

Corporate Officers as Agents

By

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This essay celebrates the scholarly insight of Professors Lyman Johnson and David Millon into an essential component of contemporary corporate law and governance, beginning in 2005 with their co-authored cornerstone article, *Recalling Why Corporate Officers are Fiduciaries*.¹ By emphasizing the salience of common law agency, Lyman and David recast the scholarly understanding of corporate officers into broader terms that enrich theoretical accounts of corporate governance while also reorienting theory closer to the law itself. Later publications by Lyman, several co-authored with Robert Ricca, made a case for the inaptness of the business judgment rule as applied to officers and addressed the importance of lawyers' advice to officers about their fiduciary duties.² In this essay, I examine further implications of Lyman and David's

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¹Lyman P.Q. Johnson & David K. Millon, *Recalling Why Corporate Officers are Fiduciaries*, 46 WM. & MARY L. REV. 1597 (2005). Preparing to write this essay, I found in my computer files a memo consisting of comments I sent to Lyman and David after they'd sent me a draft manuscript. The memo begins: "I think the basic point made in this paper is sound and that the paper ... fills a significant gap in the literature." Memorandum (undated) from Deborah A. DeMott to Lyman Johnson and David Millon (copy on file with author). I'm grateful for a fitting occasion to celebrate the prescience of this body of scholarship.

²Lyman P. Q. Johnson, *Corporate Officers and the Business Judgment Rule*, 60 BUS. LAW. 439 (2005); Lyman P. Q. Johnson & Robert Ricca, *(Not) Advising Corporate Officers About Fiduciary Duties*, 42 WAKE FOREST L. REV. 663 (2007); Lyman P.Q. Johnson, *Having the Fiduciary Duty Talk: Model Advice for Corporate Officers (and other Senior Agents)*, 63 BUS.

fundamental insight, including developments in Delaware law that it foreshadowed.

Although officers are crucial to explaining how corporations function, scholarly and theoretical accounts of corporate law and governance tend to slight officers' positions as well as the distinctive quality of their duties. Following Johnson and Millon, this essay anchors corporate officers within the common law of agency, as does black-letter law. Making agency central to understanding officers' positions and responsibilities helps to differentiate officers from directors. Like a director, an officer is a fiduciary, but distinctively so, not as a mere instance of a generic "corporate fiduciary" who owes duties of loyalty and care to the corporation. As this essay explains, officers' duties of care are more particularized than a director's general duty of care, consisting of distinct duties of care, competence, and diligence. Moreover, officers owe additional duties to the corporation: a duty to comply with a reasonable interpretation of lawful instructions received from the board or a superior officer, plus a duty to share material information with the board or others within the corporation.³ An officer's decision whether to comply with these duties is not a judgment call for the officer, just as it is not for agents more generally. Officers' distinct duties as agents are crucial to a corporation's ability to exercise control over their actions.

Venturing into more contested territory, the essay argues that when acting as agents—representing a corporation in dealings with third parties or performing functions internal to the

LAW. 147 (2007); Lyman P. Q. Johnson, *Are Corporate Officers Advised About Fiduciary Duties*, 64 BUS. LAW. 1105 (2009); Lyman P.Q. Johnson & Robert Ricca, *Reality Check on Officer Liability*, 67 BUS. LAW. 75 (2011); Lyman P.Q. Johnson, *Dominance by inaction: Delaware's long silence on corporate officers*, in CAN DELAWARE BE DETHRONED: EVALUATING DELAWARE'S DOMINANCE IN CORPORATE LAW (Stephen Bainbridge ed. forthcoming 2017)(*Dominance*).

³For these duties, see RESTATEMENT (THIRD) OF AGENCY §§ 8.09 & 8.11.

corporation—officers should be subject to the same liability standard applicable to third-party agents who provide comparable services.⁴ Thus, an officer’s breach of her duties of care, competence, and diligence should be assessed against a standard of ordinary or simple negligence, as is the case for agents generally, not the less demanding standard of gross negligence applicable under Delaware law to directors’ breaches of their more generalized duty of care. Agency law focuses on whether an agent’s performance matched the expectations underlying the principal’s choice to be represented by a particular agent, a perspective that reflects the skills and knowledge that an agent possesses or claims to possess. Corporate officers, a cohort of agents situated internally within their principals, warrant no different treatment from externally-situated agents. To be sure, some corporate officers (especially ones very high in the hierarchy) occupy positions that require exercising, not specialized or technical expertise, but more generalized management skills. Membership in this senior managerial cohort does not displace the officer’s status as an agent.

Additionally, to equate officers with directors for liability purposes undercuts directors’ right to rely on officers as well as the corporation’s ability to control its officer-agents, wherever situated within the corporation’s hierarchy. The equation of officers with directors also effaces some of the significance of the different roles occupied by directors in contrast with officers. And a board of directors might well wonder whether the corporation’s interests would be best served by supplementing its officers’ work with advice and other work product from third-party agents and advisors. But supplementing or supplanting work done by agents situated inside a

⁴For an earlier comparative treatment of a few of these points, see Deborah A. DeMott, *Inside the Corporate Veil: The Character and Consequences of Executives’ Duties*, 19 AUSTR. J. Corp. L. 251 (2006).

corporation with comparable services rendered by third-party agents may carry implications for efficiency.⁵ More generally, situating corporate officers within the ambit of agency relationships clarifies the contrast between legally-imposed (and relatively immutable) duties of loyalty and an agent's duties of performance. Subject to some fundamental limits, a principal and an agent may define duties of performance through agreement, including the standard against which the agent's performance will be assessed.

Apart from the issues that engaged Lyman and David as scholars, this essay explores implications of a further feature distinguishing officers from directors, which is the relative fluidity in meaning associated with "officer." Agency doctrine, by engaging the externally-oriented consequences of an agency relationship as well as those that are inward-facing, provides an analytic framework that can be a source of insight. The essay concludes by identifying an implication for more general or theoretical accounts of fiduciary obligation. Accounts of fiduciary obligation premised on the fiduciary's possession of discretion clash with agency, centered as it is on the principal's power to control the agent. Including agency within fiduciary taxonomy—as does the law—thus implies the need for a more inclusive definition.

I. Officers and Their Duties

Contemporary corporation statutes articulate much about the functions directors serve and the powers they hold. For example, the Delaware Corporation Law (DGCL) prescribes a function for directors, stating that the business and affairs of a corporation shall be managed "by

⁵Assessing these implications is beyond the scope of this Essay. On efficiency implications associated with transactional intermediaries situated externally to their clients, see Kathryn Judge, *Intermediary Influence*, 82 U. CHI. L. REV. 573, 590 (2015).

or under” its board of directors.⁶ Other statutory prescriptions concern directors’ terms of office, committees of the board, shareholders’ power to remove directors, and much more.⁷ In contrast, the statute treats officers more briefly and less prescriptively. DGCL section 142 states that a corporation shall have “such officers with such titles and duties” as stated in the corporation’s bylaws or a resolution of the board not inconsistent with the bylaws, “and as may be necessary” to enable the corporation to sign instruments and stock certificates in compliance with other provisions in the statute.⁸ Section 142 mandates only one function to be served by an officer, which is recording “the proceedings of the stockholders and directors in a book to be kept for that purpose.”⁹ Section 142 also permits the same person to hold multiple offices unless the corporation’s certificate of incorporation or bylaws provide otherwise.¹⁰ Thus, the person charged with the secretarial function of recording proceedings could also serve as a Treasurer, a Chief Legal Officer, or a Vice-President.¹¹

Although the Model Business Corporation Act (MBCA) treats officers more extensively as a formal matter in five separate sections, as in the DGCL only the secretarial function is

⁶Del. Code Ann. tit. 8, § 141(a).

⁷*Id.* §§ 141(d)(directors’ terms of office); 141(c)(committees of board); 141(k)(shareholders’ power to remove directors).

⁸*Id.* § 142(a).

⁹*Id.* § 142(a).

¹⁰*Id.* § 142(a).

¹¹On the agency-law implications for apparent authority of particular offices and their titles, see RESTATEMENT (THIRD) OF AGENCY § 3.03, cmt. e(5). For further discussion, see *infra* text accompanying notes 96-98.

prescribed.¹² Additional MBCA provisions are noteworthy. First, the MBCA explicitly acknowledges that the rights and duties originating in appointment as an officer are not identical to those stemming from any contract between the officer and the corporation. Under section 8.44, appointment as an officer does not itself create contract rights nor does an officer's removal or resignation from office affect contract rights that the officer or the corporation may have against the other.¹³ In Section III, this essay elaborates further on relationships between contracting and an officer's rights and duties. Second, MBCA section 1.40(8)—which has no DGCL counterpart—defines an officer (but not a director) as an employee of the corporation, regardless of other incidents of the relationship between the officer and the corporation.¹⁴ Only by accepting additional duties would a director also become an employee.

In Section III, this essay explores the implications of indeterminacy in the definition of “officer,” including those stemming from the practice of assigning “officer” titles to employees whose job functions are not executive or managerial. For present purposes, note that section 1.40(8) constitutes a formal recognition of a potential distinction between directors and officers.¹⁵ More generally, as Johnson and Millon emphasize, scholarly discourse that

¹²MBCA § 8.40 (c)(bylaws or board of directors “shall assign to one of the officers responsibility for preparing the minutes of directors’ and shareholders’ meetings and for maintaining and authenticating” records of the corporation mandated by the statute).

¹³Model Business Corporation Act § 8.44.

¹⁴ MBCA § 1.40(8).

¹⁵The wisdom of defining all officers to be employees has been questioned. See N.C. Gen. Stat., § 1.40, Amended North Carolina Commentary (iv)(deleting MBCA definition of “employee” as “unnecessary and undesirable.”). In Delaware, whether an officer is also an employee is likely a question of fact turning on the incidents of the officer's relationship to the corporation. *See Haft v. Dart Group Corp.*, 841 F. Supp. 549, 569-72 (D. Del. 1993).

amalgamates officers and directors into an undifferentiated category, “managers,” ignores critical differences in their respective roles (and duties).¹⁶ Also elided is the basic point that “officers are accountable *to* directors.”¹⁷ Directors act as or on behalf of the principal in a relationship with officers as the corporation’s agents.¹⁸

Legal implications of terminology aside for a moment, contemporary accounts of corporate governance conventionally assign functions and positions to persons designated as a corporation’s officers. For John Armour and Jeffrey Gordon, officers are “executives, tasked with making decisions about the running of the company.”¹⁹ Directors, in contrast, serve as monitors of officers’ performance, typically through board decisions on proposals that officers initiate, as well as by monitoring performance reporting and overseeing compensation structures and retention decisions for senior managers.²⁰ Tasked with decisions about running the company,

¹⁶Johnson & Millon, *supra* note 1, at 1625.

¹⁷*Id.* (emphasis in original).

¹⁸*Id.*

¹⁹John Armour & Jeffrey N. Gordon, *Systemic Harms and Shareholder Value*, 6 J. LEGAL ANALYSIS 35, 65 (2014). An officer regarded as an “executive” in some contexts is not necessarily also an “executive officer” for purposes of the federal securities laws, defined as a corporation’s “president, any vice president...in charge of a principal business unit, division or function (such as sales, administration or finance), any officer who performs a policy making function or any other person who performs similar policy making functions” 17 C.F.R. § 240.3b-7. Some requirements apply only to executive officers. *See, e.g.*, Regulation S-K, Item 402(a)(3), 17 C.F.R. § 229.402(a)(3)(mandating disclosure in proxy statement of chief executive officer and four most highly compensated executive officers other than CEO).

²⁰Armour & Gordon, *supra* note 19, at 35. Likewise, for Robert Thompson, the primary role of directors is “monitoring managers,” who “are the key decision makers in corporate decisions, a point that reflects the influence of market and economic realities more than a command from law.” Robert B. Thompson, *Anti-Primacy: Sharing Power in American Corporations*, 71 BUS. LAW. 381, 404 (2016).

officers hold “power to initiate corporate decision-making.”²¹ All true, but centering the account of officers on their status as agents supplements inward-looking treatments of corporate governance by underlining the externally-oriented functions that officers serve. As its agents, officers represent the corporation in dealings with third parties, serve as high-level conduits through which the corporation learns facts about the world external to its own boundaries, and speak authoritatively on behalf of the corporation. For example, an officer’s power to initiate conduct attributable to a corporation encompasses conduct that is tortious.²²

The background against which Johnson and Millon wrote in 2005 had little to say about the legally distinct position occupied by corporate officers. Emphasizing officers’ status as agents, by providing a “pre-existing set of expectations,” helps to flesh out officers’ duties in the absence of a “widely recognized conceptual grounding for the frequent doctrinal assertions that officers are fiduciaries.”²³ Enhancing the absence, only rarely did judicial opinions need to articulate the basis for an officer’s duties to the corporation, distinct from those of directors.²⁴

²¹Armour & Gordon, *supra* note 19, at 35.

²²For a recent example, see *Facebook, Inc. v. Power Ventures, Inc.*, 828 F. Supp. 2d 1068, 1079 (9th Cir. 2016)(defendant’s CEO subject to personal liability, in addition to corporation’s liability; CEO initiated and directed promotional campaign that unlawfully accessed plaintiff’s website to send unsolicited and misleading emails to users of plaintiff’s social networking site).

²³Johnson & Millon, *supra* note 1, at 1636. As Lyman and David noted, officers’ status as agents was almost always treated as significant when the issue was their power to “affect the corporation’s relationship with third parties,” not the basis for their inward-looking duty to the corporation as principal. *Id.* at 1609.

²⁴Lyman P.Q. Johnson, *Corporate Officers and the Business Judgment Rule*, 60 BUS. LAW. 439 (2005)(*Business judgment Rule*); Lawrence A. Hamermesh & A. Gilchrist Sparks, III, *Corporate Officers and the Business Judgment Rule: A Reply to Professor Johnson*, 60 BUS. LAW. 865 (2005). In later writing, Lyman characterized this absence as a “silence.” See Johnson, *Dominance*, *supra* note 2, ms. at 3. Alternatively, Delaware law was not silent about officers’

Post-2005 opinions from the Delaware Supreme Court and the Court of Chancery answer a series of questions, inevitably leaving others unaddressed.

In *Gantler v. Stephens*, the Delaware Supreme Court in 2008 resolved a question of first impression, holding that corporate officers “owe fiduciary duties” and that those duties “are identical to those owed by corporate directors.”²⁵ *Gantler* nicely illustrates the connection between officers’ externally-oriented status as agents and their internally-oriented fiduciary duties to the corporation. In *Gantler*, after a bank’s board decided it should be put up for sale and hired an external advisor for insight into strategic opportunities, the bank’s senior management resisted and instead urged that the bank be “privatized” via a share reclassification.²⁶ But the board persisted with the sales process and eventually directed that its financial advisor and the corporation’s senior management conduct due diligence as requested by two potential purchasers. The two officers in charge did not furnish due diligence materials to one potential purchaser after promising to do so, leading the potential purchaser to withdraw its bid. The board remained uninformed until the bidder withdrew; management scheduled a due diligence session with the second bidder only after the first withdrew. Although the second bidder increased its offer price via an improved exchange ratio and the external advisor assessed the bid positively, the board rejected the offer and proceeded with the reclassification.

duties, just reliant on the common-law backdrop of agency, which rarely occupied the foreground.

²⁵*Gantler v. Stephens*, 965 A.2d 695, 708 (Del. 2008). A few lines on, *Gantler* characterizes officers’ fiduciary duties as “the same as those of directors.” *Id.* at 709. *See also* *In re Dole Food Co. S’holder Litig.*, 2105 WL 5052214 at * 40 (Del. Ch. Aug. 27, 2015)(as an officer, corporation’s General Counsel owed “the same duties that he owed as a director”); for further discussion of *Dole Foods*, see *infra* n. 66.

²⁶965 A.2d at 700.

The *Gantler* court held that the facts alleged by the plaintiff were sufficient to establish disloyalty on the part of a majority of the corporation’s directors because they stood to benefit from the reclassification as shareholders in ways not available to other shareholders.²⁷ Additionally, on the facts alleged, the two officers breached their duties of loyalty by sabotaging their due diligence assignment. One officer—who also served as the board’s chair and the bank’s CEO—by breaching his duty of loyalty as a director would also breach “the same duty” as an officer.²⁸ The second officer—the corporation’s Treasurer and Vice President who did not serve as a director—aided and abetted the CEO’s breach of loyalty.²⁹ The Vice President/Treasurer, owing his job to the CEO, breached his duty of loyalty by assisting with the sabotage.³⁰ Thus, the officers’ externally-directed actions (and instances of inaction) as the corporation’s representatives in due diligence with third parties breached the fiduciary duties they owed to the corporation itself. Given the facts alleged, the *Gantler* court lacked occasion to canvass the field of officers’ duties more extensively to consider whether those duties might extend beyond those “identical to” the duties of care and loyalty owed by directors. *Gantler* left open the possibility that defining officers’ duties required a binary choice between duties that replicate those of directors (and no more) versus the fuller suite of duties owed by agents.

The Court of Chancery addressed this latter point in 2015 in *Amalgamated Bank v.*

²⁷*Id.* at 707.

²⁸*Id.* at 709.

²⁹On aiding and abetting another actor’s breach of fiduciary duty, see Deborah A. DeMott, *Culpable Participation in Fiduciary Breach*, in RESEARCH HANDBOOK ON FIDUCIARY LAW (Andrew S. Gold & D. Gordon Smith, eds., forthcoming 2017).

³⁰*Gantler*, 965 A.2d at 709.

Yahoo! Inc., holding that officers owe the same fiduciary duties as directors as “corporate fiduciaries” but additionally serve as “agents who report to the board of directors,” the corporation’s governing body.³¹ As agents, officers have a duty to comply with directives from the board as well as a duty “to provide the board of directors with the information that the directors need to perform their statutory and fiduciary roles.”³² On the facts alleged in *Gantler*, the two officer-defendants breached both agency-law duties; they failed to comply with the board’s directives by sabotaging the board-mandated due diligence process and they failed to provide information the board needed by not promptly informing it that a crucial component of the sale process had been frustrated, resulting in a bidder’s withdrawal. Overshadowing these breaches, though, are the officers’ evident breaches of their duties of loyalty.

In *Amalgamated Bank*, in contrast, what motivated the officer’s actions remains open for further factual exploration. A stockholder demanded—and the court granted—inspection into the corporation’s books and records concerning the hiring and firing fourteen months later of a senior executive, the corporation’s chief operating officer (COO). Under the terms of his employment agreement, the COO’s firing without cause triggered a \$60 million severance payout.³³ On the facts alleged in the stockholder’s demand for inspection, the court found “a credible basis to suspect possible breaches of fiduciary duty” by the corporation’s CEO who led the hiring process, took actions that materially increased the COO’s potential compensation, and decided to

³¹132 A.3d 752, 780 (Del. Ch. 2016).

³²*Id.* at 781.

³³More precisely, a payout of \$59.96 million. *See id.* at 773.

terminate the COO's employment without cause.³⁴ Allegedly, the CEO "cryptically" withheld the prospective COO's name from the relevant board committee early in the hiring process while seeking its approval for a large compensation package and then provided inaccurate information about the terms of the initial offer to the COO, while asking the committee to approve a change that doubled the offer's payout from options and incentive stock units.³⁵ And the CEO made changes to the final offer letter to the COO that the board committee had not authorized and did not inform the committee about the changes.³⁶ In the court's assessment, why the CEO did these things is relevant to whether they constitute a breach of fiduciary duty.³⁷ Articulating a range of potential motivations, *Amalgamated Bank* begins with "innocent mistake," one potentially inconsequential; then negligence in some degree; then an improper motive, perhaps tied to the fact that the CEO and COO shared the same former employer.³⁸ But the opinion cautions the court draws no inference that the COO acted intentionally to withhold information or to lie to the board.

Amalgamated Bank illustrates the significance of identifying agency law as a source of officers' duties. Showing that an officer breached a duty grounded in agency law does not require showing that the officer, additionally, breached a duty of loyalty, as did the two officers in *Gantler*. Thus, an officer would breach duties owed as an agent by deliberately failing to

³⁴*Id.* at 782.

³⁵*Id.* at 782.

³⁶*Id.*

³⁷*Id.*.

³⁸For discussion of motivations for action that may breach the good faith component of an officer's duty of loyalty, see *infra* text accompanying notes 75-78.

comply with a board directive although the officer acted in the belief that the officer knew better than the board what to do but did not otherwise act to further the officer's own interests.³⁹ Applying plain-vanilla agency doctrine, by disregarding the board's directive, the CEO exceeded the scope of the actual authority conferred by the corporation as principal. So to act subjects the officer—like any agent—to liability to indemnify the principal for any loss it suffers.⁴⁰ In the terminology of an earlier era in agency law, the officer breached a duty of “service and obedience.”⁴¹ Indeed, an agent is not spared liability for an unauthorized act when the act results from the agent's misinterpretation of an unambiguous instruction received from the principal.⁴² When the agent's misinterpretation is negligent, the agent has fallen short of fulfilling duties of care, competence, and diligence,⁴³ which does not excuse the agent's departure from the duty to follow the principal's instructions. More generally, like an agent's duty to provide material information to the principal, the duty to comply with instructions is an integral component of the principal's ability to exercise control over its agents. Agents who disregard the principal's instructions or withhold material information from the principal undermine its legitimate powers

³⁹For further discussion of agents' duties in interpreting and following instructions, see Deborah A. DeMott, *The Fiduciary Character of Agency and the Interpretation of Instructions*, in PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW 321 (Andrew S. Gold & Paul B. Miller, eds. 2014)(*Fiduciary Character*).

⁴⁰RESTATEMENT (THIRD) OF AGENCY § 8.09, cmt. b.

⁴¹RESTATEMENT (SECOND) OF AGENCY § 383. This section states one of a series of duties within a title “Duties of Service and Obedience.”

⁴²*Id.* cmt. b; *accord*, RESTATEMENT (THIRD) OF AGENCY § 8.09 cmt. c.

⁴³RESTATEMENT (THIRD) OF AGENCY § 8.08.

of control.⁴⁴

These implications underscore the significance of officers' status as agents, as well as the distinctiveness of agency as a body of law. Corporate law itself includes no separate duty of obedience; as Megan Wischmeier Shaner terms it, the duty is "peculiar to agency law."⁴⁵ The duty is integral to the principal's right to control its agents, itself a defining feature of an agency relationship.⁴⁶ How broadly or narrowly to formulate instructions is the principal's choice. In the corporate context the board determines, as it finds appropriate under the circumstances, the extent to which its directives confer discretion on senior officers.⁴⁷ The board may confer broad discretion on senior officers, communicating general corporate goals or objectives but leaving questions of implementation and execution to the officers' discretion.⁴⁸ But a board may also furnish tightly or narrowly drawn instructions.⁴⁹ Additionally, the board's ability to furnish instructions to officers trumps contractual provisions that define an officer's position. By providing such instructions, the board—reacting perhaps to new circumstances or its

⁴⁴On the relationship between the principal's control over agents and their duties to interpret and comply with instructions received from the principal, see *id.* § 1.01, cmt. e; DeMott, *Fiduciary Character*, *supra* note 39, at 325-26.

⁴⁵Megan Wischmeier Shaner, *Restoring the Balance of Power in Corporate Management: Enforcing an Officer's Duty of Obedience*, 66 *BUS. LAW.* 28, 44-45 (2010).

⁴⁶*Hollingsworth v. Perry*, 133 S. Ct. 2652, 2666 (2013).

⁴⁷Shaner, *supra* note 45, at 49-50.

⁴⁸Lyman P.Q. Johnson & Robert Ricca, *Reality Check on Officer Liability*, 67 *BUS. LAW.* 75, 90 (2011)(*Reality Check*).

⁴⁹Although it's likely true that only rarely does the duty of obedience have much bite as against officers, *id.* at 89, *Gantler* and *Amalgamated Bank* illustrate the significance of the basic duty.

reassessment of an ongoing situation—may cause the corporation to breach its employment agreement with the officer, but the officer’s duty as an agent still requires compliance with lawful instructions.⁵⁰ The board’s right to provide binding instructions creates a flexible capacity to respond to changed circumstances without renegotiating (and repricing) an officer’s employment agreement.⁵¹

Finally, although corporate law itself does not create a separate duty to comply with instructions, a parallel doctrine constrains directors’ discretion to depart from limits imposed by shareholders in approving stock-option and other compensation plans. For example, when directors make an award of shares in excess of a numerical limit set in a stockholder-approved plan, the business judgment rule does not insulate the directors’ decision from judicial scrutiny into its merits.⁵² Likewise, directors lack discretion to back-date an award of stock options without authorization in a stockholder-approved plan.⁵³ But these outcomes do not turn on applying a distinctively corporate-law doctrine such as waste. They might be characterized as *sui generis* or as a “peculiar subset” of cases.⁵⁴ Alternatively, although directors are not agents within the common-law definition,⁵⁵ directors, like officers and other agents, act subject to

⁵⁰RESTATEMENT (THIRD) OF AGENCY §§ 1.01 cmt. f(1); 8.09(2)

⁵¹Shaner, *supra* note 45, at 49-50.

⁵²Sanders v. Wang, 1999 WL 1044880 (Del. Ch. Nov. 10, 1999).

⁵³Ryan v. Gifford, 918 A.2d 341 (Del. Ch. 2007).

⁵⁴Landy v. D’Alessandro, 316 F. Supp. 2d 49, 69 (D. Mass 1997)(characterizing *Sanders* as within “a peculiar subset of that case law where the violation of a contract is so clear that the violation alone creates a reasonable doubt that the board acted in good faith and honest belief.”).

⁵⁵RESTATEMENT (THIRD) OF AGENCY § 1.01, cmt. f(2).

constraints that define the outer bounds of action that is rightful or authorized.⁵⁶ The rationale for this “peculiar subset,” in other words, consists of limits on directors’ authority bearing a family resemblance to constraints imposed by agency law.

II. Liability Frameworks and Standards

As the Court of Chancery noted in *Amalgamated Bank*, distinct from the content of officers’ duties, a “vibrant debate” focuses on the framework for assessing an officer’s liability stemming from a breach of duty.⁵⁷ When a director allegedly breaches a duty, the analytic framework deployed by corporate law does not conflate the standard of conduct, which specifies whether the director breached the duty, with the standard of review through which a court determines whether the director should be subject to liability.⁵⁸ In contrast, agency law conflates these questions, as do other bodies of law, including tort law.⁵⁹ Additionally, when an agent causes loss to the principal by breaching the agent’s duties of care, competence, or diligence, the agent is subject to liability to the principal for simple negligence.⁶⁰ But Delaware gears directors’

⁵⁶In the absence of such bounds, directors who benefit personally from decisions they make run the risk of losing the protection of the business judgment rule. *See Seinfeld v. Slager*, 2012 WL 2501105 at 10-11 (Del. Ch. June 29, 2012)(directors’ self-award of units under stockholder-approved restricted stock unit plan fell outside business judgment rule; terms of plan were insufficiently defined to constitute a meaningful limit on board).

⁵⁷*Amalgamated Bank*, 132 A.3d at 780-81 n. 24.

⁵⁸Melvin A. Eisenberg, *The Divergence of Standards of Conduct and Standards of Review in Corporate Law*, 62 FORDHAM L. REV. 437 (1993).

⁵⁹*Id.* at 437.

⁶⁰RESTATEMENT (THIRD) OF AGENCY § 8.08; *Amalgamated Bank*, 132 A.3d at 780-81.

liability for breaches of the duty of care to the more demanding standard of gross negligence.⁶¹ Separately, claims against directors are assessed with a deferential standard of review, the business judgment rule, which lacks a counterpart in agency law.⁶² The business judgment rule consists of a presumption that in making a business judgment directors “acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company.”⁶³ Shareholders rebut the presumption by alleging facts that support a reasonable inference that a director breached either her duty of care (measured against a gross negligence standard) or her duty of loyalty.⁶⁴ Finally, like most all other states, Delaware permits a corporation to adopt a charter provision exculpating directors—but not officers—against monetary liability resulting from breaches of the duty of care.⁶⁵ As a consequence, when an

⁶¹Aronson v. Lewis, 473 A.2d 805, 812 & n. 6 (Del. 1984), *overruled on other grounds* by Brehm v. Eisner, 746 A.2d 244 (Del. 2000)(characterizing standard as “less exacting” than simple negligence). Within tort law, “gross negligence” is defined through contrasts with other forms of culpable conduct, constituting wrongdoing in an aggravated form that falls short of an intentional tort and of reckless conduct but is “negligence that is especially bad.” RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 2, cmt. a.

⁶²*Amalgamated Bank*, 132 A.3d at 780-81 n.24.

⁶³Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984)(internal citations omitted).

⁶⁴*Gantler*, 965 A.2d at 706.

⁶⁵Del. Code Ann., tit. 8, § 102(b)(7). A few states authorize charter provisions that exculpate officers, as well as directors, from monetary liability. *See* Ofer Eldar & Lorenzo Magnolfi, *Regulatory Competition and the Market for Corporate Law* (working paper 2016) available at <https://ssrn.com/abstract=2685969>(mentioning Maryland and Nevada). *See* Md. Corps & Assn’s § 2-405.2; Nev. Stat. Ann. § 78.138 (7). Additionally, under Nevada law, unless a corporation’s certificate of incorporation otherwise provides (and subject to a few explicit statutory exceptions), an officer is not subject to liability to the corporation, its shareholders, or its creditors on the basis that the officer breached any fiduciary duty, including the duty of loyalty, in the absence of fraud, intentional misconduct, or a knowing violation of law. Nev. Rev. Stat. Ann. § 78.138(7).

officer also serves as a director, the capacity in which the officer took the actions that underlie the claim determines the availability of exculpation.⁶⁶

The vibrancy of the debate surrounding officers' liability owes much to the absence of definitive resolution from Delaware courts themselves. As the federal district court for Delaware noted in a recent bankruptcy case, the defendants cited no cases from Delaware courts holding that the business judgment rule applies to officers.⁶⁷ In *In re Tower Air, Inc.*, an earlier bankruptcy case, the Third Circuit assumed without discussion that the business judgment rule applies to officers as well as directors.⁶⁸ Given the centrality of Delaware courts to corporate litigation, this absence is itself open to competing explanations.⁶⁹ One is the greater likelihood

⁶⁶*See In re Dole Foods, Inc. S'holder Litig.*, 2015 WL 5052214 at *40 (Del. Ch., Aug. 27, 2015)(corporation's General Counsel, who also served as a director, "primarily interacted...as an officer" with board committee created when corporation's Chairman and CEO (also its controlling shareholder) proposed transaction to acquire all stock he did not own, with the consequence that General Counsel was not protected by exculpatory clause; as a director, General Counsel committed acts not in good faith and breached his duty of loyalty).

⁶⁷*Palmer v. Reali*, ___ F. Supp. 3d ___, 2016 WL 5662008 (D. Del. Sept. 29, 2016). The same was true eleven years earlier. *See Johnson, Business Judgment Rule*, *supra* note 24, at 440 (noting in 2005 that Delaware "has yet to hold squarely that the [business judgment] rule applies to officers as well as directors.").

⁶⁸*In re Tower Air, Inc.*, 416 F.3d 229, 238 (3d Cir. 2005). *Tower Air* holds that the plaintiff overcame the business judgment presumption as applied to officers through allegations that the company's officers "did nothing" in the face of negative reports concerning aircraft maintenance, failed to process used airline tickets worth a million dollars. *See* 416 F.3d at 239-41.

⁶⁹One potential explanation was the historical difficulty of securing personal jurisdiction in a Delaware court over a non-resident officer, as opposed to a director. This potential obstacle was eliminated in 2004 through a statutory amendment that deems a person who accepts election or appointment as an officer of a Delaware corporation to consent to personal jurisdiction in suits brought in Delaware courts. Del. Code Ann., tit. 10, § 3114. *See Johnson, Business Judgment Rule*, *supra* note 24, at 440 (noting that "prominent judges" in Delaware expected litigation newly focused on officers following the statutory amendment). Whether implied-consent statutes like Delaware's comport with constitutional limits on the assertion of personal jurisdiction has

that claims against officers would be asserted by bankruptcy trustees or receivers than by corporate directors, plus the hurdles that shareholders confront as plaintiffs in litigation against non-director defendants.⁷⁰ And, like other principals, directors may have a rational preference to discharge or otherwise settle up with wrongdoing agents, in this instance officers.⁷¹ Separately, an allegation that a director breached a duty of performance may require more investigation into contextual specifics than would duty-of-loyalty claims, making duty-of-performance claims more vulnerable to motions to dismiss.

While acknowledging that much remains open to debate, I focus first on the application of the business judgment rule to officers and then turn to the substantive standard applicable to conduct by officers that breaches either a generally-formulated duty of care or a component of the agency law duties of care, competence, and diligence.⁷² As noted above, the presumptions created by the business judgment rule do not apply when the plaintiff alleges facts that support a reasonable inference that in making a business decision, the actor in question breached either the duty of care or the duty of loyalty.⁷³ Delaware cases define the duty of loyalty as inclusive of a

been questioned. *See Verity Winship, Jurisdiction Over Corporate Officers and the Incoherence of Implied Consent*, 2013 U. ILL. L. REV. 1171.

⁷⁰*See* Johnson & Ricca, *Reality Check*, *supra* note 48, at 88.

⁷¹*Id.* at 87-88(discussing range of potential intra-corporate sanctions).

⁷²RESTATEMENT (THIRD) OF AGENCY § 8.08.

⁷³ A shareholder's complaint cannot survive a motion to dismiss by a director protected by an exculpatory provision when the complaint alleges only the underlying transaction would be subject to the entire fairness standard of review. *See* Cornerstone Therapeutics, Inc., S'holder Litig., 115 A.3d 1173 (Del. 2015).

duty to act in good faith.⁷⁴ A failure to act in good faith results when a fiduciary “intentionally acts with a purpose other than advancing the best interests of the corporation”⁷⁵ A fiduciary also fails to act in good faith by acting “with the intent to violate applicable positive law”⁷⁶ Additionally and perhaps more broadly, “intentionally fail[ing] to act in the face of a known duty to act, demonstrating a conscious disregard for his duties” is an instance of a failure to act in good faith.⁷⁷

If applied to officers, the business judgment rule should have comparable limitations, making its protection unavailable when the facts support a reasonable inference of a breach of the duty of loyalty or the duties of care, competence, and diligence. The good-faith component of the duty of loyalty would deny protection to an officer who acted with the requisite knowledge, intention, or scienter for a proscribed purpose or in violation of positive law. More open to debate is conduct by an officer who consciously disregards a directive received from the board or withholds material information from the board or a board committee. Would an

⁷⁴Stone v. Ritter, 911 A.2d 362 (Del. 2006).

⁷⁵In re Walt Disney Co. Derivative Litig., 907 A.2d 693, 755 (Del. Ch. 2005), *aff'd*, 906 A.2d 27 (Del. 2006).

⁷⁶*Id.* For a recent application of this definition, see In re Duke Energy Corp. Derivative Litig., 2016 WL 4543788 at 16-17 (Del. Ch. Aug. 31, 2016)(complaint alleged directors violated state law by knowingly or willfully providing false information to utility commission concerning identity of corporation’s CEO following merger that required permission from commission).

⁷⁷*Disney*, 907 A.2d at 755. The instances stated in *Disney* expressly do not exhaust the possible forms that failure to act in good faith may take, only the “most salient” three. *Id.* at 756. Another identified by the court arises when disinterested directors, aware of all the facts concerning a colleague’s self-dealing transaction (including the colleague’s conflict of interest), approve the transaction “to reward a colleague rather than for the benefit of the shareholders.” *Id.* at 756 n. 464. Delaware’s statutory safe harbor for transactions in which a director has a conflicting interest requires that the directors who approve the transaction act in good faith. Del. Code Ann., tit. 8, § 144(a)(3).

officer's breach of a distinctively agency-law duty constitute conduct not in good faith, and thus breach the officer's duty of loyalty? Or are these duties, like the duty of good faith, themselves components of the duty of loyalty?⁷⁸

More generally, it's hard to see any justification for characterizing an officer's deliberate disregard of agency-law duties as an exercise of "business judgment." Like any agent, an officer lacks discretion to ignore unambiguous directives received from the principal, even when the officer disagrees with them, just as junior or subordinate officers or employees have a duty to comply with lawful instructions received from personnel higher in an organization's hierarchy. Indeed, the most prominent defenders of applying the business judgment rule to officers acknowledge that its application should not extend to conduct "outside the scope of [officers'] delegated authority,"⁷⁹ a concept delimited by officers' distinctive duties as agents. Put differently, as an agent an officer does not have a right unilaterally to redefine the scope of her authority.

That officers are agents is more significant when focus shifts to the substantive standard applicable to breaches of duties of care, competence, and diligence. As noted above, directors' alleged breaches of the duty of care are assessed against a liability standard of gross negligence, not the simple (or ordinary) negligence standard applicable to agents. But note that directors' and officers' duties differ in their relative generality ("care") or specificity ("care, competence, and diligence"). This difference is tied to the fact that officers, like other agents, are chosen on the basis of the skills and knowledge that they possess (or claim to possess), which range from

⁷⁸For these possibilities, see Shaner, *supra* note 45, at 49.

⁷⁹Hamermesh & Sparks, *supra* note 24, at 866.

highly specialized to very general. Additionally, when courts evaluate whether directors breached duties of care, the focus is the process used, not the quality of the decision itself or, for that matter, of the decision-makers themselves.

In contrast, agency law focuses on discrepancies between agents' performance and the expectations underlying a principal's choice to be represented by a particular agent. Why apply a less demanding standard—gross negligence—to corporate officers as a particular cohort of agents? Applying a gross negligence standard is especially inapt when the officer in question performs functions as a member of a profession or particular discipline when comparable services are available from practitioners who are situated externally to the corporation. For example, why should malpractice on the part of a chief legal officer be assessed against a standard of gross negligence, as opposed to the ordinary negligence regime applicable to departures from the standard of care by other lawyers who represent the corporation?⁸⁰ Along these lines, information internal to the corporation is more accessible (or more immediately accessible to officers than to non-officer directors, which limits officers' right to rely on information furnished by others.⁸¹ Just as directors and shareholders might reasonably expect an officer to have relevant on-the-ground knowledge about the corporation's affairs,⁸² so they might

⁸⁰ For the standard of care generally applicable to lawyers, see RESTATEMENT (THIRD) LAW GOVERNING LAWYERS § 52.

⁸¹A. Gilchrist Sparks, III & Lawrence A. Hamermesh, *Common Law Duties of Non-Director Corporate Officers*, 48 BUS. LAW. 215, 218 (1992)(discussing MBCA § 8.42, official cmt.).

⁸²Directors' reasonable expectation that officers have such knowledge is linked to officers' duties as agents to share relevant information with the board. *See supra* text accompanying notes 3 & 44. The duty includes the duty to report information received from personnel lower in the organizational hierarchy. For a troubling example, characterized by the court as an instance of bad faith, see *Tower Air*, 416 F.3d at 239 (airline's officers "did nothing"

reasonably expect performance in office that's consistent with the assumed skill set and capacity for diligence and care that constituted the premise for hiring that particular officer.⁸³ Thus, directors (and others) who rely on officers to prepare financial forecasts and present them to the board would reasonably expect preparation consistent with methodologies and standards used by reasonable persons performing comparable work,⁸⁴ just as directors who rely on officers who profess to have expertise as managers that is more generalized should reasonably expect performance consistent with that of comparators acting as reasonable persons.⁸⁵

To be sure, unlike directors, in most jurisdictions officers do not have the benefit of provisions in corporate charters exculpating against monetary liability stemming from breaches of duties of care, whether stemming from gross or ordinary negligence.⁸⁶ Agency law acknowledges the possibility of contractual solutions by embracing a role for agreements

when told by Director of Safety of quality-assurance problems with aircraft maintenance and failures to record maintenance and repair work).

⁸³Relatedly, when an agent claims to possess special skills or knowledge, the agent's duties of performance are geared to a standard consistent with possessing such skills or knowledge. RESTATEMENT (THIRD) OF AGENCY § 8.08.

⁸⁴*Palmer*, __ F. Supp. 3d at __ (financial forecasts prepared by president and chief financial officer departed from established methodology by comparing corporation with companies experiencing increased revenue, not comparators—like corporation—with declining revenue).

⁸⁵Assuring the robustness of directors' right to rely on officers is consistent with perceiving the law on corporate officers as "just one more aspect of Delaware's law on directors. Johnson, *Dominance*, *supra* note 2, at ms. p. 15 (emphasis omitted)(characterizing corporate management and overall welfare as "manifestly officer-centric" in contrast with corporate governance, which is "decidedly director-centric").

⁸⁶*See supra* text accompanying note 65.

between principals and agents that define in advance the applicable standard of performance.⁸⁷ This enables an officer to negotiate for specificity in what will be expected, while also enabling the board to price the value of what it anticipates receiving in exchange from the officer.⁸⁸

Corporate law itself embraces a central feature of the agency law framework by robustly protecting directors' right to rely on officers. As formulated by statute in Delaware, a member of a board of directors has the a right to rely in good faith on "information, opinions, reports, or statements" presented by officers "or by any other person as to matters the member reasonably believes are within that person's professional or expert competence and who has been selected with reasonable care by or on behalf of the corporation."⁸⁹ A cautious director might be reluctant to rely on an officer's opinions or reports prepared by the officer or under her supervision, knowing that the officer—unlike externally-situated sources of expertise—need worry only about slippages that can be characterized as grossly negligent. In response, cautious directors might seek more input from externally-situated agents. A countervailing risk is that the prospect of greater liability risks for officers relative to directors would encourage officers to shift more responsibility to the board.⁹⁰ But the risk of responsibility-shifting, if identified in advance, can

⁸⁷RESTATEMENT (THIRD) OF AGENCY § 8.08, cmt. b.

⁸⁸ This long-standing dimension of agency law contrasts with the Delaware Supreme Court's characterization of fiduciary duties as "immutable." *See Mills Acq. Co. v. MacMillan, Inc.*, 559 A.2d 1261, 1280 (Del. 1989). However, read in context, this statement in *Mills* is limited to the duty of loyalty.

⁸⁹Del. Code Ann., tit. 8, § 141(e).

⁹⁰Hamermesh & Sparks, *supra* note 24, at 875. *See also* Sparks & Hamermesh, *supra* note 81, at 237 (depriving officers of protection of business judgment rule represents surrender by corporation of "part of its freedom from judicial scrutiny" in decisions made by directors to delegate responsibility to officers).

be priced into the terms of the corporation's relationship with its officers.

As discussed above, agency law's framework enables an officer worried about liability risks under a regime of simple negligence to negotiate terms that specify a standard for performance. In structuring the terms under which the corporation engages an officer or any other agent, the board has flexibility subject to broad constraints mostly developed in cases involving lop-sided outcomes from arrangements for executive compensation. Agency creates a framework through which an officer's concerns about liability can be specified in advance and addressed through an agreement. The parties's flexibility, although extensive, is not infinite. In retaining an advisor, the terms to which the board agrees are ineffectual if they permit the advisor to act contrary to the board's interests as the advisee, undermining the advice on which the advisor knows the board will rely.⁹¹ The same fundamental limit should also apply as well to the terms under which a corporation, acting through its directors, agrees to employ an officer, recognizing as it does that duties are inherent to some roles.⁹²

III. "Officer" as a Fluid Category

Although not a focus of Johnson and Millon's scholarship, the definitional fluidity of "officer" as a category is itself intriguing.⁹³ How "officer" is defined varies, depending on the

⁹¹RBC Capital Mkts. LLC v. Jervis, 129 A.3d 816, 865 n. 191 (Del. 2015).

⁹²For this terminology, see *Numeric Analysis, LLC v. McCabe*, 161 F. Shpp. 3d 348, 358 (E.D. Pa. 2016)(fiduciary duty of LLC's President was "inherent to the role" she played as officer of entity formed and headquartered in Pennsylvania; as a consequence, district court in Pennsylvania had specific personal jurisdiction over President for purposes of breach of fiduciary duty and duty of loyalty claims).

⁹³*See Winship, supra* note 69, at 1195.

jurisdiction and the question. In Verity Winship’s account, “‘officer’ means one thing for personal jurisdiction, another for securities disclosure rules, and who-knows-what for triggering state-law fiduciary duties.”⁹⁴ In contrast, as noted in Section I, the position occupied by a board of directors is defined by the applicable corporation statute. Numerous cases that flesh out the specifics of directors’ status, rights, and responsibilities stabilize the meaning of “director” as a category. Most of the time, though, in connection with corporate governance the meaning of “officer” conforms to the prescriptive definition stated by Gilchrist Sparks and Lawrence Hamermesh: a person entrusted with “administrative and executive functions” but not persons who lack “judgment or discretion as to corporate matters.”⁹⁵

Focusing on the status of corporate officers as agents illustrates that definitional fluidity can carry consequences. Consider first an officer’s externally-oriented role as an agent. By assigning a title that’s conventionally held by an officer, the corporation runs the risk of creating apparent authority in the title-holder to do acts conventionally associated with an officer holding a like title.⁹⁶ For example, the apparent authority of a corporation’s CEO encompasses transactions within the ordinary course of the corporation’s business although the board has restricted the CEO’s actual authority unbeknownst to third parties.⁹⁷ Likewise, by entitling an

⁹⁴*Id.* at 1195-96.

⁹⁵Sparks & Hamermesh, *supra* note 81, at 216.

⁹⁶RESTATEMENT (THIRD) OF AGENCY § 3.03, cmt. e.

⁹⁷*Id.* § 3.03, cmt. e(3). Numerous precedents define an officer’s apparent authority to engage in actions comprising a corporation’s ordinary business. For a potential regulatory implication, see Stephen M. Bainbridge, *Revitalizing SEC Rule 14A-8’s Ordinary Business Exclusion: Preventing Shareholder Micromanagement By Proposal*, 85 FORDHAM L. REV. 705, 738-40 (2016)(urging SEC’s staff to turn to apparent-authority precedents to assess whether shareholder proposal may be omitted from proxy statement because it concerns a matter of

employee “CEO,” the corporation as principal may create an appearance of authority on which third parties have a right to rely when their belief in the reality of authority is reasonable. Agency doctrine in this respect is analogous to the partnership-law doctrine of partnership by estoppel, which protects third parties who enter into transactions on the basis of a representation that a person is a partner.⁹⁸ Agency law thus responds to definitional fluidity by turning to conventional usage and meaning associated with particular titles and positions, keyed to the doctrine of apparent authority.

Now consider an internally-oriented perspective on the term “officer” and its potential consequences. For its own purposes, a corporation may assign an officer’s title to an employee, either as an honorific reward or to enable the employee to perform specified tasks on the corporation’s behalf, despite the fact that the employee’s job duties entail no executive or supervisory functions. This practice is compatible with the non-prescriptive treatment of the “officer” category in corporation statutes. To an employee, being named an “officer” may appear to be internally meaningful and to confer rights as against the corporation. Corporation statutes in Delaware and other states permit a corporation to bind itself to indemnify its directors and officers, whether present or former, against expenses incurred in connection with litigation related to their corporate positions, subject to limitations not relevant for purposes of this Essay.⁹⁹ Likewise, a corporation may bind itself to advance litigation expenses incurred by a

corporation’s ordinary business).

⁹⁸Unif. Partnership Act § 308(b). Many thanks to Andrew Gold who alerted me to this analogy.

⁹⁹Del. Code Ann., tit. 8, § 145(f).

director or officer,¹⁰⁰ and may extend advancement rights to employees and other agents through contract. One conventional route to create such rights is through a bylaw provision stating that “officers” and “directors” shall, to the extent permitted by law, receive advancements and be indemnified. A set of bylaws might go further in the direction of specificity by defining the meaning of “officer” for this purpose by listing categories of eligible persons by title.

In *Aleynikov v. Goldman Sachs Group, Inc.*, the defendant’s bylaws designated “vice presidents” as “officers” entitled to indemnification and advancement, whether incumbent or former occupants of an office.¹⁰¹ But the defendant resisted the plaintiff’s demand for advancement in connection with the expenses of a then-ongoing state prosecution. The plaintiff had copied computer files and transferred them out of the defendant’s organization to a competitor of the defendant’s when he joined it as an employee. The defendant also resisted the plaintiff’s demand for indemnification based on his successful defense of an earlier federal prosecution involving the same conduct.¹⁰² A majority of a Third Circuit panel, applying Delaware law, held that the bylaw’s use of “officer” was ambiguous and permitted the defendant to introduce extrinsic evidence of trade usage acknowledging the prevalence of “title inflation” in the financial services industry.¹⁰³ The plaintiff’s work consisted of computer programming; his success led to his designation as a “vice president” in the defendant’s equities division but not to responsibilities to supervise other employees or transact business with third parties on behalf

¹⁰⁰*Id.* § 145 (e)-(f).

¹⁰¹*Aleynikov v. Goldman Sachs Group, Inc.*, 765 F.3d 350 (3d Cir. 2014).

¹⁰²*Id.* at 353.

¹⁰³*Id.* at 364-65.

of the defendant. The Third Circuit vacated the district court's order granting summary judgment to the plaintiff on the advancement question, remanding for further proceedings.¹⁰⁴ In dissent, one member of the panel argued that under Delaware law the doctrine of *contra proferentum* should apply to resolve against the defendant any arguable ambiguity. The defendant acted unilaterally in drafting its bylaws and should be incentivized to clarify them.¹⁰⁵

Issues of ambiguity aside, it's understandable that the defendant in *Aleynikov* might not wish to fund the plaintiff's ongoing defense given the underlying premise of the prosecution. But the defendant did not revise the terms applicable to the plaintiff's association with it, including rights to advancement, as might be done by contract through an employment separation agreement.¹⁰⁶ The majority's analysis enables the defendant to have the benefit of discretion to be exercised when an "officer" seeks advancement but without either taking prior unilateral action to clarify the bylaw or restrict its coverage, or entering into an individualized contract with the "officer" providing such discretion to the corporation.

Additionally, the Third Circuit's resolution is at odds with the externally-oriented dimension of agency law discussed above. A robust doctrine, apparent authority attaches consequences to placing agents in defined positions or assigning titles conventionally associated with actual authority of a particular scope. True, the office of "vice president" may not carry

¹⁰⁴*Id.* at 368. The district court had earlier denied the plaintiff's motion for summary judgment on his claim for indemnification. *Id.* at 353.

¹⁰⁵*Id.* at 370.

¹⁰⁶For an example, see *Flood v. Clearone Commc'ns, Inc.* 618 F.3d 1110 (10th Cir. 2010)(terms of former CEO's separation agreement conditioned advancement on determination that the best interests of the company at the time of determination necessitated using funds to make advancement). In *Flood*, the company's CEO was convicted on securities fraud charges originating in an SEC investigation that began while the CEO was still employed.

actual or apparent authority to bind the corporation in the absence of a functional specification of responsibilities, for which the particular vice president would have a customary level of authority over the specified functional area (such as “sales”).¹⁰⁷ In *Aleynikov*, the vice president’s title did not include a functional designation, which undercuts the prospect that he could act with apparent authority in dealings with third parties on behalf of the defendant. And unlike many vice presidents within banks, his job duties did not require signing documents on behalf of the defendant.¹⁰⁸ But internally, the defendant’s own bylaws defined a “vice president” as an “officer” and explicitly assigned consequences to holding an officer’s position. The defendant, that is, made a manifestation to its “officers” through its bylaws about the consequences of membership in that category, constituting an instance of internally-oriented conduct that expresses meaning to persons who, not advised otherwise, may rely on its explicit terms.¹⁰⁹

A final issue is whether a defendant’s victory over its former officer in an advancement claim might otherwise operate to undercut the defendant’s position. In *Aleynikov*, the defendant

¹⁰⁷RESTATEMENT (THIRD) OF AGENCY § 3.03, cmt. (e)(4).

¹⁰⁸*See Aleynikov v. Goldman Sachs Group, Inc.*, C.A. No. 10636-VCL, July 13, 2016, slip op. at 8-9 (Post-Trial Order and Final Judgment), available at www.delawarelitigation.com/files/2016/07/AdvanAlexnCaseFinal-Order-and-Judgment2.pdf, *aff’d*, __ A. 3d __ (Del. 2017).

¹⁰⁹An allied principle requires that an employer act prospectively and give notice to affected employees when it modifies or revokes a prior binding promise or policy statement concerning compensation. RESTATEMENT OF EMPLOYMENT LAW § 3.04 (2015). Also, when a dispute involves multiple sources for indemnification and advancement, Delaware law requires that they be read distinctively, not conjunctively, as independent sources of rights. *See Narayanan v. Sutherland Global Holdings*, 2016 WL 3682617 (Del. Ch. July 5, 2016). Thus, a condition on advancement rights imposed in a bylaw is inapplicable to advancement rights created by a contract that omits the condition unless the corporation demonstrates that the two instruments were intended to operate conjunctively.

brought counterclaims against its former officer. Bound by the issue preclusion stemming from the earlier Third Circuit ruling, the Delaware Court of Chancery held that the former officer was not entitled to advancement in connection with his defense of the counterclaims (but also suggested that the Third Circuit may have misunderstood Delaware law).¹¹⁰ If, as is typical in post-employment disputes, a defendant's counterclaims allege breach of fiduciary duty, would the defendant undermine the premise of fiduciary counterclaims by persuading an earlier court that the employee was not an officer? As Professor Winship noted, what "officer" means may be "who-knows-what for triggering state-law fiduciary duties."¹¹¹ The common law of agency treats all employees regardless of status or job duties as agents, who by definition owe fiduciary duties to the principal.¹¹² In some states, however, the "fiduciary" label is confined to employees in positions of trust and confidence with the employer; other employees may be subject to more limited duties of loyalty.¹¹³ Thus, dislodging a now-former employee from the "officer" category can risk vaulting the employer into the terrain of "who-knows-what," depending on the substance of the conduct at issue in the counterclaim and the textured specifics of the corporation's relationship with its now-former employee.

¹¹⁰See *Aleynikov v. Goldman Sachs Group, Inc.*, C.A. No. 10636-VCL, July 13, 2016 (Post-Trial Order and Final Judgment).

¹¹¹Winship, *supra* note 69, at 1195-96.

¹¹²RESTATEMENT (THIRD) OF AGENCY § 1.01, cmt. c. & § 8.01, cmt. b. Agency law recognizes that "fiduciary obligation is not monolithic in how it operates," *id.* § 8.01, cmt. c, and that its scope and demands turn on specifics of an agent's position.

¹¹³RESTATEMENT OF EMPLOYMENT LAW § 8.01. An employee, whether or not in a position of trust and confidence with the employer, breaches a duty of loyalty by misappropriating the employer's property, whether tangible or intangible. *Id.* § 8.01(b)(3).

IV. Implications for Fiduciary Theory

Focusing on the status of corporate officers as agents has implications for more general or theoretical accounts of fiduciary law because it sharpens appreciation of the distinctiveness of agency relationships. This essay emphasizes the corporation's rights of control over its officers and mechanisms through which control may be exercised, grounded in the principal's right of control as an essential or constitutive element of an agency relationship.¹¹⁴ Distinctively, principals have power to give binding instructions to agents, illustrated in this essay by the directives given by boards to senior officers in *Gantler* and *Amalgamated Bank*. However, some general theories of fiduciary law require that the fiduciary be able to exercise discretionary power.¹¹⁵ This is at odds with the basic definition of agency, to which the principal's right of control is essential.¹¹⁶ And, as *Gantler* and *Amalgamated Bank* illustrate, it's not always desirable that an officer exercise discretion, a determination to be made by the board of directors, not the officer acting unilaterally.

One potential response, the taxonomic move of expelling agents from the fiduciary

¹¹⁴See *Hollingsworth*, 133 S. Ct. at 2666.

¹¹⁵See, e.g., Paul B. Miller, *A Theory of Fiduciary Liability*, 56 MCGILL L.J. 235, 262 (2011). Although not central to my own scholarship, I mention the fiduciary's possession of discretion as a common characteristic of fiduciary relationships. Deborah A. DeMott, *Beyond Metaphor: An Analysis of Fiduciary Obligation*, 1988 Duke L. J. 879, 908. Many years on, I've come to appreciate that this is inconsistent with agency law, including for my account of the significance of an agent's interpretation of instructions furnished by the principal. DeMott, *Fiduciary Character*, *supra* note 39.

¹¹⁶See Julian Velasco, *Delimiting Fiduciary Status* (ms at 11) in RESEARCH HANDBOOK ON FIDUCIARY LAW (D. Gordon Smith & Andrew S. Gold, eds. forthcoming 2017); Alice Woolley, *The Lawyer as Fiduciary: Defining Private Law Duties in Public Law Relations*, 65 U. TORONTO L.J. 285, 309-15 (2015).

family, runs counter to long-established law. It also ignores the fact, as Julian Velasco observes, that “[a]gency bears the most important hallmarks of a fiduciary relationship: the principal entrusts the agent with power, and becomes vulnerable as a result.”¹¹⁷ Or one might stretch “discretion,” or eliminate the requirement of discretion from the general definition of fiduciary.¹¹⁸ Regardless of the misfit between theoretical accounts of fiduciary law and agency, corporate officers illustrate the stakes associated with treating agents as fiduciaries, even when the principal has not conferred discretion. A corporation is vulnerable to its officers’ exercise of power, which is conferred by the principal, and the corporation’s attempt to limit its vulnerability through tightly-defined directives should not undercut its fiduciary relationship with its officers. Nor should it enable officers to obtain material benefits through the exercise of delegated power without the principal’s informed consent.¹¹⁹

IV. Conclusion

The scholarship of Lyman Johnson and David Millon is extensive as well as multi-

¹¹⁷Velasco, *supra* note 116, at (ms. 12).

¹¹⁸*Id.* at 12-13; *see also* Arthur Laby, Book Review, 35 *Law & Phil.* 123, 132 (2016)(reviewing *PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW* (Andrew S. Gold & Paul B. Miller eds. (2014))(characterizing as “too reductionist” approach that casts discretionary authority as a necessary condition for a fiduciary relationships).

¹¹⁹For example, if a board of directors instructs the corporation’s treasurer to execute a particular transaction on particular terms, the treasurer is not free to front-run the transaction just because the instruction conferred no discretion. *RESTATEMENT (THIRD) OF AGENCY* § 8.02 (agent’s duty not to acquire a material benefit from third party in connection with actions taken on behalf of the principal). Front-running may also constitute a crime. *See* Christopher M. Matthews, *HSBC Executive Arrested in U.S.*, *WALL ST. J.*, July 21, 2016 at C1 (two top bank executives, learning that client had engaged bank to execute \$3.5 billion currency exchange, front-ran order, netted millions for bank and for themselves by stockpiling millions of pounds, driving up price of pound, prior to execution of exchange of client’s dollars for pounds).

faceted. Additionally, the line of work celebrated in this essay was prescient in recasting the account of corporate officers into terms centered on officers' status as agents. As Lyman and David demonstrated, understanding how the law treats officers' positions and duties requires acknowledging that officers are agents. Their scholarship continues to furnish an analytic and normative framework for assessing subsequent developments, a hallmark of enduring influence.