



## Limits of Indemnification for Directors in Post-Employment Conduct Suits

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Recent rulings by the Delaware Court of Chancery have clarified the availability and limits of indemnification and advancement for former directors and officers of Delaware corporations in lawsuits concerning post-employment behavior.

In [Lieberman v. Electrolytic Ozone, Inc., C.A. No. 10152-VCN \(Aug. 31, 2015\)](#), two former officers of a company sought advancement for defending claims brought against them by the company for breach of a noncompete agreement. Each former officer had signed an indemnification agreement providing that the company would indemnify him against lawsuits brought “by reason of the fact” that he was an officer—the greatest extent of indemnification possible under Delaware law. In addition, the company had agreed to advance the officers’ expenses for any lawsuit against which the officers were indemnified. The Court denied their claim for advancement: “Importantly, [the company’s] contractual claims are not dependent on any alleged on-the-job misconduct.” Therefore, the Court held, the lawsuits were not claims brought “by reason of the fact” that the defendants had been corporate officers, and they were accordingly not entitled to indemnification or advancement.

In [Charney v. American Apparel, Inc., C.A. No. 11098-CB \(Sept. 11, 2015\)](#), the CEO of a company had been suspended and signed a standstill agreement that prevented him from attempting to regain control. The company then terminated the CEO and filed suit against him for breach of the standstill agreement. The ex-CEO claimed that he was entitled to advancement even for non-indemnified claims because his contract provided for advancement for any claims “related to the fact” that he had been an officer. Rejecting this argument, the Court refused to expand the ex-CEO’s right to advancement beyond lawsuits for which he could also claim indemnification. The Court then ruled that the ex-CEO was alleged to have violated the standstill agreement “solely in his personal capacity,” and the company was not suing him for breach of the agreement “by reason of the fact” that he had been an officer. The claim was thus not indemnifiable and the ex-CEO not entitled to advancement.

The Court of Chancery has the power to determine summarily whether a corporation may advance litigation expenses, as recently reaffirmed in [Tulum Management USA LLC v. Casten, C.A. No. 11321-VCN \(Nov. 9, 2015\)](#). Considered together, these rulings indicate that when

advancement is available, Delaware directors and officers can claim it promptly and with assurance for lawsuits relating to post-employment behavior, but only if there is a clear causal connection between the conduct at issue in the litigation and the director or officer's former position. The cases also highlight that officers and directors wishing to ensure advancement rights for disputes that do not involve clearly indemnifiable claims should take care to define those rights distinctly in the documents governing their indemnification and advancement arrangements.