Articles + Publications | December 15, 2025

Magic Words Required: The Court of Chancery Holds That the Phrase 'Payable as Incurred' Does Not Create Advancement Rights

WRITTEN BY

Nicholas A. Fore | Taylor B. Bartholomew | Christopher B. Chuff | Matthew M. Greenberg

In *GreenMarbles, LLC v. Clint Cushing*, the Delaware Court of Chancery held that a contractual indemnification provision requiring a party "to indemnify and hold harmless" another party, absent an express mandate for advancement through use of the words "advance" or "defend," indicates an intent to indemnify that party only. The inclusion of the phrase "payable as incurred" is insufficient to mandate advancement.[1]

Background:

In 2022, GreenMarbles, LLC (GreenMarbles) acquired all of Clint Cushing's (Cushing) interests in four limited liability companies (LLCs). Each LLC acquisition was memorialized by separate purchase agreements. In 2024, Cushing alleged that GreenMarbles engaged in fraud, among other claims, in connection with the LLC acquisitions. Litigation ensued. In February 2025, GreenMarbles served Cushing a demand alleging Section 3 of the disputed agreement mandated indemnification and advancement (*i.e.*, the obligation to pay indemnifiable losses as incurred). The language at issue read as follows:

> [Cushing] hereby agrees to *indemnify and hold harmless* the Company and any of its officers, members, managers, employees, agents or affiliates (collectively the "Indemnified Parties" and individually an "Indemnified Party") who was or is a party or is threatened to be made a party to any threatened, pending or completed action, suit or proceeding, whether civil, criminal, administrative or investigative, against losses, liabilities and expenses of each Indemnified Party (including attorneys' fees, judgments, fines, and amounts paid in settlement, *payable as incurred*) incurred by such person or entity in connection with such action, arbitration, suit or proceeding, by reason of or arising from (i) any misrepresentation or misstatement of fact or omission to represent or state facts made by [Cushing], including, without limitation, the information in this Agreement, or (ii) litigation or other proceeding brought by [Cushing] against one or more Indemnified Party in which the Indemnified Party is the prevailing party.

GreenMarbles argued that the inclusion of the phrase "payable as incurred" in the indemnification provision mandated advancement.

Analysis:

The court held the language at issue was insufficient to mandate advancement. The court explained advancement does not require magic words, but it does require contractual language expressly stating an intent to mandate advancement. Delaware courts have consistently held that the phrase "indemnify and hold harmless" is a term of art indicative exclusively of indemnification. In an indemnification provision, phrases such as "as incurred" or "as

they are incurred” will signify advancement only if the provision clearly reflects a right to payment before a final determination. However, the inclusion of the word “defend” in an indemnification provision is enough to signal a right of advancement.

Takeaways:

This case reiterates the critical importance of precise contractual language, including in the context of indemnification provisions in M&A agreements. Delaware courts will not reform or reinterpret contractual provisions absent clear ambiguity. The common interpretation attributable to the language will control. The phrase, “indemnify and hold harmless” is a term of art indicative exclusively of indemnification. However, the inclusion of the word “defend” in an indemnification provision is sufficient to grant a right to advancement, while the words “payable as incurred” are not. Parties seeking both indemnification and advancement protections must clearly provide for both; courts will not supply what the contract omits.

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[1] The inclusion of language reflecting a right to payment before a final determination will also trigger advancement rights; however, this language is not commonly found in contractual provisions.

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