CORPORATE GOVERNANCE

Guidance on Identifying "Officers" for Advancement and Indemnification

Recent Delaware decisions demonstrate that the determination of who is an "officer" for various purposes under Delaware law, particularly advancement and indemnification, is a fact-specific inquiry. Nevertheless, the decision provide some insight into the analysis that will be performed in making this determination.

By Nathan P. Emeritz

A recent decision by Vice Chancellor Travis Laster of the Delaware Court of Chancery suggests that boilerplate advancement and indemnification bylaws, which ambiguously define "officers," may be construed to apply to a broad group of individuals within a corporate structure.[1] Although the actual ruling in this case was that a former vice president at a subsidiary of Goldman Sachs was not entitled to advancement, this holding turned on the unique procedural posture of the litigation. Counsel should focus on the detailed dicta that likely will apply to future advancement and indemnification claims brought by employees under contractual provisions that do not clearly delineate "officers." This dicta also may provide useful guidance regarding determinations whether an employee is an "officer" and, therefore, owes traditional corporate fiduciary duties.

The Federal Litigation

Sergey Aleynikov was a computer programmer at Goldman Sachs & Co. (GS Subsidiary), who held the title of "Vice President." After his federal conviction for theft of computer source code was overturned by the Third Circuit Court of Appeals, Aleynikov was indicted by a New York grand jury. Aleynikov then sued the parent of the GS Subsidiary, The Goldman Sachs Group, Inc. (Parent and, together with the GS Subsidiary, Goldman), in the District of New Jersey federal court seeking advancement and indemnification for legal expenses under the Parent's bylaws (Bylaws).[2]

District Judge Kevin McNulty granted Aleynikov's motion for summary judgment, holding that Aleynikov was an "officer … of a Subsidiary of the Corporation" and therefore entitled to advancement.[3] The Third Circuit reversed the district judge's decision, holding that the term "officer" was ambiguous and that genuine issues of material fact existed, which precluded summary judgment.[4] On remand, District Judge McNulty denied Aleynikov's motion for summary judgment on the basis of the Circuit Decision.[5] Aleynikov then turned to Delaware.

The Delaware Chancery Decision

Aleynikov instituted a summary proceeding in the Delaware Court of Chancery, under Section 145(k) of the Delaware General Corporation Law (DGCL), for advancement of litigation expenses.[6] After a one-day trial, Vice Chancellor Laster ruled that that Aleynikov had failed to prove by a preponderance of the evidence that he was an officer and that Aleynikov, therefore, was not entitled to advancement.[7]

The vice chancellor held that he was constrained by the New Jersey doctrine of issue preclusion and holdings that had been "essential" to the Circuit Decision.[8] The vice chancellor quoted the US Supreme Court for the proposition that "issue preclusion prevents relitigation

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of wrong decisions just as much as right ones."[9] Accordingly, the vice chancellor held that he was precluded from reconsidering the Third Circuit's holdings that (1) the definition of "officer" under the Bylaws is ambiguous[10] and (2) the doctrine of *contra proferentem* could not be used to resolve the ambiguity.[11]

Vice Chancellor Laster held that he was not precluded from considering whether Aleynikov subjectively had believed himself to be an officer, the Subsidiary had held out Aleynikov as an officer for regulatory (but not indemnification) purposes or the Subsidiary typically had exercised its discretion regarding advancement and indemnification of vice presidents' expenses. The vice chancellor agreed with the Circuit's holdings, however, that none of the evidence on these three issues was probative of the definition of "officer."[12] It is worth noting that the vice chancellor also agreed with the Circuit that, had the Subsidiary had a practice of always advancing and indemnifying (or never advancing and indemnifying) its vice presidents' expenses, then that practice would have supported Goldman's (or Aleynikov's) position.[13] Finally, the vice chancellor held that he was not precluded from considering whether there were an industry-wide meaning of the term "officer," but found that the evidence in support of either position was unconvincing.[14] Because the vice chancellor found that the limited non-precluded evidence "stands in equipoise," he ruled that Aleynikov had failed to carry his burden of proving by a preponderance of the evidence that he was an officer and that Aleynikov was therefore not entitled to advancement.[15]

Commentary in *Dicta* from Vice Chancellor Laster

The Chancery Decision is arguably more important going forward for Vice Chancellor Laster's detailed explanation in dicta that, if he had not been constrained by issue preclusion, he was "personally inclined to think" that *contra proferentem* applied to construction of "officers" in the Bylaws and that a Goldman "vice president" is an "officer" entitled to advancement.[16] The vice chancellor stated that *contra proferentem* should have applied to construction of the term "officers" in the Bylaws for the following reasons:

- The Parent drafted the Bylaws unilaterally and, therefore, was best positioned to remove any ambiguity and "should be held responsible for the reasonable expectations created by its Bylaws."[17]
- An individual with the title "vice president" could conclude that he was an "officer" who was entitled to advancement rights under the Bylaws.[18]
- "Officers" of the Parent were defined in the Bylaws to include "vice presidents," and that provision could be read *in pari materia* with relevant provisions for non-corporate subsidiaries such as the Subsidiary.[19]
- The "widespread understanding" of the term "officers" typically includes "vice presidents." In support of this proposition, the vice chancellor observed, "The Delaware General Corporation Law expressly treats the concept of an entity's 'officers' as including a 'vice president' by identifying a 'vice president' as one of the officers who can execute a stock certificate."[20] In addition, the vice chancellor noted that the 2016 amendments to the DGCL replace the list of officers (including a "vice-president"), who are authorized by Section 158 of the DGCL to sign stock certificates, with the phrase "any two authorized officers of the corporation." Vice Chancellor Laster inferred from this amendment that "the former titles already fell within the broader category."[21]
- Commercial and investment banks have historically—based on bank records dating back to 1929—included "vice presidents" among their "officers" who have authority to sign documents that bind the bank.[22]
- Federal securities laws, including "core New Deal legislation" that imposed disclosure

obligations on officers and regulations promulgated by the SEC, historically have included and currently include "vice president" in the definition of "officer."[23]

- "Wall Street firms as a whole, and Goldman Parent in particular, have engaged in a practice of title inflation whereby impressive sounding titles that historically would have carried real-world responsibilities have been disseminated widely. The evidence supports an inference that these titles have been used in lieu of other employment benefits, such as greater compensation. Goldman Parent and its subsidiaries easily could have clarified whether or not the title of 'Vice President' was an officer title for purposes of advancement and indemnification. The doctrine of *contra proferentem* appropriately holds Goldman Parent to the promises it implicitly made 'to parties who did not participate in negotiating' the Bylaws."[24]
- Reasonable individuals would not conclude they are not "officers" simply because—like Aleynikov—they are one of many employees with the title "vice president," their hiring was not required to be approved by the board of directors and they did not have supervisory or managerial functions.[25]
- "Officers" were authorized under the Bylaws to appoint vice presidents, and Aleynikov received the vice president title in an offer letter that was signed by another vice president, who may be inferred to have been an "officer."[26]
- Applying the doctrine of *contra proferentem* in an advancement proceeding is "all the more appropriate because of Delaware's policy in favor of advancement and indemnification."[27] And declining to apply the doctrine of *contra proferentem* "has the potential to create problems for advancement proceedings, which are supposed to be summary in nature."[28] The vice chancellor stated that the Circuit Decision invited fact-intensive—not summary—dissection of whether "the individual's actual job responsibilities were not sufficiently akin to those captured by an external, common law concept of officer-ship to warrant the individual having advancement rights."[29] Applying the doctrine of *contra proferentem* and holding an entity to the presumptive implications of the title it chooses to bestow facilitates the summary disposition of advancement proceedings."[30]
- Finally, the vice chancellor stated that even if *contra proferentem* only applies to the scope of rights under the Bylaws—and not to a determination whether Aleynikov was a party to a contract—then the doctrine should have been held to apply to the Bylaws.[31]

Notwithstanding Vice Chancellor Laster's narrow legal holding, the stronger reading of the Chancery Decision is that boilerplate advancement or indemnification bylaws, which ambiguously define "officers," may be construed to cover employees with a "vice president" title.[32] Large organizations with interlocking organizational documents, entities ostensibly engaging in "title inflation" and businesses subject to extensive regulation and laws that might impose external definitions of titles (e.g., "officer" or "vice president") should be aware of the entire universe of factors that likely will be considered by Delaware courts in favor of advancement and indemnification rights.

Additional Implications of the Chancery Decision

The dicta in the Chancery Decision also may warrant consideration with respect to other issues around officer liability. While keeping in mind its limited precedential weight, counsel might consider the impact of the vice chancellor's guidance on a determination whether an employee owes traditional corporate fiduciary duties.

As noted in a previous article, corporate officers face increasing risk of fiduciary liability without exculpatory protection under Section 102(b)(7) of the DGCL.[33] The Chancery Decision may support an argument that an employee outside of the C-suite, such as a Goldman vice president, will be deemed to

be an officer who owes traditional corporate fiduciary duties. Vice Chancellor Laster observed that, under the federal securities laws that distinguished between officers and executive officers, "other officers were still officers; they were simply officers without policy-making responsibility."[34] There also is some logical appeal to a rule that the protections of advancement and indemnification would correspond to obligations that might give rise to the need for such protection.

Delaware law does not necessarily view the title "vice president" as conferring officer status.

The Chancery Decision also may be read, however, to support the position that non-executive officers, such as a Goldman vice president, will not owe traditional corporate fiduciary duties under Delaware law. As demonstrated in the chancellor's *Computer Sciences* decision, Delaware law does not necessarily view the title "vice president" as conferring officer status.[35] As the vice chancellor noted, Delaware has a strong policy and related approach to contractual construction that favors finding advancement rights; this policy-based presumption would have less application in a determination whether an employee was an officer with traditional corporate fiduciary duties. In addition, it may be worth considering whether the putative "officer" would be subject to Delaware's long-arm statute and, if not, whether a court would be inclined to hold that the employee is an officer, who owes corporate fiduciary duties, only to dismiss fiduciary claims against that defendant on jurisdictional grounds.[36]

Conclusion

Far from presenting a clean answer to the question who is an "officer" for various purposes under Delaware law, the recent decisions discussed above demonstrate the fact-intensive nature of that determination. The value of these cases is that they provide insight into the analysis that likely will be performed when this question next arises in litigation governed by Delaware law.

Notes

1. *Aleynikov v. The Goldman Sachs Group, Inc.*, C.A. No. 10636-VCL (Del. Ch. July 13, 2016) (the "Chancery Decision"). N.B. Aleynikov has filed a notice of appeal from Chancery Decision, and that appeal is docketed with the Delaware Supreme Court under the caption *Aleynikov v. The Goldman Sachs Group, Inc.*, No. 366,2016 (Del. July 15, 2016).
2. Bylaws, § 6.4, which read:

   > The Corporation shall indemnify to the full extent permitted by law any person made or threatened to be made a party to any action, suit or proceeding, whether civil, criminal, administrative or investigative, by reason of the fact that such person or such person's testator or intestate is or was a director or officer of the Corporation, is or was a director, officer, trustee, member, stockholder, partner, incorporator or liquidator of a Subsidiary of the Corporation. … Expenses, including attorneys' fees, incurred by any such person in defending any such action, suit or proceeding shall be paid or reimbursed by the Corporation promptly upon demand by such person and, if any such demand is made in advance of the final disposition of any such action, suit or proceeding, promptly upon receipt by the Corporation of an undertaking of such person to repay such expenses if it shall ultimately be determined that such person is not entitled to be indemnified by the Corporation. The rights provided to any person by this bylaw shall be enforceable against the Corporation by such person, who shall be presumed to have relied upon it in serving or continuing to serve as a director or officer or in such other capacity as provided above.
3. *Aleynikov v. The Goldman Sachs Group, Inc.*, 2013 WL 5739137 (D.N.J. Oct. 22, 2013).
4. *Aleynikov v. The Goldman Sachs Group, Inc.*, 765 F.3d 350 (3d Cir. 2014) (the "Circuit Decision").

5. *Aleynikov v. The Goldman Sachs Group, Inc.*, 2015 WL 5739137 (D.N.J. Oct. 22, 2013).
6. 8 *Del. C.* § 145(k).
7. Chancery Decision, C.A. No. 10636-VCL (Del. Ch. July 13, 2016).
8. Chancery Decision, at ¶ 3.
9. Chancery Decision, at ¶ 5(d)(xvii) (quoting *B & B Hardware, Inc. v. Hargis Indus., Inc.*, 135 S. Ct. 1293, 1308 (2015)).
10. Chancery Decision, at ¶ 4.
11. Chancery Decision, at ¶ 5.
12. Chancery Decision, at ¶¶ 6-8.
13. Chancery Decision, at ¶ 8.
14. Chancery Decision, at ¶¶ 9-10.
15. Chancery Decision, at ¶ 10.
16. Chancery Decision, at ¶ 8.
17. Chancery Decision, at ¶ 5(d)(i).
18. Chancery Decision, at ¶ 5(d)(ii).
19. Chancery Decision, at ¶ 5(d)(iii).
20. Chancery Decision, at ¶ 5(d)(iv).
21. Chancery Decision, at ¶ 5(d)(iv) & n.1 (discussing 80 Del. Laws ch. 265 § 6 (effective Aug. 1, 2016)).
22. Chancery Decision, at ¶ 5(d)(v)-(vi).
23. Chancery Decision, at ¶ 5(d)(vii)-(ix) (discussing the Banking Act of 1933, the Securities Act of 1933, the Exchange Act of 1934 and SEC Rules 3b-2 and 16a-1(f)).
24. Chancery Decision, at ¶ 5(d)(x).
25. Chancery Decision, at ¶ 5(d)(xi)-(xiii).
26. Chancery Decision, at ¶ 5(d)(xii).
27. Chancery Decision, at ¶ 5(d)(xiv).
28. Chancery Decision, at ¶ 5(d)(xv).
29. Chancery Decision, at ¶ 5(d)(xv).
30. Chancery Decision, at ¶ 5(d)(xv).
31. Chancery Decision, at ¶ 5(d)(xvi).
32. In another recent decision from the Delaware Court of Chancery, Chancellor Andre Bouchard held that an employee with the title of 'vice president' was not an 'officer' entitled to advancement, because he had not been elected by the board of directors. In that case, however, the company's bylaws unambiguously stated that officers, including vice presidents, were to be elected by the board of directors. *Pulier v. Computer Sciences Corp.*, C.A. No. 12005-CB, at 19 (Del. Ch. May 12, 2016).
33. Jeffrey R. Wolters and Nathan P. Emeritz, *The New Targets of Shareholder Litigation: Officer Liability Under Delaware Law*, Insights, Vol. 28, No. 10, at 17 (Oct. 2015).
34. Chancery Decision, at ¶ 5(d)(viii).
35. C.A. No. 12005-CB (Del. Ch. May 12, 2016).
36. 10 *Del. C.* § 3114(b) (defining "officer" for the long-arm statute as (1) "president, chief executive officer, chief operating officer, chief financial officer, chief legal officer, controller, treasurer or chief accounting officer," (2) an individual identified in public filings as one of the most highly compensated officers of the company or (3) an individual who has "by written agreement with the corporation, consented to be identified as an officer for purposes of this section").