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A recent Delaware court decision may have important effects on the rights of directors and officers to indemnification.

Corporate Responses to D&O Indemnification Following *Schoon v. Troy*

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The current financial crisis is making corporate directors nervous.[1] However, quitting may not be the right response in many cases, especially since even former directors remain vulnerable on several liability fronts. As shown by the recent Delaware decision in *Schoon v. Troy*,[2] former directors are vulnerable to retroactive amendments of the by-laws changing or eliminating their indemnification rights.

As a result of the ongoing financial crisis, indemnification provisions in corporate charters and by-laws are under heightened scrutiny. This article discusses the various corporate responses to indemnification of directors and officers following *Schoon v. Troy*, including the resulting changes in charter and by-law indemnification provisions, the growing adoption of indemnification contracts, and the relationship to directors and officers (D&O) insurance.

Introduction

The concept of director and officer indemnification stems from the basic legal rule that an agent is entitled to be indemnified by his or her principal against liability asserted against the agent by a third party.[3] In order to attract highly qualified individuals to serve as directors, corporations have traditionally sought to provide them with assurances that their

personal assets will not be at risk for actions they have taken in good faith as corporate directors.[4] Thus, the relevant business corporation laws in "corporate friendly" jurisdictions, such as Delaware and New York, generally grant corporations extensive power to indemnify directors (as well as officers and others) against claims in various legal actions and proceedings, subject to certain limitations.[5]

As a practical matter, indemnification means that the corporation has an obligation to reimburse a director at some point in the future.

As a practical matter, indemnification means that the corporation has an obligation to reimburse a director at some point in the future, subject to certain conditions being met. Since most lawsuits are settled before trial and before any final adjudication on the merits,[6] entitlement to advancement of expenses, particularly attorneys' fees, to defend any investigation or lawsuit is one of the more important aspects of any indemnification coverage.[7] In the absence of advancement of expenses, a director must fund, out of his or her own pocket, significant expenses over the course of an investigation or litigation, which may take several years to resolve. In addition, if the litigation is settled, it may be open to question whether the corporation is *required* under certain applicable statutory provisions to indemnify the director. The statutory language for required indemnification is that such director has "been successful on the merits or otherwise,"[8] which primarily seeks a final decision of a court.

Legal Basis for D&O Indemnification

The statutes in Delaware and New York generally grant corporations extensive flexibility in their discretionary power to indemnify directors (as well as officers and others) against claims in various legal actions and proceedings, subject to certain limitations. Those limitations include that the person acted in good faith and in a manner reasonably believed to be in or not opposed to the best interests of the corporation and, in derivative actions (where the person is adjudged to be liable to the corporation), a court determination that such person is nevertheless entitled to indemnification.[9] In addition, such statutes permit inclusion of a provision in corporate charters eliminating or limiting personal liability of directors for monetary damages for breach of fiduciary duty as a director, provided that the charters do not eliminate personal liability for breaches of any duty of loyalty; acts or omissions not in good faith; intentional misconduct; knowing violation of law; unlawful dividends, stock purchase, or redemptions; or transactions from which a director obtained an improper personal benefit.[10] Many corporations have included certain of these provisions in their charters.

Both Delaware and New York also permit corporations to provide advance payment of expenses to directors (as well as officers and others) in defending lawsuits, on the condition that such indemnified person will commit to repaying the advancement if it is ultimately determined that he or she is not entitled to indemnification.[11]

Both statutes also permit a corporation to obtain D&O insurance to indemnify either or both (i) the corporation with respect to its obligation to indemnify directors (as well as officers and others) and (ii) the directors (officers and others) directly.[12] Moreover, such D&O insurance may cover claims where the corporation cannot lawfully directly indemnify such directors or is financially unable to indemnify them.[13] Insurance paid directly to directors and officers is often referred to as "Side A coverage." Insurance that covers the corporation to the extent it indemnifies its directors (officers and others) for claims made against them is often referred to as "Side B coverage."[14]

Permissive vs. Mandatory Indemnity

Other than certain mandatory provisions, such as requiring indemnification to the extent that a director is "successful on the merits,"[15] most of the statutory authority is permissive. Thus, each corporation may elect, within the scope of the authority specified in the statute, to determine in its charter and/or bylaws the scope of indemnification to be provided and whether such indemnification will be mandatory for the corporation or merely permissive. Mandatory indemnification provisions generally state that the corporation "shall" or "will" indemnify its directors

and advance expenses. Permissive indemnification provisions generally state that the corporation "may" or "has the authority" to indemnify its directors and advance defense costs. Under permissive provisions, indemnification is merely optional and, absent a separate agreement between the corporation and the director or officer, the corporation can refuse, in many cases, to provide indemnification or advancement if it so chooses.

The mandatory versus permissive nature of indemnification and advancement was highlighted by the now infamous Thompson Memorandum, in which the U.S. Department of Justice directed prosecutors in criminal matters to consider, among other things, "whether the corporation is advancing legal fees or otherwise indemnifying its employees," in order to determine whether the corporation "appears to be protecting its culpable employees and agents."[16] Prosecutors pressured corporations with respect to permissive advancement of attorneys' fees to limit the advancement of legal fees to employees who invoked their Fifth Amendment rights.

The Thompson Memorandum was overruled by the McNulty Memorandum[17] and was sharply criticized by Judge Lewis Kaplan in recent opinions in *United States v. Jeffrey Stein*,[18] which involved a federal investigation of KPMG in connection with allegedly abusive tax shelters. Under "the proverbial gun to [the] head" pressure from prosecutors, KPMG had retreated from its long-standing practice of advancing legal fees.[19] KPMG limited advancement of legal expenses to employees who "cooperated fully with the company and the government" and cut off legal payments for employees who refused to be interviewed by law-enforcement investigators or who were subsequently indicted. Judge Kaplan ruled that such pressure against KPMG to withhold or otherwise condition payment violated the Fifth Amendment right to fairness in the criminal process, as well as the Sixth Amendment right to counsel.

Schoon v. Troy

In the recent Delaware case of *Schoon v. Troy*, the corporation amended its by-laws to (i) eliminate the right of "former" directors to advancement of expenses (leaving such right in place for current directors), and (ii) deny indemnification and advancement to any person initiating a lawsuit against the corporation. The amendments were apparently motivated by an ongoing dispute between the corporation and certain current and former directors. Shortly thereafter, claims were filed against a current director and a former director, and both sought advancement of expenses. Although the by-laws in effect during the former director's term of service provided for mandatory advancement of fees, the corporation refused to advance payment to the former director based upon the amended by-laws. The former director argued that the corporation could not unilaterally change his "contract right" to advancement under the by-laws in effect while he was a director.

Before Schoon v. Troy, *directors had considered that they were covered by the indemnification provisions in the by-laws in place at the time of their service.*

The Delaware court held that the director's right to indemnification and advancement of defense costs "vested" only when (i) the corporation's payment obligation was triggered, or (ii) the lawsuit against such director was filed. Thus, any rights to advancement provided in the by-laws could be unilaterally revoked by the corporation at any time prior to such "vesting." Therefore, the applicable by-laws were those that had been amended to remove the former director's right to advancement of defense costs, not those in effect while such person was serving as a director.

Before *Schoon v. Troy*, many directors had considered that indemnification and advancement provisions in by-laws were a "contractual obligation" between them and the corporation and that they were covered by the indemnification provisions in the by-laws in place at the time of their service.[20] As shown in *Schoon v. Troy*, however, the corporation can unilaterally repeal such provisions under certain circumstances. Moreover, the *Schoon* court also ruled that alternate language in the by-laws providing that "[t]he rights conferred ... shall continue as to a person who has ceased to be a director ..."[21] meant only that a director whose rights to advancement had already

been triggered while he was on the board did not lose that right by leaving the board, and leaving did not prevent the unilateral repeal.

New York vs. Delaware Law

The *Schoon* decision interpreted Delaware law. Language under the New York statute suggests a basis for argument that in a factual situation similar to that in *Schoon*, the by-laws in effect at the time of accrual of a cause of action govern a director's entitlement to indemnification. New York law provides, "No indemnification ... shall be made [if it] would be inconsistent with a provision of the certificate of incorporation, [or] a by-law ... in *effect at the time of the accrual of the alleged cause of action asserted* …."[22] The Delaware statute does not contain any comparable language. However, such language is not substantively different from that being applied by the judge in *Schoon* while interpreting the Delaware statute.[23]

It appears that adoption of separate indemnification agreements is more prevalent than just amendment of the by-laws and/or charter alone.

Thus, while there is a language argument for reaching a result in New York different from that reached by the *Schoon* court, the argument has not yet been tested in New York courts. Further, when a cause of action "accrues" can have differing answers in different factual situations. Accordingly, New York corporations have not assumed (and should not assume) that the *Schoon* decision does not have the same implications for New York directors.

Corporate Responses to *Schoon v. Troy*

The *Schoon* decision has prompted extensive discussion among commentators as to what actions should be taken to reassure directors that their indemnification protection will not be changed after they have performed services for their boards of directors. The responses have focused on amending the charter and by-laws and entering into separate indemnification contracts, as well as reassuring that D&O insurance is in place.

Within the by-law amendments and separate indemnity agreements, corporations appear to be considering four conceptual approaches: (1) attempts to "freeze" indemnification provisions or entitlements under by-law provisions; (2) attempts to insert explicit statements that indemnification and advancement provisions in by-laws constitute enforceable vested contract rights; (3) attempts to segregate advancement of expenses as a separate right from indemnity; and (4) attempts to insert references or obligations to maintain D&O insurance.

Actual corporate responses to *Schoon* have varied, including adding one or more of these concepts into the corporate charter, by-laws, and/or into separate indemnity agreements without a definitive pattern. However, it appears that adoption of separate indemnification agreements (often coupled with amendments to the by-laws) is more prevalent than just amendment of the by-laws and/or charter alone.

Charter and By-law Freezes

A random sampling of recent Securities and Exchange Commission (SEC) filings since the issuance of *Schoon v. Troy* appears to demonstrate that few public corporations have amended their charters.[24] Although the situation may be different for nonpublic companies, amendment of a corporation's charter requires approval from both the board of directors and shareholders. Accordingly, with respect to a public corporation, amending the charter would generally require a proxy solicitation and significant delay and expense. However, once indemnification protections are provided for in the charter of a public corporation, the difficulty of amending such charter provides a certain degree of comfort to directors.

In contrast, it appears that a significant number of public companies have recently amended their corporate by-laws and have incorporated "freeze" language in various forms. Certain examples follow.

- Neither the amendment or repeal of this Article, nor the adoption of any provision of the Certificate of Incorporation inconsistent with this Article, shall adversely affect any right or protection of a director of the Corporation existing at the time of such amendment or repeal.[25]

More elaborate "freeze" language attempts to permit only modifications that provide greater indemnity benefits, but not lesser indemnities, in an effort to provide a rising floor of indemnity protection. Examples include:

- To the extent that a change in Delaware law (whether by statute or judicial decision) shall permit broader indemnification than is provided under the terms of the by-laws of the Companies and this Agreement, Indemnitee shall be entitled to such broader indemnification and this Agreement shall be deemed to be amended to such extent.[26]

- Any person ... shall be indemnified and held harmless by the corporation to the fullest extent authorized by the General Corporation Law, as the same exists or may hereafter be amended (but, in the case of any such amendment, only to the extent that such amendment permits the corporation to provide broader indemnification than permitted prior thereto), against expenses (including attorneys' fees).[27]

- To the extent that a change in Delaware law, whether by statute or judicial decision, permits greater indemnification or advancement of Expenses than would be afforded currently under the Corporation's By-laws and this Agreement, it is the intent of the parties hereto that Indemnitee shall enjoy by this Agreement the greater benefits so afforded by such change.[28]

The various attempts to "freeze" the corporation's by-laws may not be a sufficient legal response, because there can be no firm assurance that the protective "freeze" and other provisions so added could not themselves later be removed by a subsequent amendment under the *Schoon v. Troy* principle. We can also envision a factual situation where certain long-serving directors could arguably have indemnity or advancement rights different from those of recently serving directors while both groups are facing similar legal claims. Out of concern for an attempted repeal of "freeze" provisions, corporations have tried to add "vesting" provisions to by-laws.

Vested or Contract Rights

In response to *Schoon v. Troy*, corporations have attempted to provide language in support of the "vested" or "contractual right" of directors to enforce indemnification and advancement provisions in by-laws to protect against subsequent modification. The following language contains express enforcement rights granted to directors and officers:

> All rights and protection pursuant to this Article IX [Indemnification] of any Director, officer or employee shall immediately vest and be effective upon the election of such Director or officer and the employment of such employee.[29]

> [t]he rights conferred upon indemnitees in this Section 17 [Indemnification] shall be contract rights that vest at the time of such person's service to or at the request of the Corporation and such rights shall continue as to an indemnitee who has ceased to be a director, officer, trustee, employee or agent and shall inure to the benefit of the indemnitee's heirs, executors and administrators.[30]

Corporations have attempted to provide language in support of the "vested" or "contractual right" of directors to enforce provisions in by-laws.

It is not certain how the "vesting" or "contract right" approach will be interpreted by various courts. It can be argued that a director or officer is entitled to rely on by-law provisions in place during his service as a director and/or officer. Further, this vesting language attempts to respond to issues discussed in *Schoon v. Troy* as to the timing or coverage of vesting of the by-law indemnity provisions in effect. We believe the courts will respect the intent evidenced by the "vesting" and "contract rights" language being added to by-laws.

Mandatory Advancement

Our random sampling of recent SEC filings since the issuance of *Schoon v. Troy* indicates that public

corporations that have amended their by-laws or entered into separate indemnity agreements have *expressly provided for rights of "advancement"* of costs and expenses in addition to the general right of indemnification. As noted in the discussion of mandatory versus permissive indemnification and the Thompson Memorandum, directors and officers consider advancement of expenses as important as indemnification. An example from a public filing follows.

Most individual indemnity agreements address indemnification and advancement separately. Some specify minimum D&O insurance.

> In accordance with the pre-existing requirement of Section 7.2 of Article 7 of the By-Laws of the Corporation, and notwithstanding any provision of this Agreement to the contrary, the Corporation shall advance, to the extent not prohibited by law, the Expenses incurred by Indemnitee in connection with any Proceeding, and such advancement shall be made within thirty (30) days after the receipt by the Corporation of a statement or statements requesting such advances from time to time, whether prior to or after final disposition of any Proceeding. Advances shall be unsecured and interest free. Advances shall be made without regard to Indemnitee's ability to repay the Expenses and without regard to Indemnitee's ultimate entitlement to indemnification under the other provisions of this Agreement. Advances shall include any and all reasonable Expenses incurred pursuing an action to enforce this right of advancement, including Expenses incurred preparing and forwarding statements to the Corporation to support the advances claimed. The Indemnitee shall qualify for advances upon the execution and delivery to the Corporation of this Agreement, which shall constitute an undertaking providing that the Indemnitee undertakes to repay the amounts advanced (without interest) to the extent that it is ultimately determined that Indemnitee is not entitled to be indemnified by the Corporation. No other form of undertaking shall be required other than the execution of this Agreement. This Section 10 shall not apply to any claim made by Indemnitee for which indemnity is excluded pursuant to Section 9.[31]

Individual Indemnity Agreements

Perhaps as a result of uncertainty, the most direct response of public corporations (and presumably nonpublic corporations) to *Schoon v. Troy* seems to be the adoption of various forms of individual private indemnity agreements. While many of these indemnification agreements cover all directors generally, without distinguishing, some cover only outside directors and not management or employee directors. There appears to be no real legal reason for different treatment of indemnification for independent outside directors from that provided to management directors.

However, where a large public corporation has numerous subsidiaries and therefore numerous "directors," it may appear to be a material administrative task to continually arrange for individual indemnity agreements for employee directors. In addition, some corporations have included executive officers in their new contractual indemnification arrangements, while others have not.

It appears that no single approach can be discerned from recent filings of indemnity agreements for executive officers, perhaps because agreements for executive officers involve too many separate business variables and are often included in employment agreements.

Most individual indemnity agreements address indemnification and advancement separately. Certain agreements include significant detail, together with certain rights to notice and requirements for cooperation with the corporation, as well as subrogation provisions and statements regarding obligations of good faith and loyalty from directors. Some even specify minimum D&O insurance. Others are very concise, simply attempting to provide a "contractual freeze" of the indemnities specified in the charter and/or by-laws.[32]

Although a "freeze" provision in the charter or by-laws may be susceptible (under the *Schoon* principle)

to being removed by a subsequent amendment, such a "freeze" provision in an agreement would appear enforceable. Many corporations are taking the "belt and suspenders" approach by entering into indemnification agreements with their directors as well as amending their by-laws. Examples of language from a simple indemnity agreements follows.

> Corporation shall indemnify Indemnitee to the fullest extent permitted by Article 7 of the BCL [Business Corporation Law] and the By-laws in effect on the date hereof, or to the fullest extent permitted if the BCL and/or the By-laws are amended to require or permit indemnification, expense advancement or exculpation more favorable to Indemnitee than so permitted prior to such amendment. It is intended that in the event of any changes in the BCL or the By-laws after the date of this Agreement which expand (but not diminish) the right of Corporation to indemnify its directors, or require or permit indemnification, expense advancement or exculpation more favorable to Indemnitee, that such changes shall be deemed to be included in Indemnitee's rights and the Company's obligations under this Agreement.
>
> Specifically, and without limitation of any other indemnification rights permitted by Article 7 of the BCL or the By-Laws or any insurance, Indemnitee shall be indemnified by Corporation against:
>
> all costs, judgments, penalties, fines, liabilities, amounts paid in settlement by or on behalf of Indemnitee in connection with any claim, action or proceeding arising out of or with respect to Indemnitee's service as director so long as Indemnitee acted in good faith and in a manner Indemnitee reasonably believed to be in the best interests of Corporation; and
>
> all expenses, including reasonable attorney's fees, incurred by Indemnitee in any such claim, action or proceeding. These expenses shall be paid or reimbursed by Corporation from time to time at the request of Indemnitee in advance of final disposition of such claim, action or proceeding; however, if it is finally determined in accordance with Article 7 of the BCL that Indemnitee was not entitled to payment of such expenses, Indemnitee agrees, in consideration of this Agreement, to reimburse Corporation for such expenses.[33]

D&O Insurance

In response to *Schoon v. Troy* and the ongoing financial crisis, corporations have also attempted to provide language repeating the corporation's intentions with respect to D&O insurance.

As noted, many corporations purchase insurance to cover their indemnification obligations to directors. Most D&O insurance policies include former directors within their definition of "insured persons," so even if the by-laws were retroactively amended as in *Schoon*, in theory, former directors should still have coverage. However, most D&O insurers take direction from the corporation and often will not "advance" expenses, but seek only to reimburse expenses already incurred. Further, most D&O insurance policies are "claims-made" policies, meaning that the policy in effect in the year the lawsuit is filed applies — not the policy in effect when the alleged wrongdoing occurred during the director's service.

Since the purchase and continued maintenance of corporate D&O insurance policies is usually at the discretion of the corporation, there is no assurance for former directors that such D&O policies will be in place at the time a claim arises. While many corporations have been including language in the indemnification agreements concerning the existence of D&O insurance, they have not been committing to maintaining such insurance. It appears that corporations are providing that, to the extent the corporation has D&O insurance in place, such D&O insurance will provide the former director with the same rights and benefits as are accorded to the most favorably insured of the corporation's current officers and directors.

A few examples of the conceptual approaches to D&O insurance follow.

- Specifically, and without limitation of any other indemnification rights provided in this Agreement, the By-laws or otherwise provided by law, Corporation shall continue to maintain an insurance policy or policies providing liability insurance for its directors arising out their service to and on behalf of Corporation.[34]

- To the extent that the Company maintains an insurance policy or policies providing liability insurance for directors or executive officers of the Company or for any person serving in any other Indemnified Position, the Director shall be covered by such policy or policies in accordance with its or their terms to the maximum extent of the coverage available for any such director or executive officer or person serving in such position under such policy or policies.[35]

- For the duration of Indemnitee's service as a director and/or officer of the Company and for a reasonable period of time thereafter, which such period shall be determined by the Company in its sole discretion, the Company shall use commercially reasonable efforts (taking into account the scope and amount of coverage available relative to the cost thereof) to cause to be maintained in effect policies of directors' and officers' liability insurance providing coverage for directors and/or officers of the Company, and, if applicable, that is substantially comparable in scope and amount to that provided by the Company's current policies of directors' and officers' liability insurance. Upon reasonable request, the Company shall provide Indemnitee or his or her counsel with a copy of all directors' and officers' liability insurance applications, binders, policies, declarations, endorsements and other related materials. In all policies of directors' and officers' liability insurance obtained by the Company, Indemnitee shall be named as an insured in such a manner as to provide Indemnitee the same rights and benefits, subject to the same limitations, as are accorded to the Company's directors and officers most favorably insured by such policy. Notwithstanding the foregoing, (i) the Company may, but shall not be required to, create a trust fund, grant a security interest or use other means, including, without limitation, a letter of credit, to ensure the payment of such amounts as may be necessary to satisfy its obligations to indemnify and advance expenses pursuant to this Agreement and (ii) in renewing or seeking to renew any insurance hereunder, the Company will not be required to expend more than 2.0 times the premium amount of the immediately preceding policy period (equitably adjusted if necessary to reflect differences in policy periods).[36]

An analysis of D&O insurance is beyond the scope of this article. However, it has been noted that "[f]or individual directors and officers accused of wrongdoing, … collection on [D&O] insurance claims is highly problematic; … [including a] gauntlet of rescission attempts, interlocutory appeals, and arbitration proceedings stacked against the policyholder."[37] In today's environment, directors of public corporations are well advised to require a minimum amount of Side A D&O insurance, review the application and policy for such insurance, and require notice of any intended cancellation.

Conclusion

The *Schoon v. Troy* decision has had and will continue to have a pronounced effect on the way in which corporations protect their directors and officers. It is clear that corporations are taking action to reassure directors and officers regarding their indemnification rights in light of *Schoon v. Troy*. These corporate responses have generally involved amendments to by-law indemnification provisions in conjunction with forms of individual indemnification agreements for directors and officers. Determination of whether the various by-law provisions and indemnification agreements and D&O insurance coverage work in tandem, or whether there are significant gaps in coverage, requires review by counsel experienced in both corporate governance and insurance law.

We have attempted to highlight various conceptual responses addressed in by-law amendments and separate indemnity agreements by corporations. These conceptual approaches have included: (1) attempts to freeze by-law indemnity provisions or entitlements; (2) attempts to use language to make indemnification and advancement an enforceable vested contract right under by-laws; (3) attempts to segregate advancement of expenses as a right distinct from indemnification; and (4) attempts to add express references to D&O insurance.

Public policy and various legal developments will have an impact on the validity or enforceability of the various approaches. Moreover, the ongoing financial crisis places directors and officers in a less favorable equitable position to seek indemnification generally. In today's business climate, indemnification and advancement provisions need to be carefully reviewed and revised to protect legal rights of direc-

tors and officers while retaining flexibility needed by corporations.

Endnotes

1. "As Firms Flounder, Directors Quit," *The Wall Street Journal* (November 21, 2008): B-1.
2. *Schoon v. Troy*, 948 A.2d 1157 (Del. Ch. 2008).
3. Restatement (3d) of Agency § 8.14, comment b (2006); *Corning v. Village of Laurel Hollow*, 48 N.Y.2d 348, 359, 422 N.Y.S.2d 932, 939 (1979).
4. E.g., *Homestore, Inc. v. Tafeen*, 2005 WL 3091887, *6 (Del. Nov. 17, 2005) ("Indemnification encourages corporate service by capable individuals by protecting their personal financial resources from depletion by the expenses they incur during an investigation or litigation that results by reason of that service."); *Sheainin v. E.F. Hutton Group, Inc.*, 652 A.2d 578, 593 (Del. Ch. 1994).
5. See Delaware General Corporation Law (DCGL) §145; New York Business Corporation Law (NY BCL) §722. Note that indemnification also may be subject to certain additional limitations with respect to various types of regulated corporations. For example, Section 1216 of the New York Insurance Law requires insurance corporations to file a notice with the Superintendent of Insurance not less than 30 days prior to payment of any indemnification.
6. See, e.g., Black, Cheffins, and Klausner, "Outside Directors Liability," *Stanford Law Review* 58, No. 1055, at 1064 and footnotes 37 and 39 at 1068.
7. E.g., *Homestore, Inc. v. Tafeen*, id. ("Advancement is an especially important corollary to indemnification as an inducement for attracting capable individuals into corporate service."); *Sheainin v. E.F. Hutton Group, Inc.*, id.
8. DCGL §145(c); NY BCL § 723(a); see *Owens Corning v. National Union Fire Ins. Co. of Pittsburgh, PA*, 257 F.3d 484, 494 (6th Cir. 2001) ("[I]t is also extremely dubious that a payout of almost ten million dollars would be deemed 'success' by the courts of Delaware.").
9. DGCL §145(a); NY BCL §723(a).
10. DGCL §102(b)(7).
11. DGCL §145(e); NY BCL §723.
12. DGCL §145(g); NY BCL §726.
13. DGCL §145(g); NY BCL §726(a)(3) and (e). For example, the Securities and Exchange Commission has taken the position that it is against public policy for corporations to indemnify directors and officers against securities related claims under the antifraud provisions and registration provisions of the securities laws against public policy. See *Globus v. Law Research Service Inc.*, 418 F.2d 1276 (2d Cir. 1969). Antitrust and Racketeer Influenced and Corrupt Organizations Act (RICO) violations also may not be indemnifiable for public policy reasons. See *Sequa Corp. v. Gemlin*, 851 F. Supp. 106 (S.D.N.Y. 1993). However, the courts have permitted corporations to provide such indemnification through insurance purchased by the corporation for securities law violations. E.g., *PepsiCo v. Continental Casualty Company*, 640 F. Supp. (S.D.N.Y. 1986) disagreed with on other grounds; *Waltuch v. Conticommodity Servs., Inc.*, 88 F.3d 87, 93 (2d Cir.).
14. While a detailed discussion of Side A and Side B coverage is beyond the scope of this article, more information is available in Glen, Jeffrey E., "D&O Insurance — Are You Getting the Coverage You Thought You Bought?" *The John Liner Review* 22, no. 3 (Fall 2008).
15. See, e.g., *Baker v. Health Management Systems, Inc.*, 264 F.3d 144, 150 (2d Cir. 2001) (noting that a director who is successful in defending against a lawsuit on the merits is entitled to indemnification under NY BCL § 723[a]); *Merritt-Chapman & Scott Corp. v. Wolfson*, 264 A.2d 358, 360 (Del. Super. 1970), (recognizing that DGCL §145 was enacted to "give vindicated directors and others involved in corporate affairs a judicially enforceable right to indemnification.")
16. Thompson, Larry D., "Principles of Federal Prosecution of Business Organizations," Memorandum to Heads of Department Components and United States Attorneys (Jan. 20, 2003), available at http://www.usdoj.gov/dag/cftf/corporate_guidelines.htm.
17. McNulty, Paul J., "Principles of Federal Prosecution of Business Organizations," Memorandum to Heads of Department Components and United States Attorneys (Dec. 12, 2006), available at http://www.usdoj.gov/dag/speeches/2006/mcnulty_memo.pdf.
18. *United States of America v. Jeffrey Stein et al.*, 435 F. Supp.2d 330, 363 (S.D.N.Y. 2006); 440 F.Supp.2d 315, 337 (S.D.N.Y. 2006); aff'd, 541 F.3d 130, 136 (2d Cir. 2008) (holding "that the government thus unjustifiably interfered with defendants' relationship with counsel and their ability to mount a defense, in violation of the Sixth Amendment, and that the government did not cure the violation.").
19. *United States of America v. Jeffrey Stein et al.*, 435 F. Supp.2d, ibid. at 336.
20. See, e.g., *Salaman v. National Media*, No. 92C-01-161 (Del. Super. Ct. Oct. 8, 1992) (invalidating attempt to retroactively rescind a former director's rights to advancement by amending by-laws after the director was sued and the company had started advancing fees). The *Schoon* court specifically distinguished Salaman, stating "that the court only upheld Salaman's right to advancement because he

was named as a defendant before the by-law was amended." *Schoon v. Troy*, id. at 1167.

21. *Schoon v. Troy*, id. at 1166.
22. NY BCL §725(b)(2) (emphasis added).
23. DCGL §145.
24. The random sample came from SEC filings between April 1, 2008, and December 23, 2008, and is not necessarily representative of all public corporations, or all corporations, for that matter.
25. Volcan Holdings, Inc., 8-K dated September 17, 2008; Beacon Energy Holdings, Inc., 8-K dated July 7, 2008.
26. Ansys, Inc., 8-K filed July 31, 2008.
27. Beacon Energy Holdings, Inc., 8-K filed July 7, 2008; Volcan Holdings, Inc., 8-K filed September 12, 2008.
28. Quanex Building Products Corporation, 8-K filed August 29, 2008; Tesoro Corporation, 8-K filed August 4, 2008.
29. Panhandle Oil and Gas, 8K filed October 29, 2008.
30. Gannet & Company, Inc., 8-K filed December 19, 2008.
31. Tesoro Corp., Form 8-K filed July 30, 2008, Item 5.03.
32. Aon Corp., 8-K filed February 5, 2009.
33. Indemnity agreement of unnamed clients of Anderson, Kill & Olick.
34. Indemnity agreement of unnamed clients of Anderson, Kill & Olick.
35. Opko Health, Inc.,10Q filed June 30, 2008; Tesoro Corp., 8-K filed July 30, 2008; Quanex Building Products, Inc., id.
36. Volcan Holdings, Inc., 8-K filed September 17, 2008.
37. See note 14.

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