

Are Vice Presidents “Officers” Entitled to Advancement and Indemnification?

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Numerous Court of Chancery decisions have addressed whether a “vice president” constitutes an “officer” entitled to advancement and indemnification. These decisions reached varying results concerning whether non-elected “vice presidents” are entitled to advancement under bylaws requiring the election of “officers.”

In *Aleynikov v. The Goldman Sachs Grp., Inc.*,² constrained by the preclusive effect of a prior Third Circuit decision, Vice Chancellor Laster concluded that the plaintiff, a “vice president,” was not entitled to advancement under the definition of “officer” in the relevant bylaws.³ The Third Circuit reached its holding by concluding that the doctrine of *contra proferentem*⁴ had “no application” in determining whether a person who did not draft the governing agreement was subject to it.⁵ In applying the Third Circuit’s decision to rule in the defendant’s favor, the Vice Chancellor explained why—had the issue been presented to him in the first instance—he would have been inclined to apply the doctrine of *contra proferentem* in the *plaintiff’s* favor,⁶ for a number of reasons, including the following: First,

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² C.A. No. 10636-VCL, 2016 WL 3763246 (Del. Ch. July 13, 2016) (Post-Trial Order and Final Judgment) (“*Aleynikov* Order”) (Laster, V.C.), *aff’d*, 155 A.3d 370, 2017 WL 443714 (Del. Jan. 20, 2017) (TABLE).

³ *Aleynikov* Order ¶ 4.

⁴ *Contra proferentem* is “the doctrine that, in the interpretation of documents, ambiguities are to be construed unfavorably to the drafter.” BLACK’S LAW DICTIONARY (10th ed. 2014).

⁵ *Aleynikov* Order ¶ 5.

⁶ *Id.* ¶ 5.d.

the defendant drafted its bylaws unilaterally, and was best positioned to remove any ambiguities on the issue, and should be “held responsible for the reasonable expectations created by its [b]ylaws.”⁷ Second, a “vice president” could reasonably conclude that he was an “officer” entitled to advancement under the bylaws for a host of reasons, including the use of the term “vice president” by the other provisions of the governing bylaws, Section 158 of the Delaware General Corporation Law, commercial and investment banks, historical sources, federal securities laws, and the defendant’s prolific use of the term in its employee ranks.⁸ The Court further observed that the sheer number of vice presidents in the defendant entity is not a good reason to deny advancement to a person holding that title.⁹ Additionally, the Court reasoned that it was unreasonable to conclude that a “vice president” was not an officer simply because the governing board did not take formal action to appoint him.¹⁰ Nevertheless, the Court held itself bound by the doctrine of issue preclusion to “wrong decisions just as much as right ones,”¹¹ and thus concluded that *contra proferentem* could not apply under the circumstances. The Court also held that the plaintiff could not meet his burden based on extrinsic evidence demonstrating that the meaning of “officer”

⁷ *Id.* ¶ 5.d.i.

⁸ *Id.* ¶ 5.d.ii-x.

⁹ *Id.* ¶ 5.d.xi. The Vice Chancellor expressed a similar view in 2015 in *Barry v. Lutonix, Inc.*, C.A. No. 11488-VCL, at 8:9-22 (Del. Ch. Sept. 16, 2015) (Transcript) (Laster, V.C.). Although *Barry* did not proceed to trial or generate a ruling on the officer issue, at a scheduling conference, the Vice Chancellor cited estoppel arguments in reacting negatively to the defendant corporation’s position: “I’m also not going to be very swayed by [the] public policy argument that it shouldn’t reach deep in the organization. If you actually think who is likely to be most in need of advancement rights, as opposed to being able to fund their own defense, it is probably the mid-level managers with vice president titles, as opposed to the big dogs at the top of the organization who actually have the bank accounts and the compensation arrangements to pay for their lawyers and who, at the time of contracting when they’re hired, have much greater bargaining leverage [] if they want to get specific advancement rights tailored to them that aren’t granted through the organization as a whole can do so.”

¹⁰ *Aleynikov Order* ¶ 5.d.xii.

¹¹ *Id.* ¶ 5xvii (quoting *B & B Hardware, Inc. v. Hargis Indus., Inc.*, 135 S. Ct. 1293, 1308 (2015)).

included vice presidents.¹² Accordingly, the Court denied the plaintiff's claim for advancement, and the Delaware Supreme Court affirmed.¹³

The Court of Chancery's views expressed in *Aleynikov* were consistent with the holding of then-Vice Chancellor (now Chief Justice) Strine in *Kale v. WellCare Health Plans, Inc.*¹⁴ In *Kale*, the defendant argued that the plaintiff did not meet the definition of "officer" in the company's bylaws, which required that any officer entitled to advancement be elected by the directors, because the plaintiff had not been elected. The Court concluded that the bylaws were ambiguous and construed the ambiguity, and the failure to adhere to corporate formalities, against the corporation in accordance with Delaware's policy favoring advancement.¹⁵ The Court further warned that, if companies desire to exclude mid-level management or "vice presidents" from the scope of advancement, they should clearly define the term "officer" in the governing document—an opt-out approach.¹⁶

In *Pulier v. Computer Sciences Corp.*, Chancellor Bouchard (interpreting the bylaws of a Nevada corporation under Nevada law) denied a vice president advancement rights as an "officer."¹⁷ There, the plaintiff was held out as a vice president of the defendant entity and was identified as a management member and executive leader on its website.¹⁸ The Court

¹² *Id.* ¶ 10.

¹³ The Delaware Supreme Court, however, "express[ed] no view at all on whether the Third Circuit ruling was correct as a matter of Delaware law or on the Vice Chancellor's consideration of that question." 155 A.3d 370, 2017 WL 443714, at *1 (Del. Jan. 20, 2017) (TABLE). After this ruling, the District of New Jersey, on remand from the Third Circuit, held that the decision in the Delaware action had preclusive effect on the issue of whether plaintiff had met his burden of proof that he was an officer, and also stated that the Vice Chancellor's views on the Third Circuit's ruling were *dicta* that did not create an intervening change in the law, especially based on the Supreme Court's declining to address the Third Circuit's ruling. See *Aleynikov v. Goldman Sachs Grp., Inc.*, 2018 WL 1919834, at *7-9 (D.N.J. Apr. 23, 2018). As of this writing, that district court's ruling has not been appealed.

¹⁴ C.A. No. 6393-VCS, 2011 WL 11071500 (Del. Ch. June 13, 2011) (Transcript) ("*Kale Tr.*") (Strine, V.C.), C.A. No. 6393-VCS (Del. Ch. June 23, 2011) (Order).

¹⁵ *Kale Tr.* at *23.

¹⁶ *Id.*

¹⁷ C.A. No. 12005-CB (Del. Ch. May 12, 2016) (Transcript) (Bouchard, C.).

¹⁸ *Id.* at 17:11-21.

found controlling the bylaws' definition of "officer," which limited "officers" to those elected through formal board action.¹⁹ The Court observed: "[T]he plain words and structure of the bylaws, in my view, make clear that individuals only become officers . . . through board election."²⁰ Because the plaintiff was never elected or otherwise appointed as an officer through formal board action, he did not qualify for advancement in that capacity.²¹

Thus, *Aleynikov*, *Kale*, and *Pulier* remind practitioners of the importance of careful, *ex ante* drafting of documents governing advancement and indemnification rights (or limitations thereof). In particular, business entities and their directors, officers, and other managers are wise to review the definitions of "officer" in instruments governing advancement and indemnification rights to ensure that they reflect the parties' intentions regarding those rights at the level of vice president.

¹⁹ *Id.* at 16:5-19:21.

²⁰ *Id.* at 19:19-21.

²¹ Prior to *Aleynikov*, *Kale*, and *Pulier*, Vice Chancellor Lamb also applied a "plain meaning" approach in evaluating officer status for mandatory advancement, but held that a former "Executive Director" and "Managing Director" did qualify for such advancement as a "nominal officer" with "management supervisory functions," pursuant to the bylaws. See *Sassano v. CIBC World Markets Corp.*, 948 A.2d 453 (Del. Ch. 2008).