

*GANTLER V. STEPHENS: BIG EPIPHANY OR BIG FAILURE?
A LOOK AT THE CURRENT STATE OF OFFICERS' FIDUCIARY
DUTIES AND ADVICE FOR POTENTIAL PROTECTION*

ABSTRACT

*The multiple corporate scandals of the early twenty-first century have recently focused much attention on the duties and liabilities of corporate officers. The Delaware Supreme Court, renowned for its corporate governance decisions, recently decided *Gantler v. Stephens* and held that corporate officers owe the same fiduciary duties as corporate directors.*

*Before *Gantler*, two competing views emerged with respect to the protections courts should extend to corporate officers for alleged breaches of fiduciary duty. One argued that officers and directors were equal fiduciaries and, therefore, courts should afford them the same business judgment presumption. Another contended that officers were agents of the corporation because they had greater responsibility over the day-to-day operations of the companies and, thus, should not be given the deferential treatment of the business judgment presumption. *Gantler* is important because it expressly held that officers are fiduciaries; however, the opinion left some very important questions undecided. One of those questions is whether the business judgment rule applies to officers. Another question is whether the Delaware General Assembly, through the Delaware General Corporation Law, should permit companies to exculpate officers from liability—similar to the 102(b)(7) protections available to directors.*

This note argues that the business judgment rule should apply equally to officers and directors. This note does not advocate, however, that the General Assembly afford officers exculpatory protections. The business judgment rule is sufficient protection against an officer's potential liability.

It will allow officers to take the necessary risks to allow their businesses to grow without having to worry about judicial second-guessing of a sound business strategy, provided, of course, that the officers exercise due diligence before engaging in potentially risky behavior. Eliminating the deterrent of potential personal liability by allowing exculpatory protections of all fiduciary duties will only induce reckless decision making, which could lead to morally hazardous situations. Finally, this note asserts that the bar for establishing what constitutes good faith conduct by directors has been set too low to allow for officer exculpation. If officers are granted these protections, they will be almost completely immune from liability.

I. INTRODUCTION

Corporations have extremely large and complex internal structures;¹ consequently, corporate officers who steer those corporations are at the center of attention whenever the corporation realizes gains or losses.² Even so, courts have yet to fully define corporate officers' roles. Over twenty years ago, A. Gilchrist Sparks, III and Lawrence A. Hamermesh stated, "[t]he precise nature of the duties and liabilities of corporate officers who are not directors is a topic that has received little attention from courts and commentators."³ This topic receives slightly more attention today, because of the rash of recent corporate scandals involving officers,⁴ but it is still an underdeveloped area of corporate law. Although, these recent scandals forced the federal government to reevaluate its previously hands-off approach to corporate governance regulation;⁵ Delaware corporate law, has

¹See A. Gilchrist Sparks, III & Lawrence A. Hamermesh, *Common Law Duties of Non-Director Corporate Officers*, 48 BUS. LAW. 215, 215 (1992) (noting that, surprisingly, few courts have specifically addressed corporate officers' duties and protections despite the "large size of many businesses and the concomitant necessity of delegating managerial responsibilities").

²See Lyman P.Q. Johnson & Robert V. Ricca, *(Not) Advising Corporate Officers About Fiduciary Duties*, 42 WAKE FOREST L. REV. 663, 665 (2007) ("Corporate officers play a critical role in corporate governance."); see also Lyman P.Q. Johnson & David Millon, *Recalling Why Corporate Officers Are Fiduciaries*, 46 WM. & MARY L. REV. 1597, 1599 (2005) ("When . . . senior officers perform well, the enterprise and its stockholders are likely to flourish; when they misbehave . . . the company, stockholders, creditors, employees, and others in society suffer significant loss.").

³Sparks & Hamermesh, *supra* note 1, at 215.

⁴For example, Andrew Fastow, Enron's chief financial officer, established and operated private equity funds which "were set up to acquire Enron assets with the purpose of reducing the size of the Company's balance sheet" and gave Fastow the opportunity to conduct self-dealing transactions to the detriment of Enron and its shareholders." Bernard S. Sharfman, *Enhancing the Efficiency of Board Decision Making: Lessons Learned from the Financial Crisis of 2008*, 34 DEL. J. CORP. L. 813, 833 (2009) (quoting Bernard S. Sharfman & Steven J. Toll, *Dysfunctional Deference and Board Composition: Lessons from Enron*, 103 NW. U. L. REV. COLLOQUY 153, 155-56 (2008), <http://www.law.northwestern.edu/lawreview/Colloquy/2008/38/>).

⁵The Sarbanes-Oxley Act, for example, "mandated a number of reforms to enhance corporate responsibility, enhance financial disclosures and combat corporate and accounting fraud, and created the 'Public Company Accounting Oversight Board,' also known as the PCAOB, to oversee the activities of the auditing profession." U.S. Securities and Exchange Commission, *The Laws that Govern the Securities Industry* (last visited Jan. 29, 2010), <http://www.sec.gov/about/laws.shtml#sox2002>; see also Johnson & Millon, *supra* note 2, at 1599 ("Recent concern about officer wrongdoing has resulted in numerous federal and state criminal charges, the initiation of [SEC] administrative proceedings, and imposition of new federal responsibilities on officers through the Sarbanes-Oxley Act." (footnotes omitted)); Aaron D. Jones, *Corporate Officer Wrongdoing and the Fiduciary Duties of Corporate Officers Under Delaware Law*, 44 AM. BUS. L.J. 475, 476 (2007) ("Federal law has responded to questions regarding the role of corporate officers. The amendments to the federal securities laws in [Sarbanes-Oxley] place new legal

however, remained interestingly silent on the issue of officers' fiduciary duties.⁶ This was partly because, until 2004, the Delaware Court of Chancery did not have personal jurisdiction over an individual solely because he served as an officer of a Delaware corporation.⁷

Since 2004, there has been a renewed effort to explain the extent to which officers are liable for their indiscretions.⁸ Recently, in *Gantler v. Stephens*,⁹ the Delaware Supreme Court finally elucidated officers' fiduciary duties. The court held, *inter alia*,¹⁰ that "officers of Delaware corporations, like directors, owe fiduciary duties of care and loyalty, and . . . the fiduciary duties of officers are the same as those of directors."¹¹ But the *Gantler* court did not address an important issue—whether the business

duties on corporate officers aimed at increasing accountability." (footnotes omitted)).

⁶See, e.g., Lyman P.Q. Johnson, *Corporate Officers and the Business Judgment Rule*, 60 BUS. LAW. 439, 439 (2005) ("One sector of society that, historically, has been strangely silent about officer wrongdoing, is state corporate law.").

⁷Johnson & Millon, *supra* note 2, at 1612 n.62. The new long-arm statute in relevant portion states:

Every nonresident of this State who after January 1, 2004, accepts election or appointment as an officer of a corporation organized under the laws of this State, or who after such date serves in such capacity . . . by such acceptance or by such service, is deemed thereby to have consented to the appointment of the registered agent of such corporation (or, if there is none, the Secretary of State) as an agent upon whom service of process may be made in all civil actions or proceedings brought in this State . . . against such officer for violation of a duty in such capacity Such acceptance or service as such officer shall be a signification of the consent of such officer that any process when so served shall be of the same legal force and validity as if served upon such officer within this State and such appointment of the registered agent (or, if there is none, the Secretary of State) shall be irrevocable.

DEL. CODE ANN. tit. 10, § 3114(b) (2006).

⁸See Jones, *supra* note 5, at 475 ("After decades of neglect, the corporate governance community is beginning to pay greater attention to the institutional role of, and legal obligations regulating, senior corporate officers.").

⁹965 A.2d 695 (Del. 2009). Before *Gantler*, "Delaware law contain[ed] abundant dicta on, but ha[d] never squarely addressed the issue of whether officers are subject to the same fiduciary duties as directors." Johnson & Ricca, *supra* note 2, at 666.

¹⁰There were three key determinations: (1) "A board decision not to pursue a merger opportunity is normally reviewed under the standard of the business judgment rule. However, where a plaintiff pleads sufficient facts to support a claim of director self-interest, then the decision could be reviewed under the more rigorous entire fairness standard." (2) "Corporate officers owe fiduciary duties to the corporation and its stockholders that are identical to those owed by corporate directors." (3) "Where stockholder approval of a transaction is statutorily required, this stockholder approval will not operate to also ratify the challenged conduct of interested directors in connection with that transaction." *Delaware Supreme Court Confirms Officers' Fiduciary Duties and Refines the Application of the Common Law Doctrine of Shareholder Ratification*, CORPORATE AND SECURITIES ALERT (Fenwick & West, LLP, S.F., Cal.), Feb. 18, 2009, at 1, available at http://www.fenwick.com/docstore/Publications/Corporate/Corp_Sec_02-18-09.pdf.

¹¹*Gantler*, 965 A.2d at 708-09.

judgment rule applies to corporate officers.¹² The court also deferred to the General Assembly on whether a company could extend exculpatory protections to officers.¹³

This note will begin with a brief description of officers as fiduciaries. Part II will analyze the pre-*Gantler* debate between scholars regarding officers as fiduciaries and the potential applicability of the business judgment rule to corporate officers. Part III will examine *Gantler* and its effect on the current duties and liabilities of corporate officers in light of the business judgment rule and exculpatory protections. Part IV will explain the availability of the business judgment rule for corporate officers following *Gantler*. Part V will examine the exculpatory protections afforded to corporate directors and their applicability to corporate officers.¹⁴

This note will conclude arguing that although officers should be afforded the business judgment presumption, the General Assembly should not grant officers exculpatory protections.

II. THE COURTS REMAIN SILENT WHILE ACADEMICS DEBATE OFFICERS' FIDUCIARY DUTIES AND THE BUSINESS JUDGMENT RULE

Directors of Delaware corporations owe fiduciary duties of care and loyalty; the latter encompasses directors' duty to act in good faith.¹⁵ Delaware law has long made it clear that corporate *officers* are fiduciaries as well.¹⁶ But before *Gantler*, the scope of officers' duties and the possible application of the business judgment rule to officers' conduct formed the basis of a longstanding debate among academics and practitioners.

¹²See *id.*; Mark S. Lahive & Andrew K. Hirsch, *Delaware Supreme Court: Officers Have Fiduciary Duties*, DEAL MAGAZINE, Mar. 12, 2009, <http://www.thedeal.com/newsweekly/community/delaware-supreme-court.php>.

¹³See *Gantler*, 965 A.2d at 709 n.37 ("Under 8 Del. C. § 102(b)(7), a corporation may adopt a provision in its certificate of incorporation exculpating its directors from monetary liability for an adjudicated breach of their duty of care. Although legislatively possible, there currently is no statutory provision authorizing comparable exculpation of corporate officers.").

¹⁴Although there will be some mention and analysis of corporate law throughout the country, this note will emphasize Delaware corporate law and the impact *Gantler* may have on future decisions.

¹⁵Stone v. Ritter, 911 A.2d 362, 370 (Del. 2006).

¹⁶See Jones, *supra* note 5, at 479; see also *Craig v. Graphic Arts Studio, Inc.*, 166 A.2d 444, 446 (Del. Ch. 1960) (finding that a non-director officer breached his fiduciary duties to the corporation).

A. Academics Debate

The business judgment rule is "a presumption 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 taken was in the best interests of the company."¹⁷ This has long afforded protection to corporate directors, but some have questioned its application to corporate officers.

Before *Gantler*, Lawrence A. Hamermesh and A. Gilchrist Sparks debated Lyman Johnson on whether courts should extend the business judgment presumption to officers.¹⁸ Hamermesh and Sparks argued that because corporate officers and directors have the same fiduciary duties, they should be treated the same.¹⁹ Identical treatment would include the application of the business judgment rule to officers.²⁰ Conversely, Johnson, with David Millon, argued that officers' duties are broader, so their liabilities should be more expansive than directors'.²¹ Therefore, courts should not grant officers protection under the business judgment rule.²²

Hamermesh and Sparks argued that the business judgment presumption is justified by the policy rationales that it will encourage officers to accept business risks, increase judicial deference while decreasing judicial hindsight bias, and preserve the board's governance role.²³ Disagreeing, Johnson argued that the reasoning behind judicial deference to directors does not support affording the overly-protective business judgment presumption to corporate officers.²⁴

¹⁷Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984), *overruled on other grounds* by Brehm v. Eisner, 746 A.2d 244, 253-54 (Del. 2000).

¹⁸For an interesting discussion of these two distinct views that formed the basis of this section of my note see Jones, *supra* note 5, at 480-85.

¹⁹Lawrence A. Hamermesh & A. Gilchrist Sparks III, *Corporate Officers and the Business Judgment Rule: A Reply to Professor Johnson*, 60 BUS. LAW. 865, 865 (2005).

²⁰*Id.* Although arguing for equal application of the business judgment rule between officers and directors, Hamermesh and Sparks "acknowledge[] that the business judgment rule should not apply to conduct of officers outside the scope of their delegated authority." *Id.* at 866.

²¹See Johnson & Millon, *supra* note 2, at 1601-04. Johnson and Millon argue for expanded liability because officers are both agents and fiduciaries, while directors are solely fiduciaries. *Id.* at 1601, 1627-42.

²²Johnson, *supra* note 6, at 440.

²³Hamermesh & Sparks, *supra* note 19, at 870-76.

²⁴See Johnson, *supra* note 6, at 455-58. As originally articulated by Johnson, the policy rationales for deferring to boards fall into three broad categories: "encouraging directors to serve and take risks; avoiding judicial encroachment into business decisions; and preserving the board's central decision making role in corporate governance." *Id.* at 455 (footnote omitted). "Although the second rationale underlying the business judgment rule might warrant extending the rule to officers, the first and third rationales do not." *Id.* at 466.

According to Johnson, the risk-encouragement rationale does not apply because officers typically "stand to reap substantial rewards for taking appropriate risks," and thus need no further inducement to do so.²⁵ Directors, on the other hand, are reluctant risk takers "because their relatively small stockholdings and lack of incentive compensation give them little of the 'upside' gains on investment projects."²⁶ Unpersuaded, Hamermesh and Sparks noted that both directors and officers receive incentive compensation; moreover, the scope of potential liability for officers disproportionately exceeds the average compensation package.²⁷ Officers in fact have more than enough incentive to act with caution.

Johnson also believed that the application of the business judgment rule to officers would undermine the authority of the board of directors because judicial deference to officers' decisions would preclude the board from bringing negligence claims against the officers.²⁸ Hamermesh and Sparks again disagreed. They felt that "judicial deference [to a board's decision whether to sue an officer] has nothing to do with the articulation of the legal principles that should govern the corporation's underlying claim against the officer."²⁹

Finally, Johnson argued that officers, rather than receive protection from the business judgment rule, should face greater potential liability because officers spend a great deal of their time physically present at their respective companies, have better access to information, have greater influence over employees, and reside at the top of the corporate hierarchy.³⁰ Hamermesh and Sparks responded that "[n]one of [those] considerations . . . adequately explain[ed] why liability for ordinary negligence would discourage valuable risk-taking by officers any less than . . . directors."³¹ Additionally, "[f]ull time work and better information . . . make it difficult for an officer to claim ignorance or reliance on others as a defense, thereby accentuating . . . a reluctance to take risks"³² Business judgment rule

²⁵*Id.* at 459.

²⁶*Id.* at 458.

²⁷Hamermesh & Sparks, *supra* note 19, at 871.

²⁸See Johnson, *supra* note 6, at 464 ("If directors make a considered judgment to pursue a . . . claim against an officer, the rationale of honoring director discretion means that officer conduct should not be deferred to under the auspices of the business judgment rule").

²⁹Hamermesh & Sparks, *supra* note 19, at 875. "Those governing legal principles are not for the board to decide as a matter of its business judgment; they are a matter of law, subject to variation only by agreement with the officer." *Id.*

³⁰See Johnson, *supra* note 6, at 460 ("[Officers] should be held to the same standard of care as are all other persons who serve as agents of companies.").

³¹Hamermesh & Sparks, *supra* note 19, at 872.

³²*Id.* (footnote omitted).

protection for officers thus makes sense according to Hamermesh and Sparks.

Yet despite such a comprehensive analysis of the issues by the academy and the practicing bar, courts generally declined to enter the fray.

B. Courts Give Little Assistance

Despite the paucity of case law directly addressing the issue, a few courts before *Gantler* upheld the applicability of the business judgment presumption to corporate officers' conduct. For example, in *In re Tower Air, Inc.*,³³ the Third Circuit, applying Delaware law, stated that "[a] plaintiff may overcome the presumption that directors and officers acted in good faith by establishing that a decision was so egregious as to constitute corporate waste."³⁴ This was because directors and officers were "comparable fiduciaries" and, the court assumed, should be judged under the same theories of liability.³⁵

Tower Air was a Delaware corporation principally operating out of New York.³⁶ Defendant-appellee, Morris Nachtomi, founded Tower Air in 1982 as an international charter airline for which he served as both a director and officer.³⁷ In the late-1990s, the company suffered severe financial turmoil.³⁸ In response, Nachtomi reduced ticket prices to the point that the company could not profit even from fully-booked flights.³⁹ Nachtomi and his co-defendants also caused millions of dollars in corporate losses when they "failed to ensure that used passenger tickets were processed for payment from credit card companies and other third parties" and neglected to address several serious safety incidents earlier that year.⁴⁰ Through these financial troubles, without much discussion or deliberation

³³416 F.3d 229, 238 (3d Cir. 2005) (reviewing a decision of the U.S. District Court for the District of Delaware to dismiss plaintiff's suit under Federal Rule of Civil Procedure 12(b)(6) based on Delaware's business judgment rule).

³⁴*Id.* (emphasis omitted) (citing *Gagliardi v. TriFoods Int'l, Inc.*, 683 A.2d 1049, 1053 (Del. Ch. 1996)).

³⁵*Id.* at 238 n.12. "Of course, the Third Circuit's perspective on matters of Delaware state law are not conclusive." Douglas H. Flaum & Shahzeb Lari, *The Applicability of the Business Judgment Rule to Corporate Officers After Gantler v. Stephens*, 41 SEC. REG. & L. REP. (BNA) 622, 624 n.9 (Apr. 6, 2009), available at <http://www.ffhsj.com/index.cfm?pageID=42&itemID=251&type=4>.

³⁶*In re Tower Air*, 416 F.3d at 232.

³⁷*Id.*

³⁸*Id.* at 232-33.

³⁹*Id.* at 233.

⁴⁰*In re Tower Air*, 416 F.3d at 233.

regarding the consequences and repercussions of their actions, the company's officers and directors continued to purchase planes and other equipment.⁴¹ These purchase decisions eventually led the company into bankruptcy.⁴²

The Chapter 7 trustee sued Tower Air's directors and officers for actual and punitive damages⁴³ alleging breach of fiduciary duty, gross mismanagement of Tower Air, and waste.⁴⁴ Reversing the district court, the Third Circuit held that the plaintiffs had overcome the business judgment presumption.⁴⁵ Specifically, the court found that "[t]he officers' alleged passivity in the face of negative maintenance reports seems so far beyond the bounds of reasonable business judgment that its only explanation is bad faith."⁴⁶ Thus, the facts of *Tower Air* allowed the court to avoid the question of whether borderline conduct by officers was protected by the business judgment rule.

Delaware state court decisions have also indicated that officers and directors are comparable fiduciaries and, therefore, assume the same liabilities and share in the business judgment presumption.⁴⁷ For example, in *Ella M. Kelly & Wyndham, Inc. v. Bell*,⁴⁸ plaintiff-stockholders asked the Delaware Supreme Court to require officers to reimburse the corporation for

⁴¹*Id.*

⁴²*Id.* ("Tower Air's fiscal descent culminated in a voluntary petition for Chapter 11 relief in 2000. [Charles] Stanziale was appointed trustee for the company's bankruptcy estate. He remained trustee when the bankruptcy was converted from Chapter 11 to Chapter 7 in late-2000.").

⁴³*Id.* at 233.

⁴⁴*In re Tower Air*, 416 F.3d at 233-34.

The Amended Complaint lists seven counts. *Count One* alleges that Tower Air's *directors* breached their fiduciary duty to act in good faith by consistently declining to repair Tower Air's older engines in lieu of leasing or buying new engines. . . . *Count Two* alleges that Tower Air's *officers* also breached their fiduciary duty to act in good faith by leasing or buying new jet engines, by failing to tell the directors about maintenance problems, and by failing to address the maintenance problems.

Id. at 234 (emphasis added).

⁴⁵The district court's decision is *Stanziale v. Nachtomi*, 330 B.R. 56 (D. Del. 2004).

⁴⁶*In re Tower Air*, 416 F.3d at 239.

⁴⁷See Andrea M. Matwyszyn, *Imagining the Intangible*, 34 DEL. J. CORP. L. 965, 999-1000 (2009) (citing *Kaplan v. Centex Corp.*, 284 A.2d 119 (Del. Ch. 1971)). *Kaplan* was a derivative action brought by a stockholder who challenged transactions initiated by officers. 284 A.2d at 120-21. The plaintiffs claimed that the company "received nothing or, alternatively, an inadequate consideration when it transferred its equity interests" in connection with a joint venture. *Id.* at 121. The court held that "the decision of executive officers may also come within the [business judgment rule]" and found that "[i]t probably does here, in the absence of any divided loyalty and in the light of subsequent ratification by the board of directors." *Id.* at 124 (citing *Kelly v. Bell*, 254 A.2d 62 (Del. Ch. 1970)).

⁴⁸266 A.2d 878 (Del. 1970).

tax payments made to the county that the corporation was not legally obligated to pay.⁴⁹ The court held that the business judgment rule protected the decision to pay the taxes and, therefore, the officers were not liable to the corporation for reimbursement.⁵⁰ The court found that "[t]here is no evidence that any director or officer was motivated by expectation of personal gain, by bad faith or by any consideration other than that of doing what was best for [the company]." "[Therefore,] these acts are governed by the 'business judgment' rule"⁵¹ With few exceptions,⁵² the majority of sister courts outside of Delaware have also held that the business judgment rule should protect officers from liability.⁵³ *Gantler*, like these cases, should be understood to apply the business judgment presumption to officers' conduct.

⁴⁹*Id.* at 878.

⁵⁰*Id.* at 879. The court did not decide whether the payments were "contrary to any public policy of Pennsylvania; even if they did in fact violate some such public policy, the directors or officers were not necessarily liable to the corporation . . . provided they exercised honest business judgment in doing so." *Id.*

⁵¹*Id.*

⁵²Professor Matwyshyn points out that some jurisdictions have held that the business judgment rule is not available for officers. Matwyshyn, *supra* note 47, at 999-1000; *see, e.g.*, Gaillard v. Natomas Co., 256 Cal. Rptr. 702, 711 (Cal. Ct. App. 1989) (holding that the defendants "were not 'perform[ing] the duties of a director' . . . but were acting as officer employees of the corporation. The judicial deference afforded under the business judgment rule therefore should not apply"); Platt v. Richardson, No. 88-0144, 1989 WL 159584, at *2 (M.D. Pa. June 6, 1984) ("The business judgment rule applies only to directors of a corporation and not to officers.").

⁵³Flaum & Lari, *supra* note 35, at 624 n.17. Flaum and Lari provide an extensive list of cases from various jurisdictions to illustrate how courts have routinely granted the business judgment presumption to officers, for example: TSG Water Res., Inc. v. D'Alba & Donovan Certified Pub. Accountants, P.C., 366 F. Supp. 2d 1212, 1226 (S.D. Ga. 2004) ("Under the business judgment rule officers are presumed to have acted properly and in good faith, and may be liable 'for their actions only when they are shown to have engaged fraud, bad faith or an abuse of discretion.'" (quoting Cottle v. Storer Comm'n, Inc., 849 F.2d 570, 574 (11th Cir. 1988)) (applying Georgia law); Resolution Trust Corp. v. Gladstone, 895 F. Supp. 356, 369 (D. Mass. 1995) ("The Business Judgment Rule shields directors and officers from liability for corporate decisions made in good faith and after due care.") (applying federal law standards of fiduciary duty); Para-Medical Leasing, Inc. v. Hangen, 739 P.2d 717, 722 (Wash. Ct. App. 1987) ("In considering the actions of a corporate officer, however, the business judgment rule rather than the standard of ordinary care applies. This rule shields the corporate officer from liability so long as he acts in good faith without a corrupt motive.") (applying Washington law).

III. *GANTLER V. STEPHENS* AND ITS EFFECTS ON THE DUTIES AND LIABILITIES OF CORPORATE OFFICERS

The board of directors is ultimately responsible for the management of the corporation.⁵⁴ In many corporations, however, the board delegates major decisions to corporate officers who may have more expertise and information on a particular subject.⁵⁵ Delaware law endows officers with their duties and titles through the corporation's bylaws or the board's resolutions.⁵⁶ An employee who does not obtain power through the bylaws or from the board of directors is not an officer, but rather an agent.⁵⁷ Because of their intimacy with the company and the authority both officers and directors possess, many commentators hypothesized that officers and directors of Delaware corporations held equal fiduciary duties.⁵⁸ In *Gantler*, the Delaware Supreme Court explicitly held as such.⁵⁹

A. The Case: Parties, Facts, and Allegations

Gantler involved a shareholder-plaintiff of First Niles Financial, Inc. who brought claims alleging that the officers and directors of First Niles breached their fiduciary duties and disseminated a materially false and misleading proxy.⁶⁰ The plaintiff, Leonard Gantler, was a former First

⁵⁴Delaware General Corporation Law section 141(a) provides that "[t]he business and affairs of every corporation organized under this chapter shall be managed by or under the direction of a board of directors, except as may be otherwise provided in this chapter or in its certificate of incorporation." DEL. CODE ANN. tit. 8, § 141(a) (2006).

⁵⁵See Sharfman, *supra* note 4, at 815 ("[M]any board decisions are correctly delegated to executive officers and those other officers and managers in the chain of command that possess the expertise and informational advantages to make superior decisions on behalf of the organization.").

⁵⁶DEL. CODE ANN. tit. 8, § 142 (2006).

⁵⁷See Jones, *supra* note 5, at 493-94; *see also* Goldman v. Shahmoon, 208 A.2d 492, 494 (Del. Ch. 1965) ("[T]he terms officers and agents are by no means interchangeable. Officers as such are the corporation. An agent is an employee."); Sparks & Hamermesh, *supra* note 1, at 215-16 (explaining the difference between an agent and an officer, and stating, "status as an employee or agent is by no means equivalent to status as an officer.").

⁵⁸See I DAVID A. DREXLER ET AL., DELAWARE CORPORATION LAW AND PRACTICE § 14.02, at 14-5 (2009) ("Indeed, in the Delaware cases in which the subject is mentioned, the two words, officers and directors, are invariably linked. Hence, there is no need for a separate discussion of the fiduciary responsibilities of corporate officers . . ."); Sparks & Hamermesh, *supra* note 1, at 217-18 ("The Model Business Corporation Act (MBCA) articulates standards of conduct for corporate officers in a provision separate from, but almost identical to, the provisions governing conduct of directors . . . Section 8.30 merely substitutes the word director for the words 'officer with discretionary authority' [in 8.42].") (footnote omitted).

⁵⁹965 A.2d 695, 708-09 (Del. 2009).

⁶⁰*Id.* at 698-99. "Count I of the complaint alleges that the defendants breached their duties

Niles director.⁶¹ One of the defendants, William L. Stephens, was the chairman of the board, president, and chief executive officer of both First Niles and the Home Federal Saving and Loan Association of Niles.⁶² The plaintiff claimed that the defendants "violated their fiduciary duties by rejecting a valuable opportunity to sell the Company, deciding instead to reclassify the Company's shares in order to benefit themselves."⁶³ The defendants argued that the claims should have been dismissed because the pleaded facts were insufficient to overcome the business judgment presumption. The Delaware Court of Chancery agreed and dismissed the action.⁶⁴ The Delaware Supreme Court reversed.⁶⁵

The plaintiffs' complaint referred to three bids that Stephens received for First Niles.⁶⁶ Following a board meeting in January 2005, the board asked management to conduct due diligence in connection with a possible sale to First Place or Cortland.⁶⁷ At a scheduled meeting in February, Stephens agreed to provide the requested reports to Cortland, but never did. Cortland subsequently withdrew its bid.⁶⁸ And although Stephens initially resisted providing due diligence reviews to First Place, he finally submitted them in February, but only after Cortland had officially withdrawn its bid.⁶⁹

Unfortunately for First Niles and First Place, the market declined in the period between First Place's first bid and the due diligence reviews. First Place's revised offer was only \$17.25 per share, but because First Niles's stock price had also dropped, the new offer was actually an 11%

of loyalty and care as directors and officers of First Niles by abandoning the Sales Process." *Id.* at 704. "[Count III] alleges that the defendants breached their duty of loyalty by recommending the Reclassification Proposal to the shareholders for purely self-interested reasons (to enlarge their ability to engage in stock buy-backs and to trigger their ESOP put and appraisal rights)." *Id.* at 712.

⁶¹*Id.* at 699.

⁶²*Id.* "First Niles, a Delaware corporation headquartered in Niles, Ohio, is a holding company whose sole business is to own and operate the Home Federal Savings and Loan Association of Niles . . ." *Id.*

⁶³*Gantler*, 965 A.2d at 699.

⁶⁴*Gantler v. Stephens*, No. 2392-VCP, 2008 WL 401124, at *1 (Del. Ch. Feb. 14, 2008), reprinted in 33 DEL. J. CORP. L. 528, 528-29 (2008).

⁶⁵*Gantler*, 965 A.2d at 699.

⁶⁶*Id.* at 700. One of the bid letters signaled that the purchaser had no intention to retain the First Niles Board. The board did not follow up on that bid. The other two bids came from Cortland Bancorp (Cortland), and First Place Financial Corp. (First Place). These offers were analyzed by a Financial Advisor who "opined that all three bids were within the range suggested by its financial models." *Id.*

⁶⁷*Id.*

⁶⁸*Id.* at 700-01. The board was not privy to the due diligence issues until after Cortland withdrew its bid because Stephens withheld that information. *Id.*

⁶⁹*Gantler*, 965 A.2d at 701.

premium.⁷⁰ At a special board meeting to discuss First Place's offer, the First Niles board voted four-to-one to reject the offer without any discussion or deliberation.⁷¹ This was surprising considering the weak market and the favorable purchase price. But the board was set on pursuing Stephens's privatization plan. After rejecting the First Place offer, the board discussed Stephens's plan and instructed its legal counsel to further investigate the plan.⁷²

Within five weeks of the special meeting, Stephens had a documented explanation of his privatization plan circulated to the board.⁷³ Later in 2005, First Niles' legal counsel "orally presented the Reclassification Proposal to the Board."⁷⁴ Although legal counsel did not present any written documentation of the finalized proposal, the board approved the plan three-to-one, with only Gantler dissenting.⁷⁵

Shortly after the board accepted the Reclassification Proposal, the composition of the board changed.⁷⁶ Specifically, Gantler was replaced, thereby extinguishing the sole dissenting vote to the Reclassification Proposal.⁷⁷ In June 2006, the board unanimously voted to amend the Company's certificate of incorporation to implement the Proposal.⁷⁸

B. The Outcome and the Effects on Officers' Liability

The Delaware Court of Chancery dismissed the loyalty and care claims because the pleaded facts were insufficient to establish a violation of either duty.⁷⁹ Claims related to the reclassification proposal failed because a "disinterested majority of shareholders had 'ratified' the Reclassification by voting" in favor of it.⁸⁰ The Delaware Supreme Court reversed holding

⁷⁰*Id.*

⁷¹*Id.* Only Gantler voted to accept First Place's offer. *Id.*

⁷²*Id.*

⁷³*Gantler*, 965 A.2d at 701. "The Privatization Proposal claimed that the Reclassification was the best method to privatize the Company because it allowed maximum flexibility for future capital management activities" *Id.*

⁷⁴*Id.* at 702.

⁷⁵*Id.*

⁷⁶*Id.* ("Shaker replaced Zuzolo in January of 2006, and Csontos replaced Gantler in April of 2006. From that point on, the Board consisted of Stephens, Kramer, Eddy, Shaker and Csontos.").

⁷⁷*Gantler*, 965 A.2d at 702.

⁷⁸*Id.* The board's determinations were "based on the advice of Management and First Niles' general counsel." *Id.*

⁷⁹*Gantler v. Stephens*, No. 2392-VCP, 2008 WL 401124, at *1 (Del. Ch. Feb. 14, 2008), reprinted in 33 DEL. J. CORP. L. 528, 528-29 (2008).

⁸⁰*Gantler*, 965 A.2d at 712.

that "[t]he pled facts [were] sufficient to establish disloyalty of at least three (*i.e.*, a majority) of the . . . directors which suffices to rebut the business judgment presumption."⁸¹ Finally, and most importantly, the court held explicitly that corporate officers owe the same fiduciary duties of care and loyalty as directors.⁸² The Delaware Supreme Court took the director-officer issue head on and held, "[i]n the past, we have implied that officers of Delaware corporations, like directors, owe fiduciary duties of care and loyalty, and that the fiduciary duties of officers are the same as those of directors. We now explicitly so hold."⁸³

IV. THE BUSINESS JUDGMENT RULE FOR OFFICERS AFTER *GANTLER*

Gantler partially resolved the debate between Johnson and Hamermesh and Sparks regarding the scope of the fiduciary duties of corporate officers.⁸⁴ There still remains the question of what standard will be applied to evaluate officers' conduct. Based on *Gantler*, it appears that the Delaware Supreme Court will apply the business judgment presumption equally to both officers and directors.⁸⁵

The Delaware Supreme Court began *Gantler* by explaining that "[t]he complaint alleges that the defendants, who are officers and directors of First Niles, violated their fiduciary duties."⁸⁶ The court held "that the complaint [pleaded] sufficient facts to overcome the business judgment presumption."⁸⁷ The Delaware Court of Chancery originally dismissed the complaints against the defendant officers and directors because the Vice Chancellor credited their argument that the pleaded facts did not overcome the business judgment presumption.⁸⁸ Moreover, the Delaware Supreme Court overruled the vice chancellor's decision to dismiss the fiduciary duty claim towards "Safarek (in his capacity as an officer)."⁸⁹ The Delaware

⁸¹*Id.* at 707.

⁸²*Id.* at 708-09.

⁸³*Id.* (footnote omitted).

⁸⁴See *supra* Part II.A.

⁸⁵See Hamermesh & Sparks, *supra* note 19, at 876 ("[T]he policies that have given rise to the application of the business judgment rule to directors apply with equal force to the actions of officers within their delegated discretionary authority."); see also Flaum & Lari, *supra* note 35, at 624 ("[T]he weight of both precedent and commentary on the issue suggests that the business judgment rule does . . . apply to officers.").

⁸⁶*Gantler*, 965 A.2d at 699.

⁸⁷*Id.*

⁸⁸*Gantler v. Stephens*, No. 2392-VCP, 2008 WL 401124, at *1 (Del. Ch. Feb. 14, 2008), reprinted in 33 DEL. J. CORP. L. 528, 528-29 (2008).

⁸⁹*Gantler*, 965 A.2d at 704.

Supreme Court decided the facts pleaded were sufficient "to support a reasonable inference that [he] had acted in bad faith or without due care" as to overcome the business judgment presumption.⁹⁰ The Delaware Supreme Court also decided that the vice chancellor erred by dismissing the fiduciary duty claim against Stephens because the facts were sufficient to overcome the business judgment presumption.⁹¹ This all evinces the court's application of the business judgment rule to Safarek and Stephens in their capacity as officers. Unfortunately, the court stated that it would not address extending exculpatory protections to officers; rather, it left the decision to the Delaware General Assembly.⁹²

V. EXCULPATORY PROTECTIONS: NOT SO FAST CORPORATE OFFICERS

The Delaware General Assembly provided exculpatory protection for violations of the duty of care to directors only after a monumental case. In 1985, the Delaware Supreme Court decided *Smith v. Van Gorkom*.⁹³ The *Van Gorkom* court, after finding that directors were grossly negligent in failing to inform themselves of the material facts surrounding a merger, held both the inside and outside directors personally liable for damages to shareholders.⁹⁴ *Van Gorkom* received resoundingly negative attention,⁹⁵

⁹⁰*Id.* at 704-05, 708.

⁹¹*Id.* at 708-09.

⁹²*Id.* at 709 n.37 ("Although legislatively possible, there currently is no statutory provision authorizing comparable exculpation of corporate officers.").

⁹³488 A.2d 858 (Del. 1985); see Bernard S. Sharfman, *The Enduring Legacy of Smith v. Van Gorkom*, 33 DEL. J. CORP. L. 287, 288-90 (2008).

⁹⁴*Van Gorkom*, 488 A.2d at 873, 893. The court stated:

To summarize: we hold that the directors of Trans Union breached their fiduciary duty to their stockholders

. . . .

On remand, the Court of Chancery shall conduct an evidentiary hearing to determine the fair value of the shares represented by the plaintiffs' class, based on the intrinsic value of Trans Union on September 20, 1980. . . . Thereafter, an award of damages may be entered to the extent that the fair value of Trans Union exceeds \$55 per share.

Id. at 893.

⁹⁵Professor Honabach noted, however, that "directors were no more at risk after *Van Gorkom* than they ever were before." Dennis R. Honabach, *Smith v. Van Gorkom: Managerial Liability and Exculpatory Clauses—A Proposal to Fill the Gap of the Missing Officer Protection*, 45 WASHBURN L.J. 307, 322 (2006); see also Roberta Romano, *What Went Wrong with Directors' and Officers' Liability Insurance?*, 14 DEL. J. CORP. L. 1, 24 (1989) ("[T]he opinion is not a scandalous harbinger of increased exposure. Quite to the contrary, the decision arguably lowered the standard of conduct by defining breaches of the duty of care in terms of 'gross' rather than 'ordinary' negligence.").

prompting the legislature to create section 102(b)(7) of the Delaware General Corporation Law.⁹⁶ "Section 102(b)(7) permits shareholders to adopt a charter provision granting directors immunity from personal liability for breaches of their duty of care."⁹⁷ Many other states followed suit and enacted their own exculpatory provisions.⁹⁸

The downside for corporate officers in Delaware is that the plain language of 102(b)(7) renders itself available only to directors, and no Delaware court has explicitly extended exculpatory protections to corporate officers. In *Gantler*, the court held that "[a]lthough legislatively possible, there currently is no statutory provision authorizing comparable exculpation of corporate officers."⁹⁹ There are only seven states that currently afford these protections to corporate officers.¹⁰⁰

⁹⁶Honabach, *supra* note 95, at 307. Not all academics believe that the legislative response was proper. See J. Robert Brown, Jr. & Sandeep Gopalan, *Opting Only In: Contractarians, Waiver of Liability Provisions, and the Race to the Bottom*, 42 IND. L. REV. 285, 305 (2009). ("[T]he Delaware legislature adopted . . . a provision designed less to solve a real governance problem and more to use the surrounding din as cover to reduce director liability.").

⁹⁷Honabach, *supra* note 95, at 307. Section 102(b)(7) in relevant part reads: [T]he certificate of incorporation may also contain . . . [a] provision eliminating or limiting the personal liability of a director to the corporation or its stockholders for monetary damages for breach of fiduciary duty as a director, provided that such provision shall not eliminate or limit the liability of a director: (i) For any breach of the director's duty of loyalty to the corporation or its stockholders; (ii) for acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of the law

DEL. CODE ANN. tit. 8, § 102(b)(7) (2006).

⁹⁸Most of these state provisions follow one of two patterns, with differing approaches as to when the exculpatory provisions will not shield directors. See Honabach, *supra* note 95, at 314. "One [pattern] is based on Delaware's section 102(b)(7)." *Id.* "The second pattern, which evolved later, is provided by section 2.02(b)(4) of the Model Business Corporation Act (MBCA)." *Id.* MBCA section 2.02(b)(4) states:

The articles of incorporation may set forth: . . . a provision eliminating or limiting the liability of a director to the corporation or its shareholders for money damages for any action taken, or any failure to take any action, as a director, except liability for (A) the amount of a financial benefit received by a director to which he is not entitled; (B) an intentional infliction of harm on the corporation or the shareholders; (C) a violation of section 8.33; or (D) an intentional violation of criminal law.

MODEL BUS. CORP. ACT § 2.02(b)(4) (2003). Honabach cites to James J. Hanks, Jr. & Larry P. Scriggins, *Protecting Directors and Officers from Liability—The Influence of the Model Business Corporation Act*, 56 BUS. LAW. 3, 25-27 (2000), for a general discussion of the development of the Model Act's director-protection provisions, in particular section 2.02(b)(4). Honabach, *supra* note 95, at 314 n.54.

⁹⁹*Gantler v. Stephens*, 965 A.2d 695, 709 n.37 (Del. 2009).

¹⁰⁰"[T]hose seven states [are] Louisiana, Maryland, Nevada, New Hampshire, New Jersey, Utah, and Virginia." Honabach, *supra* note 95, at 324-25 (footnotes omitted).

Dennis Honabach argues that more states should grant officers exculpatory protections because "the same reasoning that supports protecting directors also applies to officers."¹⁰¹ In a post-Enron world, he argues corporations should have the ability to protect officers for breaches of the duty of care in the same way they can protect directors.¹⁰² Honabach contends that "[e]xpanding the coverage of the exculpatory provisions to include officers would not undercut the deterrent value of other statutes[;] . . . [n]or would [it] . . . affect the market, ethical, and moral forces that compel most officers to perform satisfactorily."¹⁰³

Delaware, however, should not become the eighth state to include exculpatory protections for officers, and, contrary to Honabach's view, these protections are unnecessary. It may seem counterintuitive that one would argue for the acceptance of the business judgment presumption while also arguing against exculpatory protections, but this position maintains the fine line between good corporate governance and corporate lawlessness.¹⁰⁴

A. Public Policy Demands that Exculpatory Protections Be Limited to Corporate Directors

Public policy demands that the General Assembly not provide corporate officers with exculpatory protections. Honabach, despite his advocacy for officer exculpation, admits that "many of the Enron-era corporate fiascos can be traced to misbehavior by corporate officers."¹⁰⁵ In response to these fiascos, the Securities and Exchange Commission and many other federal agencies have increased their regulation of corporate officers' conduct.¹⁰⁶ The changes to and adoption of federal laws suggest that the federal government does not want corporate officers to go unpunished. Delaware should not provoke the federal government and risk a response that could threaten its position at the center of corporate law.¹⁰⁷

¹⁰¹ *Id.* at 307. "[Y]et, there has been little movement to provide such protection." *Id.*

¹⁰² *Id.* at 307-08.

¹⁰³ *Id.* at 331.

¹⁰⁴ See, e.g., Johnson, *supra* note 6, at 439 (detailing criminal charges and investigations against various corporate officers (citing *Executives on Trial: Scandal Scorecard*, WALL ST. J., Oct. 3, 2003, at B1)).

¹⁰⁵ Honabach, *supra* note 95, at 325.

¹⁰⁶ Johnson and Millon noted that Sarbanes-Oxley imposed new federal responsibilities on officers, located at 15 U.S.C. §§ 7241, 7243, 7262, 7264, and 18 U.S.C. § 1350. Johnson & Millon, *supra* note 2, at 1599 n.5.

¹⁰⁷ See Marcel Kahan & Edward Rock, *When the Government Is the Controlling Shareholder: Implications for Delaware*, 35 DEL. J. CORP. L. 409 (2010).

Based on limited personal liability, many believe that the director exculpatory protections benefit corporations because they permit directors to take greater risks with greater potential rewards.¹⁰⁸ The argument goes that without these protections directors will become risk averse, thereby hindering the company's profit-making potential. Limiting exculpatory clauses to directors, however, will not deter officer risk taking. Honabach argues that "rather than improving the quality of officer decision-making, the specter of liability might encourage officers to adopt inferior decision-making processes and to refrain from taking appropriate risks."¹⁰⁹ This is not the case. Even without exculpatory protections, corporate officers often take extreme risks, as seen in the past decade. Allowing exculpatory protection and eliminating the deterrent of potential personal liability will only induce riskier decision making that could lead to systemic risk.¹¹⁰ Consequently, legislatures should not grant exculpatory protections to corporate officers; the business judgment presumption protects officers enough.

B. The Business Judgment Rule Is Protection Enough

The business judgment rule alone would assuage Honabach's concerns regarding corporate officer liability. Honabach believes that "[i]n today's post-Enron business-legal environment, corporate officers face a substantial risk of liability litigation, including claims of negligent conduct."¹¹¹ Honabach contends that current standards would potentially expose officers to personal liability for any negligence claim.¹¹² Therefore, he asserts that "[p]roviding officers an exculpatory shield will prevent the harm of threatened litigation."¹¹³ He does note, however, that the potential increase in litigation depends mainly on the application of the duty of care laws.¹¹⁴ "The traditional articulation of an officer's duty of care is that the officer should act in good faith in what she reasonably believes to be in the

¹⁰⁸See Matthew R. Berry, Note, *Does Delaware's Section 102(b)(7) Protect Reckless Directors from Personal Liability? Only if Delaware Courts Act in Good Faith*, 79 WASH. L. REV. 1125, 1126 (2004) ("[M]any qualified directors may become reluctant to serve on boards because they desire to limit their personal exposure to liability. Those directors who do serve on boards would become increasingly risk-adverse causing them to avoid risky projects with potentially high returns for the corporation." (footnote omitted)).

¹⁰⁹Honabach, *supra* note 95, at 333.

¹¹⁰See *supra* note 104 and accompanying text.

¹¹¹Honabach, *supra* note 95, at 325.

¹¹²*Id.* at 326.

¹¹³*Id.* at 325.

¹¹⁴*Id.* at 326.

best interest of the corporation using the care that a person in like circumstances would reasonably exercise under similar circumstances."¹¹⁵

As it does for directors, the business judgment rule would protect officers from simple negligence claims. So long as officers do not act egregiously, the business judgment presumption would protect them from potential liability. Legislatures and courts should not grant officers protection from negligence;¹¹⁶ the business judgment presumption is simply protection enough.

The business judgment presumption is difficult to overcome, but it is rebuttable.¹¹⁷ The fear of excessive litigation is lessened because many suits would not survive the motion to dismiss stage, let alone summary judgment. Corporate law would continue to protect risk taking officers, provided that these risks are researched, developed, and made for the corporation's benefit. Courts should not permit whimsical decisions as the business judgment rule would not extend to cover these decisions. Honabach recognizes the depth and magnitude of harm that a whimsical decision can have on a corporation.¹¹⁸ Furthermore, he understands and acknowledges the positive deterrent effect of the current laws and liabilities.¹¹⁹ To sum it up, we do not need expanded exculpatory protection.¹²⁰

¹¹⁵Honabach, *supra* note 95, at 326. "[This] formulation tracks closely the standard generally applicable to directors." *Id.*

¹¹⁶Delaware courts have interpreted exculpatory protections to include both simple and gross negligence. *See, e.g.,* Berry, *supra* note 108, at 1126 n.12 (citing *Malpiede v. Townson*, 780 A.2d 1075, 1094-95 (Del. 2001)).

¹¹⁷*See* *Smith v. Van Gorkom*, 488 A.2d 858, 872 (Del. 1985).

¹¹⁸*See* Honabach, *supra* note 95, at 333 ("The losses to a particular company resulting from poor decision-making can be astonishingly large.").

¹¹⁹*Id.* at 332-33 ("[N]o one doubts that these restraints exist and that they provide some deterrence against sloppy decision-making.").

¹²⁰Professor Honabach proffers two possible amendments to include exculpatory protections to officers. *Id.* at 339-40. He proffers an amendment for those states using a form of section 102(b)(7) and one for those states using MBCA section 2.02(b)(4). Professor Honabach's proposed amendments are very similar to those he seeks to amend, except he adds the word "officer" and explains who is protected as such. *Id.* Professor Honabach recognizes that these provisions will not be free from controversy and that "adoption . . . would surely reignite the debate over the propriety of allowing corporations to shelter directors or officers from liability for breaches of their fiduciary duties." *Id.* at 340.

C. The Bar for Good Faith Is Set Too Low to Allow Exculpatory Protections for Corporate Officers

If corporate officers are granted exculpatory protections, only on rare occasions will a court hold an officer liable for her indiscretions.¹²¹ Exculpatory protections are only overcome by a finding of disloyalty, bad faith or intentional misconduct.¹²² Unfortunately, the bar for good faith has been set so low that it appears that only a completely egregious or intentional act will overcome the exculpatory protections. The stringent restrictions Delaware courts place on good faith are illustrated by three cases: *Lyondell Chemical Co. v. Ryan*,¹²³ *Stone v. Ritter*,¹²⁴ and *In re Walt Disney Co. Derivative Litigation*.¹²⁵ These three cases show the very high burden on a plaintiff's shoulders to prove bad faith. Allowing an officer exculpatory protection will leave them almost totally immune from liability.

¹²¹*See In re Citigroup S'holder Deriv. Litig.*, 964 A.2d 106, 125 (Del. Ch. 2009) ("The presumption of the business judgment rule, the protection of an exculpatory § 102(b)(7) provision, and the difficulty of proving a *Caremark* claim together function to place an extremely high burden on a plaintiff to state a claim for personal . . . liability.").

¹²²A closer look at Delaware's section 102(b)(7) reveals four exceptions to the exculpatory protections. They are all very similar and revolve around a loyalty paradigm. These four exceptions include breach of loyalty, lack of good faith (a sub-element of loyalty), and actions taken for personal benefit (also an element of the duty of loyalty). The statute also allows exculpation for almost any breach of care, except those completely egregious. *See Honabach, supra* note 95, at 312.

¹²³970 A.2d 235 (Del. 2009). The Delaware Supreme Court explained that "bad faith will be found if a 'fiduciary intentionally fails to act in the face of a known duty to act, demonstrating a conscious disregard for his duties. . . . Only if [the directors] knowingly and completely failed to undertake their responsibilities would they breach their duty of loyalty.'" *Id.* at 243-44 (quoting *In re Walt Disney Co. Deriv. Litig.*, 906 A.2d 27, 67 (Del. 2006)).

¹²⁴911 A.2d 362, 369 (Del. 2006) (reaffirming the *Disney* standard for good faith); *see also In re Citigroup*, 964 A.2d at 139.

[T]he discretion granted directors and managers allows them to maximize shareholder value in the long term by taking risks without the debilitating fear that they will be held personally liable if the company experiences losses. This doctrine also means, however, that when the company suffers losses, shareholders may not be able to hold the directors personally liable.

Id.

¹²⁵906 A.2d 27 (Del. 2006). The court held:

A failure to act in good faith may be shown . . . where the fiduciary intentionally acts with a purpose other than that of advancing the best interests of the corporation, where the fiduciary acts with the intent to violate applicable positive law, or where the fiduciary intentionally fails to act in the face of a known duty to act, demonstrating a conscious disregard for his duties.

Id. at 67 (quoting *In re Walt Disney Co. Deriv. Litig.*, 907 A.2d 693, 755 (Del. Ch. 2005)).

VI. CONCLUSION

Corporate officers are vested with great power, but burdened with great responsibility. Many corporate officers embrace this responsibility and act to enhance their corporations and maximize shareholder wealth. Unfortunately, some do not, and in fact are dangerous when wielding power.¹²⁶ Directors who make well-informed decisions are protected by the business judgment rule and exculpatory clauses can further insulate them from personal liability for violations of the duty of care. Still, it is unclear whether officers have the same protections.

Gantler v. Stephens shines some light on the mindset of the Delaware Supreme Court when it determined that officers and directors hold comparable fiduciary duties. Unfortunately, the court declined to address whether it would afford officers the business judgment presumption, and left the decision of officer exculpatory protection to the Delaware General Assembly.

Courts should apply the business judgment rule equally to officers and directors. The business judgment rule would encourage officers to make calculated risks and protect them from judicial second-guessing of a valid, albeit unsuccessful, business strategy. But the legislature should not give officers a free pass to make whimsical and uninformed decisions; therefore, it should not provide officers with exculpatory protections. Public policy demands that federal and state governments regulate corporations and protect stockholders. But it also requires that officers have the freedom to engage in prudent risk taking. These policies are best balanced by providing officers and directors the protection of the business judgment rule and limiting exculpatory protections to directors.

Michael Follett

¹²⁶See Jones, *supra* note 5, at 475 ("High-profile instances of misconduct by corporate officers have been mainstays in the news in recent years. Names such as Skilling, Fastow, Kozlowski, and Ebbers have become household names, earning a degree of infamy as the personification of corporate greed." (footnote omitted)).