Ultimate Corporate Counsel Guide

December 2008
Number 24

WHAT'S IN YOUR D&O INSURANCE PROGRAM?

Schoon v. Troy and the Case for Side A D&O Insurance

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In March 2008, the decision by the Delaware Court of Chancery in *Schoon v. Troy*[1] sent something of a shock wave throughout the corporate community and, in particular, to corporate boards of directors. The case, which considered the point at which a director's or officer's right to advancement of expenses in respect of litigation proceedings vests, serves as a strong reminder to corporate executives that, when it comes to building a proper risk management strategy for protecting one's personal assets, reliance on indemnification in the corporation's by-laws is often not enough. Vital to the protection of any board member is a comprehensive directors' and officers' ("D&O") liability insurance policy, and one that at least considers including Excess Side A "DIC" coverage.

The flip side to the privilege that typically comes with an appointment to a board of directors is the potential of being named in a lawsuit for failing to act with care, diligence, and prudence in the execution of one's duties. Modern corporation statutes provide for the mandatory

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indemnification of directors under certain circumstances (including where the director has not been judged by a court of competent authority to have done anything wrong by commission or omission). Even if the suit is without merit, litigation is a long and costly enterprise and the notion of any board member being able to fund such an undertaking personally and being reimbursed only after a final adjudication has serious financial consequences and may result in a truncated or less than effective defence. It may even make the difference between winning, losing, or having to settle.

Most corporations are permitted (but not required) by statute to provide within their by-laws for the indemnification and holding harmless of the corporation's board members and former board members, provided that they have acted honestly, in good faith, and with a view to the best interests of the corporation. Furthermore, the by-laws will often provide for the advancement of defence costs and expenses in the event of a suit being brought, and pay for such costs as they accumulate rather than upon ultimate disposition, which can often take years. This is what is termed "corporate advancement". Unfortunately, *Schoon v. Troy* could change the landscape, leaving former directors and officers without proper indemnification.

Schoon v. Troy – The Facts

Schoon v. Troy arose out of a dispute between William Bohnen, a major shareholder and former director, and Troy Corporation ("Troy"). Bohnen had served as a director of Troy from 1998 until his resignation in 2005 and, shortly thereafter, in September of 2005, he brought suit against Troy in order to gain access to the corporate books and records. As part of its defence, Troy alleged that Bohnen and his friend and fellow former director, Richard Schoon, had breached certain fiduciary obligations owed to the corporation. As the dispute with their former directors gained momentum, Troy's board of directors amended the corporate by-laws in November 2005 such that a former director made party to litigation as a result of his or her actions while on Troy's board would not be entitled to any advancement of expenses. Troy then brought suit against Bohnen and Schoon for breach of fiduciary duties in relation to a corporate transaction that Troy had been engaged in and in respect of which Bohnen and Schoon had provided confidential information to third parties. Upon being sued, Bohnen and Schoon sought to receive advancement of their defence costs from Troy, which promptly dismissed the request on the basis that their obligation to advancement had ended with the amendment of the by-law.

A key issue before the Delaware Court of Chancery was: at what point had the contractual right to advancement vested for Bohnen and Schoon? Bohnen and Schoon argued that they were entitled to advancement, notwithstanding the by-law amendment, because the right to advancement had vested when they had first been appointed to their directorships. Furthermore, they argued that if Troy had the right to amend the by-law, such amendment could not apply on a retrospective basis. In other words, advancement could be removed for future former directors but not for directors appointed to the board prior to the amendment.

The Chancery Court rejected the arguments put forward by Schoon and Bohnen and held that the right to advancement for a director or officer vests only at the time that he or she is named as a defendant in an action. The Court held that the right to advancement does not crystallize upon appointment to the board or even upon the development of the cause of action for which advancement is sought. Instead, vesting occurs when the corporation's indemnity obligations are actually triggered – that is, when the director or former director is named in a proceeding or investigation. In other words, there must be a firm indication that a claim against a director or officer is contemplated.

The Fallout of *Schoon v. Troy*

The impact of *Schoon v. Troy*, while perhaps an isolated and fact-sensitive circumstance to some, is likely to have a ripple effect as corporations and their board members consider the various scenarios in which corporate by-laws that provide for indemnification and corporate advancement could be changed. In change-of-control situations – for example, where a new slate of board members replaces the former – a review of past actions by the new management team could reveal indiscretions for which a modification of the by-laws may be considered prudent

ULTIMATE CORPORATE COUNSEL GUIDE

Published monthly as the newsletter complement to the ULTIMATE CORPORATE COUNSEL GUIDE, by CCH Canadian Limited. For subscription information, see your CCH Account Manager or call 1-800-268-4522 or (416) 224-2248 (Toronto).

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and, perhaps ironically, the proper exercise of one's fiduciary duty to act honestly, in good faith, and with a view to the best interests of the corporation may push the new board to restrict the scope of the indemnity in respect of former directors.

While it has often been suggested to individuals considering a directorship that they should understand the associated duties, obligations, and risks as well as the mechanisms available to address and minimize those risks, *Schoon v. Troy* makes it clear that traditional methods of safeguarding one's interests through reliance on the corporation's indemnification in its by-laws is insufficient. A customized approach for officers and/or directors is best practice, and a properly constructed and up-to-date D&O insurance program is critical.

A Complete Risk Management Approach

Directors and officers should always consider using a full compliment of risk management protections when accepting any kind of board appointment.

The first such protection may be achieved through enhancement of the corporation's by-laws. In light of *Schoon v. Troy*, many board members will, no doubt, be interested in reviewing the corporation's by-laws with a greater sense of appreciation for nuances in boilerplate language. One suggestion is that directors take steps to secure advancement rights that cannot be altered without the director's consent[2] through a provision within the by-laws allowing for the vesting of advancement and indemnification rights immediately upon a director's appointment to the board. Alternatively, the by-laws could state that any amendment or modification of the by-laws that affects vesting rights will not alter the rights of directors with respect to conduct pre-dating the amendment or modification without the affected individual's express consent.

Another risk management protection is for the corporation to have a practice of, or directors insisting upon having, individually-negotiated written indemnity agreements that set out the scope and details of any advancement and indemnity. The benefit to the corporation in having such a policy is the ability to demonstrate a clear commitment to any prospective board member that their board service is appreciated, that it will not be taken for granted, and that it will be properly protected. For the individual director, a written indemnity agreement provides, at the very least, peace of mind and the comfort of knowing that any and all manner of actions taken against him or her are fully protected and will stand separate from any corporate by-law, particularly where that by-law could be easily amended to the detriment of the director.

An Insurance Perspective

Interestingly enough, the case of *Schoon v. Troy* did not involve the triggering of any D&O liability insurance coverage (or, at least, the Court did not address it) and yet, had a D&O policy been triggered, the result may well have been very different. The case, in many respects, highlights not only the need for a strong D&O liability insurance program, but also one that is customized and that can be designed to include Excess Side A "Difference in Conditions" ("DIC") insurance coverage.

Directors' and Officers' Primary Side A, B, & C Insurance

To understand the implications of having a D&O insurance policy respond to a *Schoon v. Troy* fact-pattern, it will be helpful to understand the basic principles of how a typical D&O liability insurance policy operates.

The traditional structure for a corporation's D&O insurance program, whether it is a publically-traded or privately-held entity, typically consists of some combination of the following three Insuring Agreements. These are:

- **Personal or Direct Coverage (also referred to as "Side A Coverage"):** Provides coverage to individual directors and/or officers for losses for which they cannot or are not permitted to be indemnified by the corporation;
- **Corporate Reimbursement (also referred to as "Side B Coverage"):** Under this provision, the insurer will reimburse the corporation for losses that the corporation incurs as a result of indemnifying the directors and/or officers; and
- **Corporate Coverage (also referred to as "Side C Coverage"):** Under this provision, the insurer will pay for losses on behalf of the corporation that the corporation itself incurs. In the case of publically-traded corporations, this Side C Coverage is typically restricted to provide the entity with coverage only in the event of Securities Claims.

A complication and challenge for directors seeking advancement of defence costs from an insurer is that most D&O insurance policies, whether they offer Side A, B, or C coverage, exclude coverage for claims made against the corporation that are brought by or on behalf of directors or officers. Commonly referred to as the "Insured vs. Insured" exclusion, this typical insurance clause is often worded broadly so as to deny coverage for any claim that is even remotely related to a dispute between the corporation and its board members – whether past, present, or future. The "Insured vs. Insured" exclusion is but one reason why, in addition to having a traditional insurance program with Side A, B, and/or C coverages, boards of directors are urged to consider incorporating an Excess Side A "DIC" component into their D&O insurance program.

Directors' and Officers' Excess Side A "DIC" Insurance

The Excess Side A "DIC" policy typically sits in excess of a Side A D&O primary insurance policy, and provides a unique and optimum form of protection for directors and officers. The Excess Side A "DIC" policy typically operates to provide coverage in two different ways. Firstly, the DIC policy can act like a standard Side A excess limit of liability so as to respond in the event that the primary limit is exhausted. Secondly, and what is particularly appealing given the outcome of *Schoon v. Troy*, is that an Excess Side A "DIC" policy, generally speaking, has conditions of coverage that are broader than those of a traditional primary Side A insurance policy (hence the "Difference in Conditions" terminology) and can "drop down" to provide more expansive coverage.[3] Excess Side A "DIC" insurers have the ability to customize and broaden their coverage such that the "Insured v. Insured" exclusion can either be removed or significantly modified, thereby allowing the policy to respond in favour of former board members in circumstances such as those found in *Schoon v. Troy*. If Troy had had an insurance program that included a primary policy with Side A and B coverage as well as an Excess Side A "DIC" policy, then, in the event of the primary D&O policy carrier refusing to advance defence costs, the former board members could have argued that such action was a "wrongfully denied claim" and could therefore have invoked the Excess Side A "DIC" policy for their protection.

Conclusion

Schoon v. Troy illustrates one of the pitfalls of directorship appointments when the relationship between directors and the corporations they formerly served deteriorates. The case illustrates the need for directors and officers to ensure that they have a full compliment of risk management protections. Steps that boards of directors and those who advise them (including in-house corporate counsel) can take include:

- reviewing the corporate by-laws of the corporation to ensure that directors' and officers' indemnification and defence costs advancement rights are protected now and into the future;
- considering the benefits of an independent contractual indemnity; and
- reviewing the D&O liability insurance policy to ensure that it includes the most current and appropriate coverage protections available.

There remains a conflict of interest between the corporation and the directors in regard to the addition of Excess Side A "DIC" insurance coverage in an effort to stave off a *Schoon v. Troy* scenario for former directors. While directors would appreciate the ability to trigger personal asset protection in the event of a dispute between themselves and the corporation, the corporation would likely be less than enthusiastic about putting in place an insurance policy that could be used against them. As such, the debate of who benefits from D&O insurance coverage – the corporation or the directors and officers – remains. The counter argument is that, in order to attract the most ideal board candidates, corporations will have to ensure that the best personal asset protection is available and dedicated to them.

Notes:

[1] C.A. No. 2362, 2008 WL 821666 (Del. Ch. Mar. 28, 2008) (Lamb, V.C.).

[2] *Directors' and Officers' Liability Indemnification Update*, by Joseph M. McLaughlin of Simpson Thacher & Bartlett LLP, June 12, 2008.

[3] An Excess Side A "DIC" policy is designed to "drop down", effectively taking the place of the primary Side A insurance policy, to cover directors and/or officers in such circumstances where: the underlying insurance carrier is insolvent; or the underlying carrier wrongfully denies a claim; or the underlying coverage is more restrictive; or the underlying coverage has been rescinded; and where the Company is unable or not required or permitted to provide indemnity to its directors or officers.

LEGISLATIVE UPDATE

Federal

The Proceeds of Crime (Money Laundering) and Terrorist Financing Administrative Monetary Penalties Regulations, SOR/2007-292, come into force December 30, 2008. These Regulations set out the specific violations and classify their severity. They also set out criteria that may be used in assessing a penalty amount and determining interest rates for late payments.

The Proceeds of Crime (Money Laundering) and Terrorist Financing Suspicious Transaction Reporting Regulations are amended by SOR/2007-293, sections 1 to 3, in force December 30, 2008.

The Proceeds of Crime (Money Laundering) and Terrorist Financing Regulations are amended by SOR/2007-293, subsections 6(2) and (4), sections 7, 9, 14, 17 and 23, subsection 26(3) and sections 27 to 30, in force December 30, 2008.

Alberta

S.A. 2008, c. A-4.2 (formerly Bill 24), the *Adult Guardianship and Trusteeship Act*, received first reading on June 2, 2008, second reading on October 28, 2008, third reading on November 6, 2008, Royal Assent on December 2, 2008, and will come into force on proclamation. This Act proposes amendments to the *Business Corporations Act*, the

Cooperatives Act, the *Credit Union Act*, and the *Loan and Trust Corporations Act*.

S.A. 2008, c. 32 (formerly Bill 39), the *Court Statutes Amendment Act, 2008*, received first reading on October 20, 2008, second reading on November 3, 2008, third reading on November 5, 2008, Royal Assent on December 2, 2008, and will come into force on proclamation. This Act includes a minor amendment to the *Securities Act*.

S.A. 2008, c. 43 (formerly Bill 53), the *Miscellaneous Statutes Amendment Act, 2008 (No. 2)*, received first reading on November 24, 2008, second reading on November 27, 2008, third reading on December 2, 2008, and Royal Assent on December 4, 2008. This Act came into force on December 4, 2008, and amends various statutes, including the *Cooperatives Act*.

British Columbia

S.B.C. 2008, c. 44, formerly Bill 45, *Economic Incentive and Stabilization Statutes Amendment Act*, 2008, ss. 14–20, amending the *Financial Institutions Act*, received first reading on November 20, 2008, second reading on November 26, 2008 and third reading and Royal Assent on November 27, 2008. Sections 15 and 20 are in force on October 22, 2008. Sections 14, 16, 17, 18, and 19 are in force on Royal Assent on November 27, 2008.

Ontario

Bill 114, *Budget Measures and Interim Appropriation Act, 2008 (No. 2)* (S.O. 2008, c. 19), received third reading on November 19, 2008, and received Royal Assent on November 27, 2008. Schedule C of the Bill amends the *Corporations Tax Act*, deemed in force February 26, 2008; Schedule R amends the *Securities Act*, in force on the day of Royal Assent; and Schedule V makes amendments to various Acts consequential to the enactment of the *Taxation Act, 2007*, including the *Business Corporations Act* and the *Community Small Business Investment Funds Act*, in force January 1, 2009.

ON THE CASE

Recent Cases

Oppression

• • • Ontario Superior Court of Justice • • • Susan Chevalier ("Chevalier") was a minority shareholder in Bluffers Park Marina Limited ("the company"). The respondent Allan Cheatley ("Cheatley") was a shareholder who became part of the management team in 1988 and president of the company in 2003. The company had not produced audited financial statements since 1995 and had not held a shareholders' meeting since 1996. Chevalier was one of a number of shareholders who made cash advances to the company in 1987, in return for which they expected to receive special shares. Those shares were never issued, and a letter sent by Chevalier to Cheatley in 1996 seeking information about those funds was not answered.

In 2002, Cheatley issued a memo advising that the company was in a positive cash flow situation and that it was expecting a significant improvement in its financial operations. Chevalier subsequently made a number of formal requests asking for redemption of preferred shares which she held, and seeking information about the status of those shares. She also requested audited financial statements for the company and copies of notices of shareholders' meetings for all years after 1995. No response was received, from Cheatley or anyone else connected with the corporation. Chevalier then brought an action for oppression.

The action was allowed. At the hearing, the respondents took the position that the failure to hold shareholder meetings or issue audited financial statements, together with a failure to respond to the applicant's requests did not constitute oppression but should instead be characterized as a failure to meet statutory governance requirements, and that such failure could be remedied with an order requiring the corporation to comply with its statutory obligations. In support of that position, the respondents cited jurisprudence holding that "mere irregularities and lack of formalities, in the absence of unfair prejudice or unfair disregard are not sufficient to establish a claim under section 248".

The Court disagreed, finding that the jurisprudence relied upon by the respondents indicated that the Court should not invoke section 248 where there is "no detriment or harmful effect that cannot be remedied by a court order". In the Court's view, the evidence showed that during the years since the last shareholders' meeting, a number of significant decisions had been made and significant steps taken by the company. Those decisions affected Chevalier and she was denied any financial information

relating to those matters as well as any opportunity to participate in decisions about them at a shareholders' meeting, or to review the decisions made by the Board at a shareholders' meeting. It was not, in the Court's view, necessary for Chevalier to show that better decisions or outcomes could have been achieved. The detriment suffered was having her interest and right to participate as a shareholder unfairly affected. The Court concluded that the deprivation of Chevalier's rights could not be remedied by a court order because she could not be put back in a position of exercising her right to participate and approve or reject decisions of the Board for the past 12 years. The evidence before the Court justified a finding of oppression under section 248 of the *Business Corporations Act*.

Chevalier v. Bluffers Park Marina Limited and Cheatley, (November 4, 2008) Docket No. CV-07-082757-00 (Ont. .S.C.J.)

Dismissal for Overtime Overpayment

● ● ● **British Columbia** ● ● ● Palidwor was the bookkeeper for Julian Ceramic Tile Inc. from 1992 until she was dismissed in 2004. Her job included gathering, collating and verifying the payroll data that was processed for payment. She was hired to work 40 hours a week at straight time. Julian Ceramic Tile terminated her when it became apparent that over a 15-month period from January 2003 to April 2004, Palidwor had claimed and received payment for overtime to which she was not entitled, totalling over $10,000. Palidwor sued for wrongful dismissal. The trial judge found that Palidwor was not entitled to the 15 months of overtime payments that she believed she was entitled to, as she had calculated her payments based on the premise that she was hired to work 35 hours a week plus overtime for any additional work. However, the trial judge found that Palidwor had not acted in a deceitful manner, and had simply been mistaken as to the terms of her employment contract. Accordingly, the trial judge found that Julian Ceramic Tile had no cause to dismiss her without notice, and awarded her six months' notice plus interest. Julian Ceramic Tile appealed.

The appeal was dismissed. Palidwor was found to have made a mistake, as she did not know that the overtime payments she received were contrary to the terms of her employment. An employee who makes a mistake about an employment benefit she is entitled to receive, without any dishonesty, cannot be said to have fundamentally breached her employment contract by receiving the benefit. There was also no error by the trial judge in finding no failure to mitigate by Palidwor. Accordingly, the six months' notice award of $13,870.66 plus $890.00 interest was upheld.

Palidwor v. Julian Ceramic Tile Inc., 2008 BCCA 395

Q & A

Is Denying Extended Leave to an Employee Who Is Unable To Secure Daycare Discriminatory?

No. Entitlement to maternity and parental leaves is set out in each jurisdiction's employment or labour standards legislation. Each statute provides a fixed period of time during which employees are entitled to the leave. In some provinces, such as Quebec, maternity or parental leaves can be extended in limited circumstances, primarily for medical emergencies.

Each jurisdiction also provides that individuals cannot be discriminated against on the basis of family status. However, employees on maternity or parental leave are deemed to know of their responsibility to make suitable child care arrangements by the date of return to work and, as a result, there is nothing extraordinary about an absence of child care that requires an employer to grant an extension.

WHAT WOULD YOU DO . . .

. . . with an employee who might be suffering from a mental illness?

Rose has worked for your company for several years in the sales department and has always been an exemplary employee. She is well known for always being very cheerful and friendly with her colleagues. Recently, however, Rose's behaviour has changed. She has started arriving late to work and leaving early. She has withdrawn from her colleagues and no longer joins them for lunch and at break times. She also seems to be having difficulty concentrating and remembering things. Rose's supervisor has tried to speak to Rose about these issues. On each occasion Rose has stated that she will try to improve her attendance and concentration, but problems persist.

What You Need to Know

Employers are not mental health professionals and it is not their job to diagnose a mental disability. However, employers in every Canadian jurisdiction have a duty to accommodate mental disabilities in the workplace, just as they must accommodate physical disabilities. This accommodation obligation most often arises for employers when an employee discloses a mental disability and provides the employer with medical evidence supporting his or her need for accommodation. However, an employer's accommodation obligations can also be triggered when it *ought* to know that an employee may have a mental disability, even if the employee does not actually disclose such a disability. An example of this situation may arise when an employee begins to exhibit behaviour in the workplace that is strange, out of character, or a marked departure from his or her normal behaviour. In these situations, human rights adjudicators have found that an employer must ask itself if the employee's behaviour could be the result of a mental disability and must consider offering appropriate supports to that employee. Of course, this is easier said than done, and any employer that finds itself in this situation must demonstrate that it exercised a great deal of care and sensitivity when confronting an employee about such behaviour. It may well be that the employee is simply having a bad day or a bad week. However, unusual behaviour may also indicate an underlying mental health issue.

What Really Happened

The company's Human Resources Director, Naomi, has just attended a seminar on dealing with mental health issues in the workplace and decides to meet with Rose. During the meeting, Naomi:

- describes the behaviour that continues to be of concern to the company;
- expresses the company's commitment to support her and return her to her usual excellent performance standard;
- explains that workplace accommodations are available if needed;
- reminds her of the company's employee assistance program's referral and confidential counselling service; and
- sets a time to meet again with Rose to review and update the situation.

Naomi documents the meeting for her file and writes a reminder to follow up with Rose at the agreed-upon time. Rose believes she is valued as an employee and will decide whether she wishes to pursue the offers of assistance that have been made.

CCCA EVENTS

For more information and registration details, please visit www.cancorpcounsel.org, or call (416) 869-0522.

Financial Distress: Recognizing It, Responding to It, Protecting from It and Capitalizing on It. Presented with Davies Ward Phillips & Vineberg LLP.

Toronto: February 18, 2009: St. Andrew's Club

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