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Federal Court Standing in a Post-*TransUnion* World

Dual Representation in Derivative Litigation: Ever Permissible?

Limitations on the Recovery of Lost Profits

Can the Company Pay My Fees? Advancement and Indemnification in Business Divorce Litigation

By Franklin McRoberts

Under the so-called "American Rule," litigants must pay their own lawyer fees, even if they win, unless a contract, statute, or court rule provides otherwise. But in business divorce and other private company disputes against or between closely held business co-owners, there are a variety of ways for individual defendants to cause the business entity to assume payment of their legal fees in defense of a lawsuit. How?

The answer depends on several factors: (1) what kind of entity; (2) what kind of claim; (3) in what capacity is one being sued; and (4) if there is a contract, what does it say. In this article, we take a close look at the rules of law governing advancement and indemnification of legal fees in business divorce litigation, including some recent case law developments from the New York State Court of Appeals.

Advancement Versus Indemnification

First and foremost, what is "advancement" and "indemnification" in business divorce litigation? "Indemnification and advancement of legal fees are two distinct corporate obligations."[1]

"Advancement is a species of loan—essentially simply a decision to advance credit—to a [corporate official] pending later determination of that person's right to receive and retain indemnification. The corporation maintains the right to be repaid all sums advanced, if the individual is ultimately shown not to be entitled to indemnification."[2]

"Indemnification is the right to be reimbursed for all out of pocket expenses and losses caused by an underlying claim, and generally cannot be resolved until after the merits of the underlying controversy are decided."[3]

Generally, "whether an officer is entitled to advancement is determined in a summary proceeding" under Article 4 of the CPLR, "while the right to indemnification is delayed until the conclusion of the matter."[4]

Mandatory Versus Discretionary

Under New York law, advancement and indemnification can be either "mandatory" or "discretionary."

Mandatory means the entity's organizational documents, a resolution, or a contract, explicitly entitle a person to advancement or indemnification.

Discretionary (i.e., court-ordered) means there is no document expressly creating a right of advancement or indemnification, but the court has the power to order it nonetheless.

As a matter of policy, advancement rights are generally construed broadly "to help attract capable individuals into corporate service by easing the burden of litigation-related expenses" and to provide "immediate interim relief from the personal out-of-pocket financial burden of paying the significant on-going expenses inevitably involved with investigations and legal proceedings."[5]

Limited Liability Companies

In business divorce litigation, whether one is entitled to advancement or indemnification (whether discretionary or mandatory) depends above all upon the kind of entity involved.

For LLCs, as with most things, the right to advancement and indemnification is generally governed by the operating agreement. "To determine whether advancement is appropriate" for an LLC manager or member, "it is necessary to review relevant portions of the Company's Operating Agreement."[6]

Section 420 of the Limited Liability Company Law (the "LLC Law") provides that "[s]ubject to the standards and restrictions, if any, set forth in the operating agreement," an LLC "may, and shall have the power to, indemnify and hold harmless, and advance expenses to, any member, manager or other person . . . from and against any and all claims and demands whatsoever."

But LLC Law § 420 prohibits indemnification if there is a "judgment" or "final adjudication" against the party seeking indemnification of (i) "bad faith," (ii) "active and deliberate dishonesty," or (iii) receipt of a "financial profit or other advantage to which [the manager or member] was not legally entitled."

If an operating agreement contains the word "shall" in the context of advancement or indemnification, the right generally should be considered "mandatory."[7]

If no provision in the operating agreement addresses the subject of advancement or indemnity, courts may decline to enjoin advancement where not prohibited by the operating agreement, as seen in *Van Der Lande v. Stout*.[8]

In the order appealed from in *Van Der Lande*, the plaintiff sought a "permanent injunction restraining the defendants," his co-members, "from using company money to defend" his lawsuit for waste, fraud, and mismanagement.[9] The motion court ruled that "absent a contrary provision in the operating agreement, an LLC has the power to indemnify any member," and "[s]ince the defendants themselves constitute a majority of the shareholders, it is clear that plaintiff is not entitled to enjoin them from obtaining an advance on legal expenses."[10]

On appeal, the First Department affirmed, ruling that absent an express prohibition in the operating agreement, "Limited Liability Company Law § 420 allows the LLC to advance and pay its members' legal expenses where . . . there has been no judgment or 'final adjudication' that the individual defendants acted in bad faith, were dishonest or personally gained profit to which they were not entitled."[11]

Corporations

Corporations have the most complex advancement and indemnification statutes.

Section 721 of the Business Corporation Law (the BCL) establishes the ways in which a corporation may grant mandatory advancement and indemnification. There are several ways: (1) the certificate of incorporation, (2) by-laws, (3) shareholder resolution, (4) board resolution, or (5) "an agreement providing for such indemnification" or advancement, like a shareholders' or employment agreement.

BCL § 722 establishes the applicable legal standard for indemnification:

> A corporation may indemnify any person made . . . a party to an action . . . whether civil or criminal . . . by reason of the fact that he . . . was a director or officer of the corporation . . . against judgments, fines, amounts paid in settlement and reasonable expenses, including attorneys' fees actually and necessarily incurred as a result of such action . . . if such director or officer acted, in good faith, for a purpose which he reasonably believed to be in, or . . . not opposed to, the best interests of the corporation . . .

BCL § 723 establishes the procedures by which the board of directors or shareholders may adopt a resolution authorizing indemnification or advancement.

A very important statute, BCL § 724(a), authorizes discretionary indemnification by court order even if the corporation does not provide a right of mandatory indemnification, providing, "Notwithstanding the failure of a corporation to provide indemnification . . . indemnification shall be awarded by a court to the extent authorized under section 722." BCL § 724 (c) provides:

> Where indemnification is sought by judicial action, the court may allow a person such reasonable expenses, including attorneys' fees, during the pendency of the litigation as are necessary in connection with his defense therein, if the court shall find that the defendant has by his pleadings or during the course of the litigation raised genuine issues of fact or law.

How do these statutes work in practice? Under BCL §§ 724 and 722, a defendant needs to satisfy four elements to be entitled to advancement and/or indemnification:

- First, that he was sued in an action "by reason of the fact that he . . . was a director or officer of the corporation."
- Second, that he seeks indemnification for "judgments, fines, amounts paid in settlement and reasonable expenses, including attorneys' fees actually and necessarily incurred as a result of such action."
- Third, to be entitled to advancement, he must show, at the commencement or intermediate stages of the case, that he "raised genuine issues of fact or law" concerning the conduct of which he is accused.
- Fourth, to be entitled to indemnification, he must show, at the conclusion of the case, that he "acted, in good faith, for a purpose which he reasonably believed to be in, or . . . not opposed to, the best interests of the corporation."

New York courts often apply a liberal standard adopted by Delaware courts for determining whether a director or officer has been sued "by reason of the fact" he was a director or officer. As the Nassau County Commercial Division explained in *Schlossberg v. Schwartz* (DeStefano, J.):

> The Delaware case law . . . indicates that a broad interpretation of that phrase, which would include a wide array of claims that might be asserted against a director or officer, is warranted. Courts have shown some latitude in interpreting this language such that if there is a nexus or causal connection between any of the underlying proceedings and one's official corporate capacity, those

> proceedings are 'by reason of the fact' that one was an officer or director.[12]

The standard for raising an "issue of fact" for advancement is also quite liberal. As another Commercial Division opinion held: "Where there are issues of fact in a dispute over whether a director participated in alleged wrongful conduct and acted in good faith on behalf of the corporation, courts have generally permitted the relief of advanced litigation expenses, including attorney's fees, subject to reallocation at the end of the action."[13]

Lastly, BCL § 725 requires repayment of advanced legal fees if the court determines the officer or directed was not entitled to indemnification under the standard in BCL § 722. This subject is addressed in additional detail below in connection with the "undertaking" requirement.

General Partnerships

The general partnership indemnification statute, Partnership Law § 40(2), provides that "the partnership must indemnify every partner in respect of payments made and personal liabilities reasonably incurred by him in the ordinary and proper conduct of its business, or for the preservation of its business or property."

Indemnification under Partnership Law § 40(2) is very rarely litigated. In one case denying a partner indemnification for allegations of fraud, the Court of Appeals held, "Where one joint venturer, managing the business of the joint venture, alone commits an intentional fraud against third parties resulting in the recovery of damages by them, he is not thereafter entitled to be indemnified by the other joint venturer."[14]

Limited Partnerships

Turning to limited partnerships, Partnership Law § 115-c, applicable to limited partnership formed before July 1, 1991, provides that a limited partnership "may indemnify any general partner" sued "by reason of the fact that he . . . was a general partner" in a derivative suit against the general partner unless "such general partner is adjudged to have breached his duty to the limited partnership."

Partnership Law § 121-1004, applicable to limited partnerships formed after July 1, 1991, or to those which have elected to be governed by New York's Revised Uniform Limited Partnership Law, provides that a limited partnership "may indemnify, and may advance expenses to, any general partner" in a derivative suit unless "a judgment or other final adjudication adverse to the general partner establishes that his acts were committed in bad faith or were the result of active and deliberate dishonesty and were material to the cause of action so adjudicated, or that he personally gained in fact a financial profit or other advantage to which he was not legally entitled."

If the foregoing language looks familiar, it is because portions of LLC Law § 420 were taken from it almost verbatim.

In *Barrett v. Toroyan*,[15] the court, relying upon Delaware law, broadly construed the right to advancement, holding that a general partner had the "absolute right to obtain legal and other expert counsel at the expense of the partnership, even in litigation commenced by a limited partner."

Dissolution Claims

As seen above, the vast majority of cases in which advancement or indemnification is awarded involve derivative claims. What about judicial dissolution claims?

At least one court has held that "there is no authority for allowing counsel fees incurred in defending a dissolution proceeding . . . to be paid out of corporate funds."[16]

But even with dissolution claims, there are at least two potential ways to obtain advancement/indemnification.

First, under the right set of facts, "in cases involving derivative claims or in hybrid cases . . . involving both dissolution and derivative claims, courts have denied motions to enjoin the advancement of legal fees."[17]

Second, there is authority for the proposition that, in a dissolution case based upon alleged minority shareholder "oppression" under BCL § 1104-a followed with a buyout election under BCL § 1118, "use of corporate funds to pay attorney's fees after said election shall be deemed valid, however, any corporate funds used to pay attorney's fees after the commencement of the dissolution but prior to the BCL § 1118 election shall be deemed improper."[18]

As one can see, advancement and indemnification rights may seem broad in business divorce disputes. But, as addressed below, the doctrine of "unmistakably clear" fee-shifting agreements, the distinction between first- and third-party disputes, and the general prohibition on recovery of "fees on fees," all provide significant restrictions on advancement and indemnification rights.

"Unmistakably Clear" Fee-Shifting Agreements

Over two decades ago, in *Hooper Assoc., Ltd. v. AGS Computers, Inc.*, New York's highest court announced a legal rule that has become a cornerstone of the law of advancement and indemnification:

> Inasmuch as a promise by one party to a contract to indemnify the other for attorney's fees incurred in litigation between them is contrary to the well-understood rule

> that parties are responsible for their own attorney's fees, the court should not infer a party's intention to waive the benefit of the rule unless the intention to do so is unmistakably clear from the language of the promise.[19]

Under *Hooper*, for one party to assume the other party's legal fees, the agreement to do so must be "unmistakably clear." How does *Hooper* come into play in disputes between closely held business owners?

Third-Party Versus First-Party Disputes

In business divorce cases, disputes often arise over whether contractual advancement or indemnification provisions (for example, in an LLC operating agreement) apply exclusively to suits brought by individuals or entities outside the company (third-party disputes), or also apply to disputes within the company (first-party disputes).

A classic example of a first-party dispute would be an LLC derivative suit brought by one member on behalf of the LLC against another member, the latter of whom then seeks advancement of her defense costs under the operating agreement. A well-developed body of case law addresses this issue.

"*Hooper*'s rule of contract interpretation" requires that an "indemnification clause must be 'unmistakably clear' in its intent to apply to suits between contracting parties, as opposed to between third parties and contracting parties."[20]

"For an indemnification clause to serve as an attorney's fees provision with respect to disputes between the parties to the contract, the provision must *unequivocally* be meant to cover claims between the contracting parties rather than third party claims."[21]

Applying this principle, where fee-shifting language in an operating or shareholders' agreement "is typical of those indemnification agreements which contemplate reimbursement when the indemnitee is required to pay damages on a third-party claim,"[22] but not a first-party claim, the "indemnification provision . . . does not make it 'unmistakably clear' that the parties intended it to cover attorneys' fees incurred in litigation between them."[23]

The Crossroads Line of Cases

Over roughly a decade, a line of case law developed in three of the four Departments of the Appellate Division, emanating from the First Department's decision in *Crossroads ABL LLC v. Canaras Capital Mgt., LLC*, [24] in which the court essentially flipped the default rule of *Hooper*.

In *Crossroads*, the court ruled that where closely held business owners "use highly inclusive language in their indemnification provision, which they chose not to limit by listing the types of proceedings for which indemnification would be required" – in *Crossroads*, the contract said "any and all claims, demands, actions, suits or proceedings" – the indemnification provision must be read, by default, not to "preclude intra-party claims," entitling the parties to advancement or indemnification of legal fees in disputes between themselves.[25]

The simplest expression of this rule is in *In re Part 60 RMBS Put - Back Litig.*, in which the court wrote that "where the indemnification is broad, in the absence of limiting language, both intra-party and third-party claims are covered."[26]

Through fall 2022, there were at least seven appeals court decisions explicitly adopting the *Crossroads* rule of construction of contract indemnification provisions to cover intra-party disputes unless otherwise specified in the agreement.[27]

The *Sage Systems* Decision

Then, in October 2022, in *Sage Sys., Inc. v. Liss*, the Court of Appeals brought a climactic end to the *Crossroads* line of case law, reversing the First Department's affirmance of a motion court's decision granting the plaintiff, Sage Systems, Inc. ("Sage"), summary judgment for indemnification under a partnership agreement.[28]

In *Sage*, the Court of Appeals began with a familiar principle victorious litigants love to hate: "Under the American Rule, a prevailing party" in a breach of contract dispute "may not recover attorneys' fees from the losing party" unless the agreement contains "express language or indicia of the parties' unmistakably clear intent to indemnify each other for attorneys' fees in an action between them on the contract."[29]

The Court of Appeals noted that while the American Rule is "straightforward enough," in the "context of private agreements" courts must often "determine the intent of vague fee-shifting language and broad indemnification provisions that do not explicitly allow for the prevailing party in an action between contracting parties to collect attorneys' fees."

Overturning the nearly decade-old, common-law default rule of *Crossroads* and its progeny that broad contract indemnification provisions apply to intra-party disputes "in the absence of limiting language,"[30] the Court of Appeals held:

> To the extent that some of these decisions presume that broadly worded indemnification provisions by their nature are intended to cover attorneys' fees in direct party actions, they deviate from this Court's exacting standard that the agreement must contain "unmistakably clear" language of the parties' intent to encompass such actions.[31]

After announcing its abrogation of the *Crossroads* line of cases, the court found that "the indemnification provision makes no explicit mention that partners may recoup attorneys' fees in an action on the contract" and "nothing in the provision nor the agreement as a whole makes 'unmistakably clear' that the partners intended to permit recovery for attorneys' fees in an action between them on the contract."[32] As a result, the court reversed the affirmance of the motion court's award of attorneys' fees and dismissed Sage's complaint.

Sage is a wake-up call to closely held business owners and controllers, and especially to the lawyers who draft their partnership, shareholder, or operating agreements, that they may no longer rely on a generic, broadly worded indemnification provisions to recover advancement or indemnification of legal fees they incur defending against "intra-party" disputes a/k/a "direct actions" by another party to the contract.

A relatively quick fix for the pitfall created by *Sage* is to amend existing partnership, shareholder, or operating agreements to include language such as that the right to advancement or indemnity shall include "disputes arising out of or related to this agreement between or among the parties hereto," or words to that effect, and to explicitly provide for "attorneys' fees" to the prevailing party.

The Court of Appeals alluded to this drafting solution in *Sage*, writing at the end of its opinion that "inclusion of clear language stating that the prevailing party is entitled to recover attorney's fees in an action between the parties would avoid potential litigation on the issue."[33]

Fees on Fees

Litigants often seek recovery of their legal fees incurred in filing a legal proceeding or motion to obtain an order granting a right to advancement or indemnification. Courts often refer to this phenomenon as "fees on fees."

In *Baker v. Health Mgt. Sys., Inc.*, the Court of Appeals held, on a certified question from the United States Court of Appeals for the Second Circuit, that, in the absence of a bylaw, resolution, or agreement, BCL §§ 722, 723, and 724 do not permit a corporate officer or director to recover "fees on fees." [34]

BCL § 722(a) permits indemnification of fees "actually and necessarily incurred as a result of [an] action or proceeding" against the officer or director. In *Baker*, the Court of Appeals held that "the statutory language of section 722(a) and the legislative history contain nothing indicating that the Legislature intended to provide coverage for fees on fees."[35] The Court of Appeals clarified that "corporations remain free to provide indemnification of fees on fees in bylaws, employment contracts or through insurance."[36]

Baker's general principle against fees on fees has crept into the law of LLCs. In *546-552 W. 146th St. LLC v. Arfa*, the court, applying the LLC advancement statute, LLC Law § 420, held:

> While the language 'any and all claims and demands whatsoever' in Limited Liability Company Law § 420 may be broader than Business Corporation Law § 722(a), it does not explicitly provide for an award of fees on fees . . . Thus, as in *Baker*, while the language may arguably support an implied right of indemnification, the American Rule militates against that interpretation.[37]

In contrast, in Delaware, the right of advancement generally *does* include the right to recover fees on fees. In *Stifel Fin. Corp. v. Cochran*, the Delaware Supreme Court ruled:

> We hold that indemnification for expenses incurred in successfully prosecuting an indemnification suit are permissible . . . Allowing indemnification for the expenses incurred by a director in pursuing his indemnification rights gives recognition to the reality that the corporation itself is responsible for putting the director through the process of litigation.[38]

It is a bitter pill to swallow for many business owners and fiduciaries in New York to learn they must pay the legal fees they incur in proving their entitlement to advancement and/or indemnification.

Injunctions, Recoupment, and Common-Law Damages

Our final topic concerning advancement and indemnification is an important one: what are the remedies for business owners when their entities wrongfully advance or indemnify another's legal fees?

Where advancement or indemnification is made in violation of a statute or contract, one remedy is the injunction. Courts often issue injunctions where majority owners improperly attempt to advance their own legal fees. For example, "the overwhelming authority in straight dissolution actions is for courts to enjoin the payment of legal fees by corporations on behalf of their majority shareholders."[39]

Another remedy is recoupment. Under the BCL and the LLC Law, if a party who received advancement is found disentitled to indemnification, he or she may be forced to repay all amounts advanced by the entity. BCL § 723(c) requires the posting of an "undertaking" to "repay" any amounts advanced to an officer or director if he or she is found ineligible

for indemnification. In reality, an undertaking is little more than a promise, often in the form of a terse letter, to repay. Unless otherwise required in a contract, no security or bond is necessary, making it sometimes difficult or impossible to recover fees wrongfully advanced by the entity.

A third remedy is to simply allege a common-law claim of breach of fiduciary duty, self-dealing, or waste against an individual whose legal fees were improperly advanced or indemnified by the entity. One may also allege breach of the applicable contract, if any.

Advancement and indemnification encourage individuals and entities to invest in, and serve as fiduciaries for, closely held businesses. They are valuable rights, which can provide a dramatic advantage to those receiving company funds for their own legal defense. But advancement and indemnification rights have their limits and remain available only under the right circumstances in a select class of cases.

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Endnotes

1. *Crossroads ABL LLC v. Canaras Capital Mgt., LLC*, 105 A.D.3d 645, 646 (1st Dep't 2013).
2. *In re Adelphia Comms. Corp.,* 323 B.R. 345, 375 (Bankr. S.D.N.Y. 2005).
3. *Ryu v. Hope Bancorp, Inc.*, 2018 WL 1989591, at *3 (S.D.N.Y. Apr. 26, 2018) (internal quotations omitted).
4. *Ficus Investments, Inc. v. Private Capital Mgt., LLC*, 61 A.D.3d 1, 9 (1st Dep't 2009).
5. *Id.* (quotations omitted).
6. *Id.* at 7.
7. *Comer v. Krolick,* 2015 N.Y. Slip Op. 32274(U), *11 (Sup. Ct. N.Y. Cnty. 2015).
8. *Van Der Lande v. Stout*, 13 A.D.3d 261 (1st Dep't 2004).
9. *Van Der Lande v. Stout*, Index No. 123895/2001, 2003 WL 25519857, at *2 (Sup. Ct. N.Y. Cnty. Apr. 1, 2003).
10. *Id.*
11. *Van Der Lande v. Stout*, 13 A.D.3d at 262-63.
12. *Schlossberg v. Schwartz*, 43 Misc. 3d 1224(A), *10 (Sup. Ct. Nassau Cnty. 2014).
13. *Gen. Plumbing Corp. v. Parklot Holding Co.*, 44 Misc. 3d 1218(A), *6 (Sup. Ct. Kings Cnty. 2014) (Demarest, J.).
14. *Gramercy Equities Corp. v. Dumont*, 72 N.Y.2d 560, 562 (1988).
15. *Barrett v. Toroyan*, 35 A.D.3d 278, 278 (1st Dep't 2006) (quotations omitted).
16. Matter of *Boucher v. Carriage House Realty Corp.*, 105 A.D.3d 951, 952 (2d Dep't 2013).
17. *Romita v. Castle Oil Corp*., Index No. 053145/2011, 2012 WL 12088492, *46 (Sup. Ct. Westchester Cnty. Dec. 5, 2012).
18. *Hammad v. Al-Lid Food Corp.*, Index No. 518406/2017, 2018 WL 2722865, at *4 (Sup. Ct. Kings Cnty. May 31, 2018).
19. 74 N.Y.2d 487, 492 (1989).
20. *Maiden Lane Hosp. Group LLC v. Beck by David Cos.*, No. 18-cv-7476, 209 WL 2417253, at *5 (S.D.N.Y. June 10, 2019).
21. *Gotham Partners, L.P. v. High River Ltd. Partnership*, 76 A.D.3d 203, 208 (1st Dep't 2010) (emphasis in original).
22. *Eshaghian v. Eshaghian*, 170 A.D.3d 809, 811 (2d Dep't 2019) (quotations and brackets omitted).
23. *W. Vernon Petroleum Corp. v. Singer Holding Corp.*, 103 A.D.3d 623, 626 (2d Dep't 2013).
24. 105 A.D.3d 645 (1st Dep't 2013).
25. *Id.* at 645-46.
26. 195 A.D.3d 40, 56 (1st Dep't 2021).
27. *Id.*; WSA Group, PE., *PC v. DKI Eng'g & Consulting USA PC*, 178 A.D.3d 1320 (3d Dep't 2019); *Crown Wisteria, Inc. v. Cibani*, 178 A.D.3d 524 (1st Dep't 2019); *Healthnow New York, Inc. v. David Home Bldrs., Inc.*, 176 A.D.3d 1602 (4th Dep't 2019); 2-4 *Kieffer Lane LLC v. County of Ulster*, 172 A.D.3d 1597 (3d Dep't 2019); *Sq. Mile Structured Debt (One), LLC v. Swig*, 110 A.D.3d 449 (1st Dep't 2013); *Crossroads ABL LLC v. Canaras Capital Mgt., LLC*, 105 A.D.3d 645.
28. *Sage Sys., Inc. v. Liss*, 39 N.Y.3d 27 (2022).
29. *Id.* at 29 (internal quotation marks omitted).
30. *In re* Part 60 RMBS Put - Back Litig., 195 A.D.3d at 56.
31. *Sage Sys., Inc.*, 39 N.Y.3d at 31.
32. *Id.* at 33 (citations omitted).
33. *Id.*
34. *Baker v. Health Mgt. Sys., Inc.*, 98 N.Y.2d 80, 87-88 (2002).
35. *Id.*
36. *Id.* at 88.
37. *546-552 W. 146th St. LLC v. Arfa*, 99 A.D.3d 117, 121 (1st Dep't 2012).
38. *Stifel Fin. Corp. v. Cochran*, 809 A.2.d 555, 561 (Del. 2002).
39. *Romita*, 2012 WL 12088492, at *42.

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