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Delaware Supreme Court Affirms Guidance in Advancement Disputes

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Companies considering agreements to advance legal costs to directors and officers (commonly known as "advancement provisions") should take note of the Delaware Supreme Court's recent decision in *Trascent Management Consulting v. Bouri*. In *Trascent*, the Delaware Supreme Court unequivocally held that advancement provisions will be strictly enforced according to their terms in pending litigation, including the requirement that a company provide advancements unless and until the court reaches a final decision regarding whether indemnification is required at all. The court held so even where, as in *Trascent*, the company sues the purportedly indemnified individual for fraudulently inducing their agreement to the very contract containing the advancement and indemnification provisions.

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The facts of *Trascent* appear to have given the court little cause for pause in enforcing the advancement provision during the ongoing litigation. Trascent Management Consulting, a global consulting firm, hired George Bouri to join the nascent company as a senior executive with oversight over key areas within the company. After 16 months on the job, Trascent fired Bouri and sued him for, among other things, violating his employment agreement. When Bouri sought advancement to defend himself against Trascent's claims pursuant to the plain language of the operative contracts, Trascent refused. Bouri then filed counterclaims and moved for summary judgment to enforce the advancement provision.

As is arguably common for highly sought-after executives, Bouri's employment agreement included an extremely broad advancement provision, which provided that: Trascent was responsible for indemnifying all costs relating to his employment, and Trascent would promptly reimburse him for all costs associated with the litigation until a "determination has been made by final, nonappealable order of a court … that indemnification is not required." Trascent tried to avoid advancing Bouri's defense fees by arguing that the agreement in which the advancement provision was included was induced by fraud and therefore invalid. Bouri responded that this defense was premature, because it was inextricably bound up with the merits issues the court could only decide after a more robust presentation and review of the evidence. The

Delaware Court of Chancery agreed with Bouri, finding that the clear language of the contract and the summary nature of the proceedings under Delaware law required that advancement be provided at least until the court reached a final decision on the merits of Trascent's claims, including the alleged fraudulent inducement.

This outcome was likely expected to those familiar with Delaware's existing precedent regarding the enforcement of advancement provisions. The precedent clearly provides that advancement proceedings are to be limited in scope to the company's governing rules and the plain terms of the advancement provision, and must not prematurely wade into the merits of the underlying action, as in *Tafeen v. Homestore*, (De. Ch. Mar. 22, 2004) aff'd 888 A.2d 204 (Del. 2005), and *DeLucca v. KKAT Management* (Del. Ch. Feb. 27, 2014). A contrary outcome would, according to the courts, only encourage companies to bring similar fraud claims in every case in which a company seeks to avoid advancing legal defense costs. In other words, a contrary outcome would allow companies to have their cake—i.e., the ability to entice executives with broad indemnification and advancement provisions—and eat it too—i.e., avoid ever actually advancing expenses.

The court had no interest in upsetting this line of precedent with *Trascent*, ruling: "When a party has employed an officer under a contract where that party agreed to provide for advancement for certain claims until a court's final judgment that the officer is not entitled to indemnification, that party may not escape the obligation by injecting into a summary advancement proceeding a defense based on the argument that the underlying contract under which the parties are operating is invalid altogether, because of fraud in the inducement." Allowing such a maneuver, the court found, would "undermine the clear statutory purpose for providing a summary proceeding for advancement case."

In its 2002 ruling in *Stifel Financial v. Cochran*, the Delaware Supreme Court articulated the purpose of advancement to "promote the desirable end that corporate officials will resist what they consider unjustified suits and claims, secure in the knowledge that their reasonable expenses will be borne by the corporation they have served if they are vindicated," and to "encourage capable women and men to serve as corporate directors and officers, secure in the knowledge that the corporation will absorb the costs of defending their honesty and integrity." The Delaware Supreme Court's decision in *Trascent* demonstrated its continued commitment to this statutory purpose.

Trascent makes clear that a company can have great difficulty avoiding its obligations to advance legal fees and expenses when the covered director, officer, or employee properly invokes his or her rights under an employment agreement. Even a company with a meritorious fraudulent inducement claim against an officer cannot sidestep this obligation early in the proceedings if its advancement provision is effectively unlimited. Given the costs associated with advancement, and the significant risks that those costs will never be recovered, counsel should be mindful of this ruling both when drafting advancement provisions and when advising clients faced with the prospect of paying out large sums of money pursuant to such an agreement. •

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