



Business Law Newsletter

Prudent Director Conduct

by James V. Irving

Inside This Issue:

Prudent Director Conduct
Page 1

Fences, Rules & Neighbors
Page 2

ASHCROFT v. IQBAL
Page 2

Meet Our Attorneys
Page 4

As discussed in our March newsletter, the Business Judgment Rule insulates corporate Directors from liability for informed, good faith decisions made in the regular course of business and with the honest belief that the decision was in the best interest of the company. Similarly, corporate Directors can avoid liability based on a failure of oversight if they adhere to a pattern of prudent conduct. Statutorily, corporate Officers are charged with the duty of managing the day to day affairs of the corporation. The Directors' role should be oversight, not management. In fulfilling this obligation, Directors should diligently seek information essential to understanding the risks to the business and should be willing to solicit views, not only from outside the Board, but from beyond the Officers as well. Thoughtful inquiries directed to shareholders, employees or outside advisors or consultants, particularly when analyzing complex business plans and proposals, are consistent with diligent oversight. In fulfilling their duty, Directors must be willing to hold management accountable and should not shy away from the tough questions. A healthy degree of skepticism is appropriate, particularly when it comes to financial accounting and executive compensation matters. Executive sessions are appropriate if management's presence inhibits free deliberation among the Directors.

Directors must carefully oversee management's assessment and handling of strategic, financial, operational, and compliance risks and should require periodic briefings by management on compliance threats. Corrective steps must be taken to address identified risks. Such oversight depends on the establishment of strong internal systems and controls.

In today's corporate environment, Directors should confirm the existence of certain programs and policies, including a crisis management plan, strong whistleblower protections for employees who properly report compliance violations, and a records management policy that covers paper and electronically stored records. Securing emails and similar records is particularly critical should the corporation anticipate involvement in a law suit.

Finally, Directors should carefully consider the qualifications of those they elevate to Officer positions. Casually electing Officers without due concern for the background, history, and integrity is a quick and easy path to possible lack of oversight liability.

Particularly in mid-sized or emerging businesses, or in closely held corporations in which Directors and Officers are often synonymous, the obligation of thorough oversight can be subsumed by the jumble of day to day business. But as successful

Our Practice Areas:

BUSINESS & CORPORATE

- Appellate Practice
- Business Services
- Construction Law
- Copyright/Trademark
- Creditors' Rights
- Employment Law
- Government Contracts
- Immigration
- Land-Use, Zoning, & Local Government
- Landlord/Tenant
- Lending Services
- Litigation
- Mergers and Acquisitions
- Nonprofit Organizations
- Real Estate Services
- Title Insurance

INDIVIDUAL SERVICES

- Alternative Dispute Resolution
- Domestic Relations
- Negligence/Personal Injury
- Wealth Management & Asset Protection
- Wills, Trusts & Estates

Prudent Director Conduct

Continued from Page 1

businesses grow, careless practices become bad habits that are hard to break. Attention to careful business practices is always good policy.

Fences, Rules and Neighbors

by Thomas W. Repczynski.

In a simpler time, the construction of fences or walls to mark ones property was a traditional practice with controversy largely limited to ascetic concerns between neighbors. In the twenty-first century, HOA restrictions, utility and sight easements, county ordinances and general societal litigiousness, require significant preparation and planning before construction begins.

The following checklist of considerations will go a long way to assuring your yard enclosure does not have to come back down:

- **HOA restrictions.** If you live in a community governed by an owners' association, chances are very high you have restrictions on what you can do to the exterior of your property including installing a fence. These restrictions are typically found in either the Restrictive Covenants recorded against every property in the association or in architectural guidelines passed by the governing association. If you can install a fence at all, you will typically find that you are restricted in height, location, color and materials. Generally speaking, these restrictions are likely to be upheld, although restrictions are not binding if the association failed to follow its own procedural requirements in enacting the restrictions.
- **County ordinances.** These are usually adopted as part of a local county's zoning ordinance plans. Fence restrictions vary (much like the owners' association rules and covenants) from where and whether you can construct them to how high they can be. Generally only shorter fences are allowed in front yards. Taller ones are typically allowed in side and back yards. Be sure to ascertain how these terms are defined in the relevant code as it may not be self-evident!
- **Easements.** There are few things worse than spending a lot of money on a beautiful fence only to learn later that it runs over a cable, sewer or electrical

easement that gives Cox/Comcast, Public Works, or VEPCO the right to remove all or part of it when they need to manage or replace the lines that run beneath. A call to Miss Utility is a given before doing any work, but a review of your plat is a necessity as well. A property on or near an intersection, for instance, may have what's called a "sight easement" to assure drivers have an unobstructed view of oncoming traffic. Such a restriction will be noted on the plat.

- **Survey.** Know your property lines. Over time neighbors' memories of the precise location of the boundary tend to fade. Or maybe the line has never really been clear. Have a professional survey done to establish the boundary lines and then construct the fence sufficiently inside the line to avoid any issues. Remember, if the fence veers at any point onto or over the line, you just gave your neighbor ownership rights in that part of the fence.

Consider as well, that your neighbor need not allow you or your contractors on his or her property for the purposes of constructing or maintaining the fence. You do not have the right to use their property in order to maintain yours. Boundary bushes and trees can bring their own issues, but might make an attractive alternative.

ASHCROFT v. IQBAL

by

Philip M. Keating and James V. Irving

Following the terrorist attacks of September 11, 2001, Javid Iqbal, a Pakastani Muslim employed as a cable television installer in Hicksville, New York was arrested on charges of identification fraud and conspiracy. While awaiting trial, Iqbal was identified as a person of "high interest," housed in a maximum security unit, kept on lockdown 23 hours a day, and subject to allegedly objectionable treatment. Iqbal pleaded guilty to the charges, spent time in prison, and was deported to Pakistan.

Later, Iqbal brought what is called a Bivens action; a suit based on an implied right of action for damages against federal officials alleged to have violated a citizen's constitutional rights. The suit named more than 50 current and former federal officials and correctional officers including, and in particular, former Attorney General John Ashcroft and former FBI Director Robert Mueller. The Complaint alleged that these government officials had designated Iqbal as a person of high interest on account of his race, religion, or national origin in contravention of the First and Fifth

ASHCROFT v. IQBAL

Continued from Page 2

Amendments. Iqbal alleged that the FBI, under the direction of Mueller, arrested and detained thousands of Arab Muslim men as part of its investigation of September 11, and that Mueller and Ashcroft approved a policy of holding these detainees in restrictive conditions until they were “cleared” by the FBI.

The Complaint also alleged that the government officials “each knew of, condoned, and willfully and maliciously agreed to subject” Iqbal to harsh conditions of confinement solely based on his religion, race, and national origin and not in furtherance of a legitimate policy or interest. Iqbal named Ashcroft as the “principal architect” of the policy and Mueller as “instrumental” in its implementation and it was their possible liability that made the case particularly newsworthy. Ultimately, Iqbal established an important precedent, as a divided Supreme Court clarified important procedural rules applicable to pleadings generally and others specifically applicable to the civil liability of governmental officials.

In the Federal District Court, the Defendants’ moved to dismiss the Complaint for failure to state sufficient allegations. That motion was denied. On appeal the Second Circuit also refused to dismiss the Complaint. On May 18, 2009, the United States Supreme Court reversed the Second Circuit in a 5-4 decision on procedural grounds, holding that the conclusory allegations contained in Iqbal’s Complaint were insufficient to support a claim for purposeful and unlawful discrimination against Ashcroft and Mueller based on the acts of their subordinates. Justice Anthony Kennedy, writing for the majority, noted that requiring a Plaintiff to allege “plausible grounds” to support his claim does not impose an unreasonable pleading standard; “[the rule] simply calls for enough facts to raise a reasonable expectation that discovery will reveal evidence of an illegal agreement.” Iqbal, according to Kennedy and the majority, had an obligation to plead an entitlement to relief by more than “labels and conclusions, and a formulaic recitation of the elements of a cause of action...” and that he had failed to do so.

The Second Circuit had held that Iqbal’s claim did not require amplification and had sufficiently alleged the liability of Ashcroft and Mueller because the allegations, if proven true, would establish a violation of constitutional law. But Kennedy noted that in Bivens actions, the Plaintiff must plead that each defendant

government official violated the Constitution through his own individual actions. In addition, when the Bivens claim is for violations of the First and Fifth Amendments, the Plaintiff must allege that each Defendant acted with a discriminatory purpose. Moreover, the Plaintiff must plead sufficient facts to show that the Defendants adopted and implemented the policies not for a neutral, investigative reason, but for the purpose of discriminating based on race, religion, or national origin. Kennedy was careful to note that the Court was not requiring a heightened standard of pleading specifics, but that in order to support his claim at the pleading stage, Iqbal must allege the plausible, not just the conceivable.

Justice Kennedy’s opinion also restated several “working principles” applicable to pleadings in general: that the general observation that a Court must accept as true all allegations contained in a Complaint is inapplicable to legal conclusions; that mere recitals of the elements of a cause of action supported by conclusory statements are not sufficient to support a claim; and that a Complaint that states a plausible claim for relief must survive a motion to dismiss. Deciding what is a plausible claim is a context-specific task that requires the court to draw on its “judicial experience and common sense”, but when the Complaint includes well-pleaded factual allegations, the Court will assume their truth and then determines whether they plausibly give rise to relief. Iqbal changed none of these principles; it was because Iqbal’s pleading did not meet the existing standard that the Complaint was dismissed.

Iqbal was decided on a vote of 5-4. Justice Souter, dissenting, wrote that the proper question before the Court was whether the Complaint alleged at least knowledge and deliberate indifference, and that Iqbal satisfied this standard by alleging that Ashcroft and Mueller knew of and condoned of the discriminatory policy that their subordinates carried out. The blogger-sphere and national media have commented heavily on Iqbal with some viewing the holding as a significant blow to plaintiffs’ actions. Certainly under the Iqbal standard, discrimination claims against government officials will be much more difficult to sufficiently allege in the future.

Contact Us

2300 Wilson Boulevard, 7th Floor
Arlington, Virginia 22201
703-525-4000 fax 703-525-2207
www.beankinney.com



Mr. Jaeger is a shareholder with the firm. He concentrates his practice on mergers, acquisitions, sales of privately held companies, leveraged management buyouts, debt restructurings, reorganizations, venture capital, investment banking, and private finance.

Mr. Jaeger's transactional experience arises from an extensive and blended background in law, business, engineering and technology. He received his Bachelor of Science and Master of Engineering degrees from Cornell University in Ithaca, New York, in 1968. He earned his law degree from Catholic University School of Law in Washington, D.C. in 1975. Prior to his legal career, Mr. Jaeger worked for six years as a management systems engineer for White Consolidated Industries and the Aluminum Company of America (ALCOA). Mr. Jaeger designed, developed and implemented numerous computer and data management processing systems to assist in the operation and management of the company's businesses.

Mr. Jaeger is a frequent speaker on mergers and acquisitions and leveraged management buyouts. He is an active participant with the Mid-Atlantic Venture Association and an investor in the Washington Dinner Club. He recently completed a four-year term to the Board of Directors for the ACG National Capital Chapter. The ACG National Capital Chapter is the local chapter of the Association for Corporate Growth, an international business organization with over 7,000 members in 44 chapters worldwide - North America, Europe and Asia.

Mr. Jaeger can be reached at (703) 525-4000 or by e-mail at PJaeger@beankinney.com.

This newsletter was prepared by Bean, Kinney & Korman, P.C. as a service to clients and friends of the firm. The purpose of this newsletter is to provide a general review of current issues. It is not intended as a source of specific legal advice. © Bean, Kinney & Korman, P.C. 2009.



2300 WILSON BOULEVARD, 7TH FLOOR
ARLINGTON, VA 22201

GETTING IT DONE®