As the holiday season approaches, I want to wish each of you a wonderful holiday season. At my installation, I promised that my administration would be responsive to your needs and that your Dade County Bar Association would be here to meet those needs. Today, I seek YOUR advice on how the DCBA can better serve you. In short, how can we help you?

What are your needs? Is there a need for more CLEs? Is there a need for more social events? Is there a need for more networking events with the bar and judiciary? Is there a need for programs involving the local community and its leaders? Should there be informational podcasts and a link on our website for you to ask questions and for us to entertain answers to questions you might have?

Some of you may not know that the DCBA has a building located across from the civil courthouse. Our staff, boardroom, Lawyer Referral Service, and Legal Aid are all housed there. Our building has a vacant fourth floor and I ask you how we should develop it. Should it be broken into a series of conference rooms, or a lounge-like area where you can wait or where conversations can take place between the judiciary and the lawyers of this community?

We have a full staff, including an Executive Director, who is here to assist our members. We also invite non-members to join the DCBA. Thus, rather than writing this column, let me ask you to tell me how we can respond to your needs. My email address is stephanie.carman@hoganlovells.com. I look forward to hearing from you, and in future columns I will address the issues you will have raised and hopefully implement as many suggestions as possible.

Finally, on behalf of the DCBA and all of our colleagues, we extend our congratulations to the newly elected judges. We hope that their careers are long and distinguished, as we look forward to working with them in the administration of justice.

Stephanie L. Carman
Falling into Mindfulness

BY SCOTT ROGERS

As we bid adieu to summer, we welcome the fall and, with it, a new school year, a return to the full press of work, to Miami traffic, and to whatever else life brings our way, as we continue our journey through this complex, beautiful, and poignant world. As summer approached, I shared with you mindfulness insights and tips from a program called: “SoBe Mindful,” and today, I offer a few more that you may find helpful, especially in the morning as you ready the kids for school, or yourself for a new day.

Being mindful is being awake. It is not something special or esoteric, but rather is a natural state, unencumbered by a restless mind and agitated body. Of course, the restless mind and agitated body are frequent occurrences in our lives and it can be helpful to learn “mindfulness exercises” and practices that help to reclaim a more natural and steady state of awareness, even amid a busy and stressful day. Importantly, exercise, eating well, getting a good night’s sleep, and engaging in affirming and supportive social relationships, serve this end as well, and though we often regard these as things to achieve for balance, they are fundamental expressions of what it means to live a balanced life. Indeed, mindful awareness, like sleep, exercise, social engagement, and healthy eating arise naturally, if we can get out of our own way.

Below I share with you three short “SoBe Mindful” exercises. They are intended to be practiced in small doses throughout the day. As such, they are like briefly pressing a reset button on intensifying feelings of agitation and restlessness. I’ll begin by sharing with you a brief reminder of some of the principles underlying the “SoBe Mindful” method, and then suggest a few exercises that can be practiced in the morning (and throughout the day). And because they are so simple, you can share and practice them with young children—perhaps on the way to school.

Awareness of the body and breath, and of thoughts and feelings, are fundamental elements of mindfulness. When mindfully engaged in the moments of our life, we tend to naturally access these awareness states. We find these same elements naturally expressed in nature: with a tree representing the body, the wind representing the breath, clouds mirroring the arising and passing away of thoughts and feelings, and the sun symbolizing our capacity to be aware and kind, i.e., to spread warmth. If you are near a window or outdoors, look around and together reflect on your connection to the elements. The “SoBe Mindful!” method looks to our natural and ongoing connection to the elements of nature such as a way that they effortlessly cue a waking up out of distracted thinking and emotional reactivity.

Below are short exercises that involve the tree, wind, and sun. It is helpful to memorize and practice them so that they become “second nature.” They are intuitive and easy to learn. As you read the below, take a few moments to practice-looking outside or being outdoors as you do can enrich the experience.

Tree — Wind — Sun

Tree: When you see a tree, adjust your body posture. You may do this in a variety of ways, which can include (1) sitting or standing upright, (2) extending your arms to the side, like branches, gently moving your fingers, like leaves, and (3) reaching your arms upward toward the sky, engaging a gentle stretch.

Wind: When you feel or sense the wind, take three slower, deeper breaths, expanding the belly on the in-breath, and breathing out fully.

Sun: When you see the sun or feel its warmth, spread warmth by wishing for another person—perhaps a dear friend or colleague—“May you be happy.” Then wish, this warm feeling to yourself, “May I be happy,” followed by the wish, “May everyone be happy.” It may be challenging to want to wish happiness to everyone, but many report that doing so (which doesn’t make it so) can be helpful to one’s own well-being. And besides, perhaps that difficult person would be a little less difficult if we were a happier person. As with each of the elements, keep it simple and draw upon whatever aspects of practice feel comfortable to you.

The above three exercises can be helpful for feeling a few moments of relaxation, perhaps toning down agitation and reactivity. Even more, by deliberately engaging an exercise, you are moving in the direction of a more aware state. You may find that a busy and distracted mind, and feelings of stress, tone down.

One way of practicing is to pick one element each morning and do the exercise connected to it. You may spend as little or as long as you like, and can do it before leaving outdoors, after walking outside, on the way to or even while sitting in your car. If you have children, you can have fun (and place a wedge of awareness in the middle of a stressful morning) by playing a game using the elements. For example, you or your child points out an element and together you stop for a few moments and practice together. And reflect on how you will find creative adaptations and ways of slowing down (even if for a few moments) and enriching the gift of that morning, so that the mornings and days of our life do not slip away, unawares.

To add a little more mindfulness to the practice, after stretching the body, engaging a few conscious breaths, or wishing kindness to yourself and others, take a few moments and observe the sensations arising in the body, the movement of the breath flowing through the body, or look around you and observe the moment as it is.

One of the useful things about this morning practice is that you’ll find after a short period of practice, the elements of nature will begin to naturally cue these momentary shifts throughout the day. And so, you may begin to find yourself naturally turning to the view outside or a sense of the elements while sitting in a long or contentious meeting, taking a break from working on a project, or amid a period of restlessness or discontent.

The above instructions can be done while in motion, but are especially effective if you pause and come to a stop for a few moments as you cultivate a deliberate engagement in the extraordinary world around you and within you. If you can’t come to a complete stop, slow down your pace. After a few moments (breaths) of practice, continue on with your day—or sit for a while and experience a longer period of practice.

The book, “The Elements of Mindfulness,” just released in Spanish, offers you an in-depth understanding of the “SoBe Mindful!” method and ways to draw upon the elements as part of a daily sitting practice. Visit the website http://sobeanmindful.com to learn more and to watch discussions and demonstrations.

I hope you find these instructions to be useful, and perhaps to deepen your understanding of mindfulness and its inherent simplicity. As always, I am interested in your questions and comments. Wishing you all the best.

Scott Rogers is founder and director of the University of Miami School of Law’s Mindfulness in Law Program, and the University’s Mindfulness Research and Training Initiative. He is a nationally regarded expert on mindfulness and has been sharing mindfulness with members of the legal profession since 1992. Scott can be reached at srogers@law.miami.edu.
Child Advocacy Corner

BY NIKKI WEISBURD

It is that time of year again. I hope that you, your family, and your clients had safe and productive summer months and that your child clients are having a productive start to the school year. As you check in with them this month, please keep in mind all the tangible items that help make a school start successful, or really that the lack of such things makes a start stressful or embarrassing. For example, you may check to be sure they have all of the required school supplies, books, computer access codes, and uniforms/dress code requirements. There are many organizations in our community providing a wide range of supplies for children attending school, so if you feel that your child is missing something, please reach out to me and I can put you in touch with an organization that may be able to help. While it is the responsibility of the case management agency to make sure each child in dependency is ready for a new school year, sometimes just asking the question will reveal an important school item that is still missing. Often a child will not know how to speak up to ask for things, so our guidance and voice can go a long way in terms of readiness for school. For teenagers entering senior year, ask if they have all of the forms for graduation, class ring, senior photos, etc. Many of these deadlines (and therefore the time to make advance check requests from the agencies) will be at the beginning of the school year rather than at the time of the event. There are also the intangible components to starting school. You may ask your child, or his foster parent or case manager, questions such as: Is there an IEP (Individualized Education Program) in place for a learning difference and is it being adhered to in this new class schedule? Does the child know how he is getting to and from school? Are there after school activities he wants to participate in, but for which needs forms/uniforms/gear to participate and will there be transportation after the activity? Does the child know how he is getting lunch and will there be breakfast for him at home before school? While these questions might come naturally to us, there are also those questions we just would not have thought about, such as... Is she sitting in an assigned seat where she cannot see the board well, or where she is easily distracted by misbehaving peers? Did she take the proper pre-requisite class preceding the current course? Does she need medication during the day and does the nurse or homeroom teacher know about it? Perhaps as you prepare your

The Constitutional Corner

BY HONORABLE MILTON HIRSCH

Brown v. Board of Education, in which the Supreme Court held that state-mandated segregated public schooling violated the Equal Protection Clause of the 14th Amendment, is considered by many to be the high-water mark in American legal history. But Brown left many questions unanswered—notably, when and how was integrated education to be achieved?

At a conference of the justices at which those questions were debated, Justice Frankfurter claimed to recall a figure of speech that Justice Holmes used in Holmes’s days on the Supreme Judicial Court of Massachusetts, and described it as deriving from English equity practice: “with all deliberate speed.” It is that figure of speech that was employed by the Court in what has come to be known as Brown II. It may be the most distinctly recognizable expression in all of modern Supreme Court jurisprudence.

Justice Frankfurter, however, was plagued afterward by his inability, and that of his law clerks, to identify the opinion in which Holmes used expression. It bothered him greatly. Frankfurter had a prodigious memory which those questions were debated, and he admired Holmes above all languages of the English Chancery, man; it is enough if it proceeds, in the speed.” It is that figure of speech: “with all deliberate speed.”

The official launch of my new venture Sidebar—a resource to help modern lawyers navigate the legal profession. We’re coming together with some fantastic co-sponsors and community organizations, like YLS, on Saturday, October 6th, from 9:30 am – 1:30 pm at CIC Miami. Learn more about Sidebar’s Welcome to the Fido Legal event via Eventbrite or on Facebook.

Evian White De Leon is Program & Policy Director at Miami Homes For All, Inc.
If you want to survive in this world, you need to be active and help those that need my help. It is very important to pursue advancement in your career, grow their practices, and try to fit it all into their lives. These are the ten bedrock principles that I discovered help lawyers advance in the profession without sacrificing their personal lives. I interviewed 22 lawyers and here are excerpts from some of those conversations.

1. Embrace change. Most lawyers resist change. Life isn’t a straight line—it zigzags from one point to another. Be ready to identify opportunities that could be life-altering, and open to pursuing them.

Judge Alex Bokor: County Court Judge for the 11th Judicial Circuit of Florida

“I was now zigzagging all over the place, from Jones Day, to clerk, back to the big firm, then a boutique firm in Miami, but I knew I was growing each step of the way and I was happier and more fulfilled with each move.

But I wanted to combine that career growth with that service bug and that desire was only amplified by working at the firm for slightly over two years and seeing what they do in the community. And while I was at the firm, I got involved in the local community and had great in-house mentors. Those mentorships and that community involvement connected me with the Miami-Dade County Attorney’s Office.”

2. Find your passion, your north star. When you know what fuels you and focus on it, more of it will come your way.

Maia Aron: Associate in Kozyn Tropin & Throckmorton’s Complex Litigation Department

“The practice of law, as good as it can be, can never completely fulfill me. I need to be active and help those that need my help. It is very important to have a life outside of work and connect with others. Leadership in the Jewish community raised my profile and allowed me to contribute in a better and more fulfilling way.”

Laura Reich: Principal at Reich Rodriguez, commercial litigator formerly with White & Case

“Maybe in another couple of years, after we’d analyzed and probably overanalyzed everything again and again, we’d finally open our own firm. You encouraged us not to wait. You showed us with actual numbers that we could do it and that we could do it now, not at some unknown future time.”

Candace Duff: Attorney, mediator, arbitrator, published novelist, and book writing coach

“I had two dreams that I had kicked to the curb for the first fifteen years of my practice.”—Candace Duff

4. Examine your assumptions. Are you pre-programmed with what you should do, with no room for what you want to do? Rewrite your program.

“I didn’t start a law firm because I was searching for happiness. I started a law firm because I was running from depression.”

Joshua Hertz: Founder of his own personal injury law firm, Hertz Law

“As everyone in my school tried tirelessly applying to the big firms, I was working on my business plan of how to start working for myself. After all, I came from a long line of businessmen, and I too would follow my passion. I started my own law firm.”

Karen Lapekas: Former Senior Attorney for the IRS who now has her own law firm as an IRS tax defense attorney

“I credit owning my own law practice to being happy. And shouldn’t I be? I mean, I have the ultimate dream job. I’m my own boss; I have the freedom to travel, decide my own hours, and write my own destiny. These things don’t make me happy. However, I didn’t start a law firm because I was searching for happiness. I started a law firm because I was running from depression.”

6. You can do it your way. Break the rules. Challenge the status quo. You just may find the perfect path for your life.

Michelle Otero Valdés: Boardcertified maritime attorney handling all aspects of admiralty and maritime law

“I never feared moving from position to position, because it’s my nature to ask lots of questions, and I made sure that the position I was looking at aligned with my career goals. For example, while I was still working at Underwood, Katcher, Katcher & Anderson, I was approached by Thomas Miller to work for them. I was concerned that this job would be a step back for my career, as I was now a three-plus-year associate and firmly entrenched in a good firm handling good maritime cases.”

Michelle Estlund: Criminal defense attorney and preeminent Interpol defense lawyer

“I told you, I think I have an idea,’ and I told you about the Interpol research I had done and the client that had approached me. And I remember you smiled and told me I had to give you my credit card so we could buy a URL and start a blog. I remember that you told me, ‘You’ll be the leading expert on Interpol,’ and I knew that you were a crazy person. And turns out that kind of ended up happening, didn’t it?”

7. Find a niche. Something that will set you apart from the six million other lawyers on this planet.

Daniel Benavides: Partner at Shutt & Bowen, where he is a member of the Real Estate Practice Group

“If you want to survive in this business, you have to learn to adapt. For my part, I identified a great niche in hospitality. I realized that most attorneys who call themselves hospitality attorneys are actually practitioners in other areas, such as real estate, land use, or employment law, who sometimes assist hospitality clients, along with clients in other industries—and that’s fine.

But almost none of them dedicate their practice exclusively to the hospitality industry and the unique issues that face that industry, which means that those lawyers are not as experienced and effective at handling those issues as somebody who does that every day. And more importantly, they don’t market themselves that way.”

Suzanne Ferguson: General Counsel at Hotwire Communications Ltd.

“I don’t stop being a mother when I go to work, and I don’t stop being a lawyer when I go home. And although I do still spend very long hours at the office, and I do tend to put in overtime, I’m able to do a lot of that at home. At times, I’m able to be at work and also be seeing to my child’s needs.”

8. Tailor your work to fit in harmony with your life. And don’t waste one minute feeling inadequate. No one gets to define your work-life balance but you.

Daniel Benavides: Partner at Shutt & Bowen, where he is a member of the Real Estate Practice Group

“Prepare for your third act. Create it on your own terms through the lens of your passion, your calling, and your heart.”

BY PAULA BLACK
A Lawyer’s Guide to Creating a Life, Not Just a Living

A Lawyer’s Guide to Creating a Life, Not Just a Living is the 5th book. Let me tell you how this book came about. I have been speaking to and coaching lawyers for many, many years, and in doing so, I’ve observed the many challenges, obstacles, and myths lawyers face as they pursue advancement in their careers, grow their practices, and try to fit it all into their lives. These are the ten bedrock principles that I discovered help lawyers advance in the profession without sacrificing their personal lives. I interviewed 22 lawyers and here are excerpts from some of those conversations.

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“Prepare for your third act. Create it on your own terms through the lens of your passion, your calling, and your heart.”
I have now been general counsel at Perez Art Museum Miami for three years, and am enjoying the work immensely. Little did I know, thirty-plus years ago, when I helped bring the Picasso exhibit to Miami, and then spent years giving free legal advice to the museum, that it would lead to this. I had no motive other than to help bring something extraordinary to our community and to help create a first-class artistic legacy that would be enjoyed someday by future generations.

In my late fifties, my mother and then my father were both diagnosed with Parkinson’s disease. It’s then that I recognized that I didn’t control everything in my life. I decided to live my life as if I was going to be diagnosed with Parkinson’s any day.

I invite you to read everyone’s entire story and I guarantee their words will move and inspire you. They illustrate their ten bedrock principles that shaped their lives and seeded their joy and fulfillment. These principles can do the same for you. It’s time to take ownership of your future. Create a life of your own making, a life you want, and have the courage to make it happen. Let your passion drive you. Embrace change with a sense of adventure. Make a difference in your life and the lives of others. Celebrate progress and shake off adversity.

You will see they created a life, not just a living. You can do the same.


The University of Miami Dade County Bar Association Student Chapter hosted the Dade County Bar Association’s President Stephanie Carman, Vice President Jane Muir and YLS President Evian White de Leon as panelists. The Attorney Panel was an opportunity for current lawyers to share their post-law school career paths, as well as an insider’s perspective regarding the everyday life of a lawyer.

Labor & Employment EEOC

What a great turnout at the Labor & Employment Committee- EEOC Panel! A BIG thanks to Greenberg Traurig for hosting Michael Farrell-District Director and Robert Weisberg- Regional Attorney for the EEOC at our “Update from the Directors-EEOC” event. Dade County Bar Association’s Labor & Employment chairs, Zascha Blanco Abbott and D. Porpoise Evans, did an outstanding job organizing a much-needed seminar to keep our attorneys up to date on labor laws and informed on what to expect in the employment field in the near future.

Panelists Michael Farrell- District Director and Robert Weisberg- Regional Attorney for the EEOC speak to the audience
Mission of Dade Legal Aid

Dade Legal Aid has been at the forefront of providing critical civil legal services to vulnerable Miami-Dade County residents living in poverty for over 70 years. Dade Legal Aid serves over 5,000 clients annually in the areas of Family Law, Guardianship, Child and Teen Advocacy, Domestic Violence, Probate, Immigration, Housing, Bankruptcy and Civil Law. The agency's trilingual, culturally diverse staff provides services from strategically located offices across Miami-Dade County to better serve geographically and culturally isolated populations.

Since 1995, Dade Legal Aid’s Domestic Violence Unit has been helping underprivileged victims of domestic violence, sexual violence, dating violence, stalking and repeat violence with offices in deep South Dade, Hialeah, and Downtown Miami. Through expanded partnerships with other community providers, we provide services to all of South Florida’s diverse populations regardless of gender, national origin, sexual preference, or sexual identity. Dade Legal Aid’s Domestic Violence Unit, Miami-Dade County’s premier domestic violence service provider, is continuously out in the community helping to educate police officers, advocates, nurses, victims, and others about available Domestic Violence services for victims. Our attorneys and staff consist of dedicated professionals who take pride in what they do and truly enjoy helping people. While all of our attorneys travel throughout the county to meet and represent our clients, we have two attorneys and a paralegal located in deep South Dade, an attorney and paralegal in Hialeah, an attorney and paralegal in the Lawson Courthouse Center, and two attorneys and two paralegals in our main office in the Dade County Bar Association building. Recently we have begun to help victims with enforcement of injunctions with a dedicated attorney for just that purpose.

In addition to creating the first Legal Aid Domestic Violence Unit in Miami-Dade, during the past several decades, Dade Legal Aid and Put Something Back Pro Bono Project have been instrumental in launching numerous collaborations and innovative programs with the Courts, the Dade County Bar Association, and other stakeholders, such as the View from the Bench, the Nuts & Bolts of Divorce, Pro Se Divorce Clinics, Self Help, Volunteer Lawyers for the Arts, the Patently Impossible Project, the Battle of the Legal Bands, Dade Legal Aid Leadership Academy, and the Collaborative Law Pilot Project.

Put Something Back Pro Bono Project, a full-service pro bono program, hosts many activities and opportunities for those seeking to fulfill their pro bono aspirational goals with meaningful and rewarding service. Some of these projects include Wills on Wheels, 100% Law Firms, Hurricane Relief, Bankruptcy Clinics, Teen Trafficking Pro Bono Project, Habitat for Humanity, Legal Clinics for Creatives, Venture Law Project, Domestic Violence Pro Bono Project, Patent Pro Bono, Veterans Affairs, Self Help Clinics, and other projects. While the majority of Put Something Back client intake and referrals occurs in our main office, we also conduct phone intake and accept electronic referrals in order to create a streamlined client experience for those who are often struggling to find bus money to travel to meet us.

Dade Legal Aid offers CLE training seminars and special workshops year-round at the courthouse, at law firms, at co-working spaces, and at other venues aimed at recruiting and training a cross section of pro bono attorneys in formal and informal networking and business settings. Dade Legal Aid’s Domestic Violence Unit will participate on an informative panel discussion at the Dade County Defense Bar Association’s October 17 monthly lunchtime symposium on Domestic Violence Issues and the Role of the Attorney in the system at the Downtown Hyatt.

Dade Legal Aid’s commitment to the community is evidenced by its ongoing presence in the community. The team continually goes above and beyond to serve the unmet legal needs of the less fortunate utilizing staff attorneys, law firm partnerships, pro bono attorney volunteers, mentors, law school clinics, and close collaborations with dozens of diverse voluntary bar associations and supporting organizations. Thanks to the combined efforts of staff attorneys and Put Something Back Pro Bono Project the agency obtained $4,000,000 in benefits for its clients last year and is able to serve hundreds of additional new clients each year.

To learn more about participating or to enroll for a CLE training, please contact psh@dalelegalaid.org.

41st National Child Welfare, Juvenile Justice & Family Law Conference


PROFESSIONALISM TIP OF THE MONTH
From the Eleventh Judicial Circuit Standards of Professionalism and Civility

REMEMBER all attorneys practicing within the Eleventh Judicial Circuit are bound by the Eleventh Judicial Circuit Standards of Professionalism and Civility. The standards are controlling authority. A lawyer should never permit non-lawyer support personnel to communicate with a judge or judicial officer on any matters pending before the judge or officer or with other court personnel except on scheduling and other ministerial matters. A lawyer should notify opposing counsel of all communications with the court or other tribunal, except those involving only scheduling or clerical matters. Sections 2.4 and 2.5, Adherence to a Fundamental Sense of Honor, Integrity, and Fair Play.
An SEC Asset Freeze Can’t Touch Your D&O Policy

BY JEREMY L. KAHN

An SEC enforcement action can leave a corporate defendant literally defenseless in the face of devastating financial exposure on multiple fronts—even before there’s any proof of liability.

When the SEC sues a company’s director or officer, its usual first step is to seek the appointment of a receiver and an order freezing the assets of the company and individuals accused of wrongdoing. The purpose is to preserve funds to pay a potential disgorgement award or civil penalty to the SEC, or restitution to investors with fraud claims.

But an asset freeze also leaves a defendant unable to pay counsel to defend against the SEC enforcement action and parallel civil actions by the receiver and investors.

Yet there’s hope. A director and officers (“D&O”) insurance policy may be a viable resource to fund a defense. And recent court decisions protect the right of directors and officers to make use of these policies for their intended purpose.

Directors and Officers Insurance

D&O policies provide for advancement of defense costs and indemnification for claims alleging wrongful acts taken in the insured’s capacity as a director or an officer. While the purpose of most liability insurance is to protect the individual or entity purchasing the insurance, companies obtain D&O coverage primarily to protect their directors and officers from personal liability.

Companies purchase D&O coverage to attract the best management talent, assuring officers and directors they will have a defense to the litigation that inevitably arises if the company faces allegations of wrongdoing, becomes insolvent, or is forced into receivership. As one court explained, “Unless directors can rely on the protections given by D & O policies, good and competent men and women will be reluctant to serve on corporate boards.” In re WorldCom, Inc. Sec. Litig., 334 F. Supp. 2d 455, 469 (S.D.N.Y. 2005).

Although D&O insurance is intended to protect directors and officers, the SEC or receiver (or both) will often object to using D&O policy proceeds to advance defense costs. They will argue that the policy proceeds must remain frozen so they can be used to fund a potential disgorgement award, civil penalty, or restitution. However, the plain language of the standard D&O policy ensures that objection must fail.

The Priority-of-Payments Provision

Today’s standard D&O policy provides some coverage for the company, but that is secondary to the coverage for directors and officers. Consistent with the policy’s primary purpose of protecting these individuals, a standard D&O policy will generally contain a priority-of-payments provision stating claims against directors and officers must be paid before payments for claims against the company. Further, coverage for directors’ and officers’ defense costs is provided in the form of “advancements,” meaning ongoing, as-incurred payments of legal fees, rather than reimbursement at some later time. Thus, the standard policy requires that directors’ and officers’ defense costs are prioritized over any other payments of policy proceeds.

The recent decision in SEC v. Faulkner, No. 3:16-cv-1735-D, 2018 WL 2761850 (N.D. Tex. June 6, 2018), is part of a trend of courts looking to the plain language of a D&O policy, and in particular the priority-of-payments provision, to protect a director’s or officer’s right to advancement of defense costs. In Faulkner, defendants were accused of orchestrating an $80 million securities fraud in their capacity as officers of oil-and-gas companies. They moved to modify an asset freeze to allow the advancement of defense costs under a D&O policy. The receiver opposed the modification.

Based largely on the policy’s priority-of-payments provision, the court ruled in favor of the officers. Even if the company would have had a basis for claiming policy proceeds (such as a claim against the company by defrauded investors), the officer’s claims superseded any claims by the company due to the priority-of-payments provision. Because a receiver generally “stands in the shoes” of the company, the court explained, the receiver could have no right to the policy proceeds greater than the company would have without the receivership.

Therefore, the officers had “a current right to payment under the D&O Policy—a right that is superior to any potential right of the Receiver.” Other courts have also relied on a D&O policy’s priority-of-payments provision to allow the advancement of defense costs, despite an asset freeze and over a receiver’s objection. See, e.g., SEC v. Narayan, No. 3:16-cv-1417-M, 2017 WL 447205 (N.D. Tex. Feb. 2, 2017); SEC v. Morris, No. 4:12-cv-80 CEJ, 2012 WL 1605225 (E.D. Mo. May 8, 2012).

The Conduct Exclusions

A standard D&O policy contains exclusions for fraudulent or criminal conduct and for loss related to the insured obtaining an illegal profit or remuneration. In other words, a D&O policy usually excludes coverage for the very conduct alleged in an SEC enforcement action and related parallel actions. Under today’s standard D&O policy, however, these exclusions are triggered only if there is a final adjudication that such misconduct occurred. For example, an insured facing a fraud claim will have coverage unless and until a court rules that the insured actually committed fraud. As a practical matter, this means the D&O policy will provide coverage for defense costs for such a claim, but not for indemnification if the claim is ultimately successful.

These conduct exclusions, along with the typical exclusion for paying civil penalties, eliminate the basis for freezing the advancement of defense costs under a D&O policy. The asset freeze is put in place to conserve funds that could be used to pay a disgorgement award, civil penalty, or recovery for defrauded investors. But if the SEC’s, receiver’s, or other plaintiffs’ claims are successful, the adjudication in their favor will necessarily trigger one of the conduct exclusions.

Therefore the policy proceeds can be used only to pay defense costs, or, not at all. When funds sought to be frozen by the SEC or receiver have no possibility of being used to satisfy an award, the asset freeze serves no valid purpose. The only benefit that could inure to the SEC, receiver, and investor-plaintiffs would be depriving their adversary of counsel. Of course, that would not be a valid reason to freeze an asset.

Conclusion

Neither an asset freeze nor a receivership should prevent a director or officer from tapping a D&O policy to pay for a defense to an SEC enforcement action or parallel actions. A director or officer faced with an SEC enforcement action should quickly move for an order clarifying or modifying the asset freeze to permit the advancement of defense costs under the company’s D&O policy. That way, the director or officer and counsel can focus on their defense rather than worry about how to pay for it.

Jeremy L. Kahn is an attorney at León Cosgrove, LLP and a former law clerk for the Honorable Kenneth A. Marra. He focuses his practice on complex commercial litigation and is experienced in insurance-recovery and bad-faith litigation, class-action litigation involving allegations of deceptive business practices, and banking and financial services litigation. Jeremy represents both plaintiffs and defendants in other areas, but his insurance-recovery practice is devoted to exclusively representing individuals and entities against insurance companies. Jeremy serves on the Jewish Community Relations Council of the Greater Miami Jewish Federation and does pro bono work as a Guardian ad Litem.

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MARK YOUR CALENDAR

OCTOBER 2
FLORIDA BAR PRESIDENT,
MICHELLE SUSKAUER RECEPTION
LOCATION: BLOOM SKYBAR @
THE LANGFORD HOTEL
TIME: 6:00 PM
MEMBER ADMISSION: $25
NON-MEMBER ADMISSION: $35

OCTOBER 4
YOUR BATTLE PLAN FOR AGE
DISCRIMINATION CASES
LOCATION: JACKSON LEWIS
TIME: 8:30 AM
MEMBER ADMISSION: $10
NON-MEMBER ADMISSION: $20

OCTOBER 8
ADDRESSING BIAS AND
DISPARITIES IN THE CRIMINAL
JUSTICE SYSTEM
LOCATION: MIAMI DADE COLLEGE
NORTH CAMPUS, LEHMAN
THEATER
TIME: 10:00 AM

OCTOBER 10
PROBATE & GUARDIANSHIP
SEMINAR
LOCATION: LAWSON THOMAS
COURTHOUSE
TIME: 12:00 NOON
MEMBER ADMISSION: $15
NON-MEMBER ADMISSION: $25

OCTOBER 11
DCBA COMMITTEE FAIR
LOCATION: LAWSON THOMAS
COURTHOUSE
TIME: 12:00 NOON
ADMISSION: FREE FOR MEMBERS
WHO PRE-REGISTER
NON-MEMBER ADMISSION: $15

OCTOBER 24
YLS STYLE & SUBSTANCE:
The Art of Building and
Maintaining Your Brand
WITHOUT LOSING SIGHT OF
BEING A LAWYER
LOCATION: GREENBERG TRAURIG
TIME: 12:00 NOON

OCTOBER 25
COURT CARES
COCKTAIL PARTY
LOCATION: MCDERMOTT
WILL & EMERY
TIME: 5:30 PM

NOVEMBER 01
9TH ANNUAL PATENTLY
IMPOSSIBLE PROJECT
LOCATION: DE LA CRUZ
COLLECTION
TIME: 5:30 PM

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