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*Corporate Officer Liability and the Applicable Standard of Review Under Delaware Law and
Agency Law*

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I. INTRODUCTION

The issue of corporate officers' personal liability under Delaware Corporate Law had been a complete uncertainty until recently. While Delaware courts remained silent on the issue, scholars engaged in a vehement debate about what fiduciary duties corporate officers owed under Delaware law. Two competing views were advanced. Professors Lyman Johnson and David Millon first advanced the argument that corporate officers were agents of the corporation, and thus are subject to the duties an agent owes to his principal under common law agency principles.¹ The second view was first advanced by A. Gilchrist Sparks, III and Lawrence A. Hamermesh in 1992.² Professors Sparks and Hamermesh argued that corporate officers owed identical fiduciary duties of loyalty and care as are owed by directors.³ Despite the ongoing debate about the liability of corporate officers, the Delaware courts did not decisively resolve the issue of officer liability until 2009.

In *Gantler v. Stephens*, the Delaware Supreme Court expressly held that corporate officers owe fiduciary duties to the corporation identical to the fiduciary duties owed by directors.⁴ Therefore, under the Court's holding, an officer would be personally liable for breaches of the same duties of care and loyalty that are owed by directors.⁵ While this was a major development in Delaware Corporate Law, the Court left open a number of vital questions. Most importantly, the Court did not discuss whether the protections of the deferential business

¹ Lyman P.Q. Johnson & David K. Millon, *Recalling Why Corporate Officers are Fiduciaries*, 46 WM. & MARY L. REV. 1597 (2005).

² A. Gilchrist Sparks, III & Lawrence A. Hamermesh, *Common Law Duties of Non-Director Corporate Officers*, 48 BUS. LAW. 215 (1992).

³ *Id.* at 225.

⁴ *Gantler v. Stephens*, 965 A.2d 695, 708-09 (Del. 2009).

⁵ *Id.*

judgment rule applied to corporate officers as it does to directors.⁶ Furthermore, the Court did not decide whether corporate officers could be exculpated for breaches of their duty of care under Delaware General Corporation Law Section 102(b)(7), which allows a corporation to limit or completely eliminate, in its certificate of incorporation, its directors' liability for breaches of their duty of care.⁷ Rather, the Court expressly left this decision to the Delaware legislature to resolve.⁸ The legislature's inaction following *Gantler* is likely a signal that the exculpation provisions of Section 102(b)(7) will not be extended to corporate officers. However, the business judgment rule issue still remains open for debate.

The next major judicial decision affecting corporate officer liability came in *Amalgamated Bank v. Yahoo! Inc.*, 132 A.3d 752 (Del. Ct. Ch. 2016). In *Amalgamated*, the Chancery Court reaffirmed the Delaware Supreme Court's holding in *Gantler* that officers owe fiduciary duties identical to those directors owe, but added that officers are also "agents who report to the board of directors" and "have a duty to provide the board of directors with the information that the directors need to perform their statutory and fiduciary roles."⁹ Characterizing corporate officers as agents potentially has significant consequences for the fiduciary duties that officers owe corporations. As an agent of the corporation, an officer's fiduciary duties are likely not limited to the traditional duties of care and loyalty. Rather, a corporate officer owes two additional duties to his principal, the corporation acting through the board, under common law agency principles: the duty of obedience and the duty to inform.¹⁰

⁶ *Id.*

⁷ *Id.* at 709 n.37; *see also* DEL. CODE ANN. tit. 8, § 102(b)(7) (West 2015).

⁸ *Gantler*, 965 A.2d at 709 n.37.

⁹ *Amalgamated*, 132 A.3d at 780-81 (it is important that the CEO of Yahoo was also sitting on the Yahoo board at the time of litigation, but was sued in her capacity as an officer).

¹⁰ Deborah A. DeMott, *Corporate Officers as Agents*, 74 WASH. & LEE L. REV. (cite forthcoming) (2017).

Even after these two major developments concerning the duties corporate officers owe under Delaware law, the issue of whether the business judgment rule applies to officers has remained unresolved. Only two courts have considered the question, and both cases were decided prior to *Gantler* and *Amalgamated*. In *In re Tower Air, Inc.*, the Third Circuit affirmed the holding of the District Court for the District of Delaware by applying the business judgment rule to the decision of the defendant corporate officers involved.¹¹ However, the Third Circuit simply assumed, with no analysis, that the Delaware courts would review officer decisions under the business judgment rule. Thus, the Third Circuit's decision is not indicative of how the Delaware Supreme Court will decide the question.

The only Delaware case to hold that the business judgment rule applies to corporate officers is *Ella M. Kelly & Wyndham, Inc. v. Bell*.¹² Although this case is important, as it is a Delaware Supreme Court case, it is not clear that the Court would rule similarly if faced with the same question today. As in *Tower*, the Court in *Ella M. Kelly* simply assumed that the business judgment rule applied to officers without any reasoning supporting its decision. Furthermore, the officers in question also sat on the board, and it is not clear whether the court would decide the rule also applies to an officer who does not also serve as a director.

The purpose of this paper is to discuss whether corporate officers' fiduciary duties differ from those of corporate directors under Delaware law because of officers' status as agents of the corporation, and whether the Delaware courts should review officers' decisions under the deferential business judgment rule when determining whether those officers breached their duty of care to the corporation. In Part II, I will discuss the duties owed by corporate officers, and I argue that officers should have a higher duty of care than directors because of their position as

¹¹ *In re Tower Air, Inc.*, 416 F.3d 229, 238 (3d. Cir. 2005).

¹² 266 A.2d 878 (Del. 1970).

agents of the corporation. In Part III, I will argue that the business judgment rule should apply to the business decisions of corporate officers, but corporate officers should be held to an ordinary negligence standard under business judgment review, not the gross negligence standard applicable to director decisions. Part IV will discuss who should be considered an “officer” for purposes of business judgment rule protection.¹³ Finally, Part V will discuss why there is not likely to be an increase in suits against corporate officers despite the major developments in theories to hold them personally liable.

II. WHAT IS THE PERSONAL LIABILITY OF CORPORATE OFFICERS AS AGENTS OF THE CORPORATION?

Corporate officers hold an interesting position under Delaware law because the Delaware Supreme Court has held that officers not only have fiduciary duties identical to those that directors owe¹⁴, the duties of care and loyalty, but that officers also have duties flowing from their position as agents of the corporation, their principal, which are the duty to inform the board of material information and the duty of obedience.¹⁵ As such, officers must owe a higher duty of care than the board because officers’ fiduciary duties are created by common law agency principles. Outside directors, those directors not holding officer positions within the company, are only subjected to a gross negligence standard of care. To understand why officers must have a higher standard of care than directors, it is first important to discuss the differences between the position of directors and officers in the corporate governance structure and why officers’ positions as agents of the corporation require that they have a higher duty of care than the board.

¹³ Many modern corporations, especially large banks or investment companies, have thousands of vice presidents. It is important to distinguish which employees possessing these officer-level titles will be considered “officers” for the purpose of receiving the protection of the business judgment rule. This issue will be discussed in-depth in Part IV.

¹⁴ *Gantler*, 965 A.2d at 708-09.

¹⁵ *Amalgamated*, 132 A.3d at 780-81.

Directors are given broad power under Delaware law to manage “the business and affairs” of the corporation.¹⁶ However, it is unrealistic to assume that a board could manage all of the daily business affairs because of the mammoth size of some modern corporations.¹⁷ Instead, Delaware Code Section 141(a) allows the board to delegate a significant amount of its management authority to the officers whom the board appoints.¹⁸ The board decides on the officers’ compensation, sets the limits of the officers’ delegated managerial authority, and monitors the officers’ performance.¹⁹ Thus, although officers exercise substantial discretion on behalf of the corporation, they are nonetheless agents of the corporation acting through its board because officers may only exercise the discretion specifically delegated to them by the board. Because of their position as agents of the corporation, rather than the entity acting as the corporation like the board, corporate officers owe a number fiduciary duties to the corporation flowing from agency law principles. Corporate officers status as agents creates their fiduciary duties and also provides a basis to hold officers to a higher standard of care than directors.

A. Fiduciary Duties Owed by Officers

Agent status is a consensual relationship which includes fiduciary duties independent from those expressly included in contract.²⁰ Therefore, although many officers may not have an express written contract, they nonetheless owe specified fiduciary duties arising under common law agency principles.²¹ The most important fiduciary duty owed by officers is the duty of

¹⁶ DEL. CODE ANN. tit. 8, § 141(a).

¹⁷ Johnson & Millon, *supra* note 1, at 1607.

¹⁸ DEL. CODE ANN., tit. 8, § 141(a) (emphasis added) (stating that any corporation “shall be managed by *or under the direction of*” a board of directors).

¹⁹ Johnson & Millon, *supra* note 1, at 1607.

²⁰ RESTATEMENT (SECOND) AGENCY § 1 (1958).

²¹ Johnson & Millon, *supra* note 1, at 1629-30.

loyalty.²² The duty of loyalty requires the agent to act in the best interests of the principal, and not on behalf of anyone with interests adverse to the principal.²³ Corporate officers must act in accordance with the best interests of the corporation, acting through its board. Therefore, corporate officers' duty of loyalty to the corporation mimics the duty of loyalty that directors owe to corporate shareholders, under which the directors must act solely in the best interests of the shareholders.

However, as Professors Johnson and Millon have argued, it has not been determined whether officers' duty of loyalty is wholly identical to the duty owed by directors.²⁴ For example, it is not clear whether officers' duty of loyalty requires them to maximize shareholder wealth in the event of a takeover as it does directors.²⁵ The argument advanced by Professors Johnson and Millon is that officers do not owe any duties directly to the shareholders because officers only owe fiduciary duties to their principal, the corporation acting through its board.²⁶ However, an effective counterargument can be made that officers must make efforts to maximize shareholder wealth in the event of a takeover. Officers must act with the best interests of the corporation in mind because the corporation is their principal. The corporation's goal is to maximize shareholder wealth. Therefore officers, as agents of the corporation, must act to further their principal's goal of maximizing shareholder wealth in the event of a takeover. Nevertheless, the specific issue has not been heavily debated, nor has it come before any Delaware court.

Corporate officers' positions as agents of the corporation also creates two duties owed by officers that are separate from the typical fiduciary duties directors owe under corporate law: the

²² *Id.* at 1630.

²³ *Id.*

²⁴ *Id.* at 1630-31.

²⁵ *Id.*

²⁶ *Id.*

duty of obedience²⁷ and the duty to inform the board of material information.²⁸ The duty of obedience is the agent's duty to comply strictly with the reasonable directives of her principal.²⁹ The Restatement (Third) of Agency defines the duty of obedience as the "duty to comply with all lawful instructions received from the principal and persons designated by the principal concerning the agent's actions on behalf of the principal."³⁰

Following the Delaware Supreme Court's statement in *Amalgamated* that corporate officers are agents of the corporation, it seems appropriate to extend the duty of obedience to corporate officers. As an agent of the corporation, a corporate officer is required under agency law to comply with the reasonable directives of his principal, the corporation acting through its board.³¹ This is supported by the comment to § 8.42 of the Model Business Corporation Act, which states that "an officer is expected to observe the duties of obedience and loyalty" as well as the duty of care.³² Furthermore, requiring officers to comply with the lawful instructions of directors is consistent with Delaware corporate law because the board cannot wholly abdicate its management authority under Delaware Code § 141(a).³³ Thus, corporate officers, as agents of the corporation, must comply with the limits set by the board when delegating its managerial

²⁷ Demott, *supra* note 10, *14.

²⁸ Sparks & Hamermesh, *supra* note 2, at 226-27.

²⁹ Megan Wischmeier Shaner, *Restoring the Balance of Power in Corporate Management: Enforcing an Officer's Duty of Obedience*, 66 BUS. LAW. 28, 44-45 (2010); *see also* RESTATEMENT (THIRD) OF AGENCY § 8.08(2) (2006).

³⁰ *Id.*

³¹ *See id.* at 46.

³² MODEL BUS. CORP. ACT § 8.42 cmt. (4th ed. 2008) (citing RESTATEMENT (SECOND) OF AGENCY § 379(1) (1958)).

³³ DEL. CODE ANN. tit. 8, § 141(a).

authority to the officers.³⁴ Otherwise, the officers would be exercising the full managerial authority granted solely to the board by Section 141(a).³⁵

The duty to inform the board is not specifically created by Delaware law, but it can be inferred from the statutory requirement that directors manage the business and affairs of the corporation, and from officers' role as their agents.³⁶ As previously mentioned, it is impractical to expect a board to fully manage the day-to-day activities of a large corporation. Therefore, Delaware law allows a director, in the performance of her duties, to rely in good faith "upon such information, opinions, reports or statements presented" by any of the corporation's officers.³⁷ Furthermore, under agency law, an agent is required to use "reasonable efforts to give his principal information which is relevant to affairs entrusted to him."³⁸ Thus, officers' positions as agents of the corporation gives rise to a duty to inform the board of any information relevant to the board's duty to manage the business and affairs of the corporation.³⁹

Yet the most important, and heavily debated, of the fiduciary duties owed by corporate officers is the duty of care that officers owe to the corporation. Under Delaware law, directors are not liable for breaches of their duty of care for ordinary negligence, if they possess all reasonably available material information, because of the application of the business judgment rule to directors' decisions.⁴⁰ Rather, the plaintiff must prove that the directors acted with gross

³⁴ Shaner, *supra* note 29, at 46.

³⁵ DEL. CODE ANN. tit. 8, § 141(a).

³⁶ Sparks & Hamermesh, *supra* note 2, at 226-27.

³⁷ DEL. CODE ANN. tit. 8, § 141(c).

³⁸ RESTATEMENT (SECOND) OF AGENCY § 381 (1958).

³⁹ Sparks & Hamermesh, *supra* note 2, at 227.

⁴⁰ *Aronson v. Lewis*, 473 A.2d 805, 812 n.6 (Del. 1984), *overruled on other grounds by Brehm v. Eisner*, 745 A.2d 244 (Del. 2000) (finding that the standard of review for director's breach of duty of care is "less exacting" than review for ordinary negligence).

negligence or acted with bad faith to succeed on such a claim.⁴¹ Therefore, the key question when determining an officer's personal liability for breaches of his duty of care is what standard of care should be applicable.

There are two prominent arguments that have been advanced by commentators. The first, advanced by Professors Hamermesh and Sparks, is that corporate officers owe a duty of care to the corporation identical to the duty owed by directors.⁴² Under this argument, courts would apply the business judgment rule to officers' decisions, and officers would only breach their duty of care by acting with gross negligence or engaging in self-dealing. The second prominent argument, pushed by Professors Johnson and Millon, is that officers have duties distinct from directors because officers are agents of the corporation.⁴³ Therefore, they argue that officers, who are not also directors or are not being sued in their capacity as directors, should be held to the higher standard of ordinary negligence.⁴⁴

Following *Gantler*, it seemed that the Delaware Supreme Court had adopted the argument advanced by Professors Hamermesh and Sparks when it held that officers owed fiduciary duties identical to those of directors.⁴⁵ However, after the Court's characterization of officers as agents of the corporation in *Amalgamated*,⁴⁶ it appears that Delaware law is moving towards holding officers to the more exacting standard of ordinary negligence that is applicable

⁴¹ *Id.*

⁴² Sparks & Hamermesh, *supra* note 2, at 225-26.

⁴³ Johnson & Millon, *supra* note 1, at 1631.

⁴⁴ *Id.*

⁴⁵ *Gantler*, 965 A.2d at 708-09.

⁴⁶ *Amalgamated*, 132 A.3d at 780-81.

to agents under agency law principles.⁴⁷ This is the correct outcome because of the inherent differences between corporate directors and officers.

B. Courts Should Hold Officers to an Ordinary Negligence Standard for Breaches of Their Duty of Care.

Holding officers to the more exacting ordinary negligence standard is the better policy, and it is supported by the differences in compensation, responsibilities, and roles within the corporate structure occupied by officers and directors.⁴⁸ First, the increased personal liability of officers by holding them to an ordinary negligence standard is offset by the enormous compensation packages that they receive.⁴⁹ Although some officers receive a low base salary, similar to directors, their total compensation is supplemented by bonuses, stock and option awards, and changes in pension value.⁵⁰ In contrast, in 2016, the median total compensation for the highest paid directors was only \$260,000.⁵¹

As such, Professors Johnson and Millon argue that subjecting officers to the much less exacting gross negligence standard applicable to directors would create an imbalance in the corporate structure.⁵² This is so because directors and officers would be taking on the same amount of risk, but outside directors would be taking that risk for substantially less compensation

⁴⁷ Johnson & Millon, *supra* note 1, at 1631 (citing RESTATEMENT (SECOND) AGENCY § 379 and Official Comment (1958)).

⁴⁸ *Id.*, at 1631.

⁴⁹ Forbes, *An Extraordinary Anomaly: Executive Compensation*, <https://www.forbes.com/sites/gurufocus/2016/06/29/an-extraordinary-anomaly-executive-compensation/#64c7a6e1ab87> (accessed April 4, 2017) (stating that the average compensation for the top 200 executive officers in 2015 was \$17.6 million).

⁵⁰ *Id.*

⁵¹ Harvard Law School Forum on Corporate Governance and Financial Regulation, *2016 Director Compensation Report*, <https://corpgov.law.harvard.edu/2016/12/12/2016-director-compensation-report/> (accessed April 4, 2017).

⁵² Johnson & Millon, *supra* note 1, at 1631.

than officers.⁵³ Thus, because officers receive such high-level compensation, they should be subject to a higher standard of care when making business decisions for the corporation. Officers' enormous compensation packages are justified by the high levels of skill, competence, and experience that they bring to the corporation. Officers are expected to perform in a manner that substantially benefits the corporation because they possess, and are hired for, these special skills and knowledge. Holding officers to the less exacting gross negligence standard for their business decisions is contrary to the justifications for paying them such high-level compensation.

Additionally, applying the higher standard of care to officers is justified by the differences in responsibilities attributable to directors and officers. First, officers are agents of the corporation responsible for its day-to-day management. Therefore, officers are appointed by the board because of their knowledge and expertise in management and the particular industry of the corporation.⁵⁴ When an agent is hired by a principal on the basis of special skills or knowledge, the principal is justified in expecting performance consistent with possession of that special skillset or knowledge.⁵⁵ Thus, it follows that officers should be subject to the same standard of care that agents owe to their principals when carrying out their duties, which is a standard of ordinary negligence.⁵⁶ Holding officers to the less exacting gross negligence standard would allow for broad deviations from the particular knowledge, skills, and competence that caused the board to appoint the officers in the first place.

⁵³ *Id.*

⁵⁴ Demott, *supra* note 10, at *21-22.

⁵⁵ *Id.* at *23 (citing RESTATEMENT (THIRD) OF AGENCY § 8.08).

⁵⁶ Johnson & Millon, *supra* note 1, at 1631 (citing RESTATEMENT (SECOND) AGENCY § 379 and Official Comment (1958)).

Furthermore, as manager of the corporation's daily operations, an officer has far greater access to material information about the corporation than the directors.⁵⁷ Therefore, it makes sense to hold officers to a higher standard of care in decision-making than the gross negligence standard applicable to directors. Additionally, because of this information disparity, Delaware law allows directors to rely in good faith on the information presented to them by officers.⁵⁸ As argued by Professor Demott, directors are likely to be reluctant to rely on information provided by officers if the officers are only held personally liable for actions deemed to be grossly negligent.⁵⁹ Such a result would disrupt the normal functioning of the corporate governance structure.⁶⁰ It is not logical to apply the same gross negligence standard applicable to detached directors, who rely on officers to provide them with material information about the corporation's business, to those officers who are involved in the day-to-day operations of the corporation.

Some commentators argue that holding officers personally liable under this heightened standard of care will make it more difficult to recruit candidates for officer positions. One of the major policy justifications for applying the gross negligence standard of review to director decisions is to encourage those directors to serve and make risky decisions.⁶¹ Some analysts believe that applying the ordinary negligence standard to officers will dissuade potential officers from serving, or will cause officers to become incredibly risk-averse to avoid personal liability for bad decisions.⁶²

⁵⁷ Demott, *supra* note 10, at *22.

⁵⁸ DEL. CODE ANN. tit. 8, § 141(e).

⁵⁹ Demott, *supra* note 10, at *24.

⁶⁰ See Johnson & Millon, *supra* note 1, at 1630 (acknowledging that the board of directors rarely meets and lacks "intimate knowledge of the corporation's activities").

⁶¹ Lyman P.Q. Johnson, *Corporate Officers and the Business Judgment Rule*, 60 BUS. LAW. 439, 455 (2005).

⁶² Sparks & Hamermesh, *supra* note 2, at 230.

While this is a compelling argument for applying the less demanding standard to directors, it is simply not a reality for officers because of the differences in officer compensation compared to director compensation. Outside directors need liability protection to induce risk taking as a result of their relatively small stock ownership.⁶³ Companies have begun to offer outside directors more stock ownership to align their interests with stockholders.⁶⁴ Nevertheless, the total value of their stock and cash compensation still averages out at \$260,000⁶⁵, far less than what top corporate officers receive.⁶⁶ Further, officer compensation is much more incentivized than director compensation in the United States because of bonuses, additional stock awards, and stock options that are contingent on meeting certain earnings or sales targets.⁶⁷ As a result, corporate officers, unlike directors, are induced to take investment risks to achieve these corporate goals and receive the attached bonuses.⁶⁸ Not only are officers more incentivized to take risks than directors, they also receive much higher compensation as a reward than directors receive.⁶⁹

Furthermore, as Professor Johnson points out, there is no empirical evidence supporting the claim that potential candidates are straying from accepting officer positions as a result of heightened personal liability.⁷⁰ The Sarbanes-Oxley Act significantly increased the personal liability of company CEOs and CFOs for certain compliance violations. Section 302 of the

⁶³ Johnson, *supra* note 61, at 458.

⁶⁴ Harvard Law School, *supra* note 51 (recognizing steady growth in stock offerings as part of outside directors' compensation).

⁶⁵ Johnson, *supra* note 61, at 458.

⁶⁶ Forbes, *supra* note 49 (average salary for top 200 executive officers was \$17.6 million in 2015).

⁶⁷ *Id.*

⁶⁸ Johnson, *supra* note 61, at 460.

⁶⁹ *Id.*; *see also* Forbes, *supra* note 49 (top 200 corporate officers received \$17.6 million in total compensation in 2015 compared to \$260,000 for directors of top 100 companies).

⁷⁰ *Id.* at 460-61.

Sarbanes-Oxley Act requires the CEO and CFO to implement internal controls that ensure compliance with financial reporting, to review the effectiveness of these internal controls, and to personally sign a certification stating that the internal controls are effective to the best of the officers' knowledge.⁷¹ While there is some evidence that Sarbanes-Oxley has made it harder to recruit directors, there is no such evidence suggesting a drop in potential candidates for officer positions.⁷² A more compelling argument for applying the gross negligence standard to officers' decisions is that courts do not have the expertise to interfere in business decisions.⁷³ While this argument supports applying the business judgment rule to officers' decisions, it does not justify holding them to a lower standard of care because of the reasons discussed above.

III. A LIMITED VERSION OF THE BUSINESS JUDGMENT RULE SHOULD APPLY TO OFFICERS.

The business judgment rule is a cornerstone principle of Delaware corporate law, and corporate law generally, which is based on the proposition that corporate directors should not suffer strict judicial scrutiny of every business decision made.⁷⁴ The rule applies when a court is reviewing whether a board breached its duty of care to shareholders when making a business decision. It requires courts to look at the decision-making process utilized by the board in reaching its business decision, not the actual substance of the decision itself. The business judgment rule is a presumption by Delaware courts that “in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action was taken in the best interests of the company.”⁷⁵ Absent self-dealing or gross negligence, a board's business decision will be insulated from judicial review of the decision's

⁷¹ 15 U.S.C. § 7241 (2012).

⁷² Johnson, *supra* note 61, at 461.

⁷³ *Id.* at 462.

⁷⁴ *Id.* at 453.

⁷⁵ Aronson, 473 A.2d at 812.

merits by the business judgment rule.⁷⁶ However, the business judgment rule and its protections do not apply to certain board decisions, including a board's actions concerning a hostile tender offer, or its conclusion concerning a special committee's decision about a stockholder's derivative claim.⁷⁷

Despite the business judgment rule's inapplicability in some situations, Delaware law allows corporations to completely insulate directors from personal liability for breaches of their duty of care, absent a breach of good faith.⁷⁸ Section 102(b)(7) of the Delaware General Corporation Law allows any corporation to place a provision in its certificate of incorporation "eliminating or limiting the personal liability of a director" for breaches of his duty of care.⁷⁹ As mentioned earlier, Section 102(b)(7) does not apply to corporate officers,⁸⁰ and legislative inaction following *Gantler* signals legislative intent that the section should not be extended to them. Therefore, the major issue for officers' personal liability for breaches of their duty of care is whether their decisions will be afforded deference under the business judgment rule.

The business judgment rule should apply to the business decisions of officers because officers are exercising broad authority delegated to them by the board when making these decisions. However, the rule should not apply when an officer has exhibited ordinary negligence in the decision-making process or has engaged in self-dealing. Furthermore, the rule's protections should not be available for claims that officers breached their duty to inform the board or their duty of obedience because it only applies to duty of care claims. To understand

⁷⁶ *Id.* at 812-13.

⁷⁷ Johnson, *supra* note 61, at 454.

⁷⁸ DEL. CODE ANN. tit. 8, § 102(b)(7).

⁷⁹ *Id.*

⁸⁰ *Gantler*, 965 A.2d at 709 n.37.

why the business judgment rule should be extended to officers, it is first important to understand the original policy justifications for applying the rule to directors.

A. *The Customary Policy Rationales Supporting the Business Judgment Rule's Application to Directors' Business Decisions.*

There are three main policy justifications for the business judgment rule: encouraging directors to serve and take investment risks, preventing judicial encroachment into business decisions, and preserving the board's central decision-making role in the corporate governance structure.⁸¹ As discussed in the preceding section, the first justification, encouraging directors to serve and take risks, is not as applicable to corporate officers because of their large and highly incentivized compensation packages. However, the second and third policy rationales are just as applicable to corporate officers as they are to directors. Prior to discussing their application to officer decision-making, it is important to first briefly explain the second and third policy rationales.

Probably the strongest justification for the rule is to avoid judicial encroachment into the business decisions of corporate directors.⁸² Courts are not equipped with the information and business expertise to second-guess the business decisions of corporate management.⁸³ There are two important justifications for avoiding strict judicial scrutiny of corporate directors' business decisions. First, the deference afforded by the rule prevents courts from overreaching and replacing the past judgments of a board of directors with the retrospective judgments of the courts.⁸⁴ While the board may think a decision is reasonable when made because it resulted from a careful decision-making process, future events, unknown at the time the decision was made,

⁸¹ Johnson, *supra* note 61, at 455.

⁸² *Id.* at 456.

⁸³ *Id.*

⁸⁴ *Id.*

may make the decision seem like a colossal oversight in retrospect.⁸⁵ The business judgment rule prevents courts from improperly holding directors personally liable for carefully reasoned decisions that fail as a result of these future events. Instead, it focuses the courts' scrutiny on whether the directors used a reasonable process and availed themselves of all pertinent information prior to making the decision.⁸⁶

The second justification for avoiding judicial scrutiny of a business decision's merits is that directors already face potential sanctions from stockholders.⁸⁷ Stockholders have the ability to vote directors off the board for poor business decisions. Historically, stockholders have not had much power to effect change on the board because they did not have the power to nominate directors. However, under SEC Rule 14A-8, a stockholder owning three percent of a corporation's stock for at least three years may now submit a proposal for the corporation to include stockholder nominees in the board elections up to twenty-five percent of the board.⁸⁸ This gives stockholders some limited say in the removal of directors for poor decision-making. Judges are not subject to the same type of public sanctions for poor decisions. Thus, they should defer to the business decisions of directors, who are equipped with business expertise, and allow stockholder sanctions to punish poor decision-making.⁸⁹

The final rationale supporting the business judgment rule is that it preserves the board's traditional position at the center of corporate governance.⁹⁰ Under Delaware law, the board is tasked with managing and directing the business and affairs of the corporation.⁹¹ The business

⁸⁵ *Id.* at 457.

⁸⁶ *Aronson*, 472 A.2d at 812-13.

⁸⁷ *Johnson*, *supra* note 61, at 457.

⁸⁸ 17 C.F.R. 240.14a-8 (2010).

⁸⁹ *Id.*

⁹⁰ *Id.* at 457-58.

⁹¹ DEL. CODE ANN. tit. 8, § 141(a).

judgment rule seeks to preserve this central role of the board by preventing judges from substituting their own business decisions for the decisions of the board.⁹² By doing so, judges would essentially usurp the board's central decision-making position in the corporation. Furthermore, the business judgment rule prevents a corporation's shareholders from attempting to supplant the board's traditional central role by filing constant derivative suits to challenge the merits of the board's decisions.⁹³ By insulating the board's decision from review on the merits, the business judgment rule ensures that the board remains at the center of the corporate governance structure as Delaware law intends.⁹⁴

These two policy justifications for the rule's application to board decisions apply with equal force to the decisions of corporate officers. Thus, the Delaware courts should review an officer's business decision under the business judgment rule when determining whether that decision amounted to a breach of her duty of care. However, the business judgment rule *should not apply* when the officer exhibited ordinary negligence in the decision-making process or engaged in self-dealing. Further, the rule should not be available for claims that an officer breached her duty to inform the board or her duty of obedience because the business judgment rule is only applicable for duty of care claims.

B. The Customary Policy Rationales Supporting the Business Judgment Rule Support Extending the Rule's Protections to Corporate Officers.

Courts *should employ* the business judgment rule when reviewing the business decisions of corporate officers who are defending against claims that they breached their duty of care to the corporation. This extension to corporate officers is vital to avoid judicial encroachment into corporate management and to preserve the role of officers in the corporate governance structure.

⁹² Johnson, *supra* note 61, at 457-58.

⁹³ *Id.*

⁹⁴ *Id.*

As discussed in Part II, the protections of the rule are not needed to persuade candidates to accept officer positions and to take risks while in those positions. Nevertheless, the second and third rationales apply with equal force to directors and officers. Therefore, the business judgment rule should be extended to corporate officers.

The strongest justification for extending the business judgment rule to corporate officers is to avoid strict judicial scrutiny of the merits of their business decisions. This justification applies with at least equal, if not greater, force to officers as it does to directors.⁹⁵ Corporate officers are involved in the day-to-day management of the corporation and its business affairs, and are chosen by the board because of their particular knowledge and expertise in the corporation's industry.⁹⁶ As such, the officers not only possess greater knowledge and expertise in the industry than the directors, but the officers also have greater access to pertinent information than the directors.⁹⁷ Therefore, judges are actually better suited to review the merits of a board's decision because the directors are much more detached and lack the wealth of pertinent information and skills that corporate officers possess.⁹⁸ It is much harder to justify judicial encroachment into the business decisions of a corporate officer who was chosen because of her requisite knowledge and expertise and is also intimately familiar with the daily operations of the corporation. Consequently, it is likely even more justifiable to prevent judicial encroachment into business decisions of corporate officers.

The third rationale supporting the business judgment rule, preserving the board's central governance role, also supports extension of business judgment review to officers because the board delegates a substantial amount of its managerial authority to its officers. While it is true

⁹⁵ *Id.* at 462.

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

that officers are agents of the corporation, their special position in the corporate governance structure distinguishes them from ordinary common law agents.⁹⁹ Corporate officers are delegated and exercise vast managerial discretion to implement the broad corporate policies created by the board.¹⁰⁰ Similar to lawyers, corporate officers generally have freedom to reasonably decide how to perform their job so as to accomplish the broad end goal provided by their client, the corporation acting through the board.¹⁰¹

Additionally, the board, acting for the corporation, is unlike typical common law principals in that it generally creates extremely broad corporate goals and leaves it to its agents, the officers, to determine how to best achieve those goals.¹⁰² Unlike the typical principal-agent relationship, vast discretion over the substantive decision-making is purposefully delegated to the agent with few constraints.¹⁰³ Thus, it does not follow that an officer should be held liable for the merits of a decision purposefully delegated to him by the board when that decision would be reviewed under the business judgment rule if the board had made the decision itself.

Finally, as Professors Johnson and Ricca have argued, corporate officers operate in all industries.¹⁰⁴ Because of this variation, norms do not develop as to what reasonable substantive decisions are for all corporate officers as they do for agents who only operate within a particular industry.¹⁰⁵ Courts do not have the expertise or knowledge to develop reasonable norms for every distinct industry that corporate officers are active in. Therefore, it is proper to apply the

⁹⁹ Lyman P.Q. Johnson & Robert Ricca, *Reality Check on Officer Liability*, 67 BUS. LAW. 75, 87 (2011).

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.* at 90.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

business judgment rule to officers' decisions and review their decision-making processes rather than the substantive wisdom of the decision itself.¹⁰⁶

Some commentators believe that extending the business judgment rule to officers will actually harm the board's central role in corporate governance.¹⁰⁷ This argument was first advanced by Professor Lyman Johnson, who has since retracted it and argued for extension of the business judgment rule to officers' decisions. Nevertheless, it is still important to discuss this counterargument and why it should not prevent extension of the rule to officers. The argument is based on the statutory right of directors to pursue a breach of fiduciary duty claim against officers under Delaware law.¹⁰⁸ The argument states that when a board decides to pursue a claim against an officer for breach of his fiduciary duty of care, the court should not defer to the officer's decision under the business judgment rule because the court would be substituting its judgment about the officer's decision for the board's judgment.¹⁰⁹ Some see this as usurping the board's duty, under Delaware law, to manage the business and affairs of the corporation, which includes pursuing litigation on behalf of the corporation.¹¹⁰

This counterargument must fail for three reasons: 1) the board still retains the power for intra-firm sanctions of officers, 2) corporate officers are exercising the board's own delegated authority when making these business decisions, and 3) the officers, as agents of the corporation, would be held to the more exacting ordinary negligence standard under business judgment rule review. First, the board still retains the power to fire, demote, or reduce the pay of corporate

¹⁰⁶ *Id.*

¹⁰⁷ Johnson, *supra* note 61, at 463-64.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 464.

¹¹⁰ *Id.*; *see also* DEL. CODE ANN. tit. 8, § 141(a).

officers for poor decision-making or breaches of their fiduciary duties.¹¹¹ As Professor Johnson himself later argued, boards often choose intra-firm sanctions rather than initiating lawsuits against officers.¹¹² Second, as discussed above, officers are exercising delegated board authority when making the business decisions that would be subject to review.¹¹³ It would be contradictory to apply the deferential business judgment standard to review to board decisions in the first instance, but apply a stricter standard of review when those same decisions are instead made by officers acting under delegated authority from the board.

Finally, as will be discussed in depth in the next section, corporate officers should be held to an ordinary negligence standard under business judgment rule review. Thus, while the courts could not review the merits of the decision, the officer's decision-making process will still be reviewed for ordinary negligence, not the gross negligence standard applicable to board decisions. This prevents courts from undermining "the board's decision to hold its agent to the relevant standard" of care as Professor Johnson warned because the relevant standard of care for agents is the ordinary negligence standard.¹¹⁴

C. The Business Judgment Rule's Application to Officers Should be More Limited than its Application to Directors.

As mentioned, the business judgment rule is a presumption by Delaware courts, when determining whether a board breached its duty of care, that "in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action was taken in the best interests of the company."¹¹⁵ The rule does not apply to a board's decision if there were instances of self-dealing by the directors, or when the directors were

¹¹¹ Johnson & Ricca, *supra* note 92, at 87.

¹¹² *Id.*

¹¹³ *Id.* at 90.

¹¹⁴ Johnson, *supra* note 59, at 464.

¹¹⁵ Aronson, *supra* note 37, at 812.

grossly negligent in their decision-making.¹¹⁶ Furthermore, the business judgment rule does not apply to certain board decisions, including a board's decision concerning the response to a hostile tender offer or in reviewing a special committee's decision to terminate a stockholder's derivative claim.¹¹⁷ Similarly, although the business judgment rule should apply to the business decisions of officers, it must apply in a limited fashion.

First, and most importantly, the business judgment rule should not apply to the review of an officer's decision if the officer exhibited ordinary negligence in the decision-making process or engaged in self-dealing. As discussed in Part II of this paper, officers are agents of the corporation. Consequently, corporate officers derive their fiduciary duties from common law agency principles.¹¹⁸ Agency law imposes a standard of ordinary negligence on agents when performing tasks for their principals.¹¹⁹ As agents of the corporation, corporate officers should be held to the ordinary negligence standard applicable to other agents.¹²⁰ Even though corporate officers are not typical agents because of the wide discretion delegated to them by the board, this should not lessen the duty of care owed by the agent-officers. It merely justifies extending the protections of the business judgment rule to their business decisions so that judicial review is limited to a review of whether the decision-making process was negligent. Therefore, corporate officers should be held to an ordinary negligence standard, and the business judgment rule should not be available to an officer who was negligent in the decision-making process or who exhibited self-dealing during that process.

¹¹⁶ *Id.* at 812-13.

¹¹⁷ Johnson, *supra* note 61, at 454.

¹¹⁸ Johnson & Millon, *supra* note 1, at 1607.

¹¹⁹ *Id.* at 1637.

¹²⁰ *Id.*

Furthermore, the business judgment rule should not apply at all for claims that a corporate officer breached his duty to inform the board of material information. As mentioned, the business judgment rule does not apply to certain board decisions, such as a board's response to a hostile tender offer or a board's review of a litigation committee's decision to pursue or not pursue derivative litigation.¹²¹ Similarly, the business judgment rule should not apply to a claim that an officer breached his duty to inform the board because Delaware law expressly permits a board to rely, in good faith, on the information presented to it by the corporation's officers.¹²² It is a basic principle in Delaware law that that the board of directors cannot possibly be involved in every facet of the business, and therefore, the directors cannot possibly possess all material information relevant to making major corporate policy decisions.¹²³ This is recognized by Delaware Code Section 141, which allows the board to delegate its authority and also rely in good faith on reports furnished by corporate officers.¹²⁴

As such, when an officer fails to inform the board of relevant and material information, courts should not merely review whether the officer's decision-making process was negligent by failing to consider whether the undisclosed piece of information was material. Rather, courts should apply stricter scrutiny and examine whether the corporate officer's actual decision that the undisclosed information was not material or relevant was negligent. This strict scrutiny is necessary for the normal functioning of a corporation because the board of directors must be able to rely on officers to provide all relevant and material information. If officers are protected by the business judgment presumption that they made a good faith decision that a piece of evidence was not relevant or material, then officers may become more reluctant to disclose information

¹²¹ Johnson, *supra* note 56, at 454.

¹²² DEL. CODE ANN. tit. 8, § 141(c).

¹²³ *See Id.* at § 141(a), (c).

¹²⁴ *Id.*

that could reflect negatively on their performance. Thus, officers should not be afforded the protections of the business judgment rule in relation to their duty to disclose relevant and material information to the board. Instead, courts should look beyond the mere decision-making process and determine whether the actual decision not to disclose a piece of information was negligent.

Finally, the protections of the business judgment rule should not apply to claims that an officer breached her duty of obedience. The duty of obedience requires that an agent “comply with all lawful instructions received from the principal.”¹²⁵ As an agent of the corporation, a corporate officer has the duty to obey all lawful instructions of the board because the board is the body that acts on behalf of the corporation.¹²⁶ While corporate officers are given wide discretion to act on behalf of the corporation, they are nonetheless agents of the corporation and do not have discretion to ignore the clear directives of their principal, the corporation acting through its board.¹²⁷ Thus, the duty of obedience requires an agent to act strictly within the scope of authority delegated to him by his principal.

The business judgment rule should not apply to breaches of the duty of obedience because an agent-officer does not have discretion in the first place to make a decision that contradicts the clear directive of his principal.¹²⁸ The business judgment rule is a presumption that the director or officer in question weighed all of the reasonably available information and potential options in good faith and with the appropriate standard of care.¹²⁹ In regards to the duty of obedience, however, the agent does not have options to consider. Rather, the agent is

¹²⁵ Shaner, *supra* note 26, at 45.

¹²⁶ *Id.* at 48.

¹²⁷ *Id.* at 45.

¹²⁸ *Id.*

¹²⁹ Aronson, 473 A.2d at 812.

obligated to comply strictly with any lawful instructions of her principal. If the agent disagrees with the principal's directive, then the agent's only option is to inform the principal and try to persuade it that another course of action would be more beneficial.¹³⁰ Therefore, the courts should not review whether a corporate officer's decision-making process, or even his decision not to comply, was negligent. Instead, the court should only focus on whether the corporate officer complied with the lawful directive of the corporation's board, and the only defense available to a corporate officer should be that she did not comply with the board's order because it was unlawful.¹³¹

Regardless, the duty of obedience is much less likely to be an issue for officers than it is for typical agents because of the broad discretion agents possess. As mentioned, the board creates general corporate policies and delegates implementation of those policies to the officers. Thus, as long as the officers are operating with the broad scope of that corporate policy created by the board, their decisions should be entitled to business judgment deference. However, a major issue remains: which employees will be deemed "officers" for purposes of receiving business judgment rule protections?

IV. WHO SHOULD BE AN "OFFICER" FOR PURPOSES OF RECEIVING BUSINESS JUDGMENT RULE PROTECTION?

A vital question for determining who should receive the business judgment rule's protections is who will be considered an "officer" under Delaware law. Large public companies,

¹³⁰ Shaner, *supra* note 26, at 45.

¹³¹ *Id.*

such as large investment and commercial banks, have thousands of vice presidents. Should all of these vice presidents receive business judgment rule protection, or should the rule's protections be limited only to those officers exercising some type of high-level executive or supervisory power delegated from the board of directors? The question has not been raised in any Delaware court because the idea of officers as fiduciaries is relatively novel in Delaware.¹³² However, Delaware law and the Model Business Corporation Act provide some clues as to what the definition of "officer" should be for business judgment rule application.

The most important source for defining "officer" under Delaware law is Delaware's long-arm statute creating personal jurisdiction over officers of Delaware corporations.¹³³ Delaware Code Section 3114(b) defines officer as someone who:

- (1) Is or was the president, chief executive officer, chief operating officer, chief financial officer, chief legal officer, controller, treasurer or chief accounting officer of the corporation at any time during the course of conduct alleged in the action or proceeding to be wrongful;
- (2) Is or was identified in the corporation's public filings with the United States Securities and Exchange Commission because such person is or was 1 of the most highly compensated executive officers of the corporation at any time during the course of conduct alleged in the action or proceeding to be wrongful; or
- (3) Has, by written agreement with the corporation, consented to be identified as an officer for purposes of this section.¹³⁴

However, this statute is still relatively vague and leaves open the possibility that a number of employees within the corporation will be considered "officers" for purposes of receiving business judgment review. Additionally, although vice presidents are not explicitly

¹³² *Gantler*, 965 A.2d at 708-09 (*Gantler*, a 2009 case, was the first time the Delaware courts had recognized that officers owed fiduciary duties of any kind).

¹³³ DEL. CODE ANN. tit. 10, §3114(b) (West 2015).

¹³⁴ *Id.*

included in the definition, subsection 3 allows for vice presidents to negotiate for officer status in their employment agreements.

However, simply because an officer is designated in his employment contract as an “officer” does not mean that Delaware courts will find that he is an officer for purposes of business judgment protection. This issue was discussed in *Aleynikov v. Goldman Sachs Group, Inc.*, a Third Circuit case applying Delaware law.¹³⁵ Although that case involved the definition of “officer” in the corporation’s bylaws, the court’s decision is still relevant to such a designation in an employee’s contract because it involved judicial interpretation of the term “officer” and whether that included a vice president.

In *Aleynikov* the plaintiff, who was a vice president at Goldman Sachs, sued the corporation for indemnification and advancement of funds for a separate lawsuit he was defending against Goldman.¹³⁶ Plaintiff, a computer programmer at Goldman holding the title of vice president, had secretly accepted employment at another company, and subsequently copied source code that he developed at Goldman Sachs, which he then transferred to his new employer.¹³⁷ Goldman Sachs’ bylaws provided that indemnification and advancement of funds would be available to anyone who was “a director, officer, trustee member, stockholder, partner, incorporator or liquidator of a Subsidiary” of Goldman Sachs.¹³⁸ Thus, the question for the court was whether Plaintiff’s designation as a vice president qualified him as an “officer” under Defendant’s bylaws, thereby making him eligible for indemnification and advancement.

The court held that the term “officer” was ambiguous in Defendant’s bylaws and allowed Defendant to introduce extrinsic evidence showing that Plaintiff’s title of vice president was

¹³⁵ *Aleynikov v. Goldman Sachs Grp.*, 765 F.3d 350 (3d Cir. 2014).

¹³⁶ *Id.* at 353.

¹³⁷ *Id.*

¹³⁸ *Id.* at 359.

mere “title inflation,” meaning that he did not actually possess the typical discretion and management authority that corporate officers in the investment banking industry wield.¹³⁹ The Third Circuit found that Defendant’s extrinsic evidence supported the conclusion that “vice president” was merely a functional title showing the seniority and success of one employee compared to other employees, and that it was not indicative of the actual managerial discretion and authority possessed by the employee.¹⁴⁰ Consequently, the court found that Plaintiff’s vice president title was likely a result of his success at Goldman, not evidence that he possessed the typical executive management power that officers usually possess, and it remanded to the district court for further determinations.¹⁴¹

The court explicitly stated that whether a vice president was an “officer” depended on the usage of trade in particular industries.¹⁴² This signals that the determination of whether a vice president, or other employee with a similar title, will be considered an “officer” may depend on how the employee’s title is used in the specific industry. If so, the determination of who is an “officer” will likely be a case by case analysis dependent on the norms of the specific industry involved. This creates a large amount of uncertainty about who will be protected by the business judgment rule. Regardless, the Third Circuit decision shows that courts will look beyond an employee’s mere title when deciding if an employee is an officer. Instead, courts will examine the executive authority and responsibilities that the employee actually possesses.

Additionally, Delaware’s General Corporation Law and the Model Business Corporation Act provide some insight on how to define “officer.” Delaware General Corporation Law Section 142(a) provides that every corporation shall “have such officers with such titles and duties as

¹³⁹ *Id.* at 363-64.

¹⁴⁰ *Id.* at 364-65.

¹⁴¹ *Id.* at 365.

¹⁴² *Id.*, n.9.

shall be stated in the bylaws or in a resolution of the board of directors.”¹⁴³ This section seems to imply that the category of “officers” for business judgment protection should only include those positions specifically designated as officer-level positions in a corporation’s bylaws. The Model Business Corporations Act also provides that a corporation’s officers shall be those named in the bylaws.¹⁴⁴ However, as evidenced by *Aleynikov*, courts will not simply rely on an employee’s title as dispositive evidence that he is truly an officer.¹⁴⁵

The best approach is that taken by the Third Circuit in *Aleynikov*. The title of an employee should not be dispositive of whether that employee is an officer for purposes of the business judgment rule. As discussed earlier, the business judgment rule should only be applicable to those officers who are delegated broad discretion and authority by the board so that they are effectively acting as the board. Therefore, Delaware courts should look beyond the mere formal title of an employee and determine whether that employee is acting with discretion and managerial authority that has been delegated to him by the board. Anyone not possessing delegated board authority should not enjoy the business judgment rule review. Rather, these lower-level managing employees, although technically designated as officers, should not enjoy business judgment review, but should be subjected to a more exacting standard of review that looks for negligence in both the decision-making process and the substance of the decision itself.

However, the *Aleynikov* analysis should only apply to determine whether an employee is an officer for business judgment rule purposes. Courts should not use similar analysis to determine whether an employee, designated as an officer in the bylaws, is entitled to the indemnification and advancement of funds. The amount of discretion and authority an employee

¹⁴³ DEL. CODE ANN. tit. 8, § 142(a) (West 2015).

¹⁴⁴ MODEL BUS. CORP. ACT § 8.40(a).

¹⁴⁵ *Aleynikov*, 765 F.3d at 365.

possesses is not determinative of whether that employee is entitled to indemnification and advancement of funds under the express terms of a corporation's bylaws. Courts should not rewrite a corporation's bylaws post-hoc as the Third Circuit did in *Aleynikov*. However, analyzing an employee's discretion and authority is appropriate when determining if the business judgment rule applies. The rule was intended to insulate the board from judicial encroachment into its business decisions. Thus, only those officers exercising the discretion and authority delegated by the board should be entitled to business judgment protection.

V. DESPITE THE NEW THEORIES FOR PURSUING OFFICERS PERSONALLY, DELAWARE LIKELY WILL NOT SEE AN INCREASE IN SUITS TO HOLD OFFICERS PERSONALLY LIABLE.

It is important to understand that cases are rarely seen where a derivative suit is brought against an officer who is not also a member of the board, and I have found only one case in Delaware.¹⁴⁶ *McPadden* illustrates why more of these cases are not brought. Boards' are very hesitant to sue officers for damages, and often choose intra-firm sanctions, such as firing or demoting officers, instead of filing suit.¹⁴⁷ Shareholders are required to make a demand on the board for the board to initiate derivative suits against officers¹⁴⁸, and boards without fail refuse the demand in favor of issuing intra-firm sanctions.¹⁴⁹ The board's decision not to pursue litigation is given great deference by the courts under the business judgment rule.¹⁵⁰ Therefore, a shareholder's only real chance to bring a derivative suit against an officer is to prove making a demand on the board would have been futile because the board was incapable of making an

¹⁴⁶ See *McPadden v. Sindhu*, 964 A.2d 1262 (Del. Ch. 2008).

¹⁴⁷ Johnson & Ricca, *supra* note 99, at 87.

¹⁴⁸ See Del. Ch. Ct. R. 23.1 (requiring shareholders to make a demand on the board prior to filing derivative action).

¹⁴⁹ *Id.*

¹⁵⁰ *Aronson*, 473 A.2d at 811-12.

impartial decision, as the plaintiff did in *McPadden*.¹⁵¹ It is the rare case that a plaintiff will prove futility, which requires that the plaintiff prove the board acted in bad faith or with self-interest.¹⁵² Boards easily avoid questions of self-interest or bad faith by creating special litigation committees comprised solely of outside directors, and courts will defer to the decisions of these committees. Thus, officers are generally insulated from personal liability by the board choosing intra-firm sanctions.

This serious procedural hurdle is a major barrier to pursuing officers for breaches of their fiduciary duties.¹⁵³ Although it has been determined that officers do owe fiduciary duties to the corporation, Delaware Chancery Court Rule 23.1 is likely to continue dissuading shareholders' attorneys from pursuing officers personally for breaches of their duties. Plaintiffs' attorneys, who work on a contingent fee basis, have financial incentives to pursue directors instead of officers because they do not have to incur significant costs clearing the steep procedural hurdles of Rule 23.1 to sue directors.¹⁵⁴

Unless the procedural requirements to sue officers are significantly lessened, officers will likely continue to avoid personal liability under Delaware law. Boards rarely, if ever, pursue their own officers for breaches of their duties of care because of the availability of cheaper and less publicized intra-firm sanctions.¹⁵⁵ Furthermore, unless a plaintiff is able to meet the steep burden of proof for demand futility, courts will continue to defer to special litigation committees'

¹⁵¹ *McPadden*, 964 A.2d at 1270-71.

¹⁵² *Id.*

¹⁵³ Megan Shaner, *Legal Agency Costs: Our Preference to Sue Directors*, <http://clsbluesky.law.columbia.edu/2015/02/02/legal-agency-costs-our-preference-to-sue-directors/> (accessed April 5, 2017).

¹⁵⁴ *Id.*

¹⁵⁵ Johnson & Ricca, *supra* note 99, at 87.

judgments not to file suits against officers.¹⁵⁶ Therefore, while there have been major developments in the theories to hold officers accountable for breaches of fiduciary duties, major procedural barriers remain that will likely prevent any swell in suits holding officers personally liable.

VI. CONCLUSION

As agents of the corporation, officers should not only have fiduciary duties identical to those of the board, but also the fiduciary duties agents owe to their principals under common law agency rules. Therefore, officers must comply with the duties of care and loyalty, as well as the duty of obedience and the duty to inform the board of material information. Furthermore, officers should be afforded the protections of the business judgment rule.

However, the business judgment rule's application to officers should be more limited than it is for directors. First, officers should be held to an ordinary negligence standard of care, not the gross negligence standard applicable to directors, when defending against claims that they breached their duty of care. Officers should comply with this more exacting standard because they are involved with the day-to-day operations of the corporation, have greater access to information than the board, and receive much higher and more incentivized compensation than the board. Furthermore, business judgment review should not be available to officers when they are defending against claims that they breached their duty of obedience or duty to inform the board of material information. Finally, when determining who is an officer for purposes of business judgment review, the Delaware courts should not only look at an employee's formal title, but also to the discretion and managerial authority he possesses. The rule should only be

¹⁵⁶ See *Aronson*, 473 A.2d at 811-12 (stating that courts must defer to a board's decision not to file suit against an officer unless the plaintiff can show bad faith or self-interest).

available for those employees who are designated as officers and are exercising the broad discretion and managerial authority delegated by the board of directors.

Finally, despite these major developments concerning officer personal liability, it is unlikely that there will be an increase in suits against officers. The steep procedural hurdles created by the demand requirement, coupled with the broad discretion given to a board's decision not to pursue derivative claims and the low success of futility arguments, makes it unlikely that plaintiffs' attorneys will pursue officers. Rather, shareholder suits will likely continue to focus on directors.