

Bylaw Restricting Advancement Upheld

In *Thompson v. The Williams Companies Inc.*, 2007 WL 2215953 (Del. Ch.), the Delaware Court of Chancery upheld a bylaw that restricted advancement of defense costs to employees who were neither officers nor directors and gave the Board broad power to impose conditions on advancement. The bylaw authorized advances to be paid to such employees "upon such terms and conditions, if any, as the Board of Directors deems appropriate." The Board required, as conditions to advancement to Thompson, a defendant in a criminal proceeding, the following: (1) Thompson was required to represent to the Board his personal belief that his conduct fell within the standard for indemnification (i.e. that he acted in good faith and reasonably believed his actions were in the best interests of the corporation and not unlawful); (2) Thompson was required to provide a secured undertaking to guarantee his obligation to repay all amounts advanced; (3) the amount of the security was required to exceed, at all times, both expenses advanced plus expenses requested to be advanced; and (4) advancement was to be limited to legal expenses incurred after his indictment. In an opinion following trial, Vice Chancellor Strine rejected claims that the bylaw was invalid as against public policy and found that the Board had acted rationally and in good faith in setting the conditions of advancement. Since the Board acted both rationally and in the reasonable belief that the conditions were necessary to protect the corporation, the Board's action fell within the protection of the business judgment rule and satisfied the contractual standard of good faith and fair dealing.

Thompson reinforces the legal concept that Boards of Delaware corporations enjoy substantial flexibility in fashioning advancement and indemnification bylaw provisions. Mandatory advancement provisions-- provisions that deprive the Board of discretion to respond to advancement requests on a case-by-case basis or to impose reasonable caps or restrictions-- continue to crop up in a surprising number of situations. *Thompson* should serve as a useful

reminder that counsel should review advancement and indemnification bylaws periodically to be certain that the policy reflected by such provisions reflects the current thinking of the Board and the best interests of the corporation.

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