

Services

[Business, Corporate &
Securities](#)

Prickly Pear

Legal Alerts for the Arizona Business Community

November 2022

Reminder: Delaware Corporations Should Take Action to Shield Officers From Personal Liability for Breach of Fiduciary Claims

by Ken Witt

As explained in our [August 2022 Prickly Pear Newsletter](#), Delaware has adopted an amendment to the Delaware General Corporation Law (DGCL) that will permit corporations to protect certain senior corporate officers from personal monetary liability for breach of the fiduciary duty of care. Delaware corporations have been able to protect directors from such liability since 1986, and the amendment to the DGCL will extend this permitted “exculpation” to officers.

The officers who may be covered by the expanded exculpation include the president, chief executive officer, chief operating officer, chief financial officer, chief legal officer, controller, treasurer or chief accounting officer, the company’s most highly compensated executive officers identified in SEC filings and certain other officers who have consented to be identified as an officer and to service of process.

This additional protection of officers is not automatically effective. The certificate of incorporation of the Delaware corporation must be amended to include the exculpation of liability, requiring the approval of the board of directors and stockholders. Newly incorporated Delaware corporations may include the provision in the originally filed certificate of incorporation.

Here is new language that could be adapted for an amendment to your Delaware certificate of incorporation:

ARTICLE []

A director or officer of the Corporation shall not be personally liable to the Corporation or its stockholders for monetary damages for breach of his or her fiduciary duty as a director or officer, except for liability of (i) a director or officer for any breach of the director’s or officer’s duty of loyalty to the Corporation or its stockholders, (ii) a director or officer for acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of law, (iii) a director under Section 174 of the Delaware General Corporation Law, or (iv) a director or officer for any transaction from which the director or officer derived any improper personal benefit or (v) an officer in any action by or in the right of the Corporation. If the Delaware General Corporation Law is amended after the filing of this Certificate of Incorporation to authorize corporate action further eliminating or limiting the personal liability of directors or officers, then the liability of a director or officer of the Corporation shall be eliminated or limited to the fullest extent permitted by the Delaware General Corporation Law, as so amended.

**Scottsdale Corporate & Securities
Law Group****Ken Witt**

480.429.4864

ken.witt@kutakrock.com**Mark Lasee**

480.429.4828

mark.lasee@kutakrock.com**Marc Lieberman**

480.429.7103

marc.lieberman@kutakrock.com**Emily Smith**

480.429.4886

emily.smith@kutakrock.com**Michael Tobak**

480.429.5000

michael.tobak@kutakrock.com**London Burns**

480.429.7120

london.burns@kutakrock.com**Matthew Ditman**

480.429.5000

matthew.ditman@kutakrock.com**Colson Franse**

480.429.4851

colson.franse@kutakrock.com**Christina Poletti**

480.429.4830

christina.poletti@kutakrock.com**Christina Ribble**

480.429.4844

christina.ribbon@kutakrock.com**Isaiah Wilson II**

480.429.7122

isaiah.wilson@kutakrock.com**Scottsdale Government Relations
Group****Marcus Osborn**

480.429.4862

marcus.osborn@kutakrock.com**Daniel Romm**

480.429.4852

daniel.romm@kutakrock.com

Any repeal or modification of the foregoing paragraph by the stockholders of the Corporation shall not adversely affect any right or protection of a director or officer of the Corporation existing at the time of such repeal or modification.

If you need assistance to amend the certificate of incorporation of your Delaware corporation to give effect to the exculpation of senior officers, you should consult with your Kutak Rock attorney, one of the attorneys listed on the left or any attorney in Kutak Rock's [Business, Corporate & Securities Practice Group](#). You may also visit us at www.kutakrock.com.

