

Delaware Law on Advancement of Fees Incurred by Former Officers and Directors

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Delaware Law Update

04.21.2016

In a recent Delaware Court of Chancery case – *Hyatt v. Al Jazeera America Holdings II, LLC*, C.A. No. 11465-VCG – Vice Chancellor Sam Glasscock III of the Delaware Court of Chancery took on a “familiar” issue with a “twist”: the right of former directors to advancement of litigation costs from the entity that acquired their former employer. The plaintiffs, Joel Hyatt and Albert Gore, were former directors of Current Media, LLC (“Media”), a company acquired by Al Jazeera International (USA) Inc. (“Al Jazeera”) pursuant to an Agreement and Plan of Merger (the “Merger Agreement”). The Merger Agreement required Al Jazeera to indemnify and advance costs to Media’s former directors “to the same extent” as required by Media’s operating agreement, which entitled directors to advancement if involved in litigation “by reason of the fact” of their service as directors.

Al Jazeera asserted post-closing indemnification claims pursuant to the Merger Agreement, which were rejected by Hyatt in his capacity as the “Members’ Representative” (*i.e.*, the representative of Media’s former members with regard to issues arising from the Merger Agreement). Hyatt and Gore sued Al Jazeera (the “Underlying Action”), asserting that Al Jazeera’s request for indemnification was improper and Al Jazeera counterclaimed. The Underlying Action led to a second lawsuit – the case giving rise to the *Hyatt* opinion.

In the second suit, Hyatt and Gore sought advancement from Al Jazeera in connection with the counterclaims in the Underlying Action. Al Jazeera did not dispute its general obligation to advance costs. Instead, it argued that the counterclaims concerned Hyatt’s actions as the Members’ Representative and that Gore’s involvement in the Underlying Action was “a mere fortuity.” The Court of Chancery disagreed, holding that even though Hyatt had been sued as Members’ Representative, his rights – as preserved by the Merger Agreement – were not displaced. According to the Court, “[a]lthough the Counterclaims appear[ed] on their face to merely implicate Hyatt’s role as Members’ Representative,” their resolution, “in part, necessarily requires Hyatt and Gore to defend their actions as former officers and directors, for which they are contractually entitled to advancement.” While Media had been a limited liability company, the Court relied on case law interpreting the Delaware General Corporation Law (the “DGCL”) to construe the advancement rights of Media’s former directors, explaining that “an action is brought

'by reason of the fact' of a defendant's position as an officer or director if a 'nexus or causal connection' exists between the underlying proceedings and the defendant's 'official corporate capacity.'" Under this standard, Hyatt and Gore were entitled to advancement for four of seven claims asserted by Al Jazeera and "fees on fees" *i.e.*, fees incurred in enforcing their rights.

Hyatt is worth considering for several reasons. For alternative entity practitioners, it reinforces the relevance of case law interpreting the DGCL in disputes involving alternative, non-corporate business entities. For deal lawyers generally, the deep well of Delaware case law serves litigants well, making dispute resolution predictable and is one reason why Delaware choice of law/forum selection provisions should be strongly considered. *Hyatt* is particularly relevant in the M&A context where indemnification/advancement rights of the target's directors/officers may need to be specifically addressed, and depending on the drafter's objective, potentially curtailed with limiting language.