

GARY STEVEN FINDLEY & ASSOCIATES

Gary Steven Findley\*  
Laura Dean-Richardson  
Debra L. Barbin  
-----  
\*A Professional Corporation

A PROFESSIONAL CORPORATION  
ATTORNEYS AT LAW  
  
3808 E. LA PALMA AVENUE  
ANAHEIM, CALIFORNIA 92807

Telephone  
(714) 630-7136  
Telecopier  
(714) 630-7910

**MEMORANDUM**

TO: Directors and Officers of California Community Bank

FROM: Gary Steven Findley & Associates

RE: Indemnification of Directors and Officers

DATE: August 11, 2020

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The indemnification laws of California provide indemnification of directors and officers under Section 317 of the Corporations Code (“Section 317”). Section 317 gives a corporation the authority, and in some instances imposes an obligation upon the corporation, to indemnify a person “who was or is a party or is threatened to be made a party” to any legal proceeding “by reason of the fact that the person is or was an agent of the corporation.” Section 317 was enacted to encourage capable individuals to act for and in the place of the corporation by affording them indemnification for the expenses of defending against lawsuits to which they are made parties because they are agents of the corporation.

Under Section 317, subdivision (b), California corporations have the power to indemnify any person who was or is a party or is threatened to be made a party (other than an action by or in the right of the corporation to procure a judgment in its favor) by reason of the fact that the person is or was an agent of the corporation, against expenses, judgment, fines, settlements, and other amounts actually and reasonably incurred in connection with the proceeding if that person acted in good faith, and in a manner the person reasonably believed to be in the best interests of the corporation and, in the case of a criminal proceeding, had no reasonable cause to believe the conduct of the person was unlawful.

Section 317, subdivision (c) address indemnification with respect to actions by or in the right of the corporation. Under this subsection, corporations have the power to indemnify any person was or is a party or is threatened to be made a party to any threatened, pending, or completed action by or in the right of the corporation to procure a judgment in its favor, against expenses actually and reasonably incurred by that person in connection with the defense or settlement of the action if the person acted in good faith, in a manner the person believed to be in the best interests of the corporation and its shareholders. However, this power to indemnify is limited under certain circumstances.

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California law provides that to the extent that an agent of a corporation has been successful on the merits in defense of any proceeding referred to in Section 317, subdivision (b) or (c) or in defense of any claim, issue, or matter therein, the agent shall be indemnified against expenses actually and reasonably incurred by the agent in connection therewith.

While subdivision (c) of Section 317 establishes corporate authority to indemnify an agent who is made or threatened to be made a party to an action by or in the right of the corporation, subdivision (d) makes indemnification obligatory when the agent successfully defends such a proceeding on the merits.

In addition, Section 317, subdivision (e) provides that a corporation may advance expenses incurred in defending any proceeding prior to the final disposition of such proceeding upon the receipt of an undertaking by the agent to repay that amount if it shall be determined ultimately that the agent is not entitled to be indemnified.

While Section 317 applies to all California corporations, California Corporations Code Section 204 (a) provides additional indemnification provided, however, that language is set forth in the corporation's articles of incorporation. Under Section 204(a)(10) corporations are allowed to include provisions in the articles of incorporation eliminating or limiting the personal liability of a director for monetary damages in an action brought by or in the right of the corporation for breach of a director's duties to the corporation and its shareholders, with certain carve outs.

Section 204(a)(11) goes on to allow corporations to include a provision in the articles of incorporation authorizing, whether by bylaw, agreement, or otherwise, the indemnification of agents in excess of that expressly permitted by Section 317 for those agents of the corporation for breach of duty to the corporation and its stockholders, provided, however, that such indemnification is also subject to certain carve outs, including the prohibitions set forth in Section 317.

All California corporations should have provisions in their Articles of Incorporation which provide for broad indemnification as provided in Section 317, including the excess indemnification allowed under Section 204. Corporations should also have insurance which provides coverage for directors and officers. Policies may include coverage protecting directors and officers from claims that are not otherwise indemnified by the corporation, including where the corporation is legally barred from indemnifying those individuals. At this point in time, all insurance coverage should be carefully reviewed to determine if coverage exists for COVID-19 claims. In addition, directors and officers should each request indemnification agreements from the corporation that provide for mandatory indemnification as allowed under the law which include advancement of expenses in the event the director or officer is a named party in an action.

Gary Steven Findley & Associates  
Attorneys at Law

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It should be noted, that sometimes, the shoe is on the other foot and the corporation has a right to be indemnified by its officers. California Corporations Code Section 25505 is one example. This statute provides that a corporation that is liable under the Corporate Securities Law has a right of indemnification against any of its principal executive officers, directors, and controlling persons whose willful violation of any provision of the Corporate Securities Laws gave rise to the corporation's liability.