Volume 60 | Issue 4 Article 5

12-1-2015

An "Officer" and a G[old]man: The Third Circuit Finds Ambiguous Corporate Titles Jeopardize Right to Advancement Under Delaware Law in Aleynikov v. Goldman Sachs Group, Inc.

Carina M. Meleca

AN "OFFICER" AND A G[OLD]MAN: THE THIRD CIRCUIT FINDS AMBIGUOUS CORPORATE TITLES JEOPARDIZE RIGHT TO ADVANCEMENT UNDER DELAWARE LAW IN *ALEYNIKOV v. GOLDMAN SACHS GROUP, INC.*

CARINA M. MELECA*

"[B]eing able to choose which of its officers will receive advance payments for legal bills gives the firm significant leverage over those who become ensnared in an investigation or lawsuit. Indeed, the flexible nature of Goldman's policy could easily discourage those involved in such proceedings from implicating superiors who may have been involved in wrongdoing. Who would take such a chance, knowing that Goldman could cut off the legal fee spigot at any time?"[1]

I. INTRODUCTION

At the turn of the twenty-first century, white-collar crime permeated the corporate sector in an unprecedented way.[2] The Enron, Adelphia, and Worldcom financial scandals forced courts, regulators, and legislators to reexamine their once passive role in dictating accountability for corporate officers.[3] In the wake of these scandals and their reactionary influ-

* J.D. Candidate, 2016, Villanova University School of Law; B.A. 2012, Lehigh University. I would like to thank my family and friends, especially my parents, Michael and Vildan, who have given me every opportunity to succeed in life and without whose love and support I would not be where I am today. Additionally, thank you to Kelsey Hughes-Blaum and Mark Wilhelm for their thoughtful edits to many drafts of this Casebrief (and for fielding an incessant amount of questions at each phase). Lastly, I would be remiss to not thank Nicole Pedi, Tommy Reilly, and D.J. Shauger for their mentorship, insight, and advice throughout the entire year this Casebrief was being written.

1. Gretchen Morgenson, *At Goldman Sachs, Even the Legal Fees Are Different*, N.Y. TIMES, Sept. 6, 2014, http://www.nytimes.com/2014/09/07/business/at-goldman-sachs-even-the-legal-fees-are-different.html?_r=0 [http://perma.cc/L7XG-AKCH].

2. *See generally* JERRY W. MARKHAM, A FINANCIAL HISTORY OF MODERN U.S. CORPORATE SCANDALS: FROM ENRON TO REFORM (2006) (providing background of corporate scandals during the early 2000s).

3. *See, e.g.*, *Accountability Issues: Lessons Learned from Enron's Fall: Hearing Before the S. Comm. on the Judiciary*, 107th Cong. 4 (2002) (statement of Hon. Patrick J. Leahy, Chairman, S. Comm. on the Judiciary), *available at* http://www.gpo.gov/fdsys/pkg/CHRG-107shrg84416/pdf/CHRG-107shrg84416.pdf [https://perma.cc/6R9A-4BG3?type=source] (noting "the courts," among others, did not protect public from Enron scandal and urging committee to ensure this type of "corporate ruse" never happens again); Alton B. Harris & Andrea S. Kramer, *Corporate Governance: Pre-Enron, Post-Enron*, *in* CORPORATE AFTERSHOCK: THE PUBLIC POLICY LESSONS FROM THE COLLAPSE OF ENRON AND OTHER MAJOR CORPORATIONS 49, 49–78 (Christopher L. Culp & William A. Niskanen eds., 2003) (examining how "corporate governance"—"the process by which a corporation's management is held accountable to its residual owners"—has changed since Enron and similar

ence on the corporate climate, maintaining the "officer" title has never been riskier for the individual or more necessary for the success of the market.[4] On one hand, post-Enron officers subject themselves to new realities such as intensified public scrutiny, increasingly litigious stockholders, and the economic unpredictability embedded in managing a business still in recovery from the Great Recession.[5] On the other hand, the recent financial crises have heightened the need for competent executives to steer corporations out of the red.[6] Accordingly, for most officers, assurance of impunity from personal liability has become necessary to effectuate corporate service.[7] As courts and legislatures attempt to counterbalance these "carrots and sticks" inherent in corporate leadership, indemnification and advancement of legal fees are increasingly recognized as important sources of legal protection.[8]

---

financial scandals). One major piece of federal legislation enacted since these scandals was the Sarbanes-Oxley Act of 2002. *See id.* at 49, 71. The Act was the first regulation to address corporate accountability in federal legislation for over sixty-five years. *See id.* at 71.

4. *See, e.g.*, CHARLES R.T. O'KELLEY & ROBERT B. THOMPSON, CORPORATIONS AND OTHER BUSINESS ASSOCIATIONS: CASES AND MATERIALS 441 (7th ed. 2014) (comparing risks of maintaining corporate title—attorney's fees and frivolous suits, litigation costs, civil damages, and criminal fines—with legal protections traditionally afforded by corporate planners such as exculpatory statutes, demand rules, disinterested litigation committees, indemnification, and insurance); Martin Petrin, *Circumscribing the "Prosecutor's Ticket to Tag the Elite"—A Critique of the Responsible Corporate Officer Doctrine*, 84 TEMP. L. REV. 283, 290–92, 304–06 (2012) (explaining heightened liability risks for corporate officers, including strict liability standards, civil sanctions, criminal charges, and hefty monetary fines for "responsible corporate officers").

5. *See* Ben W. Heineman, Jr., *Foreword* to E. NORMAN VEASEY & CHRISTINE T. DI GUGLIELMO, INDISPENSABLE COUNSEL: THE CHIEF LEGAL OFFICER IN THE NEW REALITY, xv, xv–xvi (2012) ("[T]rust among shareholders, creditors, employees, recruits, customers, suppliers, regulators, communities, the media, and the general public [has decreased]. . . . This trust . . . has dramatically eroded [over the past decade] due to stark corporate scandals and unthinkable business failures."). Even after the early financial scandals of the twenty-first century, some still argue that high-level corporate officers and directors do not, in actuality, expose themselves to much liability. *See* Steven Davidoff Solomon, *Despite Worries, Serving at the Top Carries Little Risk*, N.Y. TIMES, June 7, 2011, http://dealbook.nytimes.com/2011/06/07/despite-worries-serving-at-the-top-carries-little-risk/?_r=0 [http://perma.cc/HCJ3-Z9Z2] (arguing risks of liability to officers and directors are still not as high as post-financial crisis regulatory reforms would suggest).

6. *See* Heineman, *supra* note 5, at xvii (emphasizing need for strong corporate citizenship from CEOs, which entails "making and selling great goods and services the right way and, in doing so, serving local, regional, national, and global communities in order to engender the crucial trust that is so necessary to sustained economic growth, brand power, and strong reputation with both internal and external constituencies").

7. *See infra* notes 74–78 and accompanying text (discussing policies underlying advancement).

8. *See infra* notes 30–51 and accompanying text (discussing evolution of indemnification and advancement legal fees within Delaware).

Indemnification and advancement insulate officers from personal liability when they are sued in their capacity as an officer, either by way of reimbursing the individual for losses incurred after litigation or by floating the costs of proceedings as the litigation progresses.[9] As the state of incorporation for more than half of Fortune 500 companies, it is unsurprising that Delaware law is often in the crosshairs of indemnification and advancement litigation.[10] And even Delaware, a jurisdiction historically reluctant to interfere with the gravamens of corporate management, has not been immune to criticism surrounding indemnification and advancement statutes, particularly since 2008.[11] The very idea that a corporation—or rather, its stockholders—would foot the legal bill when an officer is accused of criminal behavior is counterintuitive to most laypeople.[12] Per-

9. *See* Homestore, Inc. v. Tafeen, 888 A.2d 204, 211 (Del. 2005) (defining advancement as "provid[ing] corporate officials with immediate interim relief from the personal out-of-pocket financial burden of paying the significant on-going expenses inevitably involved with investigations and legal proceedings."); *see also* BLACK'S LAW DICTIONARY 886 (10th ed. 2014) (defining act of indemnification as "[t]he action of compensating for loss or damage sustained[ ]"); *infra* notes 34–45 and accompanying text (discussing differences between advancement and indemnification generally); *infra* notes 46–51 and accompanying text (discussing indemnification and advancement in specific context of Delaware's statutory code).

10. *See* LEWIS S. BLACK, JR., DEL. DEP'T OF STATE DIV. OF CORPS., WHY CORPORATIONS CHOOSE DELAWARE 1 (2007), *available at* http://corp.delaware.gov/whycorporations_web.pdf [http://perma.cc/YH9X-HGYR] (noting "more than one-half [of Fortune 500 companies] are incorporated in Delaware"). The prestige of Delaware's Court of Chancery also attracts companies to incorporate there. *Id.* at 5–7.

11. *See, e.g.*, Ann M. Scarlett, *Confusion and Unpredictability in Shareholder Derivative Litigation: The Delaware Courts' Response to Recent Corporate Scandals*, 60 FLA. L. REV. 589, 625 (2008) (criticizing Delaware's response to corporate scandals in part because indemnification agreements require corporations to pay incurred legal expenses). For examples of Delaware cases highlighting the importance of corporate indemnification and advancement in 2008 alone, see Barrett v. Am. Country Holdings, Inc., 951 A.2d 735 (Del. Ch. 2008); Jackson Walker LLP. v. Spira Footwear, Inc., No. 3150-VCP, 2008 Del. Ch. LEXIS 82 (Del. Ch. June 23, 2008); Reinhard & Kreinberg v. Dow Chem. Co., No. 3003-CC, 2008 Del. Ch. LEXIS 39 (Del. Ch. Mar. 28, 2008); Sassano v. CIBC World Mkts. Corp., 948 A.2d 453 (Del. Ch. 2008); Schoon v. Troy Corp., 948 A.2d 1157 (Del. Ch. 2008); Sodano v. Am. Stock Exch. LLC, No. 3418-VCS, 2008 Del. Ch. LEXIS 92 (Del. Ch. July 15, 2008), *aff'd sub nom.* 970 A.2d 256 (Del. 2009); Sun-Times Media Grp., Inc. v. Black, 954 A.2d 380 (Del. Ch. 2008).

12. *See* Matt Levine, *Goldman Sachs Just Says 'Vice President' to Be Polite*, BLOOMBERG VIEW (Sept. 4, 2014), http://www.bloombergview.com/articles/2014-09-04/goldman-sachs-just-says-vice-president-to-be-polite [http://perma.cc/M4YH-4FDV] ("Indemnification is always a weird thing, and it is not intuitive to most people that a bank should have to pay the legal bills for people accused of committing crimes against that bank."); *see also* Joseph W. Bishop, Jr., *Sitting Ducks and Decoy Ducks: New Trends in the Indemnification of Corporate Directors and Officers*, 77 YALE L.J. 1078, 1078 (1968) (providing depiction of apprehension surrounding indemnification and advancement nearly fifty years ago that is still present today).

> A vast pother has arisen in corporate circles over the dreadful plight of officers and directors, beset on the one hand by predatory strike suitors anxious to convert them and their little families into welfare clients if

haps even more counterintuitive is the idea that lawmakers would mandate this sort of protection.[13]

Nevertheless, with litigation costs often accruing to millions, indemnification and advancement provisions are vital to a properly functioning corporate America.[14] Post-Enron corporations must now reconcile how to accept responsibility for their actors without subjecting themselves to costly and undue litigation expenses.[15] This was the conundrum at the core of a recent Third Circuit case, *Aleynikov v. Goldman Sachs Group, Inc.*,[16] involving a major corporate player in the banking world and one of its officers—or, as the defense argued, one of its non-officers.[17]

In an attempt to evade advancing legal fees for one of its vice presidents, Goldman Sachs argued that "vice presidents" are not "officers," their titles are "not particularly meaningful," and the "VP" designation is largely a result of title inflation, rather than a denotation of actual author-

---

> their efforts to maximize the corporation's profits come to grief, beset on the other by ruthless minions of the Antitrust Division determined to throw them into the federal pen if those efforts succeed. Some, perhaps most, of the excitement has been generated by the aggressive and imaginative propaganda of underwriters pushing insurance against such hazards.

Id.; *id.* at 1079 ("The most brazen of these older by-laws purported to permit executives adjudged guilty of breaching their duty to the corporation to be indemnified not only for their counsel fees but also for the very sums they had been ordered to pay the corporation.").

13. *See* Stephen A. Radin, *"Sinners Who Find Religion": Advancement of Litigation Expenses to Corporate Officials Accused of Wrongdoing*, 25 REV. LITIG. 251, 263–68 (2006) (analyzing unexpected consequences of mandatory advancement statutes); Morgenson, *supra* note 1 (providing statement of Goldman Sachs spokesperson on recent appeal regarding indemnification matter who stated, "Our employees shouldn't expect the firm to pay for their defense when they steal from us." (internal quotation marks omitted)).

14. *See* LAWYERS FOR CIVIL JUSTICE ET AL., LITIGATION COST SURVEY OF MAJOR COMPANIES, 1, 2–6 (2010) [hereinafter LITIGATION COSTS OF MAJOR COMPANIES], *available at* https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&sqi=2&ved=0CB4QFjAAahUKEwi45s2om_LHAhVHMj4KHXY_AU8&url=http%3A%2F%2Fwww.uscourts.gov%2Ffile%2Fdocument%2Flitigation-cost-survey-major-companies&usg=AFQjCNHgUXsuDpsCZjhpXZW-C-gSxeXbnA&bvm=bv.102537793,d.cWw (cataloging key findings of litigation cost survey for Fortune 200 companies). The survey reports that between 2000 and 2008, outside litigation costs per respondent increased 73% from $66 million to $115 million (9% increase per year). *Id.* at 2. The average annual litigation costs for the same companies as a percentage of their revenues increased 78% over the same time period. *Id.* at 3.

15. *See* Pamela D. Pengelley, *Indemnity and Infidelity: Advancement of Defence Costs in Actions "By . . . the Corporation"*, 48 CAN. BUS. L.J. 389, 390 (2009) ("The principle of indemnification strikes a delicate balance between seeking the middle ground between encouraging fiduciaries to violate their trust, and discouraging them from serving at all." (quoting Joseph F. Johnston, Jr., *Corporate Indemnification and Liability Insurance for Directors and Officers*, 33 BUS. LAW 1993, 1994 (1978)) (internal quotation marks omitted)).

16. 765 F.3d 350 (3d Cir. 2014).

17. *See infra* notes 83–109 and accompanying text (discussing facts, procedure, holding, and analysis of *Aleynikov* case).

ity or responsibility.[18] The case has become high profile, in part because the defendant's argument—the one that ultimately persuaded the court—allows corporations to dispel responsibility for literally thousands of employees through *post hoc* contract interpretation.[19] Regardless of the inordinate amount of attention the case has received, the Third Circuit's decision is widely applicable—and problematic—to any company with bylaws and any employees who function as officers (or at least think they do).[20]

On its face, *Aleynikov* addresses a basic question: in what circumstances do which corporate actors receive the rights of advanced legal fees?[21] In a narrow sense, the court's holding cautions corporate practitioners to reexamine the clarity of their clients' bylaws and to encourage investment in liability insurance to protect individuals in high managerial positions.[22] More broadly, however, the *Aleynikov* holding gives precedential leeway for companies who benefit from employees with "inflated" VP titles to do so without culpability for their actions.[23]

This Casebrief discusses the evolution of advancement rights for corporate executives, focusing particularly on post-Enron developments for Delaware corporations.[24] Part II examines the competing statutes, case law, and policies pertinent to the *Aleynikov* decision.[25] Part III focuses on

18. *See infra* notes 96–109 and accompanying text (discussing *Aleynikov* narrative analysis).

19. *See Aleynikov*, 765 F.3d at 370 (Fuentes, J., dissenting in part) ("[T]oday's ruling encourages Goldman to . . . keep [ ] ambiguous language in place, thereby giving many persons the reasonable expectations they will receive advancement, while reserving the right to make unpredictable *post hoc* determinations about which former employees should be advanced attorney's fees and which shouldn't."); Levine, *supra* note 12 (observing that keeping ambiguous corporate bylaws helps "attract worker bees without having them worry *too much* about legal risk" so that corporations will not have to "explicitly promise to thousands of employees that it will help keep them out of jail"); Morgenson, *supra* note 1 (criticizing Goldman for "ha[ving] more leeway to pick and choose which executives' legal bills it will pay if they become entangled in an investigation or legal proceeding").

For a brief overview of the factual underpinnings that propelled Aleynikov's case into the spotlight, see Michael Lewis, *Did Goldman Sachs Overstep in Criminally Charging Its Ex-Programmer?*, VANITY FAIR (Sept. 2013), http://www.vanityfair.com/news/2013/09/michael-lewis-goldman-sachs-programmer [http://perma.cc/4MXK-EQ5F]. For a lengthier narrative of the factual underpinnings of the case and its relation to high-frequency trading models, see MICHAEL LEWIS, FLASH BOYS: A WALL STREET REVOLT (2014).

20. *See infra* notes 171–92 and accompanying text (discussing practical problems posed by *Aleynikov* decision and recommendations for practitioners).

21. *See infra* notes 83–95 and accompanying text (discussing *Aleynikov* background facts).

22. *See infra* notes 110–69 and accompanying text (discussing critical analysis and impact of *Aleynikov*).

23. *See id.*; *see also infra* notes 171–92 (positing macro-level implications of *Aleynikov* decision).

24. *See infra* notes 34–199 and accompanying text.

25. *See infra* notes 34–78 and accompanying text.

Aleynikov in its entirety, addresses the facts and procedure of *Aleynikov*, and then details the Third Circuit's rationale for its holding.[26] Part IV examines the questionable preclusion of the *contra proferentem* doctrine in consideration of Delaware precedent and policy and further juxtaposes the Third Circuit and Delaware's interpretive models for corporate contract issues.[27] In light of the *Aleynikov* holding, Part V provides practical advice for corporate practitioners seeking to avoid similar advancement issues.[28] Finally, Part VI concludes by positing the long-term implications of the Third Circuit's decision.[29]

II. BACKGROUND: AN OFFER OF DELAWARE'S VARIOUS FRAMEWORKS FOR ANALYZING ADVANCEMENT ISSUES

Advancement is a complex issue governed by a variety of frameworks.[30] Situated within Delaware's corporate jurisprudence, the frameworks provide a succinct overview of overlapping, and sometimes competing, legal theories for practitioners litigating advancement issues.[31] These legal theories are mainly rooted in statute, contract doctrine, and state public policy.[32] Depending on whether the reviewing court considers the frameworks piecemeal or comprehensively, understanding the elements of each scheme is crucial to successfully litigating an advancement claim.[33]

A. *The Groundwork: Defining Advancement and Indemnification*

When an officer is sued or charged in a claim related to their corporate service, indemnification and advancement act as complementary protections triggered at different points in the defense.[34] For officers defending against a litany of lawsuits, this distinction is critical. Indemnification is a remedy afforded after the proceeding has been resolved in the defendant's favor "on the merits or otherwise."[35] But the definitive end to any given proceeding could take months, even years, and litigation costs and attorney's fees often aggregate astronomically during that time.[36]

26. *See infra* notes 79–109 and accompanying text.
27. *See infra* notes 110–69 and accompanying text.
28. *See infra* notes 171–92 and accompanying text.
29. *See infra* notes 194–99 and accompanying text.
30. *See infra* notes 34–78 and accompanying text.
31. *See id.*
32. *See id.*
33. *See id.*; *see also infra* notes 171–92 and accompanying text (discussing litigation strategies for corporate practitioners following *Aleynikov*).
34. Homestore, Inc. v. Tafeen, 888 A.2d 204, 211 (Del. 2005) ("Advancement is an especially important corollary to indemnification . . . .").
35. *See id.*
36. *See, e.g.*, Sun-Times Media Grp., Inc. v. Black, 954 A.2d 380, 385 (Del. Ch. 2008) (noting company had advanced over $77 million to its former officers over span of five years); *see also* Andrew M. Johnston et al., *Recent Delaware Law Developments in Advancement and Indemnification: An Analytical Guide*, 6 N.Y.U. J.L. & BUS.

Advancement is the corollary protection that mitigates these costs by providing "immediate interim relief from the personal-out-of-pocket financial burden of paying the significant on-going expenses inevitably involved with investigations and legal proceedings."[37] Advancement does not consider the merits of a case at the outset, but rather focuses on whether there is a "pendency" of claims against a corporate executive.[38] Advanced fees are also conditioned on a successful judgment; defendants who receive advanced fees and ultimately lose their case must repay the funds back to the corporation.[39]

The "prepayment" latitude of advancement should theoretically insulate an officer from expenses incurred until liability is determined, at which point they are then either required to repay the fees or they become eligible for indemnification.[40] When a corporate defendant's right to advancement has been challenged, however, the individual risks insolvency and, perhaps more unjustly, mootness.[41] Advanced fees are only

---

81, 83 (2009) (citing Sun-Times Media Group, Inc., 2008 Annual Report (Form 10-K), 99 (Apr. 14, 2009)) (noting total advancement costs eventually amounted to $119 million for Sun-Times); *id.* ("The U.S. Attorney . . . cited several examples of the litigation expenses incurred in recent high-profile trials—$70 million for the defense of Jeffrey Skilling in the Enron case; $25 million for the defense of the Rigases in the Adelphia case; $21 million for the defense of Richard Scrushy in the HealthSouth case; and $26 million for the defense of Dennis Kozlowski in two Tyco trials."); LITIGATION COSTS OF MAJOR COMPANIES, *supra* note 14, (providing corporate litigation costs).

37. *Homestore*, 888 A.2d at 211; *see also* Regina Robson, *Paying for Daniel Webster: Critiquing the Contract Model of Advancement of Legal Fees in Criminal Proceedings*, 7 HASTINGS BUS. L.J. 275, 277 (2011) ("Advancement of legal fees and other costs of litigation is a modern day corollary to the right to indemnification."); *supra* note 34 (citing *Homestore*'s use of "corollary" as description for advancement rights).

38. *See* Aleynikov v. Goldman Sachs Grp., Inc., No. 12-5994 (KM), 2013 U.S. Dist. LEXIS 151603, at *14 (D.N.J. Oct. 22, 2013) ("Advancement, by contrast, depends on the pendency, not the merits, of the claims asserted against the corporate official."), *aff'd in part and vacated in part*, 765 F.3d 350 (3d Cir. 2014).

39. *See id.* at *27 (noting that advancement statute and bylaws "reserv[e] the company's right to repayment once litigation has ended"); *id.* at *28–29 ("[T]he advancement remedy . . . . is provisional to the extent that a person who receives advancement of fees must furnish an 'undertaking' to pay them back if he or she is unsuccessful in the underlying litigation."); Fasciana v. Elec. Data Sys. Corp., 829 A.2d 178, 182–83 (Del. Ch. 2003) ("[A]dvancement can be thought of as an extension of credit, the final repayment of which is conditioned on whether a corporate official is ultimately entitled to indemnification.").

40. *See* Robson, *supra* note 37, at 277 (explaining that advancement is interim form of relief for individuals who may be eligible for indemnification); *id.* at 278 (describing advancement as "prepayment").

41. *See Aleynikov*, 2013 U.S. Dist. LEXIS 151603, at *29 (explaining temporal considerations for advancement). The court noted that "advancement, if not expeditious, may be valueless." *See id.; see also* United States v. Stein, 452 F. Supp. 2d 230, 270, 272–73 (S.D.N.Y. 2006) (explaining mootness point). *See also supra* notes 14, 36 and accompanying text (providing cost of litigation).

effective so long as they are made in tandem with the litigation generating the expense.[42]

Procedural delays may obviate any potential benefit of the advancement remedy entirely.[43] Typically, a corporation will appeal a judgment that it must advance fees.[44] This appeals process may result in the fee-producing litigation "lapping" the advancement litigation, in turn rendering the advancement issue moot and the corporate official without relief.[45]

B. *The Statutory Scheme and Section 145 of the Delaware General Corporation Law*

In 1943, as Delaware's corporate jurisprudence began to depart from principles of agency law, the legislature mandated that corporations indemnify officers who have successfully defended themselves against litigation related to their official capacities.[46] However, Section 145 of the

---

42. *See* United States v. Stein, 452 F. Supp. 2d at 272–73 (describing underlying principle of advancement) *motion to strike granted by* 452 F. Supp. 2d 276 (S.D.N.Y. 2006).

> If a right to advancement of defense costs exists, the inherent nature of the right is to receive the funds as the defense costs are incurred. Postponement of determination whether such a right exists would render the right meaningless. By the time a decision were reached, the underlying proceeding would be over—the occasion for advancing defense costs would have passed and its purpose would have been defeated.

Id.

43. *See id.*

44. *See, e.g.*, Ridder v. CityFed Fin. Corp., 47 F.3d 85 (3d Cir. 1995) (appealing advancement claim because of officer's alleged fraud and breach of fiduciary duty); Elec. Data Sys. Corp. v. Reddy, 820 A.2d 371 (Del. 2003) (appealing advancement claims because of officer's alleged negligence and fraud) (mem.); Citadel Holding Corp. v. Roven, 603 A.2d 818 (Del. 1992) (appealing advancement claims because officer illegally engaged in trading stock).

45. *See Stein*, 452 F. Supp. 2d. at 273 (noting consequences of procedural delays).

> In consequence, determination of a claim for advancement cannot wait until the underlying case is over, when an employee's right to indemnification may be determined. Nor can it wait until an employer decides whether to pursue any independent claims that it may have against the employee or, if it has brought such claims, until the employer's claims are determined.

Id.

46. *See* VonFeldt v. Stifel Fin. Corp., 714 A.2d 79, 84 (Del. 1998) (noting Delaware enacted its indemnification statute in 1943); *id.* at 84 n.22 (citing first indemnification statute as Del. Laws 125 (1943), codified at 8 DEL. C. § 122(10)). The case that prompted legislatures to enact indemnification statutes was New York Dock Co. v. McCollum, 16 N.Y.S. 2d 844 (N.Y. Sup. Ct. 1939). James F. McKeown, Comment, *Corporate Indemnification of Directors and Officers—The Expanding Scope of the Statutes*, 18 CATH. U. L. REV. 195, 197 (1969) (explaining that *McCollum* "triggered a legislative reaction"). In *McCollum*, the court denied directors reimbursement after they had successfully defended themselves against a shareholder suit. *See id.* The statutory response to *McCollum* differs from Delaware's original sources of agency law. *See* RESTATEMENT (SECOND) OF AGENCY: DUTY OF INDEMNITY; § 438

Delaware General Corporation Law (DGCL) limits mandatory indemnification to instances where the officer "acted in good faith and in a manner the person reasonably believed to be in or not opposed to the best interests of the corporation."[47]

In contrast, Section 145(e) does not require corporations to advance legal fees in any circumstance, but merely empowers them to do so at their discretion.[48] Consequently, advancement provisions are largely byprod-

---

(1958). In agency law, and consequently in the early common law cases on indemnification, a principal was only required to indemnify his or her agent if the agent was acting as authorized or directed by the principal. *See id.* By contrast, Section 145 is triggered in much more attenuated circumstances: "[B]y reason of the fact that the person is or was a director, officer, employee or agent of the corporation, or is or was serving *at the request of the corporation* as a director, officer, employee or agent of another corporation . . . ." *See* DEL. CODE. ANN. tit. 8, § 145(b) (2015) (emphasis added). For a further discussion of the evolution of indemnification at common law, see Joseph W. Bishop, Jr., *Current Status of Corporate Directors' Right to Indemnification*, 69 HARV. L. REV. 1057, 1068–69 (1956).

47. *See* DEL. CODE ANN. tit. 8, § 145(a)–(c) (2015) (providing default and mandatory rules for indemnification).

> (a) A corporation shall have power to indemnify any person . . . *by reason of the fact* that the person is or was *a director, officer, employee or agent* of the corporation, or *is or was serving at the request of the corporation as a director, officer, employee or agent of another corporation* . . . against expenses (including attorneys' fees), judgments, fines and amounts paid in settlement actually and reasonably incurred by the person in connection with such action, suit or proceeding *if the person acted in good faith* and in a manner the person reasonably believed to be in or not opposed to the best interests of the corporation . . . .
>
> (b) A corporation shall have power to indemnify any person who was or is a party or is threatened to be made a party to any threatened, pending or completed action or suit by or in the right of the corporation to procure a judgment in its favor by reason of the fact that the person is or was a director, officer, employee or agent of the corporation, or is or was serving at the request of the corporation as a director, officer, employee or agent of another corporation, partnership, joint venture, trust or other enterprise against expenses (including attorneys' fees) actually and reasonably incurred by the person in connection with the defense or settlement of such action or suit *if the person acted in good faith* and in a manner the person reasonably believed to be in or not opposed to the best interests of the corporation . . . .
>
> (c) To the extent that a present or former director or officer of a corporation has been successful on the merits or otherwise in defense of any action, suit or proceeding referred to in subsections (a) and (b) of this section, or in defense of any claim, issue or matter therein, such person shall be indemnified against expenses (including attorneys' fees) actually and reasonably incurred by such person in connection therewith.

Id. (emphasis added).

48. *See* DEL. CODE. ANN. tit. 8, § 145(e) (providing default, permissive rule for advancement).

> (e) Expenses (including attorneys' fees) incurred by an officer or director of the corporation in defending any civil, criminal, administrative or investigative action, suit or proceeding *may* be paid by the corporation in advance of the final disposition of such action, suit or proceeding upon receipt of an undertaking by or on behalf of such director or officer to repay such amount if it shall ultimately be determined that such per-

ucts of the corporation's bylaws and have little, if any, explicit substantive statutory limits (or requirements).[49] Section 145(k) does regulate the procedure for advancement suits by vesting the Court of Chancery with exclusive jurisdiction over advancement and indemnification issues "brought under [Section 145] or under any bylaw, agreement."[50]

C. *The Contractual Framework: Letting Bylaws Be Bylaws*

Though Section 145(e) empowers corporations to advance legal fees for employees, the statute does not regulate the process or eligibility for advancement.[51] Instead, these provisions are typically drafted unilaterally, embedded in the organization's bylaws, and governed by contract doctrines.[52] Bylaw disputes are thus construed in accordance with three basic contract principles: (1) words will be given their plain meaning; (2) courts will not resort to extrinsic evidence if the at-issue terms can be construed unambiguously within the "four corners" of the document; and (3) in the event unilaterally drafted bylaws contain ambiguous language, the ambiguous term will be construed against the drafter—otherwise known as the

> son is not entitled to be indemnified by the corporation as authorized in this section. Such expenses (including attorneys' fees) incurred by former directors and officers or other employees and agents of the corporation or by persons serving at the request of the corporation as directors, officers, employees or agents of another corporation, partnership, joint venture, trust or other enterprise *may be so paid upon such terms and conditions, if any, as the corporation deems appropriate.*

Id. (emphasis added).

49. *See, e.g.*, Gentile v. Singlepoint Fin., Inc., 788 A.2d 111, 113 (Del. 2001) (determining mandatory advancement issue based on interpretation of corporation's bylaws); Centaur Partners, IV v. Nat'l Intergroup, Inc., 582 A.2d 923, 928 (Del. 1990) (same); *see also* Robson, *supra* note 37, at 284 ("[F]or most employees advancement is governed by bylaw provisions. Such provisions frequently parrot the language of the state statutes . . . ." (footnote omitted)); *infra* notes 52–73 and accompanying text (discussing contractual principles governing bylaw provisions).

50. *See* DEL. CODE. ANN. tit. 8, § 145(k) (providing Chancery Court with exclusive jurisdiction over bylaw matters):

> The Court of Chancery is hereby vested with exclusive jurisdiction to hear and determine all actions for advancement of expenses or indemnification brought under this section or under any bylaw, agreement, vote of stockholders or disinterested directors, or otherwise. The Court of Chancery may summarily determine a corporation's obligation to advance expenses (including attorneys' fees).

Id.

51. *See supra* notes 46–50 and accompanying text (discussing statutory framework).

52. *See Gentile*, 788 A.2d at 113 ("[T]he rules used to interpret statutes, contracts, and other written instruments are applicable when construing corporate charters and bylaws."); Hibbert v. Hollywood Park, Inc., 457 A.2d 339, 342–43 (Del. 1983) (same). Bylaws are also uniquely situated in contract interpretation in that even lack of consideration has not invalidated mandatory advancement under Delaware law. *See, e.g.*, Underbrink v. Warrior Energy Servs. Corp., No. 2982-VCP, 2008 Del. Ch. LEXIS 65, at *36–37 (Del. Ch. May 30, 2008) (indicating lack of Delaware precedent invalidating corporate bylaw concerning mandatory advancement for lack of consideration).

doctrine of *contra proferentem*.[53] Collectively, these principles protect both the corporation and its employees by ensuring bylaws will be executed predictably, fairly, and reasonably, absent *post hoc* interpretation of their terms.[54]

Under Delaware law, terms are ambiguous when they are "fairly susceptible of different interpretations or may have two or more different meanings."[55] The "plain meaning" and "four corners" rules are simple, mechanical approaches for resolving ambiguity.[56] Under the plain meaning doctrine, courts must analyze an ambiguous term in light of the term's "usual and ordinary" meaning.[57] The four corners rule states that inter-

53. *See* Activision Blizzard, Inc. v. Hayes, 106 A.3d 1029, 1033 (Del. 2013) ("[T]he terms of a charter provision, like any other contract, are given their plain meaning."); Twin City Fire Ins. Co. v. Del. Racing Ass'n, 840 A.2d 624, 630 (Del. 2003) ("[*C*]*ontra preferentem* [sic] [is the well-established] principle of construction, which is that ambiguities in a contract should be construed against the drafter."); Citadel Holding Corp. v. Roven, 603 A.2d 818, 824 (Del. 1992) ("When construing a contract, and unless a contrary intent appears, we will give words their ordinary meaning."); *cf.* Bank of N.Y. Mellon v. Commerzbank, 65 A.3d 539, 551 (Del. 2013) (explaining that it is inappropriate to resort to extrinsic evidence about parties' intent when evidence "would yield information about the views and positions of only one side of the dispute" in situations involving unilateral drafting and no negotiating). In other cases interpreting Delaware law, the Third Circuit has also found that extrinsic evidence relating exclusively to the intent of a unilaterally drafting party was irrelevant to the resolution of ambiguity. *See* MBIA Ins. Corp. v. Royal Indem. Co., 426 F.3d 204, 214 n.4 (3d Cir. 2005) ("'Undisputed background facts' do not include the self-serving parol evidence submitted by the parties, whose recollections as to the intended meaning of the agreements predictably differ."); *see also infra* notes 55–59 and accompanying text (discussing "plain meaning" and "four corners" rules).

54. *See* Aleynikov v. Goldman Sachs Grp., Inc., 765 F.3d 350, 370 (3d Cir. 2014) (Fuentes, J., dissenting in part) (criticizing rejection of *contra proferentem* because it fosters "unpredictable *post hoc* determinations"); Aleynikov v. Goldman Sachs Grp., Inc., No. 12-5994 (KM), 2013 U.S. Dist. LEXIS 151603, at *44, *57 (D.N.J. Oct. 22, 2013) (explaining that failed applications of plain meaning and four corners rules lead to introduction of extrinsic evidence and criticizing Goldman's "*post hoc* characterization" gleaned from such evidence), *aff'd in part and vacated in part*, 765 F.3d 350 (3d Cir. 2014).

55. *See* Alta Berkeley VI C.V. v. Omneon, Inc., 41 A.3d 381, 385 n.17 (Del. 2012) (quoting Rhone-Poulenc Basic Chem. Co. v. Am. Motor Ins. Co., 616 A.2d 1192, 1196 (Del. 1992)) (internal quotation marks omitted). There is a caveat to this general definition: disagreement among the parties as to the meaning of a term is not enough to show ambiguity. *See* Harrah's Entm't, Inc. v. JCC Holding Co., 802 A.2d 294, 309–10 (Del. Ch. 2002). Instead, "[t]o demonstrate ambiguity, a party must show that the instruments in question can be reasonably read to have two or more meanings." *Id.* at 309.

56. *Cf.* Richard A. Posner, *The Law and Economics of Contract Interpretation*, 83 TEX. L. REV. 1581, 1596 (2005) (noting four corners rule generally limits judge's "interpretive role" and scope of interpretation); *id.* at 1597 (positing that four corners rule is not one of "interpretation" (internal quotation marks omitted)).

57. *See Aleynikov*, 2013 U.S. Dist. LEXIS 151603, at *55 (equating plain meaning with usual and ordinary meaning); *Activision Blizzard*, 106 A.3d at 1033 (explaining charter provision terms "are given their plain meaning"). In the event plain meaning is not readily apparent from the face of the contract, Delaware courts may refer to the dictionary definition "for assistance in determining the

pretation of ambiguous terms should be limited to the four corners of the document; ambiguity should not be "judicially created" by inappropriately introducing extrinsic evidence to the record.[58] Delaware courts combine these doctrines "to give effect to each term [in a contract] and to harmonize seemingly conflicting terms."[59]

Applications of the plain meaning and four corners doctrines may ultimately prove fruitless, and courts may nevertheless be forced to consider extrinsic evidence to resolve ambiguity.[60] Unlike other rules for judicial interpretation, *contra proferentem* does not attempt to resolve the ambiguity or force courts to "hunt" for clarity within extrinsic evidence.[61] Instead, *contra proferentem* is a "last resort" rule grounded in equity rather than substance.[62] *Contra proferentem* is thus punitive in effect and prophy-

---

plain meaning . . . ." *See* Lorillard Tobacco Co. v. Am. Legacy Found., 903 A.2d 728, 738 (Del. 2006). However, Delaware courts have introduced supplemental canons of construction that reconcile ambiguity using "plain meaning" quite flexibly. *See, e.g.*, Norton v. K-Sea Transp. Partners L.P., 67 A.3d 354, 360 (Del. 2013) ("A meaning inferred from a particular provision cannot control the agreement if that inference conflicts with the agreement's overall scheme."); CA, Inc. v. Ingres Corp., No. 4300-VCS, 2009 Del. Ch. LEXIS 204, at *74–75 (Del. Ch. Dec. 7, 2009) ("[T]he court should look to the entirety of the agreement in the context of the parties' relationship instead of isolating distinct provisions."); Comrie v. Enterasys Networks, Inc., 837 A.2d 1, 13 (Del. Ch. 2003) ("If the terms of the contract are clear on their face, . . . the court must apply the meaning that would be ascribed to the language by a reasonable third party." (alteration in original) (internal quotation marks omitted)).

58. *See* Eagle Indus., Inc. v. DeVilbiss Health Care, Inc., 702 A.2d 1228, 1232 (Del. 1997) (["[E]xtrinsic evidence may not be used to interpret the intent of the parties, to vary the terms of the contract or to create an ambiguity."); Gregory M. Duhl, *Conscious Ambiguity: Slaying* Cerberus *in the Interpretation of Contractual Inconsistencies*, 71 U. PITT. L. REV. 71, 99 (2009) ("The 'four corners rule' is that a court should determine whether a contract is ambiguous from the 'four corners' of the document, without considering extrinsic evidence."); *see also* Michelle E. Boardman, Contra Proferentem: *The Allure of Ambiguous Boilerplate*, 104 MICH. L. REV. 1105, 1121–26 (2006) (arguing courts inappropriately inject ambiguity into contracts that are unambiguous); *cf.* New Castle Cnty. v. Nat'l Union Fire Ins. Co., 243 F.3d 744, 750 (3d Cir. 2001) ("Absent some ambiguity, Delaware courts will not destroy or twist [ ] language under the guise of construing it, because creating an ambiguity where none exists could . . . create a new contract with rights, liabilities and duties to which the parties have not assented."(internal quotation marks omitted)).

59. *See* Stockman v. Heartland Indus. Partners, L.P., No. 4427-VCS, 2009 Del. Ch. LEXIS 131, at *21 (Del. Ch. July 14, 2009).

60. *See, e.g.*, *Comrie*, 837 A.2d at 13 (noting court may resort to extrinsic evidence if language is not clear on its face).

61. *Compare* Wilmington Firefighters Ass'n, Local 1590 v. City of Wilmington, No. 19035, 2002 Del. Ch. LEXIS 29, at *34 (Del. Ch. Mar. 12, 2002) (noting *contra proferentem* "applies only where other secondary rules of interpretation have failed"), *with supra* notes 55–59 and accompanying text (discussing mechanical nature of "plain meaning" and "four corners" rules).

62. *See* 5-24 CORBIN ON CONTRACTS: INTERPRETATION *Contra Proferentem*—Against the Party Who Chose the Contract Words § 24.27 (2014) (describing *contra proferentem* as "doctrine of last resort"); *id.* ("If . . . the only remaining question is which of two possible and reasonable meanings should be adopted, the court will

lactic in rationale; the rule encourages clear drafting and promotes fairness to the non-drafting party who, in all likelihood, has not vigilantly read the contract.[63]

To this end, *contra proferentem* is often applied to corporate instruments under an estoppel theory.[64] Employing the doctrine in this manner addresses two primary concerns prevalent in Delaware jurisprudence: (1) securing the reasonable expectations of individuals who must rely on the instrument before joining the organization and (2) maintaining a predictable interpretive framework for Delaware litigants.[65] Consider the justification for invoking the doctrine: to protect individuals with lesser bargaining power, who take no part in drafting the instrument, who are subjected to risk under the contract, but who are nevertheless bound by its terms.[66] This calculus is exacerbated when a corporate actor joins an organization, at least in part, based on the representations of its governing

---

often adopt the meaning that is less favorable in its legal effect to the party who chose the words."). The "last resort" name refers to the fact that courts will apply other canons of construction before *contra proferentem*. *See id.*

63. *See id.*; *see also* RESTATEMENT (SECOND) OF CONTRACTS: INTERPRETATION AGAINST THE DRAFTSMAN § 206 (1981) ("In choosing among the reasonable meanings of a promise or agreement or a term thereof, that meaning is generally preferred which operates against the party who supplies the words or from whom a writing otherwise proceeds."). The Restatement goes on to provide rationale for the *contra proferentem* rule:

> Where one party chooses the terms of a contract, he is likely to provide more carefully for the protection of his own interests than for those of the other party. He is also more likely than the other party to have reason to know of uncertainties of meaning. Indeed, he may leave meaning deliberately obscure, intending to decide ata [sic] later date what meaning to assert. In cases of doubt, therefore, so long as other factors are not decisive, there is substantial reason for preferring the meaning of the other party. The rule is often invoked in cases of standardized contracts and in cases where the drafting party has the stronger bargaining position . . . .

Id. at § 206 cmt. a; David Horton, *Flipping the Script:* Contra Proferentem *and Standard Form Contracts*, 80 U. COLO. L. REV. 431, 437 (2009) (describing one explanation for rule as "deter[ring] ambiguities" and another as "a 'penalty default rule'"); Posner, *supra* note 56, at 1608 (describing *contra proferentem* as "tiebreaker" doctrine).

64. *See, e.g.*, *Stockman*, 2009 Del. Ch. LEXIS 131, at *16 ("The *contra proferentem* approach protects the reasonable expectations of people who join a partnership or other entity after it was formed and must rely on the face of the operating agreement to understand their rights and obligations when making the decision to join.").

65. *See id.*; *see also* Penn Mut. Life Ins. Co. v. Oglesby, 695 A.2d 1146, 1150 (Del. 1997) (explaining *contra proferentem* resolves ambiguities in favor of reasonable expectations of public investors). The reasonable expectations doctrine is a related but distinct facet of contract interpretation. *See* Mark C. Rahdert, *Reasonable Expectations Revisited*, 5 CONN. INS. L.J. 107, 111–14 (1998). Of its multiple applications, the reasonable expectations doctrine is primarily used to determine the meaning of contractual language and to protect parties from unconscionable interpretations. *See id.*

66. *See supra* notes 61–63 and accompanying text (providing rationale for rule).

documents.[67] Thus, to level this imbalance, Delaware courts have applied *contra proferentem* liberally to contract issues embedded in corporate instruments.[68]

While Delaware's contractual framework aims to effectuate consistent, predictable, and stable litigation results, the Third Circuit has not been particularly wedded to Delaware's interpretive model.[69] The Third Circuit's approach, unlike the standard utilized in Delaware courts, reflects a hybrid of traditional and modern interpretive norms.[70] Whereas traditional contract construction is literalist, confined to the plain meaning within the four corners of the contract and fosters predictable outcomes, the modern approach introduces unpredictability by considering "a broad inquiry into context and circumstances" surrounding the contract.[71] Illustrating this point, the Third Circuit has been willing to find contract language ambiguous under Delaware law simply because other jurisdictions have interpreted the same terms as ambiguous.[72] The upshot of this "am-

67. *See Stockman*, 2009 Del. Ch. LEXIS 131, at *18 ("[W]here an entity's governing instruments are involved, the onus is on the drafter to be clear.").

68. *See, e.g.*, Norton v. K-Sea Transp. Partners L.P., 67 A.3d 354, 360 (Del. 2013) (applying doctrine to limited partnership agreement); *Stockman*, 2009 Del. Ch. LEXIS 131, at *19 n.21 (applying doctrine where bylaw was drafted by cofounder seeking advancement); *cf.* DeLucca v. KKAT Mgmt., LLC, No. 1384-N, 2006 Del. Ch. LEXIS 19, at *25 (Del. Ch. Jan. 23, 2006) (framing estoppel question as whether plaintiff was "within the class of persons who are generally covered by the Operating Agreement's advancement provisions[]").

69. *Compare, e.g.*, *Stockman*, 2009 Del. Ch. LEXIS 131, at *16 ("[I]t is critical that the governing instruments of entities be interpreted consistently and that they be applied in a predictable manner."), *with infra* notes 70–73 and accompanying text (discussing Third Circuit's interpretive willingness to introduce broad inquiry of surrounding circumstances). *Cf.* Thomas J. Rueter & Joshua H. Roberts, *Pennsylvania's Reasonable Expectations Doctrine: The Third Circuit's Perspective*, 45 VILL. L. REV. 581, 583 (2000) (noting Third Circuit decisions have been inconsistent with Pennsylvania contract doctrines).

70. *See infra* notes 71–73 and accompanying text (comparing Delaware's traditional interpretive approach to Third Circuit's hybrid approach).

71. *See* Dale B. Tauke, *Should Bonds Have More Fun? A Reexamination of the Debate over Corporate Bondholder Rights*, 1989 COLUM. BUS. L. REV. 1, 81–83 (1989) (explaining differences in modern interpretive approach and traditional interpretive approach); *id.* at 135 ("The modern approach . . . constru[es] contract language to fulfill the contracting parties' expectations as determined through a broad inquiry into all relevant considerations.").

72. *See* New Castle Cnty. v. Nat'l Union Fire Ins. Co., 243 F.3d 744, 756 (3d Cir. 2001) ("A single phrase, which insurance companies have consistently refused to define, and that has generated literally hundreds of lawsuits, with widely varying results, cannot, under our application of commonsense, be termed unambiguous."); *cf.* Little v. MGIC Indem. Corp., 836 F.2d 789, 796 (3d Cir. 1987) ("The mere fact that several . . . courts have ruled in favor of a construction denying coverage, and several others have reached directly contrary conclusions, viewing almost identical policy provisions, itself creates the inescapable conclusion that the provision in issue is susceptible to more than one interpretation." (alteration in original) (quoting Cohen v. Erie Indem. Co., 432 A.2d 596, 599 (Pa. Super. Ct. 1981)) (internal quotation marks omitted)).

biguous by consensus" rationale is that Delaware precedent may not have a significant effect on the Third Circuit's own interpretative approach.[73]

D. *Delaware's Pro-Advancement Policies*

A strictly contract-based reading of bylaws and advancement provisions distracts from the broader policies and principles underlying them.[74] In situations where courts are forced to reconcile "hopelessly ambiguous" terms, examining policy may be the only option for an equitable resolution.[75] Delaware has been forthright that the policies served by Section 145 and any advancement provisions subsequently arising out of the statute are implemented to attract and retain competent corporate officials.[76] In upholding these policies, Delaware "eschew[s] narrow construction . . . where an overliteral reading would disserve [their purpose]."[77] Additionally, given that advancement requires procedural urgency, Delaware treats these issues with particular sensitivity and favors readings that find advancement whenever possible.[78]

---

73. *See* Boardman, *supra* note 58, at 1121–26 (discussing courts that find "[a]mbiguity by [c]onsensus").

74. *See* Sun-Times Media Grp., Inc. v. Black, 954 A.2d 380, 383 (Del. Ch. 2008) (noting inclusion of "practical and policy considerations" in addition to consideration of explicit language in bylaws); *see also* Reinhard & Kreinberg v. Dow Chem. Co., No. 3003-CC, 2008 Del. Ch. LEXIS 39, at *5–6 (Del. Ch. Mar. 28, 2008) ("Although courts use the tools of contractual interpretation when construing bylaw provisions relating to indemnification and advancement, they simultaneously apply the patina of section 145's policy.").

75. *See* Kaiser Aluminum Corp. v. Matheson, 681 A.2d 392, 398 (Del. 1996) (describing contract terms as "hopelessly ambiguous").

76. *See* Homestore, Inc. v. Tafeen, 888 A.2d 204, 218 (Del. 2005) (explaining that advancement provisions "attract[ ] the most capable people into corporate service"); VonFeldt v. Stifel Fin. Corp., 714 A.2d 79, 84 (Del. 1998) (explaining "dual policies" of Section 145 to, first, ensure corporate officials will be reimbursed for litigation expenses "if vindicated" and to, second, attract "capable [individuals] to serve as corporate directors and officers, secure in the knowledge that the corporation will absorb the costs of defending their honesty and integrity").

77. *See VonFeldt*, 714 A.2d at 84; *see also Sun-Times*, 954 A.2d at 395 ("[T]he [Advancement] Provision is to be interpreted broadly."); Stifel Fin. Corp. v. Cochran, 809 A.2d 555, 561 (Del. 2002) ("[T]he indemnification statute should be broadly interpreted to further the goals it was enacted to achieve.").

78. *See* DeLucca v. KKAT Mgmt., LLC, No. 1384-N, 2006 Del. Ch. LEXIS 19, at *23 (Del. Ch. Jan. 23, 2006) ("Delaware courts have read indemnification contracts to provide coverage when that is reasonable."); Delphi Easter Partners Ltd. P'ship v. Spectacular Partners, Inc., No. 12409, 1993 Del. Ch. LEXIS 159, at *5–6 (Del. Ch. Aug. 6, 1993) ("In construing contractual language . . . conferring rights of indemnification, courts should interpret language so as to achieve where possible the beneficial purposes that indemnification can afford.").

III. REJECTION FROM THE THIRD CIRCUIT: A COUNTER-OFFER FOR CONSTRUING ADVANCEMENT PROVISIONS IN ALEYNIKOV

Aleynikov was the Third Circuit's first opportunity to rule on *contra proferentem* in a corporate setting.[79] The court's holding will, in many ways, render federal courts within the Third Circuit unattractive venues for corporate governance issues moving forward, particularly if the issue involves contract interpretation.[80] Though even the dissenting judge in *Aleynikov* agreed the term "officer" was ambiguous as a matter of law, ample case law suggests that the term clearly includes vice presidents.[81] Moreover, the Third Circuit's failure to apply *contra proferentem* in this context demonstrates that the circuit court will not treat Delaware's policy or precedent deferentially.[82]

A. *Facts and Procedure*

Sergey Aleynikov served as a vice president at Goldman, Sachs & Co. (GSCo), a subsidiary of Goldman Sachs Group (Goldman), from 2007 to 2009.[83] During his tenure, Aleynikov created high-frequency trading source code for Goldman's trading department but did not have any managerial or supervisory obligations.[84] In April of 2009, Aleynikov resigned from GSCo and accepted a position at a Chicago startup firm.[85] During the five-week period he remained at GSCo following his resignation, Aleynikov allegedly stole thousands of lines of GSCo's proprietary code.[86] He was later charged and convicted for federal theft crimes.[87] In August of 2012, after the United States Court of Appeals for the Second Circuit

79. *See* Aleynikov v. Goldman Sachs Grp., Inc., 765 F.3d 350, 366 (3d Cir. 2014) (stating there is no direct precedent in Delaware case law addressing *contra proferentem* in this context).

80. *See infra* notes 159–69 and accompanying text.

81. *See infra* notes 115–47 and accompanying text.

82. *See infra* notes 148–58 and accompanying text.

83. *See Aleynikov*, 765 F.3d at 354 ("Aleynikov worked as a computer programmer for GSCo from May 7, 2007 until June 30, 2009, although his last day in the office was June 5, 2009. While at GSCo, he developed source code for Goldman's high-frequency trading system and held the title of vice president in GSCo's equities division."). Goldman, Sachs & Co. is a "non-corporate subsidiary" of Goldman Sachs Group. *See id.*

84. *See id.* (discussing Aleynikov's job responsibilities).

85. *See id.* (detailing Aleynikov's acceptance of job at Teza Technologies). *See generally* United States v. Aleynikov, 676 F.3d 71, 74 (2d Cir. 2012) (explaining Teza Technologies was "a Chicago-based startup that was looking to develop its own HFT system").

86. *See Aleynikov*, 765 F.3d at 354 (stating Aleynikov stole source code on his last day); *id.* (stating resignation date as April 2009 and last day as June 5, 2009).

87. *See id.* ("Aleynikov copied GSCo's source code into computer files and transferred those files to a server in Germany."). The encrypted files Aleynikov stole included thousands of source code lines from Goldman's high frequency trading system, including algorithms that purportedly value stock options. *See Aleynikov*, 676 F.3d at 74; *see also* Complaint, United States v. Aleynikov, 737 F. Supp. 2d 173 (S.D.N.Y. 2010) (No. 10 cr. 96 (DLC)).

reversed his federal conviction, Aleynikov was arrested again under New York state law for crimes related to the same conduct.[88]

Following his re-arrest, Aleynikov filed a motion for summary judgment in the United States District Court for the District of New Jersey seeking indemnification for more than $2.3 million in costs incurred as a result of his criminal proceedings.[89]

Aleynikov also claimed he was entitled to advancement under Goldman's bylaws.[90] The bylaw provisions at issue were Sections 4.1 and 6.4.[91] Section 4.1, in relevant part, authorizes Goldman's board of direc-

---

88. *See Aleynikov*, 765 F.3d at 355 ("On August 2, 2012, New York state authorities arrested Aleynikov and charged him with state crimes based upon the same alleged conduct.").

89. *See id.* ("Aleynikov and his counsel sent a letter to Goldman seeking indemnification for over $2.3 million in attorney's fees and costs incurred in connection with the federal criminal proceedings and advancement of attorney's fees and costs related to the ongoing state criminal proceedings."). Aleynikov specifically sought (1) reimbursement for the fees related to his successful defense in the federal criminal proceedings, (2) advancement for fees related to the ongoing state criminal proceedings, and (3) advancement of fees related to the current Third Circuit proceedings. *See id.* ("Aleynikov initiated this case . . . seeking indemnification and advancement, as well as 'fees on fees' incurred in attempting to obtain indemnification and advancement").

90. *See id.* (noting Aleynikov's counsel sent Goldman letter that "asserted [ ] Aleynikov was entitled to indemnification and advancement under the By-Laws"); *see generally id.* at 353 (referring to "By-Laws" as "GS Group's By-Laws").

91. *See* AMENDED AND RESTATED BY-LAWS OF THE GOLDMAN SACHS GROUP, INC. (as amended and restated as of May 22, 2013) [hereinafter GOLDMAN'S BYLAWS], *available at* http://www.sec.gov/Archives/edgar/data/886982/000119312513237445/d545345dex31.htm [http://perma.cc/ERP6-LE7U] (restating Goldman's bylaws, § 4.1 of which gives Goldman's board of directors authority to appoint "officers").

> The Board of Directors shall take such action as may be necessary from time to time to ensure that the Corporation *has such officers* as are *necessary* . . . . In addition, the Board of Directors at any time and from time to time may elect (i) one or more Chairmen of the Board and/or one or more Vice Chairmen of the Board from among its members, (ii) one or more Chief Executive Officers, one or more Presidents and/or one or more Chief Operating Officers, (iii) *one or more Vice Presidents*, one or more Treasurers and/or one or more Secretaries and/or (iv) *one or more other officers* . . . .

Id. § 4.1 (emphasis added); *see also id.* § 6.4 (providing indemnification clause).

> 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

tors to "elect [such officers as necessary, including] . . . one or more Vice Presidents . . . ."[92] Section 6.4 provides a specific advancement provision for officers of Goldman Sachs Group subsidiary companies and states, defining, in relevant part, that

> the term "officer," . . . when used with respect to a Subsidiary . . . shall refer to any person elected or appointed pursuant to the by-laws of such Subsidiary or other enterprise or chosen in such manner as is prescribed by the by-laws . . . [and] shall include in addition to any officer of such entity, any person serving in a similar capacity or as the manager of such entity.[93]

The district court granted Aleynikov's motion with respect to his claims for advancement and advancement-related fees, reasoning that a "vice president" was an officer within the meaning of Goldman's bylaws.[94] Following summary judgment, Goldman filed an appeal disputing the district court's injunction ordering advancement of fees for Aleynikov's pending state criminal case.[95]

B. *Narrative Analysis*

The Third Circuit held that "officer" was ambiguous as a matter of law and remanded the issue of whether extrinsic evidence "resolves the ambiguity to ascertain 'which of the reasonable readings [of the term officer] was intended by the parties.'"[96] In reaching this holding, the court first examined Goldman's bylaws to determine whether the plain meaning of the term could be construed unambiguously within the "four corners" of

---

> indemnified by the Corporation. The rights provided to any person by this by-law 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.

Id. (emphasis added).

92. *See* GOLDMAN'S BYLAWS, *supra* note 91, § 4.1.

93. *See id.* § 6.4.

94. *See Aleynikov*, 765 F.3d at 355 ("The District Court analyzed Section 6.4 [of] the By-Laws for ambiguity . . . . It proceeded to . . . conclud[e] that the evidence submitted did not raise any genuine issues of material fact."). The district court also determined that even if there were a genuine issue of material fact, the doctrine of *contra proferentem* would apply, which would construe the unilaterally-drafted contract against the drafter. *See id.* Therefore, irrespective of any ambiguity, Aleynikov's advancement claim would be successful by default. *See id.* The district court denied summary judgment on the indemnification issue because the actual monetary amount of Aleynikov's legal fees for his federal case was in dispute. *See id.*

95. *See id.* at 364–65 (detailing Goldman's argument and trade usage evidence that "vice presidents" are not "officers" within meaning of their bylaws). Interestingly, Goldman has indemnified or advanced the legal fees of fifteen vice presidents in the six-year period prior to this proceeding. *See id.*

96. *See id.* at 367 (alteration in original) (quoting Harrah's Entm't, Inc. v. JCC Holding Co., 802 A.2d 294, 309–10 (Del. Ch. 2002) (discussing what should be done on remand).

the document.[97] Using these dual constructions, the court determined that the definition of "officer" was "circuitous, repetitive, and, most importantly, 'fairly or reasonably susceptible to more than one meaning.'"[98] The court therefore reasoned that extrinsic evidence was the only option for resolving the ambiguity.[99]

The majority justified introducing extrinsic evidence into the record because applying *contra proferentem* would have been, in their words, "inappropriate."[100] According to the majority, *contra proferentem* is employed to resolve ambiguity concerning the scope of advancement rights, not to determine whether an individual is entitled to the right to begin with.[101] The court subsequently allowed Goldman to introduce "course of dealing" and "trade usage" evidence to refute the district court's holding that "officer" unambiguously includes "vice presidents."[102] The circuit court found Goldman's evidence that "[i]n the investment banking . . . industr[y], just about everyone is a vice president . . . ." and "[m]anagement titles such as senior vice president . . . have spread so widely that, in many cases being a vice president means nothing" particularly persuasive.[103] Given the implications of this evidence, the court determined reasonable minds could differ as to the meaning of "officer" in the bylaws, and therefore that summary judgment was improper.[104] The majority ultimately left the final determination of the evidence's "interpretive value" up to the jury.[105]

---

97. *See id.* at 359 (explaining bylaws are examined through regular contract doctrine, including plain meaning); *id.* at 362 (explaining that resorting to extrinsic evidence in bylaw interpretation is problematic and rarely appropriate).

98. *See id.* at 362 (quoting Alta Berkeley VI C.V. v. Omneon, Inc., 41 A.3d 381, 385 (Del. 2012)).

99. *See id.* ("When the provisions in controversy are [ambiguous] . . . . the interpreting court must look beyond the language of the contract to ascertain the parties' intentions." (quoting Eagle Indus., Inc. v. DeVilbiss Health Care, Inc., 702 A.2d 1228, 1232 (Del. 1997) (internal quotation marks omitted)).

100. *See id.* (explaining why doctrine of *contra proferentem* was not applicable); *see also id.* at 366–67 (rejecting *contra proferentem*).

101. *See id.* at 366–67 (distinguishing persons who were "a party to or intended beneficiary of a corporate instrument" from those whose rights and obligations are in question). The majority also explains, "we are left in a bind: most extrinsic evidence should not be considered because Goldman unilaterally drafted the By-Laws, yet we should not construe ambiguities against Goldman because we are trying to determine if Aleynikov even is a party to the contract." *Id.* at 362–63.

102. *See id.* at 363–66 (internal quotation marks omitted) (providing details of Goldman's proffered evidence).

103. *See id.* at 364–65 (fourth and sixth alterations in original) (internal quotation marks omitted) (discussing Goldman's "trade usage" evidence that "vice president" title is irrelevant in banking industry).

104. *See id.* at 368 (finding summary judgment "not appropriate for either party at this time"). The majority explained that the course of dealing and trade usage evidence could "'speak to the intent of *all* parties to [the] contract.'" *Id.* at 367 (quoting SI Mgmt. L.P. v. Charlebois, 707 A.2d 37, 43 (Del. 1998)).

105. *See id.* at 366 ("A jury must determine the interpretive value of Goldman's extrinsic evidence in resolving the ambiguity in the By-Laws.").

Judge Fuentes dissented in part.[106] While he concurred that "officer" was ambiguous within the meaning of Goldman's bylaws, he would have applied *contra proferentem* to resolve the issue.[107] Judge Fuentes additionally maintained that Delaware's public policy surrounding advancement would favor application of the doctrine in this instance, and that, by contrast, the majority's decision rewards corporations for their sloppy drafting.[108] Finally, the dissent concluded that, notwithstanding the majority's failure to apply *contra proferentem*, the extrinsic evidence was improperly admitted because it was subjective, self-serving, and provided no insight into the meaning of the advancement provision.[109]

IV. FOR YOUR CONSIDERATION: THE THIRD CIRCUIT BREAKS ITS PROMISE TO UPHOLD DELAWARE PRECEDENT AND POLICY

In *Aleynikov*, the Third Circuit faced the challenge of interpreting a matter of Delaware's substantive law.[110] The opinion, therefore, should have aligned with Delaware's well-established corporate and contractual jurisprudence.[111] A macro and micro-level analysis of the circuit court's decision reveals a number of inconsistencies between the state and federal interpretive rationales.[112]

A. *The Straight and Narrow: A Deconstructed Reading of* Aleynikov

Judicial interpretation of contracts, by definition, requires a particularized investigation into the semantics and lexicography of the document.[113] Though the narrow reading here is confined to the language in Goldman's bylaws, juxtaposing the Third Circuit's analysis with a would-be

106. *See id.* at 368–73 (Fuentes, J., dissenting in part) (arguing that court should have applied *contra proferentem* doctrine).

107. *See id.* at 368 ("Delaware has never suggested that there is an exception to its *contra proferentem* rule [in this circumstance]."); *id.* at 368–73 (providing further rationale in favor of applying contra *proferentem*).

108. *See id.* at 370 (reasoning that majority's ruling "incentivize[s]" corporations to keep ambiguous drafting).

109. *See id.* at 371–73 (admonishing majority for introducing extrinsic evidence). Judge Fuentes elaborated that, under Delaware law, extrinsic evidence is used to determine an objectively reasonable understanding of the obligations of the contract. *See id.* at 372. By contrast, Goldman's extrinsic evidence only speaks to one party's subjective belief about the meaning of the contract. *See id.*

110. *See id.* at 358 (majority opinion) (explaining opinion is constrained under Delaware law); *id.* at 358 n.3 ("The parties agree that this case is governed by Delaware law, as [Goldman Sachs Group] is a corporation organized under the laws of the state of Delaware.").

111. *See generally* Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938) (holding state substantive law to govern diversity cases).

112. *See infra* notes 115–47 and accompanying text (providing micro level analysis of *Aleynikov* decision); *infra* notes 148–58 and accompanying text (providing macro level analysis of *Aleynikov* decision).

113. *Cf.* Duhl, *supra* note 58, at 84 (describing contract ambiguity as "semantic or lexical").

Delaware approach delineates these differences in a useful manner for practitioners facing similar issues.[114]

1. *Plain Meaning*

First, the "plain meaning" dictionary definition the court constructed has been criticized as selective and shortsighted; the court examined only the definition of "officer" but not the definition of "vice president."[115] This is especially concerning given the crux of the ambiguity issue was whether the terms are interchangeable or inherently encompassed within each other.[116] The Third Circuit criticized the district court for focusing on "vice president"—a term that did not appear in the ambiguous portion of the bylaws—and instead concluded that only the ambiguity of "officer" was worth examining.[117]

The fact that "officer" was not self-defining in the bylaws or elsewhere was not problematic in and of itself, but the court also rejected a plain meaning determination of the only other term at issue—"vice president."[118] Therefore, under the court's reading, any corporate employee without "officer" explicitly denoted in their title would not be entitled to advancement.[119] This construction is inconsistent with Goldman's previous "track record" of advancement for employees with non-"officer" titles, which suggests that the court's reading is flawed insofar as it retroactively undermined a party's previous understanding and enforcement of the advancement provision.[120]

---

114. *See infra* notes 115–58 and accompanying text (discussing narrow reading of *Aleynikov* and broader implications for interpretative approaches between Third Circuit and Delaware jurisdictions).

115. *See* Brief on Behalf of Appellee at 28–29, Aleynikov v. Goldman Sachs Grp., Inc., 765 F.3d 350 (3d Cir. 2014) (No. 13-4237) [hereinafter Brief for Appellee], *available at* http://s3.amazonaws.com/cdn.orrick.com/files/aleynikov-brief-goldman-sachs.pdf [http://perma.cc/82R8-H3Z2](criticizing limited plain meaning inquiry of only "officer" and not "vice president" and explaining that "[t]he taxonomical question answered by the court was whether a 'vice president' is a species of 'officer' for the purposes of indemnification").

116. *See Aleynikov*, 765 F.3d at 359 (explaining Aleynikov's claim for advancement depends upon his "officer" status); *id.* at 354 (noting Aleynikov held title of vice president).

117. *See id.* at 360. (explaining district court erred in analyzing "vice president" because it "does not appear in the relevant portion of the contract"). As discussed further in *infra* notes 126–29 and accompanying text, the "relevant portion of the contract" is a prejudicially limited reading under Delaware law.

118. *See Aleynikov*, 765 F.3d at 360 ("[T]his apparent circuity—defining 'officer' as including any officer—is not problematic in and of itself.")

119. *See supra* note 116. It was uncontested that Aleynikov's explicit title contained no mention of "officer." *See id.* It was also uncontested that § 6.4 of Goldman's bylaws provided a circuitous definition of "officer." *See id.* at 360–62. Therefore, absent the dictionary definition of officer explicitly stating that the term includes vice presidents, the Third Circuit's reading ensured its finding of ambiguity. *See id.*

120. *See* Aleynikov v. Goldman Sachs Grp., Inc., No. 12-5994 (KM), 2013 U.S. Dist. LEXIS 151603, at *39–46 (D.N.J. Oct. 22, 2013) (detailing Goldman's "track

The Third Circuit's analysis, therefore, jettisoned one major aspect of a twofold inquiry that would have conclusively resolved the ambiguity: (1) whether the relatively amorphous definition of "officer" includes "vice presidents" and (2) whether "vice president," by designation of the title alone, intimates "officer."[121] Framing the issue this way, a would-be Delaware approach using the plain meaning doctrine establishes that "officer" is a broad, inclusive term that encompasses vice presidents.[122] This is manifest in both the dictionary definitions of each term and supporting case law on the subject.[123] Moreover, in previous "plain meaning" analyses, Delaware courts have held that the title of "vice president" confers a rebuttable presumption that the individual is an officer.[124] In other words, a broader construction in this instance would have clarified the ambiguity, whereas the Third Circuit's narrow reading precluded an immediate resolution of the issue, absent extrinsic evidence.[125]

---

record of indemnification and advancement"), *aff'd in part and vacated in part*, 765 F.3d 350 (3d Cir. 2014). In the six years preceding Aleynikov's case, Goldman indemnified or advanced fees for fifty-one employees, fifteen of whom were vice presidents. *See id.* at *40. Moreover, of the fifty-one employees, only three were corporate officers as defined in Section 4.1 of Goldman's bylaws. *See id.* at *43–44. A remaining portion of those who were indemnified were titled "managing director[s]." *See id.* at *44 (internal quotation marks omitted). Goldman argued in both the district court case and the Third Circuit case that its record of advancement for vice presidents was purely discretional, and the courts ultimately disagreed as to whether this evidence was relevant. *See id.* at *41–46; *see also Aleynikov*, 765 F.3d at 363–64.

121. *See* Brief of Appellee, *supra* note 115, at 29 ("Noting that the title 'vice president' connotes 'officer' answered [whether a 'vice president' is a species of 'officer'] as well as noting that 'officer' includes 'vice presidents.'").

122. *See infra* notes 123–24 and accompanying text.

123. *See* Brakke v. Idaho Dep't of Corr., No. 1:11-cv-00455-LMB, 2012 U.S. Dist. LEXIS 139973, at *8 (D. Idaho Sept. 25, 2012) ("The title 'Regional Vice President' connotes an officer role to a normal observer."); *In re* Foothills Tex., Inc., 408 B.R. 573, 583 (Bankr. D. Del. 2009) ("[A] person holding the title of an officer, including a vice president, is presumptively what he or she appears to be—an officer . . . ."); EMC Corp. v. Allen, No. 97-5972-B, 1997 Mass. Super. LEXIS 102, at *6 (Mass. Super. Ct. Dec. 15, 1997) ("The plain meaning of [officer] includes an individual who holds a position as vice president."); *see also* 17 C.F.R. § 240.3b-2 (1982) ("The term officer means a . . . vice president . . . and any person routinely performing corresponding functions with respect to any organization whether incorporated or unincorporated."); *see also* BLACK'S LAW DICTIONARY 1797(10th ed. 2014) (defining "vice president" as "[a] corporate officer of mid-level to high rank"); WEBSTER'S NEW UNIVERSAL UNABRIDGED DICTIONARY 2036 (2d ed. 1983) (defining "vice president," in part, as "in some corporations, any of several officer each in charge of a separate department").

124. *See In re Foothills*, 408 B.R. at 574 ("The employees in this case are 'vice presidents.' Under the plain meaning of the words, a vice president is an officer. A person holding an officer's title is presumptively an officer and, thus, an insider.").

125. *Compare supra* notes 115–20 and accompanying text (detailing *Aleynikov* court's limited plain meaning approach), *with supra* notes 121–24 and accompanying text (detailing broader plain meaning approach).

2. *Four Corners*

Second, even conceding, *arguendo*, that the plain meaning of "officer" was ambiguous within Section 6.4, the court failed to correctly construe the term within the four corners of the document.[126] The court was only able to find ambiguity based on a limited reading of the text that isolated one sentence in the advancement provision from several other sentences in the bylaws that explicitly define officer as "[including] . . . one or more Vice Presidents . . . ."[127] When ambiguity can be resolved by inter-textually defining the term, Delaware courts favor the more comprehensive reading.[128] By contrast, the Third Circuit interpreted one facially ambigu-

---

126. *See infra* notes 127–28 and accompanying text.

127. *See* GOLDMAN'S BYLAWS, *supra* note 91, §§ 1.7, 4.1 (including vice presidents within ambit of what is considered an officer).

Irrespective of what is perhaps common knowledge in some corporate sectors—that there is a clear difference between *corporate* Vice Presidents and *non-corporate, employee* vice presidents—the court's interpretive role is limited substantially by the four corners of the document, and the document here does not distinguish between the two VP categories. *Compare supra* notes 115–25 and accompanying text (discussing plain meaning doctrine), *with infra* notes 196–97 and accompanying text (providing statements supporting argument that vice president title for banking employees is meaningless). The natural reading of Sections 1.7 and 4.1 of Goldman's bylaws, however, supports Aleynikov's position. GOLDMAN'S BYLAWS, *supra* note 91, §§ 1.7, 4.1. Section 1.7 of the bylaws lists several corporate positions, Vice President being one of them, and then immediately contrasts that list with the phrase, "or other officers." *See id.* § 1.7. The actual definition of officer in Section 4.1 follows a similar construction to Section 1.7. *See id.* § 4.1 ("[T]he Board . . . may elect . . . one or more Vice Presidents . . . or [ ] one or more officers . . . ."). The definition from Section 4.1 is incorporated in the indemnification provision under Section 6.4, which adds a further caveat when the term is applied to Goldman's subsidiaries: "[T]he term 'officer' shall include in addition to any officer of such entity, any person serving in a similar capacity or as the manager of such entity . . . ." *See id.* § 6.4. Thus, while a more conservative construction here may have produced an antithetical result for those well-versed with banking industry terms and culture, that construction would not have been internally inconsistent or ambiguous. *See id.* The sentence immediately following the imputation of the Section 4.1 definition of officer—including "one or more Vice Presidents . . . ."—was allegedly the ambiguous source of confusion. *See Aleynikov v. Goldman Sachs Grp., Inc.*, 765 F.3d 350, 360 (3d Cir. 2014).

128. *See, e.g.*, Council of the Dorset Condo. Apts. v. Gordon, 801 A.2d 1, 7 (Del. 2002) (explaining courts must flexibly construe contractual provisions so as to "reconcile[ ]" entire document when read as a whole); Smartmatic Int'l Corp. v. Dominion Voting Sys. Int'l Corp., No. 7844-VCP, 2013 Del. Ch. LEXIS 110, at *13 (Del. Ch. May 1, 2013) ("[I]f parties introduce conflicting interpretations of a term, but one interpretation better comports with the remaining contents of the document or gives effect to all the words in dispute, the court may . . . resolve the meaning of the disputed term in favor of the superior interpretation." (internal quotation marks omitted)); *In re* Cencom Cable Income Partners, L.P. Litig., No. 14634, 2000 Del. Ch. LEXIS 90, at *18 (Del. Ch. May 5, 2000) ("[T]he contract should be read in its entirety and interpreted to reconcile all the provisions of the agreement.").

ous sentence in one provision of the bylaws as fatal to the document's clarity.[129]

3. *Delaware's Advancement Policy*

Third, the majority's rejection of *contra proferentem* because "the doctrine [does not] appl[y] to determine whether a person has rights and obligations under . . . a contract" is misguided.[130] The court questioned Aleynikov's status as a party to Goldman's bylaws based on dicta from an unrelated case stating, "[t]he bylaws of a Delaware corporation constitute part of a binding broader contract *among the directors, officer[s], and stockholders* . . . ."[131] While this language was a convenient excerpt to preclude use of *contra proferentem*, it was inapposite to Aleynikov's circumstance.[132]

The Delaware Supreme Court has recognized that legally enforceable bylaws, by default under the DCGL, authorize a corporation's board of directors to create a "broader contract" between the select few corporate officials referenced in *Aleynikov*'s majority opinion.[133] But the general default rule that initially gives shape to a corporation's bylaws is also "by design, flexible and subject to change."[134] Goldman's bylaws change the default rule by expressly relating two separate provisions to *employee* obligations.[135] This point is reinforced by a general understanding that "constitutive documents . . . are meant to structure the affairs of everyone associated with a business entity."[136] Thus, it is without question that Goldman's individual employees were parties to the broader bylaw contract, and that applying *contra proferentem* would have been appropriate.[137]

129. *See Aleynikov*, 765 F.3d at 359–62 (limiting analysis to Section 6.4 of bylaws); *id.* at 362 (noting that although definition of "officer" was probably meant to be axiomatic, plain meaning construction did not clarify ambiguity). *Compare Goldman's Bylaws*, *supra* note 91, §§ 1.7, 4.1 (including "vice presidents" as "officers"), *with id.* § 6.4 (providing circuitous definition of "officer").

130. *See Aleynikov*, 765 F.3d at 366; *see also infra* notes 148–58 and accompanying text (discussing broader Delaware principles of application).

131. *See Aleynikov*, 765 F.3d at 366–67 (emphasis added) (quoting Boilermakers Local 154 Ret. Fund v. Chevron Corp., 73 A.3d 934, 939 (Del. Ch. 2013)) (internal quotation marks omitted).

132. *See infra* notes 133–37 and accompanying text.

133. *See Boilermakers*, 73 A.3d at 939 (providing "binding broader contract" language (internal quotation marks omitted)); *id.* at n.7 (citing Airgas, Inc. v. Air Products & Chems., Inc., 8 A.3d 1182, 1188 (Del. 2010)); Lawson v. Household Fin. Corp., 152 A. 723, 726 (Del. 1930)).

134. *Boilermakers*, 73 A.3d at 939.

135. *See* GOLDMAN'S BYLAWS, *supra* note 91, § 4.3 (authorizing board to require employee "to give security for the faithful performance of his or her duties"); *id.* § 6.4 (authorizing board to provide indemnification to "any one or more officers, *employees* and other agents of any Subsidiary") (emphasis added)).

136. *See* Aleynikov v. Goldman Sachs Grp., Inc., No. 12-5994 (KM), 2013 U.S. Dist. LEXIS 151603, at *64 (D.N.J. Oct. 22, 2013), *aff'd in part and vacated in part*, 765 F.3d 350 (3d Cir. 2014).

137. *See supra* notes 134–36 and accompanying text.

4. *Mitigating and Equitable Circumstances*

Meanwhile, the fee-producing litigation underlying the Third Circuit case also supports the conclusion that Aleynikov was in fact a party to the bylaws.[138] Aleynikov's criminal charges were brought "by reason of fact" that he was able to steal software that was so powerful it "could manipulate the market in unfair ways."[139] It was uncontested that Aleynikov's position at GSCo afforded him the privilege and authority to access this exceedingly confidential information.[140] This point was overlooked (or not raised) in the Third Circuit case, which focused only on Goldman's extrinsic evidence.[141] The Third Circuit's furnished definition of "officer"—"someone holding a position of trust, authority, or command"—seems to inconspicuously describe the functional aspects of Aleynikov's position.[142] Even peripheral knowledge of the suit underlying Aleynikov's advancement claim would compel a common sense understanding that he was an officer within the meaning of bylaws.[143]

The combined effect of this piecemeal deconstruction informs a broader discussion of the interpretive differences between Delaware and Third Circuit courts.[144] All things considered, the Third Circuit's constructive alternative in *Aleynikov* was too strict to effectuate an equitable holding.[145] Time will be the ultimate determinant as to whether *Aleynikov* is an outlier or part of a growing trend in the Third Circuit's corporate and contractual jurisprudence.[146] Regardless, the decision is an incre-

138. *See infra* notes 139–142.

139. *See* JIM MCTAGUE, CRAPSHOOT INVESTING: HOW TECH-SAVVY TRADERS AND CLUELESS REGULATORS TURNED THE STOCK MARKET INTO A CASINO 40 (2011) (quoting U.S. Attorney Joseph Facciponte, prosecutor for Aleynikov's criminal trial in Southern District of New York) (internal quotation marks omitted). *See generally* DEL. CODE ANN. tit. 8, § 145(a) (stating indemnification shall be paid "by reason of the fact" individual was officer of corporation); United States v. Aleynikov, 676 F.3d 71, 73–75 (2d Cir. 2012) (providing specific background and details of Aleynikov's position and charges).

140. *See Aleynikov*, 676 F.3d at 74 (noting Aleynikov had access to closely guarded high frequency trading system); *see also id.* (noting Aleynikov was highest paid programmer in his group).

141. *See Aleynikov*, 765 F.3d at 362–65 (detailing Goldman's extrinsic evidence).

142. *See id.* at 360–61.

143. *See* Douglas v. Tractmanager, Inc., No. 9073-ML, 2014 Del. Ch. LEXIS 94, at *27 (Del. Ch. May 30, 2014) (inferring "[p]laintiffs' unique position as officers allowed them to engage in the alleged wrongdoing" and therefore holding that advancement was enforceable).

144. *See infra* notes 148–58 and accompanying text (framing broader interpretive approaches).

145. *See Aleynikov*, 2013 U.S. Dist. LEXIS 151603, at *59 (explaining procedural delays on advancement issues leave parties without remedy and it is "not [within] the letter or spirit of the Delaware statute . . . to take the easy option of simply denying the motion . . . ."); *supra* notes 38–47 and accompanying text (discussing same).

146. *See supra* notes 70–73 and accompanying text (discussing Third Circuit's relationship to Delaware's precedential interpretive norms); *see infra* notes 148–58

mental showing that the jurisdictional approaches to contract interpretation and their respective attitudes towards corporate law splinter on key points.[147]

B. *On to the Broad Strokes: Examining Variant Interpretive Approaches Between the Third Circuit and Delaware Courts*

Aleynikov's majority opinion most notably departs from Delaware interpretive framework in its rejection of the *contra proferentem* doctrine.[148] Though the opinion was a matter of first impression, the summation of Delaware precedent contradicts the "narrow construction" and "overliteral reading" exhibited by the circuit court's majority that ultimately precluded use of the doctrine.[149] The *Aleynikov* majority focused narrowly on the fact that, even with its well-established contractual and corporate case law, Delaware has never applied *contra proferentem* against an individual whose "officer" status was in question.[150] Unwilling to read the doctrine liberally, the circuit court admitted extrinsic evidence and its subsequent analysis aligned more closely with the "broad inquiry into . . . surrounding circumstances" exhibited in the modern contractual approach.[151]

Delaware's interpretive rationale, by contrast, is much more forward-looking and can be articulated as a "means-to-an-end" approach—the end being consistent, predictable results in its corporate and contractual jurisprudence.[152] Delaware courts have not been concerned with making a

---

and accompanying text (situating Third Circuit approach in *Aleynikov* to Delaware principles of construction).

147. *Compare infra* notes 148–51 and accompanying text (discussing Third Circuit reading), *with infra* notes 152–58 and accompanying text (discussing Delaware interpretive rationale).

148. *Compare supra* notes 59–68 and accompanying text (discussing applications of *contra proferentem* under Delaware law), *with supra* notes 100–01 and accompanying text (detailing Third Circuit reasoning for rejecting doctrine).

149. *See* Aleynikov v. Goldman Sachs Grp., Inc., 765 F.3d 350, 366 (3d Cir. 2014) (noting that court has not found case law addressing *contra proferentem* to construe ambiguity against non-drafting individuals whose benefit to contract was in question); *see also* VonFeldt v. Stifel Fin. Corp., 714 A.2d 79, 84 (Del. 1998) (asserting Delaware prohibits narrow constructions and overliteral readings of advancement provisions); *supra* notes 59–78 and accompanying text (discussing liberal applications of *contra proferentem* and flexible interpretations of advancement provisions).

150. *See Aleynikov*, 765 F.3d at 366 (stating it would be inappropriate to apply *contra proferentem*).

151. *See* Tauke, *supra* note 71, at 78. *Compare Aleynikov*, 765 F.3d at 363 (admitting evidence "to shed light on how reasonable individuals in the investment banking industry and at GSCo specifically would have interpreted the term officer"), *with supra* note 71 and accompanying text (discussing modern contractual approach).

152. *See, e.g.*, Stockman v. Heartland Indus. Partners, L.P., No. 4227-VCS, 2009 Del. Ch. LEXIS 131, at *16 (Del. Ch. July 14, 2009) (declaring predictable and consistent interpretations to be critical "as a practical matter").

case's novel factual circumstance fit cleanly within precedent.[153] Instead, Delaware focuses on maintaining a stable and efficient framework for judicial interpretation; "one size fits all" rules like *contra proferentem* are therefore embraced under Delaware law—within reason.[154]

Situating these fundamental aspects of Delaware's interpretive model in *Aleynikov*, it is axiomatic that Delaware courts would have applied the *contra proferentem* rule as a means to an end.[155] The *Aleynikov* dissent touched on this point, noting that use of the doctrine would encourage consistent and predictable judicial interpretations.[156] The underlying "triggers" for invoking the doctrine—disparate bargaining power, unilateral drafting, "reliance interest," and subjected risk/benefit—also support the dissent's reading of Delaware's interpretive approach.[157] In sum, the *Aleynikov* majority's narrow reading of the *contra proferentem* doctrine is inconsistent with the principles underlying the rule as well as Delaware precedent that uses the doctrine as a "mechanistic device" in circumstances where its utility would be the means to the "ends" of efficiency, predictability, and consistency.[158]

C. *A Funny Thing Happened on the Way to the Forum: Forum Shopping in Light of* Aleynikov

Implicit in the *Aleynikov* decision is the larger issue of forum-shopping.[159] Given the Third Circuit's interpretation of the substantive state

153. *See id.* at *19 n.21 (applying *contra proferentem* even though claimant "was probably involved in drafting . . . . [because] [d]oing otherwise [would] risk[ ] the bizarre outcome of concluding that the same language . . . means different things as applied to two persons . . . .").

154. *See* Aleynikov v. Goldman Sachs Grp., Inc., No. 12-5994 (KM), 2013 U.S. Dist. LEXIS 151603, at *60 (D.N.J. Oct. 22, 2013) (explaining Delaware law is tolerant of ambiguity and will remedy by *contra proferentem*).

155. *See Aleynikov*, 765 F.3d at 369 (Fuentes, J., dissenting in part) (asserting Delaware would apply doctrine to "(1) assure relevant stakeholders that they could reasonably rely on the face of governing documents of Delaware corporations, and (2) encourage Goldman to redraft the advancement provision in its By-Laws.").

156. *See id.* at 370 (explaining application of *contra proferentem* encourages clear drafting and predictable results).

157. *Compare id.*, *with supra* notes 59–67 and accompanying text (discussing justifications for invoking *contra proferentem*).

158. *See* Wilmington Firefighters Ass'n, Local 1590 v. City of Wilmington, No. 19035, 2002 Del. Ch. LEXIS 29, at *34 (Del. Ch. Mar. 12, 2002) (coining term "mechanistic device"); *supra* notes 113–58 and accompanying text (highlighting inconsistencies between Delaware and Third Circuit interpretive approaches).

159. *See* Lynn M. LoPucki & William C. Whitford, *Venue Choice and Forum Shopping in the Bankruptcy Reorganization of Large, Publicly Held Companies*, 1991 WIS. L. REV. 11, 14 (1991) ("'Forum shopping' is commonly defined as attempting to have one's case heard in the forum where it has the greatest chance of success."); Kimberly Jade Norwood, *Shopping for a Venue: The Need for More Limits on Choice*, 50 U. MIAMI L. REV. 267, 268 (1996) ("Forum-shopping 'occurs when a party attempts to have his action tried in a particular court or jurisdiction where he feels he will receive the most favorable judgment or verdict.'" (quoting BLACK'S LAW DICTIONARY 655 (6th ed. 1990))). Aleynikov's case is paradigmatic of the forum-shopping

law at issue in *Aleynikov*, litigants seeking advancement relief or arguing under contract theory will be dissuaded from finding remedy in any federal court under the circuit court's binding authority.[160] Beyond the general consensus that forum-shopping is an unfair manipulation of the judicial process, it also has harmful effects on the integrity of the supervisory structure of the appellate courts.[161] When corporate litigants flock to Delaware to receive a specific outcome, other courts hear less corporate cases and their stake in corporate jurisprudence becomes less relevant and less credible.[162] But the efficacy of the appellate system depends on vari-

---

concern; he filed suit in the Delaware Court of Chancery on February 10, 2015, seeking advancement once again from Goldman Sachs. *See* Jonathan Stempel, *Goldman Ex-Programmer Files New Lawsuit to Recoup Legal Fees*, REUTERS (Feb. 10, 2015), http://www.reuters.com/article/2015/02/10/goldman-aleynikov-idUSL1N0VK2IV20150210 [http://perma.cc/DH8D-U8VZ] ("The case is Aleynikov v. Goldman Sachs Grp., Inc., Delaware Chancery Court, No. 10636."). Also indicative that the Third Circuit's decision will lead to forum shopping was Goldman's immediate removal of the case to the United States District Court for the District of Delaware and its subsequent motion to transfer to the United States District Court for the District of New Jersey, which, unlike the Delaware Court of Chancery, would be bound by the Third Circuit's decision. *See* Notice of Removal, Aleynikov v. Goldman Sachs Grp., Inc., 1:15-cv-00148 (D. Del. Feb. 10, 2015); *see also* Defendant's Motion to Transfer, Aleynikov v. Goldman Sachs Grp., Inc., 1:15-cv-00148 (D. Del. Feb. 12, 2015). The case was transferred to the District of New Jersey on March 23, 2015. *See* Certified Copy of Transfer Order and docket received, Aleynikov v. Goldman Sachs Grp., Inc., 2:15-cv-02057-KM-MAH (D.N.J. March 23, 2015). At the time this Casebrief went to print, the last major disposition of the case was Aleynikov's motion to remand the proceeding back to state court. *See* Letters Regarding Plaintiff's Emergency Motion to Remand, Aleynikov v. Goldman Sachs Grp., Inc., 2:15-cv-02057-KM-MAH (D.N.J. Aug. 26–Sept. 28, 2015).

160. *See supra* notes 52–73 and accompanying text (juxtaposing Third Circuit and Delaware contract construction). Delaware has already been the target of forum-shopping for breach of fiduciary duty defensive declaratory injunctions and for corporate bankruptcy actions. *See* Edward B. Micheletti & Jenness E. Parker, *Multi-Jurisdictional Litigation: Who Caused This Problem, and Can it Be Fixed?*, 37 DEL. J. CORP. L. 1, 6 (2012) (discussing origins of non-Delaware forum-shopping for breach of fiduciary duty claims because these claims that "might otherwise be dismissed by the Delaware courts may gain traction in a non-Delaware forum"); *id.* at 14–27 (discussing defense mechanisms to keep Delaware courts adjudicating breach of fiduciary duty issues); Todd J. Zywicki, *Is Forum Shopping Corrupting America's Bankruptcy Courts?*, 94 GEO. L.J. 1141, 1157–80 (2006) (reviewing LYNN M. LOPUCKI, COURTING FAILURE: HOW COMPETITION FOR BIG CASES IS CORRUPTING THE BANKRUPTCY COURTS (2005)) (discussing forum-shopping in Delaware in bankruptcy context).

161. Richard Maloy, *Forum Shopping? What's Wrong With That?*, 24 QUINNIPIAC L. REV. 25, 25–28 (2005) (reviewing case law and scholarship and submitting that "forum shopping is the taking of an unfair advantage of a party in litigation"); *see also infra* notes 159–64 and accompanying text (discussing forum-shopping as detrimental to inter-jurisdictional competition).

162. *See* Samir D. Parikh, *Modern Forum Shopping in Bankruptcy*, 46 CONN. L. REV. 159, 197 (2013) (noting Delaware bankruptcy courts that have been targeted by forum shopping are among the courts that are "making [the] law").

ance and competition among multiple jurisdictions.[163] Without the "competition" of other courts' voices, Delaware law becomes a monopoly.[164]

Thus, when the Third Circuit is challenged with interpreting Delaware law, its role in corporate governance assumes even greater importance.[165] The balance here is delicate.[166] On one hand, non-Delaware courts cannot and should not blindly defer to Delaware for all corporate matters.[167] On the other hand, if non-Delaware courts treat issues arising under Delaware law erroneously, they lose credibility as nonpartisan forums and compromise future opportunities to legitimately challenge Delaware's grip on corporate law.[168] The Third Circuit's significant departure from Delaware precedent and policy in *Aleynikov* will therefore potentially have devastating effects on the jurisdiction's stake in corporate law, both as a competing venue to Delaware and as a reputable (and predictable) proxy for interpreting Delaware law generally.[169]

V. CONTRACTING AROUND ALEYNIKOV: PRACTICAL RECOMMENDATIONS FOR CORPORATE PRACTITIONERS

Ambiguous contracts generate an enormous amount of time and expense for both corporations and their constituents.[170] Practitioners should therefore thoroughly draft and review governing instruments, es-

163. *See id.* at 198 (discussing harmful effects of forum-shopping).

> A cornerstone of our judicial system is that the law be subject to a variety of interpretations at the trial level. Significant disagreement at the trial level will often prompt circuit court review, and disagreement at the circuit court level will often prompt Supreme Court review. But when a few judges, by virtue of sitting in desirable venues, are the only judges to review certain issues, the system breaks down. Without discourse, the review process ceases.

Id. (footnotes omitted) (internal quotation marks omitted). *But see* LoPucki & Whitford, *supra* note 159, at 58 arguing forum shopping is beneficial for competition).

164. *See* Parikh, *supra* note 162, at 198 (explaining that "[w]ithout discourse . . . inaccuracies remain unchallenged and are actually strengthened by repeated application to a long string of cases").

165. *See supra* notes 159–64 and accompanying text; *see also* Monica E. White, Note, *Give Me a Break-Up Fee: In re* Reliant Energy Channelview LP *and the Third Circuit's Improper Rejection of Bankrupcy Bid Protection*, 48 HOUS. L. REV. 659, 671 n.76 (2011).

166. *See also* White, *supra* note 165, at 671 n.76 (explaining that "because Delaware wields disproportionate influence in corporate and bankruptcy law" Third Circuit influence in bankruptcy especially "assumes greater importance"); *see also supra* notes 152–58 and accompanying text.

167. *See* Parikh, *supra* note 162 (positing unchallenged inaccuracies foster strength of inaccuracies under Delaware law).

168. *See id.* at 198 ("Forum shoppers are voicing their approval of certain courts' interpretation[s] . . . [and] their disapproval of how other courts have interpreted the same issues.")

169. *See supra* notes 153–62 and accompanying text.

170. *See supra* notes 14 and 36 (detailing litigation expenses for advancement suits).

pecially if the organization's structure is multifaceted.[171] As a proactive measure, corporations and their employees may benefit from investing in Directors and Officers (D&O) liability insurance policies.[172] Finally, in the event a bylaw dispute reaches litigation, counsel must be cognizant of the difference between the Third Circuit's and Delaware's interpretive approaches and guide their client's choice of venue accordingly.[173]

A. *Transactional Practitioners*

The ambiguity issue raised in *Aleynikov* is avoidable.[174] Transactional practitioners should review ambiguous bylaws and be proactive to ensure that their client's governing instruments do not leave room for unaccounted interpretation.[175] These documents should explicitly state which employee titles receive which benefits and should not use vague, catchall terms that are not self-defining.[176]

Depending on the structure of the organization, the proactive steps necessary to ensure constructive clarity may vary.[177] Part of the ambiguity in *Aleynikov* was caused by the fact that Goldman did not have a separate and independent advancement provision for its subsidiary companies.[178] This fact became problematic because, as Goldman argued, the industry understanding of "officer" and "vice president" varies based on the size and structure of the organization.[179] Therefore, for organizations comprised of several entities, maintaining separate advancement provisions

171. *See infra* notes 174–80 and accompanying text (discussing various considerations for clear drafting depending on organizational structure of business).

172. *See infra* notes 181–84 and accompanying text (providing information on D&O insurance policies).

173. *See supra* notes 113–69 and accompanying text (comparing interpretive approaches between Third Circuit and Delaware courts); *see also infra* notes 185–92 (providing procedural considerations for filing at state and federal levels).

174. *See, e.g.*, Morgenson, *supra* note 1 ("The bylaws of JPMorgan Chase, Bank of America and Morgan Stanley, by contrast, are unambiguous on whose legal fees will be covered.").

175. *See generally* Aleynikov v. Goldman Sachs Grp., Inc., 765 F.3d 350 (3d Cir. 2014) (examining ambiguous bylaw as source of litigation), *en banc reh'g denied*, *summary judgment denied*, 2015 U.S. Dist. LEXIS 5296 (D.N.J. Jan. 16, 2015).

176. *See* Michael Stoner, *When Is a Vice-President a Corporate Officer for Indemnification and Insurance Purposes?*, PROP. CASUALTY 360 (Nov. 24, 2014), http://www.propertycasualty360.com/2014/11/24/when-is-a-vice-president-a-corporate-officer-for-i?page_all=1 [http://perma.cc/HZ8X-ACZF] (advising corporations following *Aleynikov* to "review[ ] their bylaws to ensure that their definition of officer is clear and unambiguous . . . [and] ensur[e] that the scope of the term 'officer' meets the company's goals as it relates to advancement, indemnity, and insurance").

177. *See infra* note 180 (discussing how complex structures change proactive measures for drafting clearly).

178. *See Aleynikov*, 765 F.3d at 354 (explaining Section 6.4 of Goldman's bylaws address advancement for corporate and non-corporate subsidiaries). *See generally* GOLDMAN'S BYLAWS, *supra* note 91, § 6.4 (providing advancement provision).

179. *See Aleynikov*, 765 F.3d at 361, 363 (arguing Goldman corporation and its non-corporate subsidiaries had varying appointment procedures for officers).

will safeguard parent corporations from inadvertently transposing titles and terminology onto their subsidiaries.[180]

Careful drafting and transparent communication between a corporation and its employees will not eliminate every situation that triggers the right to advancement.[181] D&O insurance policies offer a flexible scope of protection for both corporations and their employees when these unavoidable situations arise.[182] D&O policies tend to apply to a broader range of individuals and cover expenses for a broader scope of litigation than is typically required by Section 145.[183] Practitioners should be well-versed in the coverage offered by various types of insurance policies and advise their clients accordingly.[184]

B. *Litigation Practitioners*

Aleynikov indicates that, for corporate claimants choosing between state and federal venues, forum-shopping will ultimately be outcome determinative for contract-based claims.[185] Thus, before initiating suit, corporate counselors should advocate to have their case heard in the venue that applies Delaware's substantive law most favorably to their client's circumstance.[186] For parties seeking an exacting contractual standard that does not weigh heavily on Delaware's pro-management policies, file "verti-

180. *See* David L. Cox & Clay C. Wheeler, *Indemnification, Advancement, and Insurance Coverage: Food for Thought When an Employee Is Charged with a Crime*, LEGAL ALERT (Kilpatrick Townsend, New York, N.Y.), Sept. 9, 2014, at 2, *available at* http://www.kilpatricktownsend.com/en/Knowledge_Center/Alerts_and_Podcasts/Legal_Alerts/2014/09/Indemnification_Advancement_and_Insurance_Coverage.aspx?utm_source=mondaq&utm_medium=syndication&utm_campaign=view-Original [http://perma.cc/BX8C-NGCL] (advising against complex business structures adopting "Goldman's 'one size fits all' approach"); Kevin LaCroix, *Who Is an "Officer"? A Critical Inquiry for Indemnification and Insurance*, D&O DIARY (Sept. 17, 2014), http://www.dandodiary.com/2014/09/articles/corporate-governance/who-is-an-officer-a-critical-inquiry-for-indemnification-and-insurance/ [http://perma.cc/L9PQ-AYW8] (advocating for "separate operating units to have separate indemnification provisions").

181. *Cf., e.g.*, Perconti v. Thornton Oil Corp., No. 18630-NC, 2002 Del. Ch. LEXIS 51, at *15 (Del. Ch. May 3, 2002) (summarizing corporation's argument that corporate official was not entitled to indemnification, not because of ambiguous bylaws, but rather because his conduct was "motivated by personal self-interest and greed").

182. *See infra* notes 183–184 and accompanying text.

183. *See* Cox & Wheeler, *supra* note 180, at 2 ("D&O policies may provide broader coverage than the company's indemnification obligations"); LaCroix, *supra* note 180 (explaining D&O policies broadly include employees); *see also* Stoner, *supra* note 176 (explaining "Side-B coverage under D&O policies" apply to corporate employees in addition to corporate officers and directors).

184. *See generally* Bennett L. Ross, *Protecting Corporate Directors and Officers: Insurance and Other Alternatives*, 40 VAND. L. REV. 775 (1987) (providing history and pertinent information on D&O policies).

185. *See supra* notes 118–58 and accompanying text (analyzing variant narrow and broad interpretive approaches to *contra proferentem*).

186. *See infra* notes 187–88 and accompanying text.

cally" at the federal level.[187] For parties seeking deference to pro-management policy and flexible contract interpretation effectuating this goal, file "horizontally" in Delaware.[188]

Once claimants have been advised on the most hospitable venue for filing, practitioners should take note of the procedural advantages and disadvantages at both the state and federal levels and should structure pleadings accordingly.[189] Delaware, for example, is a notice-pleading jurisdiction and therefore has a more lenient standard for surviving a 12(b)(6) motion.[190] Moreover, state-level litigation has the advantage of the Court of Chancery's procedural tools that effectuate timely invocation of advancement remedies.[191] The state's summary procedure—compared to the limited federal options of summary judgment or jury trial—is an efficient mode of dispute resolution for issues, like advancement, that are provisional in nature and require immediate relief.[192]

---

187. *See generally* Faith Stevelman, *Regulatory Competition, Choice of Forum, and Delaware's Stake in Corporate Law*, 34 DEL. J. CORP. L. 57, 60 (2009) (internal quotation marks omitted) (describing federal system as "vertical" to Delaware (internal quotation marks omitted)).

188. *See generally id.* at 61 (internal quotation marks omitted) (describing state courts as "horizontal" (internal quotation marks omitted)).

189. *See infra* notes 190–92 and accompanying text (comparing procedural differences between Delaware and federal courts).

190. *Compare* Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007), *and* Ashcroft v. Iqbal, 556 U.S. 662 (2009) (providing heightened pleading standard for federal filings pursuant to FED. R. CIV. P. 12(b)(6)), *and In re* Moll Indus. Inc., 454 B.R. 574, 581 (Bankr. D. Del. 2011) (articulating heightened federal pleading standard).

> A claim is sufficient if it is facially plausible, that is "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Determining whether a complaint is "facially plausible" is "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." "[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but not shown—that the pleader is entitled to relief."

Id. (alteration in original) (citations omitted), *with* Cent. Mortg. Co. v. Morgan Stanley Mortg. Capital Holdings LLC, 27 A.3d 531, 535 (Del. 2011) (articulating Delaware's pleading standard).

> When reviewing a ruling on a motion to dismiss, we (1) accept all well pleaded factual allegations as true, (2) accept even vague allegations as "well pleaded" if they give the opposing party notice of the claim, (3) draw all reasonable inferences in favor of the non-moving party, and (4) do not affirm a dismissal unless the plaintiff would not be entitled to recover under any *reasonably conceivable* set of circumstances.

Id. (emphasis added).

191. *See infra* note 192.

192. *See* Confederate Motors, Inc. v. Terny, 859 F. Supp. 2d 181, 188 (D. Mass. 2012) (explaining summary advancement proceedings under Delaware law).

> Under Delaware law, [a]n advancement action is a summary proceeding. Unlike proceedings to determine the right to receive final indemnification, the scope of an advancement proceeding is limited to determining the issue of entitlement according to the corporation's ad-

VI. CONCLUSION

The Third Circuit's *Aleynikov* decision is a culmination of the court's reading of a non-linear set of issues manifest in Delaware law.[193] To this end, the opinion is not as much a betrayal of stare decisis as it is a definitive statement that Delaware law will not be treated with Delaware's corporate-friendly gloss in this federal jurisdiction.[194] While variant approaches to corporate law are vital to the efficacy of the appellate process, non-Delaware courts should pick their battles conservatively or risk losing competitive credibility altogether.[195] Contravening Delaware's traditional application of *contra proferentem*, the *Aleynikov* majority opened the door to a flood of evidence suggesting, as Goldman argued, "vice president" is a meaningless denotation in the banking sector.[196] And that may very well be true.[197] But at the end of the day, who should bear the cost of sloppy

---

vancement provisions and not to issues regarding the movant's alleged conduct in the underlying litigation.

Id. (alteration in original) (citations omitted) (quoting Kaung v. Cole Nat'l Corp., 884 A.2d 500, 509 (Del. Super. Ct. 2005)) (internal quotation marks omitted). *See also* Aleynikov v. Goldman Sachs Grp., Inc., No. 12-5994 (KM-MAH), 2015 U.S. Dist. LEXIS 5296, at *6 n.4 (D.N.J. Jan. 16, 2015) ("[T]he federal court options may be limited to summary judgment or trial—procedural tools not designed with state provisional remedies specifically in mind."). *See generally* Aleynikov v. Goldman Sachs Grp., Inc., 2013 U.S. Dist. LEXIS 151603, at *27 (D.N.J. Oct. 22, 2013) (explaining "emergent and provisional nature of the advancement remedy"), *aff'd in part and vacated in part*, 765 F.3d 350 (3d Cir. 2014).

193. *See supra* notes 46–78 and accompanying text (providing background of various frameworks governing ambiguous contract disputes under advancement provisions).

194. *See supra* notes 110–58 and accompanying text (comparing Delaware and Third Circuit approaches to corporate governance and contract interpretation); *see also* Jill E. Fisch, *Contemporary Issues in the Law of Business Organizations: The Peculiar Role of Delaware Courts in the Competition for Corporate Charters*, 68 U. CIN. L. REV. 1061, 1071 (2000) (explaining that because "Delaware's corporate law rules are standards based, Delaware precedents are narrow and fact-specific . . . Delaware courts employ weak principles of stare decisis leading to extensive doctrinal flux.").

195. *See supra* notes 159–69 and accompanying text (discussing forum-shopping).

196. *See* Aleynikov v. Goldman Sachs Grp., Inc., 765 A.3d 350, 363–66 (3d Cir. 2014) (detailing extrinsic evidence on title inflation).

197. *See, e.g.*, *id.* at 354 (noting one third of GSCo's tens of thousands of employees are vice presidents); *Chief Receptionist Officer? Title Inflation Hits C-Suite*, KNOWLEDGE@WHARTON (May 30, 2007), http://knowledge.wharton.upenn.edu/article/chief-receptionist-officer-title-inflation-hits-the-c-suite/ [http://perma.cc/MRL6-XULK] ("[I]n the investment banking and brokerage industries, just about everyone is a vice president, including 'the guys opening the door and serving you coffee.'" (quoting Peter Cappelli, Director of Wharton's Center for Human Resources)); Stuart Silverstein, *Title Inflation—Standard Fare in Banking, Hollywood—Is Now in Corporate America*, L.A. TIMES, May 31, 1998, http://articles.latimes.com/1998/may/31/business/fi-55115 [http://perma.cc/YX5E-5GG8] ("[M]anagement titles such as senior vice president, executive vice president and senior executive vice president have spread so widely that 'in many cases being a vice president means nothing.'" (quoting Paul Baard, Assoc. Professor of Commc'ns & Mgmt. at Fordham Univ.)).

drafting and an industry-wide title inflation ruse?[198] All things considered, the Third Circuit's answer to this question may have prematurely challenged Delaware law on an issue Delaware courts ultimately would have gotten right.[199]

---

198. *See supra* notes 2–20 and accompanying text (discussing corporate accountability in Post-Enron world).

199. *See supra* notes 113–58 and accompanying text (discussing Delaware approach to *Aleynikov*); *see also supra* notes 159–69 and accompanying text (discussing forum shopping's impediment on appellate process).