

LITIGATION | July 29, 2016

## “Veep”: The Evolving Law of Advancement and Indemnification

Companies confer title of “Vice President” on a wide range of employees, from senior executives, in some cases, to line-level personnel, in others. While distinguishing someone functioning as a senior executive from someone in a lower-level position may be clear to a company insider, courts face a more complicated task when they are asked to draw the line, a common occurrence when employers and employees disagree over who must pay for legal fees arising out of an employee’s alleged misconduct. Company bylaws normally provide for the company to indemnify legal fees incurred by individual “officers and directors,” meaning that whether a “Vice President” can prove he or she is an “officer” will make the difference between whether he must pay his own (often substantial) legal fees, or whether the company picks up the tab. This can be particularly contentious when the vice president in question is essentially asking the company to finance his litigation against the firm.

In *Pulier v. Computer Sciences Corp.*,<sup>1</sup> Computer Sciences Corp. (“CSC”) acquired ServiceMesh and made the former CEO of ServiceMesh, Eric Pulier, a “Vice President and General Manager” of CSC. CSC later sued Pulier, alleging that Pulier inflated ServiceMesh’s revenues by entering into sham contracts with one of its customers. While most of CSC’s claims related to Pulier’s pre-closing behavior, which Chancellor Bouchard of the Delaware Chancery Court found were covered by ServiceMesh under its bylaws, Pulier’s only option for claiming indemnification of fees incurred defending his post-closing conduct was against CSC. Pulier claimed that his title as a Vice President of CSC necessarily made him an officer of the company. Chancellor Bouchard found otherwise, holding that under Nevada law (where CSC is incorporated), an employee can only become an officer per company bylaws or as determined by its board, that CSC’s bylaws provided that officers must be elected by the board and that CSC’s board never properly elected Pulier as an officer.

More recently, the Delaware Chancery Court held that a financial institution’s bylaws did not require it to advance legal fees to a computer programmer with the title of Vice President who allegedly misappropriated computer source codes for the firm’s high-frequency trading system, and then asked the company to pay for his defense against two criminal prosecutions.<sup>2</sup> Vice Chancellor Laster ruled for the company on grounds of issue preclusion, finding that an earlier precedent from the Third Circuit precluded the employee’s claim, and did not decide the merits of whether the bylaws made all Vice Presidents officers of the company. The Third Circuit had held that,

<sup>1</sup> Civil Action No. 12005-CB 9, oral decision (Del. Ch. May 12, 2016) (Bouchard, C.).

<sup>2</sup> *Aleynikov v. Goldman Sachs Group, Inc.*, No. CA10636 (Del. Ch. July 13, 2016) (Laster, V.C.).

while the company's bylaws were ambiguous and ambiguity is normally construed against the drafter under the doctrine of *contra proferentem*, the doctrine did not apply to the bylaws because it was unclear whether the bylaws were part of the contractual relationship between the company and the employee first place. While acknowledging that he was bound, Vice-Chancellor Laster nonetheless questioned the Third Circuit's decision not to apply *contra proferentem*.

While the Court in these two cases ultimately came down in the companies' favor, the circumstances were fact-specific and hotly contested. Corporations may wish to consider consulting with counsel and examining their bylaws' definition of those persons eligible for indemnification and/or advancement of expenses to ensure that they are comfortable with the designated categories of covered persons (whether they be "officers and directors," "employees, directors and agents" or any other formulation) and have defined the relevant categories with sufficient precision to achieve the intended outcome. While, admittedly, it is more common for corporations to object to claims for advancement of expenses on the basis of the claimant's allegedly disqualifying conduct (such as willful misconduct), that ground for refusal often cannot be resolved until the end of the proceedings involving the individual, after the court has adjudicated the status of his or her conduct. In contrast, defenses to indemnification and advancement based upon the employee's status at the company, where that status is clearly delineated, may require no such litigation. Moreover, because Delaware public policy strongly favors advancement and indemnification and Delaware courts will construe bylaws consistent with that policy preference, ambiguity as to coverage in most cases will be resolved in favor of the claimant.

## CONTACTS

**Jaculin Aaron**

New York  
+1.212.848.4450  
[jaaron@shearman.com](mailto:jaaron@shearman.com)

**George A. Casey**

New York  
+1.212.848.8787  
[gcasey@shearman.com](mailto:gcasey@shearman.com)

**Adam S. Hakki**

New York  
+1.212.848.4924  
[ahakki@shearman.com](mailto:ahakki@shearman.com)

**Scott Petepiece**

New York  
+1.212.848.8576  
[spetepiece@shearman.com](mailto:spetepiece@shearman.com)

**Paula Howell Anderson**

New York  
+1.212.848.7727  
[paula.anderson@shearman.com](mailto:paula.anderson@shearman.com)

**Michael S. Dorf**

San Francisco  
+1.415.616.1246  
[mdorf@shearman.com](mailto:mdorf@shearman.com)

**Daniel H.R. Laguardia**

New York  
+1.212.848.4731  
[daniel.laguardia@shearman.com](mailto:daniel.laguardia@shearman.com)

**Linda E. Rappaport**

New York  
+1.212.848.7004  
[lrappaport@shearman.com](mailto:lrappaport@shearman.com)

**Stuart J. Baskin**

New York  
+1.212.848.4974  
[sbaskin@shearman.com](mailto:sbaskin@shearman.com)

**Christopher M. Forrester**

Menlo Park  
+1.650.838.3772  
[christopher.forrester@shearman.com](mailto:christopher.forrester@shearman.com)

**Kenneth J. Laverriere**

New York  
+1.212.848.8172  
[klaverriere@shearman.com](mailto:klaverriere@shearman.com)

**John J. Cannon III**

New York  
+1.212.848.8159  
[jcannon@shearman.com](mailto:jcannon@shearman.com)

**Alan S. Goudiss**

New York  
+1.212.848.4906  
[agoudiss@shearman.com](mailto:agoudiss@shearman.com)

**Doreen E. Lilienfeld**

New York  
+1.212.848.7171  
[dlilienfeld@shearman.com](mailto:dlilienfeld@shearman.com)

ABU DHABI | BEIJING | BRUSSELS | DUBAI | FRANKFURT | HONG KONG | LONDON | MENLO PARK | MILAN | NEW YORK  
PARIS | ROME | SAN FRANCISCO | SÃO PAULO | SAUDI ARABIA\* | SHANGHAI | SINGAPORE | TOKYO | TORONTO | WASHINGTON, DC

This memorandum is intended only as a general discussion of these issues. It should not be regarded as legal advice. We would be pleased to provide additional details or advice about specific situations if desired.

599 LEXINGTON AVENUE | NEW YORK | NY | 10022-6069

Copyright © 2016 Shearman & Sterling LLP. Shearman & Sterling LLP is a limited liability partnership organized under the laws of the State of Delaware, with an affiliated limited liability partnership organized for the practice of law in the United Kingdom and Italy and an affiliated partnership organized for the practice of law in Hong Kong.

\*Dr. Sultan Almasoud & Partners in association with Shearman & Sterling LLP