



BUSINESS BULLETIN

Personal Indemnification Agreements for Directors & Officers

Although D&O insurance is important for protecting directors' and officers' personal assets, it is often an individual insured's last line of defense. For most directors and officers, state statutory protections, corporate bylaws/ indemnification provisions and/ or individual indemnification agreements will provide the first line of defense. Only if these protections fail would a director or officer need to turn to D&O insurance for personal asset protection. In order to be fully protected, individual directors and officers need all of these protections to work together - while indemnification rights and D&O insurance both play key roles in protecting insured persons, neither provides complete coverage on its own.

Statutory protections are well-established and followed closely by securities counsel, and bylaws exist in every company even though the breadth of director indemnification can vary widely and change over time. A topic which we see becoming increasingly popular among those who serve on Boards of Directors is the request for a Personal Indemnification Agreement, to specifically detail the scope and breadth of the company's indemnification duties to the individual. Among the questions that we suggest a Personal Indemnification Agreement answer are:

- » Is the corporation's obligation to advance legal fees nondiscretionary?
- » Does the obligation to advance legal fees last until the final resolution of all litigation?
- » Has the actual process and procedure for the advancement of legal fees been specified in detail? (ask us about the Homestore, Inc. case)
- » Does the agreement set forth the procedure for choosing defense counsel for the directors and officers?
- » Is there a clearly stated presumption in favor of the right to indemnification?
- » Is the agreement designed to remain in effect so long as there may be any liability resulting from having been an officer or director of the corporation?

The Management Liability practice group of The Simkiss Companies can arrange a broad array of state of the art protections for public and private companies and the individuals who serve on their Boards.

Please contact us at 610.727.5300 to discuss how we can help you.