

## Goldman's Vague Corporate Titles May Still Cost It Millions

By Ed Beeson

*Law360, New York (September 05, 2014, 7:11 PM ET)* -- Goldman Sachs Group Inc. may have won over the Third Circuit when the court axed an award of legal fees to a former vice president accused of stealing trading code, but the bank could have avoided the mess — and the prospect of further litigation — had it better defined what being a Goldman VP means, attorneys say.

Instead, Goldman now returns to the lower court to face more litigation on former programmer Sergey Aleynikov's demands for indemnification and advancement of attorneys' fees tied to his yearslong quest to clear his name of theft charges brought over the proprietary code he allegedly took in 2009 when he left Goldman to join a new firm. In overturning the award of these fees on Wednesday, the appellate majority also remanded the case back to district court for further deliberation.

The question still needs to be resolved: Does Goldman's frequently bestowed title of VP make current and former workers like Aleynikov "officers" of the bank and confer the right to have legal expenses paid if their work at the company lands them in hot water? Aleynikov, whose legal plight helped inspire Michael Lewis' bestseller "Flash Boys," argued that to be the case when he sued Goldman in 2012, seeking to recoup some \$2.3 million and counting in legal fees he racked up defending the now-overturned federal charges and the still-pending New York state matter.

While the circuit panel was split as to whether the lower court was correct in awarding partial summary judgment to Aleynikov — granting him an advance of legal fees for the New York state case — all three judges agreed that Goldman's bylaws were ambiguous as to whether a vice president at the firm is also an officer.

Goldman argued that such titles are merely functional and do not confer the authority of an officer. Aleynikov countered that where there is ambiguity, Delaware case law requires bylaws to be construed against the drafter. The majority judges said they were inclined to agree with Goldman but that a district court jury should answer the question.

"The evidence presented to this court strongly suggests that to the extent that Aleynikov understood himself to be an officer, this was unreasonable in the relevant industry, given the trade usage of the words 'officer' and 'vice president,'" Judge D. Michael Fisher said in the majority opinion.

"We stop short of making this determination, as it is a factual question to be resolved by a jury."

A Goldman spokesman declined to comment on the litigation. Returning the case to district court only

heaps more legal costs onto the bank that some attorneys say may have been avoidable.

“The lesson for other banks is to make sure their bylaws are very clear as to who they are going to provide advancement to,” said Angelo Savino, a member of Cozen O’Connor.

Goldman, too, could look to redraft its bylaws. “Given the expense they have incurred and the prospect of having to indemnify someone who they contend stole from them, they certainly have an incentive to go back and take a look just to avoid future problems,” he said

Savino, however, said he did not expect the appellate opinion to have much weight on other litigation because of its fact-dependence. But, he said, “it may be that it causes other companies and officials to go and study their bylaws very carefully.”

Indeed, the majority opinion notes that one piece of extrinsic evidence that Goldman presented to show that a VP designation does not confer “officer” status was media reports about the widespread usage of the title across Wall Street. That may show the question of who is an officer entitled to legal fees could be broader than one bank.

“The district court placed the burden of this inartfully bestowed title on Goldman, penalizing Goldman for the industry’s profligacy in conferring the title of vice president,” Judge Fisher said. But he said this evidence raises genuine issue of material fact, which a jury must interpret when addressing the bylaws’ ambiguity.

Companies may prefer to keep their bylaws somewhat vague on questions of indemnification, other attorneys said, as it gives them some flexibility to decide for whom they will pay legal fees.

One of the concerns companies face is the appearance to the government of shelling out for an employee who’s been accused of wrongdoing, said Richard Scheff, chairman of Montgomery McCracken Walker & Rhoads LLP.

“This is a very delicate area these days,” he said.

Goldman’s desire to maintain some flexibility on paying legal fees was on display in the circuit’s opinion, which said the bank presented evidence that it in recent years considered paying attorney’s fees for 53 people associated with the firm but ended up paying just for 51. Aleynikov and another unidentified vice president were excluded from coverage, the court said.

“Goldman put forward evidence suggesting that for at least some of these individuals, Goldman was invoking its discretion in agreeing to pay the fees, even if the individual was not necessarily entitled to indemnification or advancement under the bylaws,” Judge Fisher said. He added that the majority opinion would not discount this evidence as the district court did.

While the decision does not address insurance contracts, there is a chance carriers will look to the opinion to attempt to limit who is covered under a directors and officers policy.

“Despite what insurers may suggest in future coverage disputes, the Third Circuit’s Aleynikov decision should not have any impact on determining whether an individual is covered under the terms of a D&O insurance policy,” said Jared Zola, a partner with Dickstein Shapiro LLP.

“While policyholders are well-advised to take a hard look at the specific language provided in their respective policies, current-day D&O policies frequently provide coverage for ‘wrongful acts’ committed by ‘insured persons’ who include ‘executives’ and ‘employees’ of the insured ‘organization,’” Zola said in an email.

Aleynikov’s attorney declined to comment beyond an earlier statement, in which he said the entire circuit panel ruled in favor of his client on the "pivotal" issue of Goldman's ambiguous definition of an officer.

"We believe, as the dissent did, that this finding compels judgment in Mr. Aleynikov's favor as a matter of Delaware law. We will seek rehearing on that basis," the attorney, Kevin Marino of Marino Tortorella & Boyle PC, said at the time.

U.S. Circuit Judges Julio Fuentes and D. Michael Fisher and U.S. District Judge C. Darnell Jones II, sitting by designation, sat on the panel for the Third Circuit.

Aleynikov is represented by Kevin Marino of Marino Tortorella & Boyle PC.

Goldman is represented by Christopher E. Duffy of Boies Schiller & Flexner LLP.

The appeals case is Sergey Aleynikov v. The Goldman Sachs Group Inc., case number 13-4237, in the U.S. Court of Appeals for the Third Circuit.

The district court case is Sergey Aleynikov v. The Goldman Sachs Group Inc., case number 2:12-cv-05994, in the U.S. District Court for the District of New Jersey.

--Additional reporting by Cara Salvatore and Max Stendahl. Editing by Jeremy Barker and Philip Shea.