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Recent Developments in Director and Officer Indemnification and Advancement Rights 2024

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§ 4.1. INTRODUCTION

This chapter summarizes significant recent legislative and case law developments[1] concerning the indemnification of directors, officers, employees, and agents by the corporations or other entities they serve, as well as the rights of such persons to the advancement of litigation expenses before final resolution of the litigation.

Although much of this chapter focuses on Delaware case law developments, due to the state's preeminence in matters of corporate law, the chapter also includes summaries of decisions from both state and federal jurisdictions other than Delaware that either apply Delaware law or otherwise present analysis of significant issues concerning the indemnification and advancement rights of directors and officers. This chapter also refers to legislative developments under Delaware law and the Model Business Corporation Act.

§ 4.2. INDEMNIFICATION AND ADVANCEMENT: 8 *DEL. C.* § 145

Section 145 of the Delaware General Corporation Law ("DGCL")[2] authorizes (and at times requires) a corporation to indemnify its directors, officers, employees, and agents for certain claims brought against them, and it allows a corporation to advance funds to those persons for the expenses they incur while defending such claims. Specifically, Section 145(a) and (b) broadly empower a Delaware corporation to indemnify its current and former corporate officials for expenses incurred in legal proceedings to which a person is a party "by reason of the fact" that the person is or was a director, officer, employee, or agent of the corporation or is or was serving at the request of the corporation as a director, officer, employee, or agent of another entity or enterprise.

If a present or former director or officer is successful in defending an action brought "by reason of the fact" that the person is or was a director or officer, Section 145(c) of the DGCL requires the corporation to indemnify that person for expenses (including attorneys' fees) reasonably incurred in connection with that defense. Section 145(c) allows a corporation to advance to corporate officials the reasonable expenses (including attorneys' fees) incurred in defending an investigation or lawsuit. The Model Business Corporation Act ("MBCA") contains similar provisions regarding the indemnification and advancement of expenses to corporate officials and employees, and the alternative entity statutes of Delaware and many other jurisdictions similarly contain enabling provisions concerning indemnification and advancement.

Many corporations have charter or bylaw provisions, or are parties to agreements with directors, officers, or employees, that supplement statutory indemnification and advancement rights. Such provisions often make indemnification and advancement mandatory under specified circumstances.

§ 4.2.1. Legislative Developments

Effective February 7, 2022, the Delaware General Assembly amended 8 *Del. C.* § 145(g), to expressly authorize a corporation to purchase and maintain director and officer insurance through use of a "captive insurance company"—i.e., an insurer that is directly or indirectly owned, controlled or funded by the corporation—as an alternative to traditional third-party D&O insurance. This allows a corporation to provide insurance for its officers, directors, employees, and agents even if section 145 otherwise prohibits indemnification by the corporation itself for such losses.

Per the 2022 amendment, the captive insurance must exclude from coverage any "loss … arising out of, based upon or attributable to … personal profit or other financial advantage" to which the covered officer or director is "not legally entitled" (i.e., self-dealing), or any "deliberate criminal or deliberate fraudulent act" or "a knowing violation of law[.]" The amendments also include requirements for separate conduct determinations—e.g., regarding excluded conduct—such as by an independent claims administrator, and they impose a disclosure requirement where payment under the captive policy requires notice to shareholders.

Without limitation, section 145(g) was revised, effective February 7, 2022, as follows (amendments in italics):

(g) A corporation shall have power to purchase and maintain insurance on behalf of any person who is or was a director, officer, employee or agent of the corporation, or is or was serving at the request of the corporation as a director, officer, employee or agent of another corporation, partnership, joint venture, trust or other enterprise against any liability asserted against such person and incurred by such person in any such capacity, or arising out of such person's status as such, whether or not the corporation would have the power to indemnify such person against such liability under this section. *For purposes of this subsection, insurance shall include any insurance provided directly or indirectly (including pursuant to any fronting or reinsurance arrangement) by or through a captive insurance company organized and licensed in compliance with the laws of any jurisdiction, including any captive insurance company licensed under Chapter 69 of Title 18, provided that the terms of any such captive insurance shall:*

> *(1) Exclude from coverage thereunder, and provide that the insurer shall not make any payment for, loss in connection with any claim made against any person arising out of, based upon or attributable to any (i) personal profit or other financial advantage to which such person was not legally entitled or (ii) deliberate criminal or deliberate fraudulent act of such person, or a knowing violation of law by such person, if (in the case of the foregoing paragraph (g)(1)(i) or (ii) of this section) established by a final, nonappealable adjudication in the underlying proceeding in respect of such claim (which shall not include an action or proceeding initiated by the insurer or the insured to determine coverage under the policy), unless and only to the extent such person is entitled to be indemnified therefor under this section;*
>
> *(2) Require that any determination to make a payment under such insurance in respect of a claim against a current director or officer (as defined in paragraph (c)(1) of this section) of the corporation shall be made by a independent claims administrator or in accordance with the provisions of paragraphs (d)(1) through (4) of this section; and*
>
> *(3) Require that, prior to any payment under such insurance in connection with any dismissal or compromise of any action, suit or proceeding brought by or in the right of a corporation as to which notice is required to be given to stockholders, such corporation shall include in such notice that a payment is proposed to be made under such insurance in connection with such dismissal or compromise.*

The American Bar Association did not make any changes to the indemnification and advancement provisions of the MBCA during the 2022 to 2023 period.

§ 4.2.2. Delaware Case Law Developments

1. Gandhi-Kapoor v. Hone Capital LLC[3]—Contempt Sanction for Failure to Comply with Advancement Order

In a matter of first impression, the Delaware Court of Chancery held that an LLC and its parent company were subject to civil contempt sanctions for failing to comply with an order to advance expenses. The court noted that usually contempt is not available for monetary judgments; however, because this was an advancement issue, which is, at its core, time sensitive, judicially awarding interest would not suffice to remedy the harm. The court explained that the delay caused irreparable harm to the member of the parent company, who was not compensated as the court had ordered.

Gandhi, a member of Hone, was terminated and then sued by the parent company in California Superior Court. In response, Gandhi and another party filed a suit against the parent to enforce their rights in profit interests. Gandhi accumulated almost half a million dollars in expenses defending the claims the LLC brought against her. Gandhi brought an

advancement action in Delaware and successfully moved for summary judgment. Every month after advancement was granted, Gandhi submitted advancement demands to the companies, which were never paid.

The court ultimately ruled that, as a sanction, Gandhi was entitled to damages in the amount of $1,000 a day in addition to the advancement, until the companies complied with the Court's Advancement Order.

2. Hoffman v. First Wave Biopharma, Inc.[4]—Board "Investigation and Inquiry" Versus "Remedial" Action as Triggering Advancement Right

In *Hoffman v. First Wave Biopharma, Inc.*, the Delaware Court of Chancery considered whether certain board actions amounted to an "investigation or inquiry" (as opposed to only "remedial" actions) sufficient to trigger a director's mandatory advancement right.

Plaintiff, Hoffman, served on the board of directors of First Wave Biopharma, Inc. (the "Company"). After a leak of confidential information, the Company's board concluded that Hoffman was responsible for the leak, although it "had no concrete evidence." Fearing further leaks, the board established a committee consisting of all the directors except Hoffman.

Though neither party disputed that Hoffman enjoyed a mandatory advancement right, only certain covered proceedings triggered that right, particularly at issue: an "investigation" and an "inquiry." Hoffman contended that because the Company concluded that he leaked the information and therefore breached his fiduciary duty, "the [Company] necessarily must have conducted an 'investigation' and/or 'inquiry' into [his] actions." The Company contended "it never undertook an investigation or inquiry into Hoffman's conduct."

The court determined that the board took no steps to confirm the belief that Hoffman leaked the information and found that "the Company did not investigate or otherwise conduct an inquiry into Hoffman." The court ultimately held that because "the Company directors started from the conclusion that Hoffman leaked" the non-public information, the Company's actions were "corrective actions from that conclusion, not investigative actions undertaken in reaching that conclusion." Thus, because the Company took only "remedial, not investigatory" actions to assuage their fear of further leaks, the board's response fell "short of an 'investigation' or 'inquiry' sufficient to trigger Hoffman's advancement rights."

In a footnote, the court, as the Delaware Court of Chancery often does, turned to dictionary definitions in order to ascertain the plain meaning of the words "investigation" and "inquiry" to determine whether advancement was appropriate.

3. Keller v. Steep Hill, Inc.[5]—Impact of Plaintiff's Characterization of Claim on Indemnification Rights

This Delaware Court of Chancery opinion addressed whether an officer and director was entitled to indemnification after a company reframed a fiduciary duty claim into a breach of contract claim in an attempt to escape its advancement obligations. Plaintiff, Keller, was a Steep Hill director and officer through a consulting agreement between the company and Delft Blue Horizons, an entity owned and controlled by Keller. Steep Hill asserted conclusory breach of contract claims against Delft Blue Horizons on the theory that Keller's alleged mismanagement and fiduciary misconduct resulted in regulatory troubles for the company—which in turn constituted a breach of the consulting agreement.

Steep Hill initiated arbitration proceedings against Keller. Keller's initial defense to arbitration was that he was not a party to the consulting agreement between Steep Hill and Delft Blue, and, so, he could not be forced to arbitrate. The arbitrator found that Keller was a third-party beneficiary to the consulting agreement, bringing him into the arbitration proceedings. Keller then filed a response to the arbitration demand, asserted counterclaims, and made an advancement demand.

This case hinged on the fact that Steep Hill, in an attempt to avoid its advancement obligations, responded that it planned to withdraw the breach of fiduciary duty claim and any other claims involving Keller's conduct as a director or officer. Despite this, Steep Hill continued to claim that Keller's actions caused Delft Blue to breach the consulting agreement. Keller sought indemnification for the fees and expenses he and Delft Blue incurred in the arbitration proceedings.

Ultimately, the question was whether Keller was entitled to indemnification for the fees and expenses he and Delft Blue incurred both defending the claims against Delft Blue and asserting counterclaims against Steep Hill. It was clear that Steep Hill merely reframed its fiduciary duty claims for the purpose of avoiding its advancement obligations. Pursuant to Section 145 of the DGCL, Keller was entitled to indemnification for fees and expenses nominally incurred by Delft Blue.

The court in *Keller* found that since Keller wholly and indirectly owned Delft Blue, he was entitled to recover the fees incurred through that ownership as a practical matter. Keller ultimately was able to recover nearly all the fees and expenses incurred in the arbitration. Although Keller failed to separate his fees from Delft Blue's fees, that did not preclude a ruling in his favor. The court ordered Keller to submit a good faith estimate of expenses incurred relating to the claims found to be subject to indemnification.

4. Kokorich v. Momentus Inc.[6]—Release of Indemnification and Advancement Rights

Plaintiff, Kokorich, a Russian national who had a hand in founding and running a "space infrastructure" company, sued for indemnification and advancement, which the Court of Chancery dismissed as released claims. In 2017, the company and Kokorich entered into an indemnification agreement, which provided that the company would indemnify Kokorich to the fullest extent permitted by law, including coverage for claims brought against him while acting as an officer or a director. A 2020 revision of the bylaws of the company extended this provision to all officers and directors. The company merged with another and planned to launch a space vehicle, which sparked concerns with the SEC over foreign ownership of the company. This resulted in Kokorich resigning from all officer and director positions in 2021, pursuant to a separation agreement.

This agreement put Kokorich's company equity into a trust and released any employment claims, but did not release claims related to his previous indemnification agreement. Subsequent issues led to Kokorich and the company executing a stock repurchase agreement, in which the company repurchased Kokorich's interest. That agreement, the Court of Chancery found, released all of Kokorich's claims against the company, including the advancement and indemnification claims, thereby nullifying the 2017 agreement, despite that the stock repurchase agreement excluded any advancement or indemnification releases.

The company unsuccessfully argued that Kokorich's claims should be dismissed because the court lacked subject matter jurisdiction, despite that the initial indemnification agreement had a binding choice of law clause stating that all claims must be brought in the Delaware Court of Chancery. Kokorich unsuccessfully attempted to sidestep the multiple agreements in order to enforce the initial indemnification agreement and invoke a statutory claim for advancement and indemnification. Not only did the court reject both of Kokorich's arguments, but it also determined that the bylaws, which applied to all officers and directors, released Kokorich's claims under his initial agreement. The court also found that Kokorich was not entitled to mandatory arbitration, and his declaratory judgment was not ripe.

5. Krauss v. 180 Life Sciences Corp.[7]—"By Reason of the Fact" Standard for Advancement

This Delaware Chancery Court decision reinforced the interpretation under Delaware law of the phrase that serves as a prerequisite to the right of advancement, with its origin in section 145 of the DGCL—namely, whether the person seeking advancement was sued "by reason of the fact" that she was an officer or director.

Plaintiff Krauss was the former CEO and director of KBL Merger Corp. IV ("KBL"), until she resigned following KBL's combination with a group of several entities (the "Company"). Following the combination, the United States Securities and Exchange Commission (SEC) launched an investigation into the combination. In connection with that investigation, Krauss was served a number of subpoenas. Subsequently, the Company filed a complaint against Krauss and others, asserting claims of breach of fiduciary duty, alleging, among other things, "that Krauss intentionally failed to disclose information that rendered certain KBL disclosures materially false and misleading." After her multiple demands for advancement for legal fees went unanswered, Krauss filed her Complaint for Advancement, seeking advancement pursuant to the Company's Charter and Bylaws.

Perennially, one of the more common defenses to a claim for advancement is whether the prerequisite to the provision for advancement in a company's charter or bylaws is triggered to the extent the litigation for which advancement is sought is being prosecuted: "by reason of the fact that … [the plaintiff] is or was a director or officer of the company." The court in Krauss explained that the "by reason of the fact" standard is satisfied when "a nexus or causal connection" exists between the underlying proceeding and the official's "corporate capacity." The court further explained that it "construes such provisions broadly to effectuate Delaware's policy of providing temporary relief from substantial expenses."

The Krauss decision is also noteworthy as a reminder that the court will not typically make a determination at the advancement stage regarding the allocation between legal fees that must be advanced and intertwined claims in the same case that may not be subject to advancement. Rather, the court approved the procedure described in *Danenberg v. Fitracks*,[8] which directed advancement payments based on the good faith allocation of the parties, with final allocation to be made at the conclusion of the case.

The court in *Krauss* ultimately entered summary judgment in favor of Krauss, in part, ordering advancement for fees and expenses incurred in connection with the SEC subpoenas and her defenses (including affirmative defenses) and one counterclaim in the Company's lawsuit. The parties were ordered to confer and submit an "implementing order" consistent with the court's decision, as well as a "joint letter" setting forth their respective positions regarding allocation consistent with the *Fitracks* decision.

§ 4.2.3. Other State and Federal Case Law Developments

1. Iarussi v. LobbyTools, Inc.[9]—"By Reason of the Fact" Versus "Misconduct"

The court in *Iarussi* confirmed that a former officer was not entitled to attorney fee indemnification, because her former employer-corporation's lawsuit against her was not "by reason of the fact" that she held an officer position. Rather, the court found that the lawsuit was based on allegations of her misconduct—misappropriation or retention of trade secrets and disclosure of confidential information to the company's customers.

A husband and wife successfully ran a multi-million-dollar corporation until they divorced. The wife, Sarah Michael (oddly defined as "Michael" in the court's decision), worked as an officer for the corporation for more than a decade. Michael's husband, John Iarussi, was the majority shareholder and chair of the corporation. When their marriage deteriorated, the corporation cut Michael's corporate power and initiated a lawsuit against her, accusing her of violating her confidentiality and noncompete agreements. The corporation moved for injunctive relief to prevent Michael from possessing and/or using any confidential information. The trial court determined that Michael was entitled to the information while divorce proceedings were ongoing, but that once the divorce proceedings were finalized, Michael was not allowed to possess the confidential information. The corporation was satisfied with the trial court's opinion and voluntarily dismissed its case without prejudice. Michael then sought attorney fee indemnification from the corporation, pursuant to Florida's applicable statute, Sections 607.0850 and 768.79, Florida Statutes (2018).

This is essentially a statutory interpretation case, relating to whether an officer was entitled to indemnification because she was allegedly sued "by reason of the fact" that she held the officer position.

Concluding that Michael was not eligible for indemnification, the court in *Iarussi* reasoned that she had *not* been sued by reason of her position as an officer or former officer of the company. Rather, the court found that the corporation sued her based on allegations of misconduct—specifically, her purported retention of trade secret information and disclosure of confidential information relating to, among other things, the company's competitors. The court concluded that the statutory language did not extend indemnification rights to Michael's alleged misconduct under these circumstances.

2. Schorr v. PPA Holdings, Inc.[10]—Contract Interpretation—Current Versus Former Directors and Officers

In *Schorr v. PPA Holdings, Inc.*, plaintiff Gregory Schorr, a former officer and director of defendants, sued unsuccessfully to obtain a declaratory judgment that he was entitled to indemnification and advancement of expenses he incurred in defending claims asserted against him by a third party, FNA. Schorr contended that defendants were obligated by the plain language of their bylaws and under Indiana law to advance the expenses to him, but the U.S. District Court for the Southern District of Indiana disagreed.

While Schorr was still a director and officer of defendants, third party FNA entered into a Stock Purchase Agreement to purchase all issued and outstanding securities of one of the defendants. As part of FNA's due diligence investigation, FNA requested documents and information from defendants and Schorr responded to those requests. After Schorr was no longer a director or officer of defendants, FNA alleged that Schorr had intentionally misled it during the due diligence investigation by providing incorrect, misleading information in response to its requests.

Pursuant to an advancement provision in defendants' bylaws, Schorr made a written demand to defendants for indemnification and advancement of expenses relating to FNA's allegations. Defendants refused to advance any expenses, and Schorr then filed suit. The defendants answered, and Schorr moved for judgment on the pleadings pursuant to Fed R. Civ. P. 12(c).

The court concluded that Schorr was entitled to judgment as a matter of law only if he could show that the advancement provision in the bylaws unambiguously applied to current *and* former officers and directors. Applying Indiana law, the court held that the phrase "director or officer" in the bylaws was subject to more than one reasonable interpretation and that the resulting ambiguity precluded judgment on the pleadings. The court also declined to construe the ambiguity against defendants on the ground that they had drafted the bylaws. The court reasoned that under Indiana law, the meaning of the phrase "director or officer" should be decided with the benefit of extrinsic evidence, and, therefore, it ruled that judgment on the pleadings was inappropriate.

Schorr further argued that he had a contractual right to advancement under the bylaws while he was an officer, and under the Indiana Business Corporation Law, Ind. Code § 23-1-36-(4)(b), that right could not be affected by his subsequent removal or resignation. The court concluded, however, that whether section 23-1-36-(4)(b) allowed Schorr to presently enforce a right to advancement also depended on whether the term "officer," as used in the bylaws, referred to current *and* former officers (or only to current officers). If the term referred only to current officers, then the obligation to advance expenses did not become enforceable unless a proceeding was initiated against an officer before he or she was removed or resigned. In this case, Schorr was no longer an officer when FNA's allegations against him arose. Thus, if the term "officer" referred only to current officers, Schorr's right to advancement was unenforceable.

The court reiterated that the term "officer or director" in the bylaws was ambiguous and extrinsic evidence was necessary to determine its meaning. The court, therefore, denied Schorr's motion for judgment on the pleadings.

3. Pointe Royale Property Owners' Ass'n, Inc. v. McBroom[11]—No Right to Jury Trial on Indemnification Counterclaim

The *Pointe Royale* case is interesting in its procedural result—whether a jury trial is required on a counterclaim for indemnification under a company's applicable by-laws.

Plaintiff McBroom appealed a final judgment in favor of Defendant Pointe Royale Property Owners' Association, Inc. ("Pointe Royale"), which removed McBroom as a Director from Pointe Royale's Board of Directors. McBroom's appeal raised three points, including whether the trial court erred in conducting a bench trial and ruling on McBroom's equitable claims before a jury trial on the legal claims, thus allegedly depriving him of his constitutional right to a jury trial.

More specifically, McBroom argued that the trial court's rulings on various claims before resolving his counterclaim seeking indemnification violated his constitutional right to a jury trial. The court, however, deemed this question moot to the extent resolving the question on its merits would not practically impact McBroom's right to a jury trial on his amended counterclaim.

The court explained that, under the circumstances, McBroom did not generally or under the applicable bylaws possess a right to a jury trial on his amended counterclaim for indemnification. The court concluded that the trial court did not abuse its discretion, as McBroom lacked the right to a jury trial on his amended counterclaim, which was "incidental" to the equitable claims affirmatively brought by Pointe Royale.

4. Schnupp v. Annapolis Engineering Servs., Inc.[12]—*De Facto* Officer Doctrine

In *Schnupp*, the Court of Special Appeals of Maryland considered whether an employee, Schnupp, working in a managerial position but alleging to be a *de facto* officer of the corporation, was entitled to advancement rights for claims arising from his alleged breach of the employment contract and related claims, after he resigned from the corporation. Concluding that Schnupp was not entitled to advancement rights, the court in *Schnupp* analyzed the *de facto* officer doctrine and its underlying reasoning and rationale.

Schnupp was employed as the laboratory director for Annapolis Engineering Services ("Annapolis"). Annapolis had a single officer during the term of Schnupp's employment (its president, Brian Flynn). Schnupp's employment agreement identified him as an "employee," clarifying that he had no authority to act in a fashion that would imply he had apparent authority to bind or enter into agreements on Annapolis's behalf.

Nevertheless, Schnupp argued that he was a *de facto* officer, because he exercised sole supervision, training, and direction of the subordinate laboratory technicians and employees. He contended he was responsible for maintaining the day-to-day operations of the testing lab, including authorizing the purchase of necessary equipment. Further, he claimed he was responsible for developing Annapolis's client base and obtaining certifications and accreditations to properly run the testing lab.

In 2017, Schnupp entered into a Stock Agreement that incentivized him with an equity interest, based on his performance as laboratory director. The Stock Agreement provided Schnupp with full and exclusive authority and control in the management of Annapolis, while noting that the powers of Annapolis would be exercised only by, or under the authority of, Annapolis's president, Mr. Flynn.

After Schnupp resigned from Annapolis in 2019, he entered into a Stock Redemption Agreement by which Annapolis agreed to repurchase Schnupp's equity interest.

Schnupp was later hired by one of Annapolis's industry competitors. Shortly thereafter, Annapolis brought suit against Schnupp, alleging breaches of his employment agreement. Schnupp filed a counterclaim, seeking advancement and/or indemnification of his legal fees

pursuant to a provision of Annapolis's Articles of Incorporation, which provided indemnity to a present or former director or officer of the corporation. In support of his counterclaim, Schnupp argued that he was a *de facto* officer of Annapolis.

Annapolis moved to dismiss the counterclaim, and the trial court found that Schnupp was not entitled to advancement or indemnification, because he was not a *de facto* officer and the alleged misconduct did not occur while Schnupp was acting in any capacity as an officer or *de facto* officer of Annapolis.

The court in Schnupp generally described the *de facto* officer doctrine as follows:

> The [*de facto* officer] doctrine originated as a function of public policy with the primary purpose of binding an individual's actions when acting pursuant to an unofficial or defective appointment to public office. ...The most widely cited touchstone of the doctrine is found in *Norton v. Shelby Cnty.*[, 118 U.S. 425 (1886)] where the United States Supreme Court held: "an officer *de facto* is one whose acts, though not those of a lawful officer, the law, upon principles of policy and justice, will hold valid, so far as they involve the interests of the public and third persons ..."

The court undertook a comprehensive review, examining rationales traditionally associated with the doctrine within the realm of public office and extrapolating its relevance and application to the "realm of private corporations and association." Drawing upon insights from Delaware case law, the court identified three distinct scenarios warranting the invocation of the *de facto* officer doctrine: first, to bind a corporation's actions concerning third parties; second, to hold the *de facto* officer accountable for corporate liabilities; and third, to resolve disputes arising from corporate elections.

The court in *Schnupp* found a conspicuous absence of any of these circumstances in the case. The court held that Schnupp's claim for advancement failed as a matter of law, emphasizing that the *de facto* officer doctrine cannot be invoked "for the *sole purpose* of securing a corporate benefit or protection [such as advancement and indemnification of attorney's fees]."

5. Miesen v. Hawley Troxel Ennis & Hawley LLP[13]—Evidence and Apportionment of Advanceable Expenses

The Idaho federal district court in *Miesen v. Hawley Troxel Ennis & Hawley LLP* recognized that a third-party defendant was entitled to an advance of expenses to defend against claims pertaining to his role as an officer or director, but awarded an amount that was significantly less than the third-party defendant had requested.

In *Miesen*, defendants/third-party plaintiffs AIA Services Corp. and AIA Insurance, Inc. (collectively, "the AIA entities") asserted claims against Reed Taylor, a third-party defendant, for actions he took as an officer or director of the AIA entities. Taylor then moved for an expense advance from the AIA entities but did not specify the amount he was seeking. The court concluded that Taylor was entitled to an advance, but only for those expenses related to his defense of claims against him for actions related to his role as officer or director of the AIA entities. The AIA entities were not required to advance money to Taylor for expenses he incurred in opposing the AIA entities or pursuing counterclaims.

The court ordered Taylor to submit itemized invoices of fees associated with his relevant legal defense so that the court could determine the amount of the advance the AIA entities were required to pay him. Taylor complied with the court's order, but requested a total of $71,945.46 for expenses related to (1) his defense as an officer or director of the AIA entities and his efforts to obtain an advance; (2) his overall defense of the claims, including those related to his actions/inactions as an officer or director of the AIA entities as well as his alleged membership on an advisory board; and (3) his affirmative claims (*i.e.*, counterclaims) as well as his overall defense.

The court rejected Taylor's request for an advance of expenses that were unrelated to his defense against claims pertaining to his role as an officer or director. The court reasoned that many of the expenses Taylor claimed were incurred relating to his counterclaim and only incidentally related to his defense. The court then determined that Taylor's request for an advance of $22,412.00 for expenses related to his defense was reasonable.

The AIA entities argued that Taylor's request was unreasonable in that it included fees for over 27 hours spent on Taylor's motion for advancement of expenses and that 27 hours was unreasonable. The court disagreed. The court noted that under Idaho Code § 30-29-854(b), if a court determines that a director is entitled to an advance for expenses, it must "order the corporation to pay the director's expenses incurred in connection with obtaining court-ordered indemnification or advance for expenses." The court concluded that 27 hours was a reasonable amount of time to spend on the motion, given the complexity of the case, the need for an opening brief and a reply brief, the lengthy period of invoices to review, and the need to categorize and redact time entries. The court, therefore, ordered the AIA entities to pay Taylor $22,412 within thirty days.

6. In re DeMattia[14]—Statutory Interpretation, Unclean Hands as a Defense, and Mandamus Remedy

This case merits attention due to the court's recognition that "[t]here is limited Texas case law concerning advancement under the Texas Business Corporation Act or the Texas Business Organizations Code." The court in *DeMattia* conducted a thorough analysis of Delaware law on advancement, applying it to interpret the advancement provision at issue and addressing its applicability to former members.

Two brothers, Mark and David DeMattia, acquired Restoration Specialists ("Restoration") and restructured it as an LLC. Mark served as the managing member, and David was the minority member. In 2018, as the brothers endeavored to sell Restoration, Mark wrongfully copied and deleted Restoration's project history files a few days before the closing. Restoration filed a lawsuit against Mark for misconduct allegedly occurring while he was the managing member. Mark, then, sought indemnification and advancement of his attorney's fees from Restoration, pursuant to Restoration's "corporate regulations" and applicable provisions of the Texas Business Organizations Code.

Restoration's corporate regulations included an indemnification provision that allowed advancement to members acting as officers. Following amendments in accordance with the Texas Business Organizations Code, the dispute centers on whether the advancement provision applies to *former* members.

Looking to Delaware case law, the court in *DeMattia* concluded that current Texas law explicitly allows the advancement of reasonable expenses to both current and former officers/governing persons, and that advancement is mandatory "if a company's governing documents so state."

Addressing Restoration's corporate regulations in particular, the court highlighted the use of the term "Proceeding" in both the advancement and indemnification sections, referring to an action, suit, or proceeding to which a member was made a party "by reason of the fact that he or she is or was a Member." This commonality, the court explained, creates an obvious linkage between the two regulation sections, which led the court to reject Restoration's argument that the indemnification and advancement sections must be interpreted separately.

Restoration also raised public policy concerns in support of its arguments against Mark's alleged indemnification and advancement rights. Restoration argued that Mark was not entitled to indemnification or advancement, because he had "unclean hands." The court rejected this argument, emphasizing that at the time an advancement dispute ripens, it is often the case that the corporate board has drawn harsh conclusions about the integrity and fidelity of the corporate official seeking advancement. The court found support for this holding in Delaware case law, which the court recognized frequently upholds the indemnification and advancement rights of corporate officials accused of serious misconduct.

The court granted Mark's petition for a writ of mandamus, reasoning that it was the "appropriate relief to correct an order denying advancement of a claimant's fees because the act of proceeding to trial without advancement would defeat the substantive right at stake."

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1. This chapter update generally covers legislative and case law developments during 2022 and 2023. The views reflected herein are those of the authors and may not reflect those of their law firms or clients. ↑
2. The DGCL is found in Title 8 of the Delaware Code. ↑
3. C.A. No. 2022-0881-JTL, 2023 WL 4628782 (Del. Ch. July 19, 2023) (Laster, V.C.). ↑
4. C.A. No. 2023-0097-MTZ, 2023 WL 6295345 (Del. Ch. Sep. 27, 2023) (Zurn, V.C.). ↑
5. C.A. No. 2022-0098-MTZ, 2023 WL 5624215 (Del. Ch. Aug. 31, 2023) (Zurn, V.C.). ↑
6. C.A. No. 2022-0722-MTZ, 2023 WL 3454190 (Del. Ch. May 15, 2023) (Zurn, V.C.). ↑
7. C.A. No. 2021-0714-LWW (Del. Ch. Mar. 7, 2022). ↑
8. 58 A.3d 991 (Del. Ch. 2012). ↑
9. No. 1D22-1649, 2023 WL 5734338 (Fla. Ct. App. September 6, 2023). ↑
10. Case No. 1:22-cv-02083-TWP-TAB, 2023 WL 3602760 (S.D. Ind. 2023). ↑
11. 672 S.W.3d 68 (Mo. Ct. App. 2023). ↑
12. 2022 WL 2134690 (Md. Ct. App. June 14, 2022) (unpublished). ↑
13. Case No. 1:10-cv-00404-DCN, 2022 WL 1554833 (D. Idaho May 17, 2022). ↑
14. 644 S.W.3d 225 (Tex. Ct. App. 2022). ↑

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