UMKC LAW REVIEW
DE JURE

Vol. 2 Spring 2014 Pages 9-22

ADVANCEMENT OF LEGAL EXPENSES TO CORPORATE EXECUTIVES UNDER MISSOURI AND OTHER JURISDICTIONS' LAW

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I. INTRODUCTION

In this comment, I intend to explore the concept of advancement, which is a contractual provision granting the right to advancement of legal fees and expenses by a corporation to a named party, usually an executive or high-level employee, with the employer footing the bill. This type of contractual agreement is explicitly authorized in Missouri by statute; however, Missouri courts have had precious few occasions to examine and construe the advancement law. In the few Missouri cases which have dealt with the issue, the courts have brought in decisions and reasoning from courts sitting in other jurisdictions, with particular emphasis on Delaware—the "capital" of corporate law in the United States. An exploration of Delaware and other foreign jurisdictions is necessary to supplement Missouri courts' construction of both the advancement statute and contracts providing for advancement. Disputes over advancement often arise during shareholder derivative suits against corporate officers, as well as when the corporate employer sues a current or former corporate officer, thus raising the possibility of a corporation paying the legal expenses for its litigation opponent; these situations will be explored in this comment. Of particular interest is the question of whether a board of directors must first vote to approve the disbursement of advancement funds to an executive with whom the corporation is locked in legal battle, or whether an advancement guarantee to an employee (whether contained within an employment contract or a company's bylaws) can override the express will of a board to deny advancement of such funds to its erstwhile employee. A further topic of discussion is whether a corporation's claim of a violation by the former employee of his or her fiduciary duties by means of self-dealing can entitle a board to deny an advancement it otherwise would be contractually required to disburse to said employee. The distinction between advancement and indemnification will also be examined throughout this comment.

* The author wishes to thank Prof. Luppino for his sage advice and insight into the subject of this article.

II. MISSOURI LAW REGARDING ADVANCEMENT OF LEGAL EXPENSES

Missouri law, through statute, expressly grants corporations the power to indemnify directors and officers "to the extent and in the manner permitted by law."[1] Further, Missouri statutorily allows advancement by a corporation to a director or officer of,

> [E]xpenses incurred in defending any civil, criminal, administrative, or investigative action, suit, or proceeding…in advance of the final disposition of the action, suit or proceeding as authorized by the board of directors in the specific case upon receipt of an undertaking by or on behalf of the director [or] officer…to repay such amount unless it shall be ultimately determined that he or she is entitled to be indemnified by the corporation as authorized in this section.[2]

The preceding statutory language seems to suggest that advancement of expenses to an officer or director is contingent upon authorization by the corporation's board of directors. Per such a reading, authorization by the board would be a prerequisite for the disbursement of funds to the officer, and such authorization would only take place following the board's receipt of an undertaking from the officer promising to repay the amount advanced by the corporation if he or she is later found to be ineligible for indemnification. However, it is unclear if such a reading of this statutory language (or even the statute itself) is applicable if a corporation has contracted for mandatory advancement of expenses to an officer.

Missouri is bereft of case law that interprets the subsection in question, but one Missouri case does construe a very similar statute in the context of a non-profit corporation. In *Kansas City University of Medicine and Biosciences v. Pletz*, the court examined the wording of Missouri Statutes section 355.476.5, which is identical to § 351.355(5), which is quoted above; the *Pletz* court examined the statute in the context of a dispute over advancement of legal fees to a former CEO.[3] The *Pletz* court spent most of its time construing the non-profit subsection focusing on the "specific case" language of the statute, and after looking at the statute as a whole, including Missouri Statutes section 355.476.4, the court stated, in what is arguably dicta, that *indemnification* was conditioned upon board authorization in a specific case.[4] The court expressly limited its holding construing the meaning of "specific case" as mentioned in Missouri Statutes sections 355.476.4-355.476.5, but made no mention of whether authorization was required by the board to advance funds at the request of the officer or director.[5]

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[1] MO. REV. STAT. § 351.385(10) (2010).
[2] MO. REV. STAT. § 351.355(5) (2013).
[3] *See generally* Kansas City Univ. of Med. and Biosciences v. Pletz, 351 S.W.3d 254 (Mo. Ct. App. 2011).
[4] *Id.* at 262-63.
[5] *See id.* at 263.

Further, the court in *Pletz* was interpreting the non-profit indemnity/advancement statute in the context of the advancement guarantee found in the non-profit corporation's bylaws, with the guarantee mirroring Missouri Statutes section 355.476.5.[6] The non-profits' bylaws contained a provision requiring board authorization before any advancement of expenses would be paid to a director or officer or former director or officer.[7] Considering an argument offered by the former officer based in equity and asking that the judge look to the policy behind the advancement statutes to essentially "read out" the authorization requirement, the judge stated,

> [E]ven if requiring Board of Trustees authorization may substantially diminish the availability and effectiveness of advancement under KCUMB's Bylaws, we are tasked in this case with interpreting and applying the right to advancement *as contained in those Bylaws*, not in the abstract. The right to advancement which Pletz seeks to enforce is plainly conditioned upon authorization by the Board of Trustees, and we must honor this condition.[8]

In support of the preceding, the court then quotes a Delaware holding dealing with advancement,[9] and finishes by stating, "our law is clear: any agreement on the part of a corporation to provide advancement rights should be construed according to its terms."[10]

In light of the two preceding quotes from the Missouri Court of Appeals, the correct construction of Missouri Statutes section 351.355.5 seems to be that contractual provisions to provide advancement rights to directors or officers or former directors or officers are required to be construed according to the terms of the contract or the corporation's bylaws. In other words, it seems likely that an employment contract or a corporation's bylaws would control whether authorization by the corporation's board is required before advancement of expenses may be delivered to a director or officer, regardless of whether the advancement statute is read as requiring board authorization before such disbursement of expenses.[11] However, the outcome of an advancement suit in

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[6] *Id.* at 260-64.
[7] *Id.*at 260.
[8] *Id.* at 263-64 (emphasis in original).
[9] *See* Thompson v. The Williams Cos., No. 2716-VCS, 2007 WL 3326007, at *3 (Del. Ch. July 31, 2007) (holding that "Delaware General Corporation Law allows, but does not require, corporations to advance the litigation costs and expenses of their directors, officers, key employees and agents," and that Delaware courts have "long recognized that advancement is not mandatory absent a clearly worded by-law or contract making it mandatory," and that as a "corollary to that principle", such advancement bylaws are to be "strictly construed according to their terms"); *see infra* note 15 for text of Delaware's advancement statute.
[10] *Pletz*, 351 S.W.3d at 264 (quoting Thompson v. The Williams Cos., No. 2716-VCS, 2007 WL 3326007, at *4 (Del. Ch. July 31, 2007)).
[11] *See Pletz*, 351 S.W.3d at 264 (holding, "Public policy considerations cannot justify our disregard of the unambiguous conditions on the right to advancement *established by KCUMB's Bylaws*." (emphasis supplied)).

the absence of a contractual provision or bylaws considering advancement seems to be an open question under Missouri law.

Reinforcing the above conclusion with respect to an advancement provision being present in an employment contract or a corporation's bylaws, at least one Missouri court has held that "a corporation, no less than a natural person, is bound by a contract entered with proper authority, and no less than a natural person, may not repudiate the undertaking [citations omitted]. These principles apply with equal effect to a corporation employment contract."[12]

As mentioned above, there is precious little Missouri case law on the subject of advancement. The most pertinent case was the aforementioned *Pletz* decision, which set forth a few critical notions regarding the doctrine of advancement: the first is that "advancement is a distinct right complementary to the right of indemnification".[13] The *Pletz* court gave a brief description of the differences between the two contractual rights, and set forth some of the policy considerations behind indemnification and advancement provisions for corporate officers:

> Indemnification and advancement work in tandem to encourage talented individuals to serve as corporate officers. Corporate service entails the risk of civil and criminal liability, and corporations may be willing to assume the expenses of defending such suits to attract talented employees. The right to indemnity, however, is often impossible to determine until the legal proceedings are finished. Absent advances, the officer himself must front the cost of defending the legal proceeding, significantly diminishing the attractiveness of indemnity. Advancement addresses this problem by providing timely relief in the midst of litigation. If a corporation withholds advances, the right will be irretrievably lost at the conclusion of the litigation, because at that point the officer will only be entitled to indemnity.[14]

As mentioned above, because of the paucity of Missouri cases dealing with advancement disputes, the *Pletz* court placed great emphasis on Delaware cases interpreting Delaware's advancement statute to help craft its holding.[15]

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[12] McKnight v. Midwest Eye Inst. of Kansas City, Inc., 799 S.W.2d 909, 913 (Mo. Ct. App. 1990).
[13] *Pletz*, 351 S.W.3d at. at 257.
[14] *Id.* (quoting Westar Energy, Inc. v. Lake, 552 F.3d 1215, 1225 (10th Cir. 2009), which construed Kansas advancement law).
[15] Delaware's statute authorizing corporate advancement of legal expenses is remarkably similar to Missouri's advancement statute (which is set forth above in the body of text). Delaware's law states,

> Expenses (including attorneys' fees) incurred by an officer or director of the corporation in defending any civil, criminal, administrative or investigative

III. OTHER JURISDICTIONS' LAW ON ADVANCEMENT AND MISSOURI'S RELIANCE ON DELAWARE LAW

A. Other Jurisdictions' Law on Advancement, with Special Emphasis on Delaware Holdings

Missouri is not alone in recognizing, as did the *Pletz* court, that Delaware courts are by far the most experienced in handling advancement disputes. Delaware holdings regarding advancement are heavily quoted in many of the cases from other jurisdictions dealing with advancement matters.[16] What follows is a sampling of advancement cases, with the majority coming from Delaware, but with a few from other jurisdictions that demonstrate the outsize place Delaware holdings hold in the law of advancement.

One such case from a foreign jurisdiction which relied heavily on Delaware law was *In re Aguilar*. In *Aguilar*, a former officer and director was sued under Texas law by his former employer for breach of fiduciary duties and civil conspiracy.[17] During the course of the litigation, the former officer sent a letter to his former employer requesting advancement of his legal defense costs, as was set forth in the corporation's bylaws.[18] The bylaws provided for advancement of legal fees to a former officer, without determination of indemnification, upon a written undertaking by or on behalf of the former officer to repay the amounts advanced if it was ultimately determined that the former officer was not entitled to indemnification; as opposed to the situation in *Pletz*, there was no requirement in the bylaws of any authorization from the board of directors for advancement of legal fees and costs.[19] The former officer filed a "motion to compel" advancement of the funds after his demand letter to the company went unreturned; Shortly, thereafter the corporation's board voted not

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> action, suit or proceeding may be paid by the corporation in advance of the final disposition of such action, suit or proceeding upon receipt of an undertaking by or on behalf of such director or officer to repay such amount if it shall ultimately be determined that such person is not entitled to be indemnified by the corporation as authorized in this section. Such expenses (including attorneys' fees) incurred by former directors and officers or other employees and agents of the corporation or by persons serving at the request of the corporation as directors, officers, employees or agents of another corporation, partnership, joint venture, trust or other enterprise may be so paid upon such terms and conditions, if any, as the corporation deems appropriate.

DEL. CODE ANN. tit. 8, § 145(e) (West 2011).

[16] *See, e.g.*, *In re* Aguilar, 344 S.W.3d 41, 47 (Tex. App. 2011); Int'l Airport Ctrs., L.L.C. v. Citrin, 455 F.3d 749, 752 (7th Cir. 2006) (Posner, J.) (stating, "'advancement' is rather a Delaware specialty"; Westar Energy, Inc. v. Wittig, 235 P.3d 515, 521-23 (Kan. Ct. App. 2010) (citing several Delaware advancement cases and stating, "To summarize, Delaware cases provide useful instruction on the…law of advancement of defense expenses and attorney fees.").

[17] *In re* Aguilar, 344 S.W.3d at 44.

[18] *Id.* at 44-45.

[19] *Id.*

to advance the former officer his defense costs,[20] The Texas district court denied the former officer's motion, whereupon he appealed the denial.[21]

In its opinion, the Texas Court of Appeals engaged in a lengthy discussion of advancement, paying close attention to the policy behind advancement and the particular situation of a former officer's right to advancement in the context of a suit against him by his former corporate employer. The court stated, "The right to advancement is not dependent on the right to indemnification. 'A now long line of recent cases enforces mandatory advancement provisions. These cases all stand for the proposition that a…bylaw…provision mandating advancement in no way renders the right to advances dependent upon the right to indemnity.'"[22]

The *Aguilar* court held that under Delaware law, "advancement is allowed even when the official seeking advancement is being sued by the corporation that must advance the litigation expenses".[23] The court noted that advancement claims are frequently granted when the corporation is "suing an official for breach of fiduciary duty".[24] "The corporation cannot defend against the advancement claim on the ground that it now believes the fiduciary to have been unfaithful because 'it is in those very cases that the right to advancement attaches most strongly.'"[25] The *Aguilar* court found that entitlement to advancement does not hinge on proof that the director did not violate his fiduciary duties and that the former director's alleged conduct in the underlying litigation is irrelevant during an advancement hearing.[26] The court rebuffed the corporation's "unclean hands" defense to the former officer and director's advancement claim, stating that Delaware courts have specifically rejected this theory because "it 'would turn every advancement case into a trial on the merits of the underlying claims of official misconduct'".[27]

Further, the court made clear that "advancement of expenses can only occur during the course of the trial proceedings [because] [t]he value of the right to advancement is that it is granted or denied while the underlying action is pending[,] [and that] it is indemnification of expenses that occurs at the conclusion of the case.[28] The *Aguilar* court ultimately granted the former officer's request for advancement pursuant to the corporation's bylaws providing for such advancement.[29]

Moving to Delaware case law, a very significant holding dealing with advancement comes from the "landmark" Delaware case of *Citadel Holding Corp. v. Roven*.[30] In *Roven*, the Delaware Supreme Court enforced an advancement provision contained within an indemnification agreement between a

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[20] *Id.* at 45.
[21] *Id.*
[22] *Id.* at 46 (quoting Stephen A. Radin, *"Sinners Who Find Religion": Advancement of Litigation Expenses to Corporate Officials Accused of Wrongdoing*, 25 REV. LITIG. 251, 268-69 (2006)).
[23] *Id*. at 47.
[24] *Id.*
[25] *Id.* (quoting James River Mgmt. Co., v. Kehoe, 674 F. Supp. 2d 745, 750 (E.D. Va. 2009)).
[26] *Id.* at 47-49.
[27] *Id.* at 48.
[28] *Id.* at 55.
[29] *Id.* at 56.
[30] *Citadel Holding Corp. v. Roven*, 603 A.2d 818 (Del. 1992).

former director and the corporation upon whose board he sat; the context of the advancement proceeding was a suit by the corporation against the former director.[31] The *Roven* court began by recognizing the distinction between indemnification and advancement. The court proceeded to find ambiguity in the language used in the advancement provision because the language of the agreement could have been construed to require the corporation to advance defense costs to the former director for any litigation in which he was embroiled, whether related to his former corporate role or not.[32] To help determine the parties' intent in entering the agreement, the court looked to the recitals of the indemnification agreement.[33] The court found that the recitals reflected an intent on the part of the corporation to provide broader coverage than set forth by the Delaware advancement statute; the court rejected the corporation's argument that the scope of advancement rights enjoyed by the former director under the indemnification agreement could not be greater than the rights conferred by statute.[34]

In rejecting the corporation's argument, the court held that the Delaware advancement statute allows a corporation to advance the costs of defending a suit to a director, and that the authority is permissive, in that the "corporation 'may' pay an officer or director's expenses in advance".[35] The court further held that the indemnification agreement at the heart of the proceeding rendered mandatory the corporation's duty to advance expenses, because the agreement provided that expenses *shall* be paid in advance.[36] The *Roven* court ultimately granted to the former director his request for advancement of reasonable defense costs per his agreement with the corporation, with the caveat that the parties could litigate their rights under the *indemnification* provision of the agreement at the appropriate time in the future.[37]

Reddy v. Electronic Data Systems Corp is another heavily cited Delaware case in the same mold as the preceding cases.[38] In *Reddy*, a corporation filed suit against a former high-level employee, charging negligence, gross negligence, fraud, and breach of the employee's employment and incentive compensation agreements; the suit followed a criminal indictment of the former employee.[39] The former employee filed suit demanding advancement pursuant to the bylaws of the corporation, which entitled a former employee advancement of defense costs during the litigation to the extent allowed under Delaware's corporation law.[40] The corporation argued that the former employee was not entitled to any advancement payments because the former employee's motivation for the allegedly wrongful actions he took as an employee was personal—essentially, dishonesty rooted in greed—and as such, advancing the former

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[31] *See generally id.*
[32] *Id.* at 822-23.
[33] *Id.* at 820, 823.
[34] *Id.* at 823.
[35] *Id.*
[36] *Id.*
[37] *Id.* at 826.
[38] Reddy v. Elec. Data Sys. Corp., No. CIV.A. 19467, 2002 WL 1358761 (Del. Ch. June 18, 2002).
[39] *Id.* at *2.
[40] *Id.* at *3-4.

employee funds for his legal defense would not serve the policy concerns addressed by the Delaware advancement statute.[41] The *Reddy* court rejected this argument, stating that if the corporation's reasoning were adopted, there would be no logical stopping point. The court stated,

> It is not uncommon for corporate directors, officers and employees to be sued for breach of the fiduciary duty of loyalty, and to have to defend claims that they took official action for the primary purpose of diverting corporate resources to their own pocketbooks-in the form of contractual compensation benefits … or an unfair return on a self-dealing transaction. Therefore, it is highly problematic to make the advancement right of such officials dependent on the motivation ascribed to their conduct by the suing parties. To do so would be to largely vitiate the protections afforded by [the Delaware advancement statute] and contractual advancement rights.[42]

The court empathized with the reluctance of a board to advance funds to a former corporate official about whose integrity and fidelity the board has drawn harsh conclusions with the added negative of the corporation possibly never being paid back.[43] Nevertheless, the *Reddy* court enforced the bylaws in question and ordered the advancement of the funds to the former employee, reasoning that it was possible that the former employee could possibly be innocent, and thus any withholding of the funds would make the promise made by the corporation to the former employee an illusory one.[44] Further, the court wholly rejected the argument that advancement should be denied upon a showing of personal greed as motivation behind the former employee's actions.[45] The court held that because the underlying suit by the corporation against the former employee was initiated to hold the former employee liable for alleged wrongdoing he committed in his official capacity as a corporate executive, the suit was within the scope of the corporation's bylaws and thus advancement was mandatory – and any charges of personal greed were irrelevant to the advancement suit.[46]

The *Reddy* court took great pains to distinguish its holding regarding the former employee's official capacity from a 2002 Delaware Supreme Court advancement case wherein a corporation commenced an arbitration action against a former officer and director for, among other alleged wrongs, breach of fiduciary duties, breach of a non-compete provision in his employment agreement, and failure to repay both excess compensation and a personal promissory note held by the corporation.[47] In *Stifel Financial Corp. v. Cochran*, the Delaware Supreme Court held that,

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[41] *Id.* at *5.
[42] *Id.*
[43] *Id.*
[44] *Id.* at *5-6.
[45] *Id.* at *6.
[46] *Id.*
[47] *Id.* at *7-8 (distinguishing Stifel Fin. Corp. v. Cochran, 809 A.2d 555 (Del. 2002)).

> "When a corporate officer signs an employment contract committing to fill an office, he is acting in a personal capacity in an adversarial, arms-length transaction…When the corporation brings a claim and proves its entitlement to relief because the officer has breached his individual obligations, it is problematic to conclude that the suit has been rendered an 'official capacity' suit subject to indemnification under [Delaware's indemnification statute] and implementing bylaws."[48]

The *Cochran* court stated that the non-compete and promissory note claims litigated in the arbitration were properly characterized as personal, not directed at the former officer in his "official capacity" as an officer and director, and that as a result, indemnification was not appropriate.[49] The *Reddy* court concluded that the *Cochran* holding was not applicable to its case as *Cochran* involved indemnification, not advancement; further, *Reddy* held that *Cochran* was a "very unusual circumstance," in which the corporation conceded before trial that the breach of fiduciary duty claim was, in reality, brought by reason of the officer's service at the corporation and thus worthy of indemnification.[50] The *Reddy* court further narrowed *Cochran* by pointing out that if the former officer in *Cochran* were indemnified by the corporation for paying back to the corporation a personal loan and impermissible excessive compensation, that would represent an "inequitable and unintended boon" for the former officer.[51] Finally, the *Reddy* court mentioned that the *Cochran* court expressly noted that the former officer's conduct as a "corporate official was 'irrelevant' to the contract dispute before them".[52] It is worth noting that the Delaware judge who wrote the *Reddy* opinion also wrote the appellate opinion in *Cochran* that was basically affirmed by the Delaware Supreme Court, and so the distinctions drawn and the narrowing of the opinion are fairly significant.

Essentially, both the *Cochran* and *Reddy* courts were drawing a line between officers' and directors' actions taken in a purely personal capacity having little or nothing to do with any of the on-the-job responsibilities and on-the-job conduct of said officers or directors, with the latter being subject to coverage by advancement provisions. This reasoning was further refined by Delaware courts and eventually distilled into a test to establish the capacity of the former officer or director in advancement cases. In the heavily cited *Homestore, Inc. v. Tafeen* case,[53] the Delaware Supreme Court held that the "limited and narrow focus of an advancement proceeding precludes litigation of the merits of entitlement to indemnification for the [defense costs of] the underlying proceedings."[54] The *Homestore* court then set forth the test for capacity, stating,

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[48] *Cochran*, 809 A.2d at 562.
[49] *Id.*
[50] *Reddy*, 2002 WL 1358761, at *7-8.
[51] *Id.* at *8.
[52] *Id.*
[53] Homestore, Inc. v. Tafeen, 888 A.2d 204 (Del. 2005).
[54] *Id.* at 214.

> [W]e hold that if there is a nexus or causal connection between any of the underlying proceedings contemplated [by Delaware's advancement statute] and one's official corporate capacity, those proceedings are 'by reason of the fact' that one was a corporate officer, without regard to one's motivation for engaging in that conduct.[55]

The former officer in *Homestore* had allegedly overstated the corporation's revenues through a scheme of multiple fraudulent transactions by the corporation's finance department, which he headed.[56] He was investigated and indicted by the federal government, and investigated and audited by the corporation.[57] The corporation had bylaws mandating advancement with the following language, "[t]he Corporation *shall pay* all expenses (including attorney's fees) incurred by such a director or officer in defending any such Proceeding as they are incurred in advance of its final disposition."[58] Following a refusal by the corporation to advance funds to the former officer for his defense costs, the former officer filed suit for the advancement. The Delaware Court of Chancery rejected all but one of the Corporation'saffirmative defenses and the corporation appealed.[59]

On appeal, the Delaware Supreme Court set forth the rule above and affirmed the Court of Chancery's conclusion that the former officer was entitled to advancement of the reasonable expenses incurred in his defense, as the former officer was a party to the underlying litigation and investigations because of his alleged acts *as* a former officer, thus he was acting in his official capacity when the wrongs allegedly occurred.[60] The court concluded its opinion by expounding on the "salutary" public policy behind the advancement law and the more expansive corporate bylaw in question during the case, stating that the broader salient benefits of advancement "will only be achieved if the promissory terms of advancement contracts are enforced by courts even when corporate officials, such as [the former officer], are accused of serious misconduct."[61]

Several cases have construed and applied the test set forth in *Homestore*. Two of the most significant and heavily cited decisions further narrowed the circumstances in which a corporate officer or director could be found to have acted in a personal, rather than an official, capacity. In *James River Mgmt. Co., v. Kehoe*,[62] the federal Eastern District of Virginia found that, under Delaware law and the corporation's bylaws that mandated advancement, the defendant former director was entitled to advancement for expenses incurred in defending a suit brought by his former employer, the corporation.[63] The corporation had conceded that the defendant former director was entitled to advancement for

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[55] *Id.*
[56] *Id.* at 206-07.
[57] *Id.*
[58] *Id.*
[59] *Id.* at 207-08.
[60] *Id.* at 214.
[61] *Id.* at 218.
[62] James River Mgmt. Co., v. Kehoe, 674 F. Supp. 2d 745 (E.D. Va. 2009).
[63] *Id.* at 749-52.

defense costs with respect to its breach of fiduciary duty claim, but the corporation claimed that the former director was acting in a personal capacity when he allegedly misappropriated company secrets.[64] The *Kehoe* court rejected this argument in light of the "landmark" *Homestore* holding and stated that the former director allegedly used his "entrusted corporate powers" to misappropriate the secret information, and therefore, the necessary nexus existed between his prior role as director and the current suit because any liability would have "arisen directly out of his prior role" as director of the corporation.[65]

In *Paolino v. Mace Sec. Intern., Inc.*,[66] a Delaware Chancery Court case, a former CEO who was fired with cause by his corporate employer initiated arbitration proceedings to recover severance pay he claimed was due him. The corporation counterclaimed and refused to advance the former CEO defense costs as mandated by the corporation's bylaws, claiming that its counterclaims did not arise "by reason of the fact" that the former CEO was an officer, but rather, arose out of his employment agreement.[67] The court rejected the corporation's argument, finding that Delaware courts will not enforce a contractually mandated advancement provision when the parties are litigating a "specific and personal contractual obligation that does not involve the exercise of judgment, discretion, or decision-making authority on behalf of the corporation."[68] The court further held that the "nexus" requirement set forth in the *Homestore* test would be met "'if the [former officer's] corporate powers were used or necessary for the commission of the alleged misconduct.'"[69]

The *Paolino* court also went out of its way to narrow the *Cochran* "personal capacity" holding, stating that *Cochran* "did not establish an exception to advancement requirements for employment agreements"; instead, the *Paolino* court stated that *Cochran* actually held that the former officer's personal contractual obligation lacked the necessary nexus because of the specificity of the obligation and the circularity of Cochran being obligated to make the required repayment of his promissory note, then obtaining it back through indemnification.[70] *Paolino* boiled *Cochran*'s holding down to the following rule: that when a corporation seeks to avoid advancement, the claim on which it seeks to avoid advancement must involve a "specific and limited contractual obligation without any nexus or causal connection" to the subject officer's official duties.[71] The *Paolino* court held that the counterclaims asserted against the former officer Paolino directly challenged his conduct generally and his alleged failings in his official capacity; the court further stated that "the fact that Paolino and Mace were parties to the Employment Agreement does not convert Paolino's duties as CEO into a personal contractual obligation like the loan repayment…in *Cochran*."[72]

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[64] *See id.* at 747-48.
[65] *Id.* at 751.
[66] Paolino v. Mace Sec. Int'l Inc., 985 A.2d 392 (Del. Ch. 2009).
[67] *Id.* at 403.
[68] *Id.*
[69] *Id.* at 406 (quoting Bernstein v. TractManager, Inc., 953 A.2d 1003, 1011 (Del. Ch. 2007)).
[70] *Id.*
[71] *Id.* at 407.
[72] *Id.*

B. Missouri Courts' Reliance on Delaware Corporate Law

Delaware corporate law has played an outsize role in the creation and development of Missouri's General and Business Corporation Law; in fact, it has been said that Missouri's corporate statute (Section 351 of the Revised Statutes of Missouri) was "patterned after" the Delaware General Corporation Law.[73] Further, as referenced above, the Missouri Court of Appeals in the *Pletz* decision relied heavily on Delaware law, implicitly acknowledging that the law of advancement is not well-developed in Missouri.[74]

An older Supreme Court of Missouri case further demonstrates Missouri courts' reliance upon Delaware corporate law in developing Missouri's General and Business Corporation Law. In *Phelps v. Watson-Stillman Co.*, the court used Delaware law to help determine a stock valuation formula—the court cited two Delaware cases to illustrate one method for share valuation.[75]

Missouri's reliance on Delaware's corporate law expertise is not misplaced, nor unusual. Delaware statutory and case law are widely acknowledged as being at the forefront of business and corporate governance and litigation matters. For example, it has been said that,

> [i]n matters of state corporate law, Delaware has won—that is the consensus among scholars, commentators, and practicing corporate lawyers…Delaware's corporate law enjoys extraordinary respect and prestige, as do the state's corporate lawyers and judges.[76]

Finally, an interesting case that deals with the place granted Delaware law in Missouri courts is *Swope v. Siegel-Robert, Inc.* In a federal district court opinion, the court reviewed and rejected plaintiff's argument that because of Delaware's "experience in questions of corporate law," Delaware law and precedent hold extra weight in interpreting and applying Missouri corporate law.[77] Instead, the *Swope* court held that, notwithstanding the guidance from Delaware law that the Supreme Court of Missouri sought in *Phelps*, in actuality the Missouri Supreme Court in *Phelps*,

> did not indicate that it relied on Delaware law any more than on New York law, which the court also cited. Nor has any other fair value case suggested that Delaware law holds a place of special significance in Missouri corporate law decisions. [After summarily reviewing a Missouri appellate case cited by plaintiff for the

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[73] Seth Chertok, *For Privately Held Companies, Missouri Corporate Law May Prove More Favorable Than Delaware Law*, 63 J. MO. B. 116, 117-18 (2007).
[74] *See Pletz*, 351 S.W.3d 254 at 258, 260-64.
[75] Phelps v. Watson-Stillman Co., 293 S.W.2d 429, 434 (Mo. 1956).
[76] Faith Stevelman, *Regulatory Competition, Choice of Forum, and Delaware's Stake in Corporate Law*, 34 DEL. J. CORP. L. 57, 59 (2009).
[77] Swope v. Siegel-Robert, Inc., 74 F.Supp.2d 876, 916-17 (E.D. Mo. 1999), *rev'd*, 243 F.3d 486 (8th Cir. 2001).

> notion of the primacy and attractiveness of Delaware corporation law, the court stated that it] certainly does not interpret this description of Delaware's appeal to those seeking to incorporate a business [as being indicative] of Delaware law's particular persuasiveness on Missouri courts' decisions. Thus, the Court sees no reason to grant Delaware law any significance above that of other states' fair value decisions.[78]

However, on appeal the Eighth Circuit reversed the district court on its refusal to use Delaware case law in determining the fair value of stocks, holding that, "we find Delaware's decisions on this matter persuasive, not only because of Delaware's expertise in analyzing issues of corporate law, but also for its reasoning."[79] … Other states have followed the same trend as Delaware: as a result, the court stated that "if deciding the issue today, the Missouri Supreme Court" would following the same logic as these other states.[80]

While not explicitly stating that Delaware case law should be given more precedential value than other states, in *Swope*, the Eighth Circuit does point out Delaware's undisputed expertise in corporate matters[81], and therefore it is likely that Missouri's highest court would hew to the well-respected decision of Delaware courts in this corporate law matter. Such a conclusion seems fitting given the importance of Delaware corporate law throughout the United States. As such, it seems likely that Delaware corporate law decisions carry more weight in Missouri courts as persuasive authority than other states' decisions on an undeveloped point of Missouri corporate law.

IV. CONCLUSION

Though Missouri appellate courts have rarely construed advancement provisions in the context of a corporation's litigation against an erstwhile officer or board member, per the holding in *Pletz*, it seems likely that a Missouri court would enforce a contractual provision which guaranteed mandatory advancement of legal fees to a corporation's executive or board member. However, as this is seemingly still an unsettled area of Missouri law, Missouri courts in deciding this matter would be wise to emulate Delaware courts in upholding these advancement provisions, even in the case of a corporation suing a former officer or director, if such advancement is contractually guaranteed to said former officer or director. As stated above by Delaware courts with great eloquence, policy and fairness demand such an outcome. Further, enticements such as advancement that may be offered by corporations to attract top executive candidates, and then enshrined in contract, should not be taken lightly or disregarded. In sum,

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[78] *Id.* at 917.
[79] Swope v. Siegel-Robert, Inc., 243 F.3d 486, 496-97 (8th Cir. 2001).
[80] *Id.*
[81] *See id.*

Missouri courts should give great credence to such advancement provisions, and enforce these contracts even in the unfortunate context of litigation between a corporation and its former officers or directors if such advancement is not explicitly ruled out by the aforementioned contracts.