riskINSIGHTS
FALL 2016

Why Corporate Executives Should Have a Separate Written Indemnification Agreement

Most companies' corporate bylaws or articles of incorporation contain indemnification and advancement provisions. While these provisions provide protection for corporate executives, these provisions alone may not provide sufficient protection.

The most important reason for individuals to have a written indemnification agreement (agreement) is that they typically provide more comprehensive protection than corporate bylaws or statutory provisions. Most bylaws, for example, provide for permissive indemnification, whereas most agreements require mandatory indemnification. Moreover, the rights enumerated in the agreement are enforceable obligations that cannot be amended or terminated without the indemnitee's consent.

Second, a written indemnification agreement can provide definitions of important terms. For example, the agreement can broadly define the types of "expenses" for which indemnification and advancement are available, and the types of "proceedings" in connection with which the individual is entitled to advancement. By way of example, a written indemnification agreement might clarify that the indemnitee is entitled to indemnification or advancement even if the indemnitee is just a witness in a proceeding.

Third, the written indemnification agreement can memorialize the indemnitee's right to select their own counsel. This could be particularly critical if issues arise after the indemnitee has left the company and new management is in place. There may also be a host of potential conflicts with the new management, which could necessitate that the indemnitee retains his or her own counsel.

Fourth, the written indemnification agreement can specify the procedures to be followed if disputes arise with regard to indemnification or advancement. Among other things, the agreement can provide a presumption in favor of indemnification or advancement. The agreement can also provide a mechanism for resolving disputed amounts or items, as well as an expedited dispute resolution procedure.

RT ProExec
Setting New Expectations

CONNER STRONG & BUCKELEW
INSURANCE | RISK MANAGEMENT
EMPLOYEE BENEFITS

Further, the agreement can provide indemnification for so-called "fees on fees" (that is, fees incurred in order to enforce rights to advancement or indemnification).

Indemnification and advancement disputes are all too common. Disputes emerge because indemnification and advancement questions often arise during serious litigation, and frequently when the company is in the midst of a larger crisis. The use of a separate written indemnification agreement is one way to clarify the indemnification process while times are calm and relationships are cooperative. The agreement can assist in ensuring that the individual directors' and officers' rights will be protected even when things are no longer calm and relationships have deteriorated.

Finally, the written indemnification agreement will often address the procurement of D&O insurance. The agreement can include an undertaking by the company to continue to purchase D&O insurance as long as it is commercially available. The agreement may also state that the insurance will protect the indemnitee to the same extent as the company's then-current directors and officers.

Although individuals can try to protect themselves with a written indemnification agreement, unfortunately, at times, companies are prohibited by public policy or are financially unable to honor indemnification or advancement commitments. For that reason, it is absolutely critical that the company maintain a robust and expansive D&O insurance program, inclusive of an A-Side Difference in Conditions policy, so that if the company is unable to indemnify its directors and officers, the individuals will have strong D&O insurance protection. Even if the company is able to meet its indemnification obligations, the insurance can fund these obligations under its "reimbursement" coverage -- so that the company can preserve its balance sheet.

In conclusion, it is well-advised that corporate executives have their rights memorialized in separate written indemnification and advancement agreements with the companies they serve. It is also critically important for executives to select a knowledgeable and experienced insurance broker to assist in the procurement of D&O insurance in the event that indemnification is unavailable. The concepts of indemnification agreements and D&O insurance are inherently related, and the value of both is maximized when they are carefully analyzed in light of each other.

ABOUT THE AUTHOR

This article was prepared by Kevin M. LaCroix, Esq. of RT ProExec. Kevin has been advising clients concerning Directors' and Officers' Liability issues for nearly 30 years. Prior to joining RT ProExec, Kevin was President of Genesis Professional Liability Managers, a D&O Liability insurance underwriter. Kevin previously was a partner in the Washington, D.C. law firm of Ross Dixon & Bell.

Kevin is based in RT ProExec's Beachwood, Ohio office. Kevin's direct dial phone number is (216) 378-7817, and his email address is kevin.lacroix@rtspecialty.com.

ABOUT RT PROEXEC

RT ProExec is the Professional & Executive Liability Division of R-T Specialty, LLC. R-T Specialty, LLC is an independent wholesale insurance brokerage firm that provides Property, Casualty, Transportation and Professional & Executive Liability insurance solutions to retail brokers across the country. Our proven leadership, deep talent pool, and commitment to coverage and service has made us one of the largest wholesalers in the Professional & Executive Liability insurance marketplace.

ABOUT CONNER STRONG & BUCKELEW

Conner Strong & Buckelew is among America's largest insurance brokerage, risk management and employee benefits brokerage and consulting firms. The firm is an industry leader in providing high-risk businesses with comprehensive solutions to prevent losses, manage claims, and drive bottom line growth. Its employee benefits practice focuses on providing best-in-class benefits administration, health and wellness programs and strategic advisory services.

The company provides insurance and risk services to a wide-range of industries including but not limited to aviation, construction, education, healthcare, hospitality & gaming, life science & technology, public entity and real estate. Additionally, Conner Strong & Buckelew and its affiliates offer a number of innovative and specialty solutions which include captive strategies, construction wrap-ups, executive risk, safety and risk control, and private client services.

Founded in 1959 with offices in New York, New Jersey, Pennsylvania, Delaware and Florida, Conner Strong & Buckelew has a team of nearly 400 professionals, serving clients throughout the United States and abroad.

DISCLAIMER