

BUSINESS LITIGATION NEWS & COMMENTARY

InSights

INDEMNIFICATION UNDER MINNESOTA LAW NOT AVAILABLE

When Employees, Officers or Directors Admit to Intentional Fraud



InFocus

RANELLE LEIER TRIAL LAWYER

"Practicing law is an intellectual exercise. Litigating, advocating and winning is what keeps me passionate; even after 10 years, I look forward to coming to work every day," according to Ranelle. As a business litigation partner, she works with a wide range of clients in the areas of products liability, healthcare-related litigation, and contract and business disputes. In addition, she practices environmental law and assists clients with litigation and transactional matters.

Ranelle enjoys spending one-on-one time with her clients connecting on both a professional and personal level. This helps build a cohesive "team" and trusting relationships, which enables her to be more successful. She defines success as, "having achieved a positive result for my client while being efficient and effective."

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Individuals can end up in court as a result of something they allegedly did while on the job. Minnesota law protects many of these people through its mandatory indemnification law, and some companies repeat these protections in their corporate charters or in individual agreements.

Generally speaking, employees, officers and directors of Minnesota corporations and limited liability companies are entitled to have a host of court-related expenses covered by their employers, including attorneys' fees and court-imposed fines and judgments.

Of course, the person seeking indemnification must satisfy certain requirements, one of which is that the person acted in good faith. Good faith is defined in Minnesota law as "honesty in fact in the conduct of the act or transaction concerned." However, in practice good faith has always been a tricky term to define. Determining whether someone has acted in good faith generally requires a fact-intensive inquiry by a judge or jury.

A recent case, however, provides some clearer guidance. In *Augustine v. Arizant Inc.*, the Minnesota Court of Appeals ruled that an individual's sworn admission that he acted with fraudulent intent conclusively established that he did not act in good faith and was, therefore, not entitled to indemnification.

Minnesota Joins National Trend

With this decision, Minnesota joins a growing number of states in which courts have found that a person who admits to intentional fraud is considered not to have acted in good faith and is therefore not eligible for indemnification. The reasoning behind this position seems rather sensible. Allowing persons who have admitted to intentional fraud to ask their employers to foot the bill for their actions would seem to allow these persons to avoid taking personal responsibility for their admitted bad acts. This is exactly what was involved in the *Arizant* case, where *Arizant's* former CEO was charged with aiding and abetting intentional fraud on the Medicare system.

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The CEO ultimately reached an agreement with the government under which he would plead guilty to a lesser charge and pay a \$2 million fine. During that process, the CEO specifically admitted to intentional fraud. He then asked Arizant to reimburse him for the fine and his attorneys' fees, which the company refused to do on the grounds that he had failed to act in good faith while committing the intentional fraud. The Minnesota Court of Appeals agreed with Arizant, finding that when a corporate officer admits under oath to intentionally participating in fraud, that individual does not meet the good-faith standard of the indemnification statute.

In light of the Arizant case, here are a few suggestions for businesses that may face an indemnification claim and for individuals who may seek indemnification.

Steps Businesses Should Take

- Thoroughly investigate the underlying action that led to the indemnification request. Consider whether there has been any sworn testimony that may reveal intentional fraud or other dishonest conduct. Understand that Arizant only involved admitted intentional fraudulent misconduct. Many crimes, and their associated convictions, do not require fraudulent or other dishonest intent and might not fall within the Arizant decision.
- After receiving a request for indemnification, carefully follow the indemnification procedure outlined in Minnesota law. Retain experienced legal counsel to advise your board of directors. If an individual's request for indemnification is turned down, the board's decision and decision making process may be examined later by a court, so it is important that the decision be careful and deliberate and that records of the board's proceedings be thoughtfully prepared.

Pitfalls Individuals Should Avoid

- Avoid situations where indemnification may not be available. As a result of the Arizant decision, it is now clear in Minnesota that if you admit to intentional fraud your request for indemnification will almost certainly be turned down.
- Enter all settlement negotiations and plea bargains, and provide sworn testimony, with your eyes wide open. A sworn admission of fraudulent intent will almost certainly make indemnification unavailable, while merely pleading guilty to a crime without a separate sworn admission might not. Other types of statements may also lead a company (and a court) to find that you did not act in good faith. Potentially, fraudulent or other inherently dishonest intent could be found in any sworn testimony or civil judgment as well as in criminal convictions.

Minnesota Companies and Corporate Officers Beware

Minnesota indemnification law serves a very important purpose. It assures individuals that if they are brought into court as a result of actions they take in an official capacity, their company will stand behind them financially.

However, indemnification is not available to individuals who do not act in good faith.

The Arizant decision confirms that in Minnesota individuals who admit under oath to engaging in intentional fraudulent conduct will not meet the good-faith standard and will not be eligible for indemnification.

Minnesota companies, and their employees, officers and directors, need to understand the implications of this decision.

If you have further questions, please contact your Oppenheimer attorney. ■



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CLIENT SUCCESS

OPPENHEIMER OBTAINS DISMISSAL

Deepening Insolvency

Oppenheimer earned a victory in the Minnesota Court of Appeals ruling which affirmed a trial court's dismissal of claims against our client, Grant Thornton. The Court of Appeals held that the novel damage recovery theory of "deepening insolvency" is not a recognized claim in Minnesota.

A bankruptcy trustee argued that Technimar Industries was harmed by becoming more insolvent than it would have been absent the alleged negligence of its auditor, Grant Thornton. Oppenheimer was successful in persuading the Court to reject this novel theory in the face of precedent from other jurisdictions that permitted recovery based on deepening insolvency.

In this cutting-edge case, Oppenheimer successfully established sound policy reasons that the Court relied on in rejecting the "deepening insolvency" theory.

Oppenheimer convinced the Court of Appeals that "deepening insolvency" was not a substitute for establishing traditional damage theories. ■

TRIAL VICTORY

Breach of Contract

Oppenheimer represented TCF National Bank in a breach of contract action against three individual guarantors who failed to pay the remaining balance due on a note.

The Oppenheimer trial team filed a lawsuit in Minnesota State Court in February 2007 and obtained summary judgment on the liability issues and for recovery of its attorneys' fees in August 2007. The team then tried the sole remaining issue of damages to the Court in October.



The Court entered an order in favor of our client for the full amount due and owing on the note as well as all attorneys' fees and costs.

The defendants attempted to drive up the cost of litigation by asserting baseless counterclaims, frivolous defenses, and taking unnecessary discovery of our client. To obtain summary judgment in six months and win a trial in eight months from the start of the lawsuit is highly unusual. Oppenheimer's strategy—which focused on obtaining a judgment and not being sidetracked by the defense—proved to be efficient and effective. ■

ARBITRATION & APPEAL VICTORY

Earnout Agreements

A Fortune 500 manufacturer purchased a small company that solely produced a water-filtration system, which added to its product line. A major portion of the purchase price was tied up in an earnout provision of the Asset Purchase Agreement which would trigger payments to the selling company once certain sales thresholds were met. The seller made various claims against our client in a dispute over the earnout provisions.



The primary challenge faced by Oppenheimer's trial team was that the agreement contained an arbitration clause. The arbitration hearing required us to combat the seller's "David vs. Goliath" theme and prove that our client did not owe—what was essentially a sole owner/inventor—any additional money for the company it bought from him.

When the plaintiff tried to appeal the adverse arbitration decision, Oppenheimer was successful in convincing the federal courts, including the 10th Circuit Court of Appeals, that such an attempt was frivolous and that sanctions ought to have been awarded to compensate our client for its attorneys' fees. ■

MOTION TO DISMISS

Forum Non Conveniens

Oppenheimer was presented with a very difficult challenge when, just days before discovery was to close, several related companies and individuals became dissatisfied with the representation they were receiving and asked Oppenheimer to take over the defense of a serious action filed against them in Minnesota state court.

The action sought nearly \$2 million in damages and was commenced by an Australian plaintiff against several Panamanian companies, their Minnesota principals, and a Minnesota company with a worldwide market in the agriculture industry.

Oppenheimer conducted an expedited review of the facts and determined that its clients had a reasonable basis to argue that the lawsuit should be dismissed under a doctrine known as *forum non conveniens*. This doctrine essentially provides that a Minnesota court should not proceed with an action that should more appropriately have been filed elsewhere.

Oppenheimer concluded that this case belonged in Panama because the dispute involved the alleged failure of Oppenheimer's clients to properly operate a Panamanian plantation where the plaintiff was growing trees. While motions to dismiss on the basis of *forum non conveniens* are normally brought at the start of an action, Oppenheimer was able to quickly prepare a persuasive motion and present it to the court. The Court dismissed all claims against Oppenheimer's clients and instructed the plaintiff to refile the case in Panama if it wished to proceed. ■

from cover: InFocus

It's not just about being right or wrong, but working on behalf of their best interests and aligning with their long-term business goals."

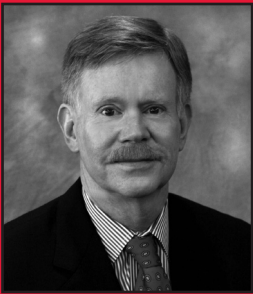
Ranelle is passionate about helping women develop professionally and chairs the Oppenheimer Women Attorneys' group (OWA). OWA serves as both a leadership forum for the firm's clients and a social and peer network for Oppenheimer's women attorneys. OWA sponsors professional development and client appreciation events throughout the year.

Away from the office, you'll find Ranelle at home in Brooklyn Park spending time with her family: husband, Andrew, and their two daughters: McKenna (7) and Sydney (5). She also enjoys a variety of outdoor activities and plays on the firm's football and softball teams. Given a day off, Ranelle says, "I would volunteer at my daughters' school and finally give in to their request that I eat lunch with them—even though the food isn't that appetizing."

Ranelle is a North Dakota native, who was raised with an appreciation for education given both her parents were teachers. It was only natural that she toyed with the idea of teaching, but after receiving her B.S. degree, *summa cum laude*, from Valley City State University, she knew this was just the beginning. Law school was next; she obtained a J.D., *summa cum laude*, from William Mitchell College of Law and she has never second-guessed her decision.

Ranelle is active in the American Bar Association, Litigation Section; Minnesota State Bar Association, Environmental and Natural Resources Section; Hennepin County Bar Association; and Minnesota Women Lawyers. In addition, she serves on the Board for *Friends of Children*, a not-for-profit agency dedicated to improving the lives of children in foster care in Hennepin County. ■

CONGRATULATIONS



Oppenheimer Wolff & Donnelly is pleased to announce that Edward Laine has been honored as a Fellow of the American College of Trial Lawyers (ACTL).

The ACTL is considered to be one of the premier legal associations in North America. The induction ceremony took place on October 13th, during the ACTL's 2007 Annual Meeting in Denver, Colorado.

Fellowship in the College is a singular honor as total membership never exceeds one percent of the total attorney population in a given state or province. Invitations are extended to "experienced trial lawyers who have mastered the art of advocacy and whose careers have been marked by the highest standards of ethical conduct, professionalism, civility and collegiality." In addition, lawyers must have a minimum of 15 years trial experience before they can be considered for membership.

