

Chancery Grants Advancement to Ex-Director Guilty of Insider Trading

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The Delaware Court of Chancery recently added to the jurisprudence on advancement of fees for officers and directors pursuant to Section 145 of the Delaware General Corporation Law, in [Holley v. Nipro Diagnostics](#), (Del. Ch., Dec. 23, 2014). Although we represent the defendant company, this summary of the decision provides an objective overview of key parts of the ruling that may be of widespread interest. An unusual factual aspect of this case involved a former director of the company who pleaded guilty to insider trading, and thereafter sought advancement for related litigation, including fees incurred in a U.S. Securities and Exchange Commission action alleging insider-trading claims based on the same set of facts that were the factual basis of his guilty plea.

Another somewhat unusual factual aspect of this case was that the indemnification agreement had a carve-out that excluded coverage for insider-trading claims. If upheld, the agreement would exclude from the right to indemnification any fees incurred in connection with insider-trading claims.

The Court of Chancery recited the well-known principle that issues related to indemnification and advancement need to be addressed separately. That is, the court held that an advancement claim is analyzed independently, regardless of whether the director would ultimately be entitled to indemnification in a subsequent indemnification claim. The court did not have indemnification claims directly before it in this motion for partial summary judgment on advancement.

Another interesting procedural twist to this case was that a prior suit was filed in Florida by the company to seek a ruling from the Florida court regarding whether the company was required to provide advancement and indemnification. The Court of Chancery determined that the first-filed rule under the *McWane* doctrine did not require that this Delaware case be stayed, in part because the court found that the issues addressed in the Florida action were not deemed to include the same issues that were being presented to the Court of Chancery.

Several other principles recited by the court in this opinion are notable. The court held that the prerequisite for advancement that a suit against a covered person must be "by reason of the fact" of his corporate position can be determined as a matter of law. Even if insider-trading claims do not involve any overtly official corporate actions by a director, it may still satisfy the prerequisite of being "by reason of the fact" for purposes of an advancement action. A limitation on an indemnification right, moreover, may not necessarily be a limitation on a right to advancement.

Even though it may seem counterintuitive, one who pleads guilty and admits that he did not act in the best interest of the company may under some circumstances still be eligible for at least partial indemnification. Therefore, pleading guilty will not per se bar subsequent requests for advancement based on the same actions leading to the guilty plea, according to this opinion.

The court observed that Section 145(a) has a good-faith requirement for indemnification (not advancement), if a director, for example, is convicted (which is not a per se disqualification to indemnification). But, Section 145(c) has no such prerequisite, in connection with indemnification for a director or officer who has been "successful or otherwise" in defending a claim. The phrase "or otherwise" is broadly defined in this context.

Based on the public policy of Delaware to provide advancement, a takeaway from this case may be that: When it is a "close call," the court may give the "benefit of the doubt" to the person seeking advancement.

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