature, because any harm resulting from the wrongful conduct was to the corporation.” *Id.* at 869; *see also id.* at 880. As a result, claims of breach of fiduciary duty by corporate directors may lie in derivative actions. *Id.*; *see also State by and through Pierotti ex rel. Boone v. Sundquist*, No. 02S01-9311-CV-00072, 1993 WL 166938, at *3-4 (Tenn. Ct. App. May 19, 1993), *aff’d* 884 S.W.2d 438, 440 (Tenn. 1994).

Certain nonprofit members and nonprofit directors may bring derivative actions under the Nonprofit Corporation Act. Tenn. Code Ann. § 48-56-401(a); *see also Summers*, 112 S.W.3d at 506. By statute, only members having at least five percent of the voting power or being at least fifty in number may bring a derivative suit. Tenn. Code Ann. § 48-56-401(a). Plaintiffs not meeting these requirements, on the other hand, are barred from bringing such suits. *State by and through Pierotti*, 1993 WL 166938, at *3. Private citizens who are not members or directors of the corporation also have no direct right of action against a director for breach of fiduciary duty because generally a director’s fiduciary duties are owed only to the corporation and its members. *Id.* at *5. These restrictions, among others, may present problems in connection with policing directors’ actions in a memberless corporation. *Summers*, 112 S.W.3d at 506.

The Nonprofit Corporation Act does, though, allow the Attorney General to bring a direct action against a corporation or its directors in at least two contexts. First, the Attorney General may ask a court to dissolve the corporation for various reasons, including illegal activity. Tenn.

Code Ann. § 48-64-301(a)(1); *Summers*, 112 S.W.3d at 506. Specifically, the Attorney General may seek judicial dissolution of a mutual benefit nonprofit corporation that has obtained its charter through fraud, exceeded or abused the authority conferred upon it by law, has violated any provision of law resulting in the forfeiture of its charter, or has carried on, conducted, or transacted its business or affairs in a persistently fraudulent or illegal manner. Tenn. Code Ann. § 48-64-301(a)(1)(A)-(D). Additionally, the Attorney General may bring an *ultra vires* suit directly against the corporation or a wayward director if the corporation lacked the power to act in the way it did or in a proposed manner. Tenn. Code Ann. § 48-53-104(b)-(c). The term *ultra vires* designates acts beyond the scope of a corporation's powers, as defined by their charters or acts of incorporation. *State ex rel. v. Holston Trust Co.*, 79 S.W.2d 1012, 1016 (Tenn. 1935). Accordingly, the Attorney General may bring an *ultra vires* suit when wayward nonprofit directors act outside the scope of their authority under the corporation's charter or bylaws.

The Attorney General, moreover, may intervene as of right in some cases brought by others involving nonprofit corporations. By statute, the Attorney General may intervene as of right in any proceeding brought by others when he was required to be provided notice of the proceeding or if he was statutorily authorized to commence the proceeding. Tenn. Code Ann. § 48-51-701(b)(2).¹ Accordingly, the Attorney General could intervene as of right in a suit brought under Tenn. Code Ann. § 48-64-301 for judicial dissolution or under Tenn. Code Ann. § 48-53-104(b)-(c) regarding claims that a corporation lacked the power to act because he was authorized to bring those actions.

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¹ In connection with mutual benefit nonprofits, such notice must be given regarding changes or elimination of restrictions on charitable assets or derivative actions regarding a mutual benefit nonprofit holding assets in charitable trust. Tenn. Code Ann. §§ 48-56-401(g), 48-60-108(c), 48-60-206(b).