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Update: Delaware Amendment in Response to *Schoon v. Troy*

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An amendment to Section 145(f) of the Delaware General Corporation Law, which will become effective on August 1, 2009, addresses the recent decision in *Schoon v. Troy Corp.*, 948 A.2d 1157 (Del. Ch. 2008) and resolves a major issue discussed in the recent article "D&O Indemnification Following *Schoon v. Troy*" in *The John Liner Review* 23, no. 1 (Spring 2009). The issue is whether a corporation can amend its bylaws to eliminate the right of "former" directors to advancement of expenses.

The amendment provides:

> A right to indemnification or to advancement of expenses arising under a provision of the certificate of incorporation or a bylaw shall not be eliminated or impaired by an amendment to such provision after the occurrence of the act or omission that is the subject of the civil, criminal, administrative or investigative action, suit or proceeding for which indemnification or advancement of expenses is sought, unless the provision in effect at the time of such act or omission explicitly authorizes such elimination or impairment after such action or omission has occurred.

However, a number of important issues remain unresolved.

Initially, a fundamental question is should directors and officers should be relying on bylaw or charter provisions for indemnification and advancement in the first place?[1] Moreover, will other states follow the reasoning in *Schoon* without a similar statutory amendment in such other state?

The Delaware amendment attempts to prevent elimination or impairment of indemnification and advancement from bylaws or charters, but it does not affirmatively grant or create such rights. If existing by-laws or charter provisions are only "permissive," not "mandatory," or if such provisions fail to include acts or omissions in respect to pension plans by trustees or fail to cover directors or officers of subsidiaries of the company or if they fail to provide a separate right for advancement of costs, the directors or officers will remain inadequately protected after the amendment.

The decision in *Schoon* provided a wake-up call, prompting many companies to review and update their bylaws or to consider entering into indemnification and advancement agreements with directors and officers and to review their D&O insurance. We believe this process should continue, since the amendment does not create indemnification or advancement rights and many companies have not given these issues their full consideration.

Endnote

1. The ruling in *Schoon* would not have affected a written indemnification agreement between a director and the company, which many commentators still suggest as best practice.

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