Corporate Indemnification and Advancement Provisions, Good Faith, and the Responsibility of Corporate Attorneys to Protect the Corporation from Misconduct

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INTRODUCTION

In the last decade, the general public’s confidence in corporate America has disappeared due to evidence of corporate mismanagement. The growth of the Occupy Wall Street Movement, whose primary goal is the “ending of greed and corruption of the wealthiest 1% of America,” illustrates that hostility towards corporations, Wall Street, and the financial sector continues to expand. More significantly, these scandals suggest corporations are vulnerable to corruption and exploitation, and require protection from the very individuals entrusted to handle their affairs. Due to fraudulent accounting and executive excess, some of the largest corporations in the United States collapsed, forcing U.S. regulators, legislators, and enforcement officials to quickly act to contain the damage and shore up confidence in the financial system. Following a year of corporate scandals, Congress enacted the Sarbanes-Oxley Act of 2002, which, among other things, turned its attention to the roles and responsibilities of corporate attorneys. Through its enactment, Congress revitalized the role of corporate attorneys as “gatekeepers” responsible for protecting the corporate institutions they represent.

Some suggest that Congress’ decision to regulate corporate attorneys results from the lack of accountability for lawyers while fraud-ridden corporations deceived shareholders and the investing public. More importantly, Congress’ decision to revamp the corporate attorney’s function exemplified the need for a reevaluation of the attorney’s responsibility and ethical duty to its corporate client and highlighted that the rules of professional ethics, found in the American Bar Association’s Model Rules of Professional Conduct, were inadequate to protect corporate clients, innocent constituents of corporations, and the investing public from serious managerial abuse. Certainly, if the professional rules fell short in governing the lawyers at Enron, it is likely that they are also inadequate when applied to the less dramatic, but
cumulatively more significant, daily work of corporate lawyers across the country, which is, for the purposes of this article, drafting indemnification and advancement provisions.  

The first section of this Article evaluates the ethical obligation of corporate attorneys to serve as “gatekeepers” for the organizations they represent; the legal profession’s reluctance to accept this responsibility, which resulted in its failure to provide adequate guidance to corporate attorneys who represent corporate institutions; and Sarbanes-Oxley’s role in creating specific ethical obligations, which require corporate attorneys to realize their “gatekeeper” obligation to the corporation, specifically in business transactions where one constituency of the corporation may gain at the expense of others. The second section surveys the Delaware General Corporation Law, and those sections enacted to protect corporate officials from liability; the basic principles governing indemnification and advancement; and the substantive standards that trigger indemnification under Delaware’s General Corporation Law. The third section details the parameters of the corporation’s power to indemnify corporate officials; the court’s handling of bylaw, charter, and indemnification provisions mandating advancement, and how those provisions can negatively affect the corporation. The final section includes an empirical study of the indemnification and advancement provisions of Fortune 500 companies, incorporated in Delaware, and provides suggestions for drafting indemnification and advancement provisions, which serve the dual policies of: 1) encouraging corporate individuals to serve as corporate directors and officers and 2) shielding the corporation from indemnifying corporate officers that act in “bad faith” or “consciously intentionally disregard their responsibility” to the corporation.

I. Lawyers as “Gatekeepers” for Corporate Conduct.

Gatekeepers are “guardians with independent professional responsibility, including the responsibility for protecting the institution.” While the function of the attorney as a gatekeeper
is not a novel concept, countless corporate scandals have created a renewed interest in this topic, including a redefining and reshaping of this concept. The critical role that lawyers play in the actions of corporations is undeniable, from planning, structuring, negotiating, and drafting to implementing the transactions necessary for the corporation to function. Yet, many legal commentators continue to reject the rather obvious fact that lawyers are “gatekeepers.” In spite, however, of resistance of the legal profession to accept its “gatekeeper” role, judges, legislatures, and boards of directors seemingly have always expected the lawyer’s function to be one that protects the corporate institution it represents. In the litigation arising out of the 1980 savings and loan crisis, Judge Stanley Sporkin famously asked:

Where were these professionals, a number of whom are now asserting their rights under the Fifth Amendment, when these clearly improper transactions were being consummated? Why didn’t any of them speak up or disassociate themselves from the transactions? Where also were the outside accountants and attorneys when these transactions were effectuated? What is difficult to understand is that with all the professional talent involved (both accounting and legal), why at least one professional would not have blown the whistle to stop the overreaching that took place in this case.

Over twenty years later, the same questions were asked of Enron lawyers where its board of directors concluded there “was an absence of forceful and effective oversight by … in-house counsel, and objective and critical professional advice by outside counsel at Vinson & Elkins.” Similarly, an internal investigation at WorldCom faulted the firm’s lawyers for allowing a “breakdown in … the company’s corporate-governance structure,” and criticized its general counsel for its failure “to maximize its effectiveness as a control structure upon which the Board could depend.” Recently, the Director of Enforcement for the U.S. Securities and Exchange Commission (SEC) described lawyers who advise companies as being a part of the “sentries of the marketplace,” and, thereby, justified the SEC’s decision to bring sanctions against the Enron attorneys as “lawyers for public companies serve a vital role as gatekeepers to our
financial markets…the sanctions reflect the seriousness with which we [SEC] view breaches of the public trust by attorneys.” 20 As Senator John Edwards aptly summarized the problem, when companies break the law, “you can be sure that part of the problem is that the lawyers… are not doing their jobs.” 21 Essentially, the failure of corporate attorneys to “protect the institution” in circumstances like Enron and WorldCom, led Congress to determine that “corporate lawyers should not be left to regulate themselves [any] more than accountants should be left to regulate themselves.” 22 Thereafter, Sarbanes-Oxley required the SEC to adopt new ethics rules bringing the corporate lawyer – client relationship into the federal regulatory sphere.

A. Corporate Representation and the Gatekeeper’s Role under the Model Rules.

Prior to Sarbanes-Oxley, state promulgated ethical professional rules were the sole authorities for attorney regulations. Based on the entity theory of representation, 23 Rule 1.13 of the Model Rules of Professional Conduct specifies that the “lawyer [who] is employed or retained by an organization represents the organization acting through its duly authorized constituents.” 24 Although the entity acts through its authorized constituents, namely its officers, directors, and employees, Rule 1.13 makes clear that the corporate entity itself is the client. 25 Therefore, if the corporation’s objectives are inconsistent with the wishes of particular individuals within the corporate enterprise, the lawyer’s primary professional responsibility is to assist the organizational client to achieve its goals and objectives. 26

1. Model Rules and the Corporate Attorney’s relationship to the organizational entity.

The Model Code of Professional Responsibility lacks disciplinary rules that deal explicitly with the corporate lawyer’s responsibility to the organization; nevertheless, case law has developed standards of conduct that are well-settled. 27 First, a lawyer employed to represent an organization owes professional duties of competence and loyalty to the organization. 28
Second, the persons authorized by law to act for the organization make decisions to retain or discharge a lawyer for the organization, determine the scope of representation, and provide direction to the lawyer. Third, although an organization’s lawyer works closely with the constituents of the organization, who provide direction, the lawyer does not thereby form a client-lawyer relationship with the officers or employees, who direct its operations or who own it, and does not owe duties of care, diligence, or confidentiality to those constituents. Finally, as part of the duties of care, competence, and diligence that an organization’s lawyer owes to the corporation, the lawyer is required to exercise reasonable care to prevent a constituent of the organization from violating a legal obligation to the organization or causing harm to the organization by taking acts on behalf of the organization that will cause injury to it, such as exposing the organization to criminal or civil liability. When the lawyer knows that such a situation has arisen, the lawyer must proceed in the best interests of the organization.

2. Shortcomings of the Model Rule and the Entity Theory

Although the entity theory is appealing for its simplicity, some suggest that it fails adequately to account for the complex mix of interests among corporate constituencies. One commentator suggests that much of the failure of the entity theory can be corrected by better merging the entity theory with corporate fiduciary principles that obligate corporate managers to pursue the best interests of the shareholders. Campbell explains the rules of professional conduct demand that all lawyers act in the best interests of their clients, which in turn, means the best interests of the corporate entity as a whole.

Modern corporate scholarship has parsed the corporate entity and identified a number of constituencies that have interests in the corporation and its success—[its] shareholders, creditors, employees, and managers. In most corporate transactions, these four continuances have interests that are parallel… where a proposed corporate transaction affects all constituencies similarly – the entity theory continues to be functional. The lawyer is able to define his professional
responsibility by considering the entity as a whole. Other corporate transactions, however, affect the various constituencies differently and at times put their interests in conflict. In those transactions – where one constituency gains at the expense of another – it remains imperative that the lawyer act in the best interests of the client. An attempt to define the identity of the client solely by reference to the interests of the corporate entity as a whole, however, is not helpful in such circumstance.  

One challenge of the attorney-organizational client relationship is the attorney’s inability to “define the identity of the client.” Corporate lawyers may develop a “de facto loyalty to the management that [they allow] to trump their de jure duties:”

We have seen corporate lawyers sometimes forget who their client is. What happens is their day-to-day conduct is with the CEO or the chief financial officer because those are the individuals responsible for hiring them. So as a result, that is with whom they have a relationship. When they go to lunch with their client, the corporation, they are usually going to lunch with the CEO or the chief financial officer. When they get phone calls, they are usually returning calls to the CEO or the chief financial officer.

Generally, a corporate lawyer looks to the senior executive officers to speak on behalf of the entity. This course of action does not become an issue until the interests of the officers and the corporation diverges: at this point, the executive can no longer be considered as speaking on behalf of the entity. It is in this instance when the corporate attorney’s role as ‘gatekeeper’ must take precedence.

The Model Rules, however, have been criticized for failure to enact rules in furtherance of the corporate attorney’s ethical obligation as “gatekeeper”. John Coffee suggests that with the adoption by the ABA of the Model Rules of Professional Conduct, “any suggestion of the attorney having gatekeeping responsibilities was eliminated.” He further explains that as a result of the ABA’s client-serving focus,

Many lawyers of large public corporations saw themselves as advocates for senior inside corporate managers, especially for the chief executive officers (“CEOs”), who had the power to hire and fire them and set their compensation. In this
context, it is not surprising that corporate lawyers conflated the interests of the corporate entities that they purportedly served with the interest of the senior corporate managers who they treated as their ‘real’ clients. All too often instead of helping to ensure the corporation complied with the law, corporate lawyers helped senior corporate managers to create endless shells under which to hide and move the peas.44

Due to the Model Rules failure to address the complexity of the attorney-organizational client relationship, Congress was required to step in.

**B. Corporate Representation and the Gatekeepers Role Under Sarbanes-Oxley**

A group of law professors lobbied for Sarbanes-Oxley § 307.45 They argued that ABA Model Rule 1.13 failed to protect the investing public from corporate scandals like Enron, and, therefore, recommended that special attention be given to the role that lawyers play in public companies.46 It was clear during the senate hearings that many had lost faith in the state bars’ ability to handle the regulation and punishment of attorneys in their jurisdiction; therefore, federal oversight was necessary.47 For the first time in the history, Congress imposed specific professional responsibilities on attorneys, who practice before the Securities and Exchange Commission, requiring the SEC issue rules of professional conduct for attorneys.48 As expected, this legislation provoked significant debate because 1) it was the first statutory federal regulation of attorneys, and 2) many believe it imposed new and stronger obligations on attorneys representing the organization as client.49

In particular, § 307 provides specific and mandatory duties for corporate lawyers.50 When lawyers for public companies receive evidence of material illegal activities, or breaches of fiduciary duty, they must report the evidence to the chief legal officer (“CLO”) or the chief executive officer (“CEO”) of the corporation.51 If the CLO or CEO fails to provide an “appropriate response,” then the lawyer is required to “report the evidence to the audit
committee… or to another committee of the board of directors comprised solely of [independent] directors… or to the full board.” Unlike pre-Sarbanes-Oxley Model Rule 1.13, a lawyer’s duties are clear under § 307, and the duty to report misconduct is now mandatory. Sarbanes-Oxley establishes beyond dispute that when an attorney represents a corporation, the corporation is the client, and the attorney owes the fiduciary duty to the corporation, not its officers or directors.

Further, in his article, *From Lapdog to Watchdog: Sarbanes-Oxley Section 307 and a New Role for Corporate Lawyers*, Peter Kostant suggests that the “greatest benefit of Sarbanes-Oxley Section 307 has been the beginning of a sea change in the perceived role of corporate lawyers… [as] the lawyers can no longer justify their role as the compliant servants of senior corporate managers.” Instead, corporate lawyers must now recognize that they serve as gatekeepers for their corporate clients and must be responsive to the ultimate authority of corporations, the board of directors. As gatekeepers, corporate lawyers should serve as watchdogs helping their large institutional clients to obey the law.

The article will focus on the necessity of expanding the corporate attorneys “gatekeeper” function, specifically, in those business transactions which affect the various constituencies differently and, at times, put their interests in conflict. Further, this article argues that indemnification of corporate officers and directors constitutes a business transaction whereby one constituency, the officers and directors, may gain at the expense of others, shareholders, employees, and creditors. Therefore, when drafting indemnifications and advancement provisions it is imperative that the lawyer act in the best interests of the client, the corporation.
II. Protecting Directors and Officers from Liability under the Delaware General Corporation Law

A. Protecting directors from liability under §102(b)(7) and the requirement of good faith

Section 102(b)(7) permits stockholders of Delaware corporations to exculpate their directors to eliminate, or limit their personal liability for violations of duty of care. However a director is only entitled to protection from personal liability, if a decision was made in good faith. Therefore, § 102(b)(7) is a permissive right for limiting liability only for “duty of care” violations by directors. The protective ambit of subsection (b)(7) does not include acts or omissions undertaken dishonestly, such as: breach of the director’s duties of loyalty; acts not in good faith involving intentional misconduct, or a knowing violation of law; transactions creating improper personal gain for the director; or liability covered under 8 Del. C. § 174.

Section 8 Del. C. § 102(b)(7) only exculpates directors for conduct amounting to gross negligence. “Acts not in good faith,” are specifically excluded from protection under the statute. As a result, the Delaware Supreme Court has been very careful to not create a definition of “bad faith” that includes the gross negligence standard. Relying on the Delaware General Assembly, the Court concluded that § 102(b)(7), and 8 Del. C. § 145, Delaware’s indemnification statute, provide a clear distinction between bad faith, and a failure to exercise due care (i.e., gross negligence), which precludes gross negligence from constituting “bad faith.” Section 102(b)(7) specifically carves out “acts or omissions not in good faith” as an exception to exculpation, thereby prohibiting a corporation from exculpating a director from monetary liability for conduct that is not in good faith. Similarly, 8 Del. § 145 permits a corporation to indemnify an individual if that person “acted in good faith and in a manner the person reasonably believed to be in or not opposed to the best interests of the corporation.” So, to adopt a definition of “bad faith,” in which, a breach of the duty of care constitutes an automatic violation of “good faith” would
nullify both legislative protections, and there is “no basis in policy, precedent, or common sense that would justify dismantling the distinction between gross negligence and bad faith.” \(^\text{68}\)

Therefore, the intent of the Delaware Code is to afford significant protection and shield directors (and other fiduciaries) from liability when their actions were taken in good faith and in the best interests of the corporations, yet “’despite the directors’ good intentions, [the challenged transaction] did not generate financial success and … the possibility of hindsight bias about the directors’ prior ability to foresee that their business plans would not pan out’ could improperly influence a post hoc judicial evaluation of the directors’ actions.” \(^\text{69}\)

Delaware’s Supreme Court, however, has established a category of “bad faith,” which includes fiduciary misconduct that is both non-exculpable, under § 102(b)(7), and non-indemnifiable, under § 145, which has been defined as an “intentional dereliction of duty [or] a conscious disregard for one’s responsibilities.” \(^\text{70}\) Section 102(b)(2)(11) expressly denies exculpation for “acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of law,” which clearly distinguishes “intentional misconduct” and a “knowing violation of law” (both examples of subjective bad faith) from “acts… not in good faith.” \(^\text{71}\)

Therefore, since the statute exculpates directors only for conduct amounting to gross negligence, the statutory denial of exculpation for “acts… not in good faith” must encompass the intermediate category of misconduct captured in the “intentional dereliction of duty [or] a conscious disregard for one’s responsibilities” definition of bad faith.

Therefore, §§ 102(b) and 145 are permissive for limiting liability only for “duty of care”\(^\text{72}\) violations. As for intentional misconduct,\(^\text{73}\) however, case law is clear that foreknowledge of the wrongfulness is required to accord individual liability. Specifically, those directors (and other fiduciaries) who “consciously and intentionally disregard their responsibilities” to the
corporation], adopting a “we don’t care about the risks” attitude concerning a material corporate decision, are prohibited from seeking protection under 102(b)(7) or § 145.\textsuperscript{74}

B. Brief Background of Indemnification and Advancement Principles

1. Section 145 of the Delaware General Code.

Section 145 of the Delaware Code provides the framework for the indemnification and advancement rights of corporate personnel. The policy underlying section 145 is that indemnification “serves the dual policies of (a) allowing corporate officials to resist unjustified lawsuits, secure in the knowledge that, if vindicated, the corporation will bear the expense of litigation; and (b) encouraging capable individuals to serve as corporate directors and officers, secure in the knowledge that the corporation will absorb the cost of defending their honesty and integrity.”\textsuperscript{75} In the Delaware General Law, § 145 remains the primary means of protecting officers and directors against personal exposure to liability because of their service to the corporation.\textsuperscript{76} Indemnification refers to reimbursement by the corporation of liabilities, including judgments, amounts paid in settlement, expenses, and attorneys’ fees, incurred by directors, officers, employees, and agents in the course of their service to the corporation.\textsuperscript{77} Advancement is the payment of potentially indemnifiable expenses as they are incurred, or in advance of the final disposition, which, in certain circumstances, must be repaid to the corporation.\textsuperscript{78}

Delaware law, however, is known for its flexibility in drafting contract provisions that are intended to control the governance relationship among Delaware-formed business entities, their owners, and their managers\textsuperscript{79}, and § 145 is no exception. Section 145 is both permissive and mandatory in its application to corporations.\textsuperscript{80} The statute empowers corporations to indemnify their present and former officers, directors, employees, and agents as well as persons serving in
such capacities in other entities at the request of the corporation. Although, under certain circumstances, the statute mandates indemnification; in true Delaware fashion, $§ 145$ provides parties with the freedom to expand or narrow the corporate indemnification protections afforded by Section 145 of the Delaware General Corporation Law.

2. The requirement of “good faith.”

Indemnification encourages corporate service of capable individuals by protecting their personal finances during an investigation or litigation that results by reason of that service. Section 145, however, places several conditions on an individual’s right to indemnification. Subsection (a) of the statute defines the extent of indemnification and the scope of its availability, and expressly grants a corporation the power to indemnify directors, officers, and others from expenses incurred in legal proceedings, dependent upon their having met the conditions required by the statute: “act[ing] in good faith and in a manner reasonably believed to be in or not opposed to the best interest of the corporation.”

In Stockman v. Heartland Industrial Partners, the Delaware Chancery Court established that, as a matter of public policy, the requirements of § 145(a) prevent corporations from indemnifying corporate officials when the officials have been convicted, or incurred liability as a result of culpable conduct. The case involved indemnification requests by David A. Stockman and J. Michael Stepp, two former officers and directors of Collins & Aikman Corporation. In March 2005, C & A publicly disclosed and corrected “certain historical accounting errors” revealed in an internal management review. Two months later, Collins & Aikman filed for bankruptcy protection and, thereafter, was liquidated in 2007. One criminal action was filed by the federal government, but was dismissed through a nolle prosequi order after it was concluded that further prosecution “would not be in the interests of justice.”
Although Stockman and Stepp’s indemnification rights were governed by Heartland’s Partnership Agreement, “inelegant drafting” of the indemnification provision, and the parties’ “express appeals to the language and policies of § 145” required the court look to § 145 to determine if the defendants were entitled to indemnification for the dismissed criminal proceeding. In evaluating subsections (a), (b), and (c) along with 145’s policy goals, as described by the Delaware Supreme Court, this court determined,

...corporations can [only] shield their indemnitee from the risk that they will incur personal liability in the course of their good faith efforts to serve the corporation. But, the corporation’s power to do so is limited where there is a risk that indemnification will encourage officers to break the law or breach their duty of loyalty to the corporation... Therefore, the purpose of limits on indemnifiable conduct in §§ 145 (a) and (b) is in part to ensure that corporate officials do not evade the consequences of their own misconduct in such a way that they are rewarded for or encouraged to violate applicable laws and to breach their fiduciary duties to the corporation.

Ultimately, the “requirements of §§ 145 (a) and (b) [are] best read as public policy limits designed to prevent corporations from indemnifying corporate officials in only the most incentive-distorting circumstances: when the officials have been convicted or otherwise incurred liability, as a result of culpable conduct and that liability was the result of conduct that involved a certain level of scienter.”

Where, however, there is no punishment to avoid—i.e., there is no conviction, no fine, and no settlement payment-- subsection (c) prohibits the corporation from inquiring into the good faith and lawfulness of an indemnitee. The “second integral part” of § 145 is that subsection (c) grants corporate indemnitees an absolute right of mandatory indemnification, and assures that their reasonable legal expenses will be paid any time they are “successful on the merits” in the underlying proceeding. Therefore, when a matter concludes by a dismissal in
favor of an indemnitee, §§ 145 (c) applies and the indemnitee was “successful on the merits” in the criminal proceeding because it was dismissed.

Recently, in *Hermelin v. K-V Pharmaceutical Co.*, the Delaware Chancery court clarified that § 145 of the Delaware Code sets two boundaries for indemnification: The statute requires a corporation to indemnify a person, who was made a party to a proceeding by reason of his service to the corporation, and has achieved success on the merits or otherwise in that proceeding; and the statute prohibits a corporation from indemnifying a corporate official, who was not successful in the underlying proceeding, and has acted in bad faith. In setting these broad boundaries, Delaware law furthers important public policy goals of encouraging corporate officials to resist unmeritorious claims, and allowing corporations to attract qualified officers and directors by agreeing to indemnify them against loss and expenses they personally incur as a result of their service. Further, prohibiting the indemnification of unsuccessful “bad actors” also relieves stockholders of the costs of faithless behavior, and provides corporate officials with an appropriate incentive to avoid such acts to begin with.

Therefore, for any circumstance between the extremes of “success” and “bad faith,” the Delaware General Corporation Law leaves the corporation with the discretion to determine whether to indemnify its officers or directors. Because indemnification between the boundaries of “success” and “bad faith” is permissive when a corporation has established by contract the indemnification rights of a corporate officer, the agreement controls unless it conflicts with a mandatory statutory provision.

However, because § 145 (c) sets forth the terms of mandatory indemnification, it applies to all Delaware corporations regardless of any provision in a corporation’s bylaws, agreements or indemnification plan(s). In addition, if the person is not entitled to mandatory indemnification
under section 145 (c), then that person must then meet the “good faith” standard to be entitled to indemnification under §§ 145 (a) or (b). Lastly, as already established, those directors (and other fiduciaries) who “consciously and intentionally disregard their responsibilities [to the corporation]”, are not indemnifiable under § 145.

III. Indemnification rights conferred pursuant to § 145(f) must be “consistent with” the statute.

A clear reading and understanding of § 145 establishes that, although, § 145 (f) permits corporations to confer indemnification rights that “go beyond” the rights provided by § 145, the conferred rights must also be “consistent with,” and within the scope of the corporation’s powers to indemnify, as delineated in the statute’s substantive provisions. Therefore, any corporate indemnification that fails to require “good faith,” as a condition of indemnification, is outside the scope of the corporation’s power and is, therefore, void and unenforceable.

A. Good Faith requirement prevails

Prior to Hermelin, it was determined that any indemnification provision requiring a corporation to indemnify officers and director regardless of their “acting in good faith” exceeded the permissive scope of § 145 (a) and was, therefore, void and unenforceable.110 Waltuch v, Conticommodity Services, Inc. involved the indemnification request of Norton Waltuch, the vice-president and chief metals trader for Conticommodity Services, Inc.111 Between 1981 and 1985, numerous lawsuits were filed against Waltuch and Conticommodity, by some of the firm’s clients, alleging fraud, market manipulation, and antitrust violations.112 By the time of the settlements and subsequent dismissals, Waltuch spent 2.2 million dollars in unreimbursed legal fees to defend himself against the civil lawsuits and an enforcement proceeding brought by Commodity Futures Trading Commission.113 In this appeal, Waltuch argued that § 145 (f), which
permitted corporations to grant indemnification rights outside the limits of subsection (a), required Conticommodity to indemnify him for all incurred expenses.\textsuperscript{114} Therefore, he was not required to meet the “good faith” requirement of § 145 (a).\textsuperscript{115} The court rejected this argument holding that § 145 (f) did not permit a corporation to bypass the “good faith” requirement of § 145(a).\textsuperscript{116} Further, there are “public policy limits on indemnification under § 145(f)” as “there would be no point to the carefully crafted provisions of Section 145 spelling out the permissible scope of indemnification under Delaware law, if subsection (f) allowed indemnification, in additional circumstances, without regard to these limits. The exception would swallow the rule.”\textsuperscript{117} The fact, however, that § 145(f) is limited by § 145(a) does not make § 145(f) meaningless, because § 145 (f) “still may authorize the adoption of various procedures and presumptions to make the process of indemnification more favorable to the indemnitee without violating the statute.” \textsuperscript{118}

Therefore, under § 145 (f), a corporation may provide indemnification rights that go “beyond” the rights provided by § 145 (a) and the other substantive subsections of § 145.\textsuperscript{119} At the same time, however, any such indemnification rights provided by a corporation must be “consistent with” and within the scope of the corporation’s power to indemnify, as delineated in the statute’s substantive provisions, particularly § 145 (a).\textsuperscript{120} Most importantly, § 145 (f) does not permit a company to bypass the “good faith” requirement of § 145 (a).\textsuperscript{121} It does, however, permit the corporation to grant additional rights to indemnitees.\textsuperscript{122}

Delaware commentators have identified various indemnification rights that are “beyond those provided by the statute,” and that are at the same time consistent with the statute. Indemnification provisions or by-laws could provide for: (1) mandatory indemnification, unless prohibited by statute; 2) mandatory advancement of expenses, which the indemnitee can, in
many instances, obtain on demand, 3) accelerated procedures for the determination required by section 145(d) to be made in the specific case; 4) litigation appeal rights of the indemnitee in the event of an unfavorable determination; 5) procedures under which a favorable determination will be deemed to have been made under circumstances where the board fails or refuses to act; and 6) reasonable funding mechanisms.123

Therefore, when taking advantage of the freedom to contract provided by § 145 (f), corporations must be careful that their provisions are within the “scope” and “consistent” with § 145 (a), (b) and (c) and do not accidently confer rights which could negatively affect the corporation.124

B. Mandatory Indemnification

Entitlement to indemnification is not automatic, whether permissive or mandatory, whether by statute, bylaw, or contract.125 Section 145(d) requires that indemnification “under subsections (a) and (b) shall be made by the corporation only as authorized in the specific case,” in accordance with a statutorily mandated decision-making process such determination shall be made: 1) by a majority vote of the disinterested directors, not parties to the action; 2) by a separate committee of designated directors; or 3) by the company’s stockholders.126 The determination that must be made in each case is whether indemnification of the directors, officers, employees, or agents is proper, under the circumstances, because they have met the applicable standard of conduct set forth in subsections (a) and (b), “acting in good faith and in a manner the person reasonably believed to be in or not opposed to the best interests of the corporation.” Yet, seemingly most, if not all, corporations have completely bypassed this case-by-case requirement by simply mandating indemnification to officers and directors through corporate documents.127
IV. Advancement rights are contractual in nature

In addition to indemnification for liabilities, § 145 also authorizes advancement, corporate payment of a litigation expenses, including attorney’s fees, which the director or officer must repay if such expenses are ultimately deemed non-indemnifiable.\(^\text{128}\) Unlike indemnification, however, no Delaware Corporation is required to provide for the advancement of expenses. Yet, most corporations provide some form of advancement rights to their officers and directors. Advancement is an “especially important corollary to indemnification,” as it relieves directors and officers from “the personal out-of-pocket financial burden of paying the significant ongoing expenses inevitably involved with investigations and legal proceedings.”\(^\text{129}\)

Advancement is necessary because “whether a corporate officer has a right to indemnification is a decision that must necessarily await the outcome of the investigation or litigation.”\(^\text{130}\) Advancement, however, “fills the gap… so the corporation may shoulder… interim costs.”\(^\text{131}\)

Therefore, providing advancement is “sound public policy” because “a person who serves an entity in a representative capacity should not be required to finance his or her own defense” and “adequate legal representation often involves substantial expenses, during the course of the proceeding, and many individuals are willing to serve as directors only if they have the assurance that the corporation has the power to advance these expenses.”\(^\text{132}\) Therefore, advancement provisions serve “as an inducement which promotes the same salutary public policy that is served by indemnification: attracting the most capable people into corporate service.”\(^\text{133}\) For this reason, “although advancement provides an individual benefit to corporate officials”, it should also be considered “a desirable underwriting of risk by the corporation in anticipation of greater corporate-wide reward for its shareholders.”\(^\text{134}\)
Section 145 (e) conditions advancement to current directors on the receipt of an “undertaking by or on behalf of such director or officer to repay such amount if it shall ultimately be determined that such person is not entitled to be indemnified by the corporation as authorized by this section.” When read together with § 145(d) it establishes that the statutorily mandated decision-making process for entitlement to advancement, similar to indemnification, is made: 1) by a majority vote of the disinterested directors, not parties to the action; 2) by a separate committee of designated directors; or 3) by the company’s stockholders. Subsection (e), however, is permissive in that it permits a corporation to advance corporate officials the cost of defending an investigation or lawsuit, to be paid on such terms and conditions as the corporation deems appropriate. Additionally, § 145 (e) contemplates that corporations may confer a right to advancement that is greater than the right to indemnification by allowing corporations to tailor indemnification provisions, as they see fit, in their by-laws and Articles of Incorporation.

Similar to mandatory indemnification “a great many corporate charters, bylaws and [private] indemnification agreements” include mandatory advancement provisions. However, advancement has always been considered a contractual right or entitlement that parties can agree to in the instruments that govern their relationship. Therefore when made mandatory, the advancement right is enforceable as under a contract, and courts will only construe the bylaw as it is written, and will give language, which is clear, simple, and unambiguous, the force and effect required.

A. Unconditional mandatory advancement provisions

The Homestore litigation illustrates that the limited and narrow focus of an advancement proceeding precludes litigation of the merits of entitlement to indemnification and the dangers
of drafting mandatory advancement provisions into corporate bylaws. In March 2002, Homestore announced findings of accounting irregularities, which resulted in an overstatement of the company’s revenues, and restated its financial statements for several periods. As a result, Homestore and its officers and directors were named as defendants in numerous civil actions. Additionally, they became the subjects of an administrative investigation by the Securities and Exchange Commission, and a criminal investigation by the Department of Justice. Peter Tafeen, a former officer of Homestore, incurred substantial legal fees related to several investigations, civil actions, and a criminal indictment, and sought advancement of those fees from the company. Homestore refused the requests and asserted that Tafeen received $15 million wrongly from the alleged transactions, and, therefore, had unclean hands prohibiting any indemnification rights.

Despite the company’s claim, the Supreme Court of Delaware determined that the company’s bylaws provided corporate officials with a mandatory right of indemnification and an unconditional mandatory right to advancement, which provided its corporate officers with the maximum possible protection against personal liability; therefore, Tafeen was entitled to advancement under the corporation’s bylaw provisions. Section 6.1 of Homestore’s bylaws provided for mandatory indemnification “to the fullest extent permitted by the” Delaware General Corporation Law:

Each person who was or is... involved in any action, suit or proceeding, whether civil, criminal, administrative or investigative (the “Proceeding”), by reason of the fact that such person... is or was a director or officer of the Corporation.... shall be indemnified and held harmless by the Corporation to the fullest extent permitted by the Delaware General Corporation Law...

Additionally, Section 6.2 of Homestore’s bylaws contained a mandatory and unconditional advancement provision:
The Corporation shall pay all expenses (including attorney’s fees) incurred by such a director or officer in defending any such Proceeding as they are incurred in advance of its final disposition; provided, however to the Corporation of an undertaking, by or on behalf of such director or officer, to repay all amounts so advanced if it should be determined ultimately that such director or officer is not entitled to be indemnified.  

Yet, in spite of the mandatory and unconditional indemnification and advancement provisions drafted in its corporate documents, *Homestore* argued the officer was not entitled to indemnification “because his conduct was motivated exclusively by personal greed.”

Consistent, however, with the line of authority upholding the contractual and statutory advancement and indemnification rights of corporate officials charged with serious misconduct allegedly inspired by personal greed, the *Homestore* court explained, “the scope of an advancement proceeding is summary in nature and limited to determining the issue of entitlement in accordance with the corporation’s own uniquely crafted advancement provisions.” Therefore, “the broader salient benefits that the public policy behind § 145 seeks to accomplish for Delaware corporations will only be achieved if the promissory terms of advancement contracts are enforced by courts even when corporate officials are accused of serious misconduct.” The unconditional and mandatory advancement rights adopted by *Homestore* provided its corporate officials with the maximum possible protection against personal liability for the interim costs involvement in any legal proceeding, including accusations of serious misconduct, and must be enforced by the court.

Further, even the likelihood that indemnification would not be permitted at the end of the case is irrelevant to the right to advancement. The statute provides that if it is subsequently determined those corporate officials are not entitled to indemnification they must repay the funds advanced. In most instances, unfortunately, this determination has happened long after the corporation has advanced large sums of money to cover litigation costs. In *Homestore*, the
Supreme Court affirmed the Court of Chancery judgment ordering Homestore to advance over 3.9 million in defense costs, including attorney’s fees incurred in the advancement proceeding – so called “fees on fees.”\textsuperscript{159} The court also awarded pre- and post judgment interest at the rate of seven percent, totaling $206,015.84, through the date of the Court of Chancery’s judgment plus $756.40 per day during the appeal.\textsuperscript{160} Three months following the Supreme Court’s decision, Homestore announced a settlement with Tafeen, which required Homestore to reimburse Tafeen up to a maximum of $11.85 million, including $6.4 million already advanced, and precluded Homestore from seeking repayment of the funds advanced if it was subsequently determined that Tafeen was not entitled to indemnification.\textsuperscript{161} Following the settlement, Tafeen pleaded guilty to one count of securities fraud pursuant to a plea agreement that stated Tafeen received $6.4 million by selling more than 235,000 shares of Homestore stock based on inside information.\textsuperscript{162} On August 12, 2005 and March 2006, two courts issued rulings rescinding Homestore’s director and officer insurance policies based on misrepresentations concerning Homestore’s true financial condition in its insurance policy applications – thus requiring Homestore to use corporate funds, not insurance funds to pay the defense costs owned to Tafeen.\textsuperscript{163} Homestore and other Delaware decisions illustrate the weight courts attach to corporate decisions to grant mandatory advancement rights and the courts’ willingness to enforce those rights in summary proceedings.\textsuperscript{164} Most significantly, Homestore illustrates how an individual can fail to meet the requirements of indemnification under subsection (a), Tafeen admitted to personally receiving 6.4 million dollars for insider trading, and under subsection (c), he was not “successful on the merits or otherwise,” but nevertheless was indemnified by the corporation by way of a mandatory advancement provision.
B. “Good faith” in advancement proceedings.

The Delaware court has also established that the requirement to advance funds does not conclude when an individual pleads guilty or confesses to breaching their fiduciary duty to the corporation. In Bergonzi v. Rite-Aid Corporation, the Court found that Rite-Aid Corporation was required to advance expenses to a former officer, who plead guilty to criminal charges, including conspiracy to defraud the company and falsification of financial statements. 

This case arose from the June 21, 2002 federal jury indictment of Frank Bergonzi, the former chief financial officer of Rite Aid Corporation, accusing him of engaging in criminal conspiracy to defraud Rite Aid. Bergonzi pled guilty to the lead count of the indictment, participation in a criminal conspiracy to defraud Rite Aid while serving as its chief financial officer, and admitted under oath to deliberate falsification of the Company’s financial statements. Following Bergonzi’s guilty plea, Rite Aid’s Board of Directors decided he was not entitled to indemnification, notified him that it would no longer advance the costs of his defense, and demanded repayment (pursuant to the undertaking) of money the company had previously advanced on his behalf. Rite Aid’s charter, however, provided Bergonzi with a contractual right to advancement before a final disposition of the criminal proceedings. Further, Rite Aid provided Bergonzi with an undertaking that bound him to repay amounts advanced “in the event that a court of competent jurisdiction ultimately determined in a final judgment that [Bergonzi] was not entitled to indemnification.” The terms of the undertaking required three essential predicates before an ultimate determination of Bergonzi’s right to indemnification. The undertaking required a court to make the determination of entitlement to indemnification, granted the court complete jurisdiction to determine the entitled to indemnification, and required that the determination be in the form of a final judgment. This Court determined that
Bergonzi’s guilty plea did not satisfy those conditions as the court merely accepted his plea. The proceeding, however, had not reached final judgment since he still awaited sentencing. Therefore, Rite Aid was contractually bound to continue advancing Bergonzi’s litigation costs. Rite Aid could have (and perhaps should have) drafted this provision differently, but simply did not.

Lastly, a corporation’s contractual obligation to advance funds to indemnitees continues, even beyond the sentencing hearing. In *Sun-Times Media Group, Inc. v. Black*, the Court of Chancery held that the final disposition of a proceeding involving criminal charges did not occur until the final, non-appealable conclusion of that proceeding. The Sun Times Media Group, formerly known as Hollinger International Inc., brought action seeking to foreclose its obligation to provide advancement to its former officers, Conrad Black, John Boultbee, Peter Y. Atkinson, and Mark S. Kipnis. In a prior decision the Chancery Court found Black “breach[ed] his fiduciary and contractual duties [to Hollinger] persistently and seriously.” On August 18, 2005, the defendants were charged in seventeen count indictments with the following offenses: 1) mail and wire fraud, including the deprivation of the intangible right to honest services; 2) money laundering; 3) obstruction of justice; 4) racketeering; and 5) criminal tax violations.

At the conclusion of a four-month jury trial in 2007, each of the defendants were convicted on three counts of violating the federal mail fraud statutes. The defendants appealed their convictions to the U.S. Court of Appeals for the Seventh Circuit. After the defendants were sentenced, but before the civil complaint was filed, the Sun-Times informed the defendants that it would stop advancing fees, related to their appeals, and any post-conviction proceeding at the trial level. By the time of the sentencing, the Sun-Times had advanced more that 77
million dollars to defendants during the prior five years, including approximately 60 million
related to their criminal proceeding.\textsuperscript{185}

The Sun-Times’ Certificate of Incorporation provided directors’ and officers’ advancement
and indemnification “to the fullest extent permitted by applicable law,” and it provided for
mandatory advancement of attorneys’ fees and expenses to directors and officers upon the
receipt of an undertaking.\textsuperscript{186} The company, however, argued that they were no longer obligated
to continue advancing fees and expenses under the advancement provision in its bylaws because
the final disposition of a criminal proceeding occurs at the time of sentencing at the trial court
level.\textsuperscript{187} Further, under its Bylaws the company was not obligated to “indemnify… in
connection with a proceeding (or part thereof) initiated by [them] unless such proceeding (or part
therefore) was authorized or consented to by the Board of Directors,”\textsuperscript{188} therefore the company
was not required to provide advancement for appeals because it constituted a proceeding initiated
without board approval.\textsuperscript{189} The Court, however, disagreed, stating that the “most logical
reading” of the company’s broad advancement provision was that “advancement must be
provided until the underlying action, suit, or proceeding is finally resolved or disposed of, in the
sense that its outcome is not subject to further disturbance.”\textsuperscript{190} It is only at that point that the
ultimate determination that the recipient either was, or was not entitled to indemnification can be
made.\textsuperscript{191}

These cases illustrate that a corporation’s failure to properly draft advancement
provisions have resulted in the costly advancement of litigation fees to corporate officials who
would not have been entitled to indemnification, permissive or mandatory, because they failed to
meet the “good faith,” or the “success on the merit” standards, as required by the statute. Further,
these cases highlight the necessity of drafting advancement provisions, which require the board
to make a proper determination of whether the corporation is in a position to advance funds on a case-by-case basis.

Chancellor Strine acknowledges that

One wishes that the tsunami of regret that swept over corporate America regarding mandatory advancement contracts would have been followed by the more careful tailoring of advancement provisions, with a diminishment (especially as to officers) of the mandatory term that seems to so bother directors faced with the responsibility of actually ensuring that the corporation honors its contractual duties once a (typically) former officer is sued or prosecuted for fraud or other serious wrongdoing. Although it is uncomfortable to cause the corporation to advance millions in fees to a former officer the current board believes engaged in serious misconduct, it does stockholders no service for a board to refuse to do so when the advancement obligation is clear. If the directors in such a situation truly wish to serve the stockholders, they should fix what they can by revising the corporation’s advancement obligations on a going-forward basis. To breach a contract because you do not like its terms while refusing to change it when you have the authority to do so is hard to explain as an act of appropriate fiduciary fortitude. 192

It is imperative that corporate America heeds the warnings of the chancery court regarding the use of mandatory advancement provisions in their corporate bylaws or articles of incorporation.

V. Suggestions to Corporate Attorneys for Drafting Indemnification Provisions

It is imperative that corporate transactional attorneys, responsible for drafting indemnification provisions for a corporate client, use clear and deliberate language, including comprehensive organization of relevant provisions; sufficient awareness of the interests of the company, including the function of the Board to avoid the misuse of corporate funds; and a clear understanding of the permissive nature of § 145, as to not exceed the scope of the corporation’s authority in conferring indemnification and advancements rights to corporate officers and directors. Through the use of ambiguous terms and boilerplate language, most provisions fail adequately to protect the finances of the corporation; deprive the board of its business judgment power to determine on a case-by-case basis whether advancement of expenses is in the best
interests of the company; and negatively impact the corporation and its shareholders.

A. **Good Faith and acting in the best interests of the corporation**

Indemnification *is not a blanket authorization to indemnify directors* against all expenses, fines, or settlements of whatever nature and *regardless of the director’s conduct.* Delaware courts have established that certain types of “bad faith” actors are non-exculpable and non-indemnifiable under Delaware law. Yet, we have seen many corporations indemnify countless officers and directors that were guilty of breaching their fiduciary duty to the corporation. In accordance, however, with *Hermelin* and *Stockman*, corporations *must* include “good faith and acting in the best interests of the corporation” as a requirement for permissive indemnification, otherwise the provision is void and unenforceable, against public policy, and inconsistent with the statute.

B. **Mandatory Indemnification**

If a contract or by-law provision provides only that indemnification “shall” be made “to the fullest extent permitted by law,” the decision-maker is obliged to indemnify once the determination has been made that the official “has met the applicable standard of conduct set forth in subsection (a) and (b).” However, in the absence of such a provision, indemnification is permissive and is at that discretion of the Board. There are definite benefits to a corporation making the right to indemnification mandatory, to certain corporate officials, otherwise, once corporate officials establish their eligibility by meeting the “good faith and best interest of the corporation” standard, as required under §§ (a) and (b), they would still be required to await a final decision from the board of directors regarding the right to indemnification. Further, an indemnification provision conferring mandatory indemnification “to the fullest extent permitted by Delaware law” still requires that all corporate officials meet the “good faith” standard to
establish their entitlement to indemnification.

C. Separate section for advancement rights

The State of Delaware has maintained for a generation that the terms advancement and indemnification are not synonymous because rights to indemnity and advancement differ in important ways. Yet, may corporate indemnification provisions treat advancement as a subsidiary component of indemnification. In Weinstock v. Lazard Debt Recovery GP, two former managers of two investment funds operated by a large investment bank sought advancement of litigation expenses for lawsuits brought against them by the investment bank. The investment bank argued that the managers lost their right to advancement under the respective operating agreements when they severed their employment with the investment bank.

Although the General Partner’s LLC Agreement did not expressly confer advancement rights to former directors, the court concluded that former directors had the right to advancement, under the agreement, as a result of its ambiguous language, and the lack of a clear structural separation among the indemnification and advancement provisions. The controlling provision in the LLC agreement stated, in pertinent part:

“(a) Each Indemnified Party shall, in accordance with this Section 2.06, be indemnified and held harmless by the Company from and against any and all losses, claims, demands, liabilities, expenses... arising from any and all claims, demands, actions, suits or proceedings...whether or not the Indemnified Party continues to be such at the time any such Indemnification Obligation is paid or incurred... Expenses incurred in any proceeding will be paid by the Company in advance of the final disposition for such proceeding upon receipt of an undertaking by or on behalf...

(b) The indemnification provided in this Section 2.06 shall not be deemed to be exclusive of any other rights to which each Indemnified Party may be entitled under any agreement... and shall continue as to such Indemnified party who has ceased to have an official capacity for acts or omissions during such official capacity otherwise when acting at the request of the Managing Member and shall
inure to the benefit of the heirs, successors, and administrators of such Indemnified Party."  

The court determined that the entirety of § 2.06 addressed indemnification broadly and treated the right to receive payments of expenses in advance as a subsidiary component. When “read sensibly and completely”, the clear intention of § 2.06 was to entitle officers to receive indemnification-related rights, regardless of whether they ceased to serve in an official capacity. Relying on a previous decision, in which it was determined that the term “indemnification” could refer to both “indemnification” and “advancement” where that would make sense and be linguistically economical, the Court held that the intent of the drafters was to extend the right of advancement to former directors because of the interrelated nature of the indemnification and advancement provisions. Therefore, as a result of the corporation’s ambiguous language, and its failure to draft separate indemnification and advancement provisions, it was subject to the court’s interpretation and required to advance litigation fees to a former director.  

Therefore, if a corporation desires to confer distinct advancement and indemnification rights unto its corporate officials, that intent must be clear from the drafting and should be explicitly stated in all relevant provisions. Following the ruling in Weinstock, the Delaware Chancery Court determined that clear separation of indemnification and advancement provisions would preclude an interpretation that advancement was a subpart of the indemnification provision. In Schoon v. Troy, William Bohnen, a former director, and a Richard Schoon, a current director, sued the corporation for advancement of legal fees and expenses incurred while defending fiduciary duty claims filed by the corporation. Bohnen served as a director designee for Steel Investment Company from 1998 until his resignation in February 2005. At that time, Steel elected Schoon to replace Bohnen on the Troy board of directors.
On November 3, 2005, the Troy board approved several amendments to the bylaws. In those amendments, Troy removed the word “former” from its definition of the directors entitled to advancement.\(^{210}\) Troy also inserted the following provision purportedly limiting the right to advancement:

Proceedings Initiated by Indemnified Persons. Notwithstanding any provisions of this Article to the contrary, the Corporation shall not indemnify any person or make advance payments in respect of Losses to any person pursuant to this Article in connection with any Proceeding (or portion thereof) initiated against the Corporation by such person unless such Proceeding is authorized by the Board of Directors or its designee; provided, however, that this prohibition shall not apply to a counterclaim, cross-claim or third-party claim brought in any Proceeding or to any claims provided for in Section 8 of this Article. \(^{211}\)

Analyzing both provisions, the court concluded that the company’s bylaws did indemnify former directors, however it did not confer upon them entitled to advancement of fees.\(^{212}\) The bylaws, as amended, provided for mandatory advancement of all fees and expenses incurred in defending threatened or pending claims, not prosecuting one.\(^{213}\)

Therefore, the language of the indemnification and advancement provision was unambiguous and deliberately drafted to express the intent of the corporation, and the specific rights of advancement conferred upon its former directors. The corporation adequately protected itself from incurring this cost and was not required to advance expenses to its former director for a claim he initiated. Therefore, it should be commonplace for corporate indemnification provisions to include both an indemnification section and an advancement section.

**D. Advancement should be determined by the Board on a case-by-case basis**

A corporation’s advancement provision may expose the corporation, and ultimately its shareholders, to the form of credit risk created by mandatory advancement provisions that require “maddening” payments to corporate officers or employees about whose “integrity and
fidelity” directors have drawn “harsh conclusions.” Often these payments involve millions of dollars. In short, when drafting advancement provisions “care must be taken… to ensure that advancement bylaws are written in a manner that is fundamentally fair to the company and its stockholders.” Directors must seek “to determine the proper balance between seeking able persons to serve as directors and officers, and safeguarding the expenses advanced by the company, and thus the corporation’s stockholders.”

As Chancellor Allen put it, mandatory advancement rights deprive the board of the opportunity to evaluate the important credit aspects of a decision to advance expenses. To the same effect, in Schoon, Chancellor Strine explained that Delaware’s indemnification statute authorizes advancement of funds, but § 145 (e) requires “receipt of an undertaking … to repay… if it shall ultimately be determined that [the individual] is not entitled to be indemnified…”; significantly, “such expenses… may be so paid upon such terms and conditions … as the corporation deems appropriate.” Therefore, Section 145 (e) leaves to the business judgment of the board the task of determining whether the undertaking proffered, in all of the circumstances, is sufficient to protect the corporation’s interest in repayment and whether, ultimately, advancement of expenses would on balance be likely to promote the corporation’s interests.

Simply put, corporations, some misguidedly, provide for mandatory advancement in their corporate documents. However, in the absence of a bylaw or contractual right, specifically providing for mandatory advancement, the decision to accept an undertaking and to advance expenses would be left to the business judgment of the board.

However, once the bylaw or advancement provision has been drafted, the rights provided will be strictly construed according to the terms. In Thompson, an employee claimed he was entitled to mandatory advancement and challenged the company’s decision to condition his
advancement upon: 1) the employee’s representation to the board that he personally believed he met the standard for indemnification set forth in the bylaw, 2) proof that he “acted at all times as an employee”… in good faith and for a purpose that he believed to be in the best interests of the company, 3) the Board’s decision to advance only legal expenses incurred after the indictment and 4) the employee providing, at his own cost, “adequate security to secure fully his obligation to repay the company any and all amounts advanced should it be determined that he was not entitled to indemnification”. 222 The applicable advancement bylaw states:

Expenses Payable in Advance. Expenses incurred by an officer or Director in defending a civil or criminal action, suit or proceeding may be paid by the Company in advance of a final disposition… on behalf of the Director or officer to repay such amount if it shall ultimately be determined that such person is not entitled to be indemnified by the Company as authorized. Such expenses incurred by other employees and agents shall be paid upon such terms and conditions, if any, as the Board of Directors deems appropriate. 223

The related “Indemnification Bylaw” provides, in relevant part:

Power to Indemnify in Actions, Suits of Proceedings Other Than Those by or in the Right of the Company… [T]he Company shall indemnify any person who was or is a party or is threatened to be made a party to any threatened, pending or completed action, suit or proceeding, whether civil, criminal, administrative or investigative… by reason of the fact that such person is or was an employee… of the Company… if such person acted in good faith and in a manner such person reasonably believed to be in or not opposed to the best interests of the Company, and, with respect to any criminal action or proceeding, had no reasonable cause to believe the conduct was unlawful…. 224

The court reasoned that the board was “entitled to protect its legitimate interest”, and used its “contractual discretion rationally and in good faith” to do just that. 225 Strictly adhering to the language of the bylaws, the court contended the employee was not entitled to advancement as the advancement bylaw did not confer unconditional mandatory advancement, but expressly gave the board of directors the discretion to protect the company by conditioning advancement on the provision of security sufficient to guarantee that the corporation would be repaid. 226
E. “Fullest extent permitted by Delaware law” language.

Finally, it must be noted that Delaware courts have interpreted the “fullest extent authorized by the Delaware General Corporation Law” language, found in bylaw provisions, to encompass mandatory indemnification and, potentially, mandatory advancement.227 In Brown v. LiveOps, Inc, the court determined that by including “to the fullest extent permitted by law” in the indemnification agreement, coupled with the plain meaning of the corporation’s corporate documents, obligated the corporation to provide mandatory advancement to the broadest extent possible under Delaware law.228 The company’s indemnification agreement provided that the company shall advance expenses in connection with certain proceedings for which a right to indemnification may exist:

[LiveOps] shall advance all expenses incurred... in connection with the investigation, defense, settlement... indemnitee hereby undertakes to repay such amounts advanced only if, and to the extent that, it shall ultimately be determined that [indemnitee] is not entitled to be indemnified by the Company...229

[Company] shall indemnify Indemnitee if Indemnitee was or is a party or is threatened to be a made a party to any threatened ...against expenses (including attorneys’ fees) and, to the fullest extent permitted by law, amounts paid in settlement actually and reasonably incurred by Indemnitee …230

Additionally, the company bylaws provided for mandatory indemnification and advancement “to the fullest extent permitted by [the] General Corporation Law of Delaware”.231 Therefore, in light of the purpose of § 145, advancements “corollary importance to indemnification,” and the “to the fullest extent permitted” language included in the indemnification agreement the court determined, under the company’s bylaws, the director was entitled to mandatory advancement.232

When Delaware courts were ultimately forced to address the meaning of the language “indemnify... to the fullest extent permitted by the law” in addition to the broad use of
“indemnification” in corporate documents, it was determined that the intention of the parties was to cover both advancement and ultimate indemnification. In Sodona, the court determined that based on the corporation’s conflicting usage of “indemnification” to: 1) encompass both advancement and ultimate indemnification, and 2) to narrowly cover ultimate indemnification, the best reading of the language “indemnify … to the fullest extent permitted by law and the corporation’s organizational documents” was that the corporation intended to, and was responsible for covering both advancement and ultimate indemnification. The court also suggested that the agreement could have been drafted more precisely by “specifically referring to advancement,” if that was the intention.

Therefore, the use of the “fullest extent permitted by Delaware law” should be limited to indemnification provisions only as this language will be interpreted as conferring a mandatory indemnification right to corporate officials. Subsequently, should corporations elect to draft separate advancement provisions into their corporate documents; it would be counter-productive to include this language in the advancement section. Finally, the right to advancement is, essentially, a contract right, while indemnification is statutorily mandated, in certain circumstances. Since Delaware provides corporations with the freedom to tailor their indemnification and advancement rights, as it deems appropriate, the Court will only construe a provision as it is written and will give language, which is clear, simple, and unambiguous, the force and effect required. Therefore, provisions must clearly state and separate these rights, both in writing, through clear language, and structurally, through clear organization. Delaware courts have made it clear that it is unwilling to allow corporations to “escape the consequences of their own contractual freedom” as “it is not the job of a court to relieve sophisticated parties of the burdens of contracts they wish they had drafted differently, but in fact did not.” However, it is
the job of the corporate attorney to draft provisions that assist the organizational client in achieving its goals and objections and serve its best interest.

VI. **Empirical Study**

The final section of this article takes a close look at the indemnification provisions found in the corporate bylaws of the top 150 Fortune 500 Companies incorporated in the state of Delaware, and analyzes whether the provisions 1) require “good faith”, 2) confer mandatory indemnification rights, 3) confer mandatory advancement rights, or 4) confer mandatory unconditional advancement rights. It’s important to note that corporate indemnification provisions can confer mandatory advancement rights by: a) treating advancement as a subsidiary of indemnification; b) failing to require board evaluation on a case-by-case basis; or 3) use of the “fullest extent permitted under Delaware law” language in reference to advancement rights. Therefore, should a bylaw confer mandatory advancement rights through one of these mechanisms that will be noted. Finally, mandatory unconditional advancement rights are conferred by a failure to require that the conditions specified by subsection (a) and (b) are met to establish entitlement to advancement and, therefore, provide the “maximum possible protection against personal liability for the interim costs involvement in any legal proceeding, including accusations of serious misconduct. The Homestore litigation established that advancement rights under a mandatory unconditional advancement provision cannot be denied even if the indemnitees’ conduct was motivated exclusively by personal greed. Finally, this research only reflects indemnification and advancements rights conferred to officers and directors. No reference relates to indemnification and advancement rights conferred upon employees or agents.

<table>
<thead>
<tr>
<th>Company (by Fortune 500 rating)</th>
<th>Indemnification</th>
<th>Good Faith Required</th>
<th>Advancement</th>
</tr>
</thead>
<tbody>
<tr>
<td># 2 - Wal-mart</td>
<td>Board determination</td>
<td>No</td>
<td>Mandatory &amp; Unconditional</td>
</tr>
<tr>
<td># 4 – ConocoPhillips</td>
<td>Board determination made in accordance with § 145(d)</td>
<td>Yes, good faith explicitly defined. - reliance on records or books of account, - advice of legal counsel or on information on records given or reports made to the Corporation by a certified public accountant or by an appraiser</td>
<td>Mandatory &amp; Unconditional – “Expenses shall be paid in advance of the final disposition.” – Limited to defending any action – Fails to require a Board determination.</td>
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<td># 5 - General Motors (effective March 15, 2011)</td>
<td>Mandatory – Shall indemnify and advance expenses to every director and officer to the fullest extent permitted – Initiated proceeding requires authorization by the Board</td>
<td>No</td>
<td>Mandatory &amp; Unconditional - Separate section - “shall” pay the expenses incurred in defending in advance of final disposition. - No Board determination required</td>
</tr>
<tr>
<td># 10 - Hewlett Packard (amended March 21, 2012)</td>
<td>Board determination made in accordance with § 145(d)</td>
<td>No</td>
<td>Subject to Board Approval - HP not required to advance expenses for initiated proceedings - HP will not advance or continue to advance expenses in any proceeding if a determination is reasonably and promptly made by 1) Board of Directors, 2) Disinterested Directors, or 3) majority vote of a committee of Disinterested Directors</td>
</tr>
<tr>
<td># 12 - Valero Energy (effective July 12, 2007)</td>
<td>Mandatory - Shall be indemnified and held harmless to the fullest extent authorized</td>
<td>No</td>
<td>Mandatory &amp; Unconditional - “Indemnification” used broadly to refer to indemnification and advancement.</td>
</tr>
<tr>
<td># 13 - Bank of America (as amended April 29, 2009)</td>
<td>Mandatory - Shall be vested with the contractual right to indemnification and held harmless to the fullest extent authorized by the DGCL. - No Board determination required</td>
<td>Yes</td>
<td>Mandatory &amp; Unconditional - Separate Section - Shall include the right to be paid by the Corporation the expenses incurred in defending any proceeding - No Board determination required</td>
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</tr>
<tr>
<td>#14 McKesson (effective July 27, 2011)</td>
<td>Board determination made in accordance with § 145(d)</td>
<td>Yes, good faith explicitly defined - Based on records or books of account of the Corporation - Advice of legal counsel for the Corporation or independent certified public accountant or by an appraiser or expert selected with reasonable care.</td>
<td>Mandatory &amp; Unconditional - Separate section - Expenses incurred by a director or officer in defending a proceeding shall be paid by the Corporation in advance of the final disposition. - No Board determination required</td>
</tr>
<tr>
<td># 16 – J.P. Morgan Chase (effective July 15, 2008)</td>
<td>Board determination made in accordance with § 145(d)</td>
<td>No</td>
<td>Mandatory &amp; Unconditional - The Corporation shall advance all reasonable expenses incurred within 30 days after the receipt. - No Board determination required.</td>
</tr>
<tr>
<td># 20 – Citigroup (amended December 19, 2009)</td>
<td>Mandatory - Shall indemnify to the fullest extent permissible under the DGCL</td>
<td>Yes - Director and officers shall be fully protected in relying in good faith upon the books or accounts or other records of the Company - Upon information opinions, reports, or statements made to the Company - or in a manner reasonably believed are within such person’s professional</td>
<td>Mandatory &amp; Unconditional - Treats advancement as a subsidiary of indemnification - Company shall advance expenses incurred in defending. - No Board determination required</td>
</tr>
<tr>
<td># 28 - Archer Daniels Midland</td>
<td>Mandatory - Company shall indemnify and hold harmless to the fullest extent permitted. - No Board determination required unless proceeding was initiated by indemnitee.</td>
<td>No</td>
<td>Mandatory &amp; Unconditional - Corporation shall pay the expenses incurred in advance of its final disposition. - No Board determination required</td>
</tr>
<tr>
<td># 31 - Marathon Oil (amended February 23, 2011)</td>
<td>Mandatory - Shall indemnify and hold harmless to the fullest extent permitted by law - No Board determination required unless proceeding was initiated by indemnitee.</td>
<td>No</td>
<td>Mandatory &amp; Unconditional - Corporation will advance all expenses reasonably incurred - Corporation will accept any such undertaking without reference to financial ability to make repayment. - No Board determination required</td>
</tr>
<tr>
<td># 35 - Home Depot (amended August 20, 2009)</td>
<td>Mandatory - Shall indemnify and hold harmless to the fullest extent permitted by the DGCL. - No Board determination required unless proceeding was initiated by the indemnitee.</td>
<td>No</td>
<td>Mandatory &amp; Unconditional - Shall pay the expenses incurred by an officer or director in advance of its final disposition. - Fails to require board evaluation. - Subject to Board approval - Limits advancement of expenses incurred by former directors and officers to the Board’s discretion.</td>
</tr>
<tr>
<td># 39 – Boeing (amended April 30, 2012)</td>
<td>Mandatory - Shall be indemnified and held harmless to the full extent permitted by the DGCL - No Board determination required unless proceedings is initiated by the indemnitee</td>
<td>No</td>
<td>Mandatory - advancement shall be made upon receipt of an undertaking - shall be determined by final judicial decision from where there is no right to appeal - The advancement of expenses shall not be made if the Board of directors makes a good faith determination that such payment would violate law or public policy (ambiguous and conflicting language)</td>
</tr>
</tbody>
</table>
| # 40 – Pfizer  
(Amended April 22, 2010) | Mandatory  
- Corporation shall indemnify and hold harmless to the fullest extent permitted by applicable law  
- No Board determination required unless proceeding is initiated by the indemnitee | No | Mandatory & Unconditional  
- Shall pay the expenses incurred in advance of its final disposition  
- No Board determination required |
| #44 – Dell  
(effective August 7, 2005) | Mandatory  
- Shall be indemnified and held harmless by the Corporation to the fullest extent authorized by the DGCL.  
- No Board determination unless proceeding is initiated by the indemnitee. | No | Mandatory & Unconditional  
- Treats advancement as a subsidiary of indemnification  
- Indemnification shall include the right to be paid by the Corporation in advance of its final disposition.  
- No Board determination required |
| # 46 – Caterpillar  
(effective June 9, 2010) | Mandatory  
- Shall indemnify to the full extent permitted under the DGCL  
- No Board determination required | No | Mandatory & Unconditional  
- Treats advancement as a subsidiary of indemnification  
- Corporation shall pay or reimburse expenses incurred in advance of its final disposition.  
- No Board determination required |
| #48 – United Technologies  
(December 10, 2008) | Mandatory  
- Shall indemnify and hold harmless to the full extent permitted by the DGCL.  
- No board determination required unless proceeding is initiated by indemnitee | No | Subject to Board Approval  
– payment and reimbursement are subject to approval of CEO or General Counsel and CFO. |
| # 51 – Intel  
(effective July 26, 2011) | Mandatory  
- Shall be indemnified and held harmless by the corporation to the fullest extent authorized by the DGCL.  
- No board determination required unless proceeding is initiated by indemnitee. | No | Mandatory & Unconditional  
- Expenses incurred by an officer or director in defending shall be paid in advance of the final disposition of such Proceeding.  
- No Board determination required |
<table>
<thead>
<tr>
<th>#</th>
<th>Company</th>
<th>Indemnity Language</th>
<th>Board Determination Required</th>
<th>Advancement Language</th>
</tr>
</thead>
<tbody>
<tr>
<td>56</td>
<td>Amazon (effective February 12, 2009)</td>
<td>Mandatory - shall be indemnified and held harmless by the corporation to the full extent permitted by the DGCL. - No Board determination required unless proceeding is initiated by indemnitee</td>
<td>No</td>
<td>Mandatory &amp; Unconditional - Treats advancement as a subsidiary of indemnification - Shall include the right to be paid by the corporation the expenses incurred in advance of its final disposition.</td>
</tr>
<tr>
<td>66</td>
<td>Walt Disney Co.</td>
<td>Mandatory - Shall indemnify to the full extent authorized or permitted by law - No board determination required</td>
<td>No</td>
<td>No mention of advancement or payment of expenses</td>
</tr>
<tr>
<td>68</td>
<td>Morgan Stanley (effective March 9, 2010)</td>
<td>Mandatory - Shall be indemnified and held harmless by the Corporation to the fullest extent permitted by the DGCL. - No Board determination required unless proceeding is initiated by indemnitee</td>
<td>No</td>
<td>Mandatory &amp; Unconditional - Treats advancement as a subsidiary of indemnification - Corporation shall pay the expenses incurred by such person in defending any such proceeding in advance of its final disposition - No Board determination required</td>
</tr>
<tr>
<td>69</td>
<td>Sysco (Amended November 16, 2011)</td>
<td>Mandatory - Shall be indemnified and held harmless by the Corporation to the fullest extent authorized by the DGCL. - No Board determination required unless proceeding is initiated by indemnitee</td>
<td>No</td>
<td>Mandatory &amp; Unconditional - Shall also have the right to be paid in advance of its final disposition - No Board determination required</td>
</tr>
<tr>
<td>70</td>
<td>FedEx (Effective September 26, 2011)</td>
<td>Mandatory - Shall to the fullest extent permitted by law indemnify and hold harmless any person. - No Board determination required</td>
<td>No</td>
<td>Mandatory &amp; Unconditional - Treats advancement as a subsidiary of indemnification - “fullest extent permitted” language includes advancement - pay the expenses incurred in advance of its final disposition - advancement for initiated proceedings must be authorized by the Board of directors.</td>
</tr>
<tr>
<td># 73 – Google (effective July 18, 2012)</td>
<td>Board determination made in accordance with § 145(d)</td>
<td>Good faith explicitly defined - Based on records or books of account of the corporation - Information supplied by officers of the corporation - Advice of legal counsel - Reports given or reports made to the corporation or by an independent certified public accountant or by an appraiser or other expert selected with reasonable care by the corporation or another enterprise.</td>
<td>Mandatory &amp; Unconditional Separate section - To the fullest extent not prohibited by the DGCL, expenses incurred shall be paid in advance of the final disposition. - No Board determination required</td>
<td></td>
</tr>
<tr>
<td># 74 – Hess Corporation (amended February 17, 2011)</td>
<td>Mandatory - Shall be indemnified by the Corporation – No board determination required</td>
<td>Only required for reimbursement of expenses and for any liability.</td>
<td>Subject to Board approval Requires good faith * - Shall be reimbursed if one delivers a written finding such person acted in good faith...” - Any expense incurred may be advanced prior to the final disposition.</td>
<td></td>
</tr>
<tr>
<td># 79 – Humana (January 4, 2007)</td>
<td>Mandatory - Shall be indemnified and held harmless to the fullest extent authorized by the DGCL. - No board determination required unless proceeding is initiated by indemnitee</td>
<td>No.</td>
<td>Mandatory &amp; Unconditional - Treats advancement as a subsidiary of indemnification - “fullest extent permitted” language includes advancement - Shall include the right to be paid by the Corporation expenses incurred in defending any such Proceeding in advance of its final disposition.</td>
<td></td>
</tr>
<tr>
<td># 80 – Goldman Sachs Group (amended May 7, 2010)</td>
<td>Mandatory - Corporation shall indemnify to the full extent permitted by law - No board determination required unless proceeding is initiated by indemnitee</td>
<td>No</td>
<td>Mandatory &amp; Unconditional - Treats advancement as a subsidiary of indemnification - “fullest extent permitted” language includes advancement - No Board determination required - No payment or reimbursement of expenses in connection with a</td>
<td></td>
</tr>
<tr>
<td>#</td>
<td>Corporation/Date of Amendment</td>
<td>Indemnification Details</td>
<td>Board Requirement</td>
<td>Other Details</td>
</tr>
<tr>
<td>------</td>
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<td>-------------------------------------------------------------------------------</td>
</tr>
<tr>
<td>#82</td>
<td>Oracle Corporation (July 10, 2006)</td>
<td>Mandatory - Shall be indemnified and held harmless to the fullest extent permitted by the DGCL. - No board determination required unless proceeding is initiated by indemnitee</td>
<td>No</td>
<td>Proceeding initiated by an indemnitee unless the Board has authorized it. Requires Good Faith * - Corporation shall not be required to advance any expenses to a person against whom the Corporation brings a claim, in a proceeding, for breach of the duty of loyalty, acts or omissions not in good faith or that involve intentional misconduct or knowing violation of law or for any transaction from which such person derived an improper personal benefit.</td>
</tr>
<tr>
<td>#83</td>
<td>Delta Air Lines (May 19, 2008)</td>
<td>Mandatory - Shall be indemnified and held harmless to the fullest extent authorized by the DGCL. - No board determination required unless proceeding is initiated by indemnitee</td>
<td>No</td>
<td>Mandatory &amp; Unconditional - Separate section – Expenses incurred shall be paid to the fullest extent not prohibited by law in advance of the final disposition - No Board determination required</td>
</tr>
<tr>
<td>#91</td>
<td>News Corp – (August 6, 2010)</td>
<td>Mandatory - Shall be indemnified and held harmless to the fullest extent authorized by the DGCL. - No board determination required unless proceeding is initiated by indemnitee</td>
<td>No</td>
<td>Mandatory &amp; Unconditional - Shall to the fullest extent not prohibited by law pay the expenses incurred in advance of its final disposition. - No Board determination required</td>
</tr>
<tr>
<td>#93</td>
<td>Allstate (May 18, 2011)</td>
<td>Board determination made in accordance with § 145(d)</td>
<td>No.</td>
<td>Mandatory &amp; Unconditional – Expenses shall be paid in advance of the final disposition – No Board determination required</td>
</tr>
<tr>
<td>#96</td>
<td>Tyson Foods (October 30, 2009)</td>
<td>Mandatory - Shall be indemnified and held harmless to the fullest extent legally permissible – No Board determination required</td>
<td>No</td>
<td>Mandatory &amp; Unconditional - Shall be paid in advance of the final disposition - No Board determination required</td>
</tr>
<tr>
<td>#98</td>
<td>Murphy Oil (August 5, 2011)</td>
<td>Mandatory - Shall be indemnified and held harmless to the fullest extent permitted</td>
<td>No</td>
<td>Mandatory &amp; Unconditional - Treats advancement as a subsidiary of indemnification - Shall also include the right to be paid</td>
</tr>
<tr>
<td>by Delaware Law. - No Board determination required</td>
<td>- Shall indemnify and hold harmless, to the fullest extent permitted by applicable law - No board determination required unless proceeding is initiated by indemnitee</td>
<td></td>
<td>- Shall pay the expenses incurred in defending, and such advances shall be made within thirty days - Not required to advance expenses for initiated proceedings unless the Board authorized the proceeding.</td>
<td></td>
</tr>
</tbody>
</table>

| #102 – 3M Company (amended February 10, 2009) | Mandatory | No | Mandatory & Unconditional |
| - Shall indemnify to the fullest extent authorized or permitted by law – No Board determination required | - Treats advancement as a subsidiary of indemnification - Expenses incurred in defending any action shall be paid or reimbursed - No Board determination required |

| # 103 – Time Warner (amended May 20, 2011) | Board determination made in accordance with § 145(d) | No | Mandatory & Unconditional |
| - Shall be indemnified and held harmless to the fullest extent authorized by the DGCL - No board determination required unless proceeding was initiated by indemnitee | – Shall include the right to receive payment of expenses - All reasonable expenses incurred shall be advanced by the Corporation |

| # 104 – Northrop Grumman (amended March 30, 2011) | Mandatory | No | Mandatory and Unconditional |
| - Shall be indemnified and held harmless to the fullest extent authorized by the DGCL - No board determination required unless proceeding was initiated by indemnitee | - Shall include the right to have the expenses incurred in advance of its final disposition - No obligation to advance fees in connection with a proceeding instituted by the Corporation against such person. |

| # 105 - DirecTV | Board determination made in accordance with § 145(d) | Yes | Mandatory & Unconditional |
| - Expenses incurred by a director or officers in defending any proceeding shall be paid by the Corporation in advance of this final disposition of such action. - No Board determination required |

| #107 – McDonald’s (effective July | Board determination made in accordance with § 145(d) | Indemnified person must meet the standard of conduct | Subject to Board Approval |
| - Subject to conditions set forth in clauses A and B, shall have the right to | Subject to Board Approval |

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<table>
<thead>
<tr>
<th>#</th>
<th>Company</th>
<th>Board Determination</th>
<th>Good Faith</th>
<th>Subject to Board Approval</th>
</tr>
</thead>
<tbody>
<tr>
<td>17, 2012</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td># 110 - Macy’s (effective May 14, 2010)</td>
<td>Board determination made in accordance with § 145(d)</td>
<td>No</td>
<td>Mandatory &amp; Unconditional</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>- Indemnification includes the right to receive payment in advance of any expenses incurred.</td>
<td></td>
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<tr>
<td></td>
<td></td>
<td></td>
<td>- No Board determination required</td>
<td></td>
</tr>
<tr>
<td># 113 – Rite Aid (bylaws effective January 21, 2010)</td>
<td>Board determination made in accordance with § 145(d)</td>
<td>Good Faith explicitly defined</td>
<td>Mandatory &amp; Unconditional</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>- Based on records or books of account of the Corporation</td>
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<td></td>
<td>- Information supplied to such person by the officers of the Corporation</td>
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<td>- Advice of legal counsel for the Corporation</td>
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<td></td>
<td>- Reports given or made by an independent certified public accountant or by an appraiser</td>
<td></td>
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</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>- Expenses shall be paid by the Corporation in advance of the final disposition of such action.</td>
<td></td>
</tr>
<tr>
<td># 114 – Staples Co. (effective June 4, 2012)</td>
<td>Board determination made in accordance with § 145(d)</td>
<td>Yes</td>
<td>Subject to Board approval</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>- Any such indemnification or advancement of expenses shall be made promptly, unless the corporation determines that the Indemnitee did not meet the applicable standard of conduct. Such determination shall be made by (a) a majority vote of a quorum of the directors...</td>
<td></td>
</tr>
<tr>
<td># 122 - Occidental Petroleum (effective May 6, 2011)</td>
<td>Board determination made in accordance with § 145(d)</td>
<td>Good Faith Explicitly defined</td>
<td>Mandatory &amp; Unconditional</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>- Reliance on records or books of accounts</td>
<td></td>
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</tr>
<tr>
<td></td>
<td></td>
<td>- Opinions, reports, or statements supplied by the officers, committee of Board, or employees</td>
<td></td>
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<tr>
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<td>- Advice of legal</td>
<td></td>
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<td></td>
<td></td>
<td></td>
<td>- Expenses incurred may be paid in advance of the final disposition.</td>
<td></td>
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<tr>
<td></td>
<td></td>
<td></td>
<td>- No Board determination required</td>
<td></td>
</tr>
<tr>
<td>#</td>
<td>Company Name</td>
<td>Determination Required</td>
<td>Payment Requirement</td>
<td></td>
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<td></td>
</tr>
<tr>
<td>123</td>
<td>AMR Corporation (effective January 20, 2009)</td>
<td>Yes</td>
<td>Mandatory &amp; Unconditional - To the fullest extent permitted by applicable law... shall be paid by the corporation in advance of the final disposition of such action.</td>
<td></td>
</tr>
<tr>
<td>131</td>
<td>Hartford Financial Services Group, Inc – (effective October 21, 2010)</td>
<td>No</td>
<td>Mandatory &amp; Unconditional - Each potential indemnitee shall be entitled to receive from time to time advance payment of any expenses incurred</td>
<td></td>
</tr>
<tr>
<td>132</td>
<td>U.S. Bancorp (effective January 19, 2010)</td>
<td>No</td>
<td>Mandatory &amp; Unconditional - Shall include the right to be paid by the Corporation the expenses incurred in defending any such proceedings or threatened proceedings in advance of its final disposition.</td>
<td></td>
</tr>
<tr>
<td>135</td>
<td>Freeport-McMoRan Copper &amp; Gold Inc. (effective February 2, 2010)</td>
<td>No</td>
<td>No mention of advancement</td>
<td></td>
</tr>
<tr>
<td>137</td>
<td>Kimberly –Clark (amended April 30, 2009)</td>
<td>Yes</td>
<td>Mandatory &amp; Unconditional - Expenses shall be paid by the corporation, to the fullest extent permitted by applicable law, in advance of the final disposition of such action.</td>
<td></td>
</tr>
<tr>
<td>140</td>
<td>United States Steel (published March 26, 2008)</td>
<td>No</td>
<td>Mandatory &amp; Unconditional - Corporation shall pay the expenses in advance of its final disposition.</td>
<td></td>
</tr>
<tr>
<td># 141 - Baker Hughes (reinstated May 21, 2012)</td>
<td>Board determination made in accordance with § 145(d) - The Corporation shall not be obligated to indemnify any person against any action arising out of any adjudicate criminal, dishonest or fraudulent acts, errors or omissions or any adjudicated willful, intentional or malicious acts, errors or omissions of such person.</td>
<td>No</td>
<td>Mandatory &amp; Unconditional - Expenses shall be paid in advance of the final disposition of such action - No Board evaluation required</td>
<td></td>
</tr>
<tr>
<td># 142 – Time Warner Cable (effective July 26, 2012)</td>
<td>Mandatory - Shall indemnify and hold harmless to the fullest extent permitted or required by the DGCL</td>
<td>No</td>
<td>Mandatory &amp; Unconditional - Expenses shall be advanced by the Corporation - No Board evaluation required</td>
<td></td>
</tr>
<tr>
<td>#148 – Capital One Financial</td>
<td>Mandatory – No Board determination required unless proceeding was initiated by indemnitee - Shall indemnify and hold harmless to the fullest extent permitted by the General Corporation Law</td>
<td>No</td>
<td>Mandatory &amp; Unconditional - Treats advancement as a subsidiary of indemnification - The payment of expenses incurred in defending a proceeding in advance of its final disposition - Includes “To the fullest extent” of the provisions of this Bylaw - No Board determination required (ambiguous language)</td>
<td></td>
</tr>
<tr>
<td># 149 - Illinois Tool Works</td>
<td>Board determination made in accordance with § 145(d)</td>
<td>Yes</td>
<td>Subject to Board Approval - Expenses may be paid by the corporation in advance of the final disposition as authorized by the Board of Directors in the specific case</td>
<td></td>
</tr>
</tbody>
</table>

A. Good Faith

A glance at numerous indemnification provisions finds that the majority of corporations exclude the “act[ing] in good faith and in a manner reasonably believed to be in or not opposed to the best interest of the corporation” language from the respective provisions. Ultimately,
these provisions fail to comply with the permissive scope of subsection (a), and exceed the parameters established by the Waltuch and Hermelin decisions. Therefore, these provisions are void and unenforceable because subsection (a) and (b) do not grant corporations the power to bypass the “good faith” requirement established by the statute.

In contrast, however, instead of omitting the “good faith” language, some corporations, namely ConocoPhillips, McKesson, Citigroup, Google, Rite Aid and Occidental Petroleum, explicitly defined conduct that constitutes good faith in their bylaw provisions. Such conduct includes: reliance on records or books of accounts, opinions, reports, or statements supplied by the officers, committee of Board, or employees; advice of legal counsel and reports of public accountant or an appraiser. This is significant because although § 145 requires good faith, it, and subsequent case law, fail to define good faith explicitly. Yet, under subsection (f) corporations are able to utilize their freedom of contract to include a definition of good faith, that 1) is consistent with the provisions of the statute, 2) specifically outlines conduct officers and directors should adhere to protect their right to indemnification, and 3) protects the corporation from indemnifying officers and directors who are not entitled to indemnification. While explicitly defining good faith is not a requirement under law, it is wise to establish the limits of indemnification and the requisite standard of conduct prior to when a dispute arises.

ConocoPhillips defines good faith as:

**Good Faith Defined.** For purposes of any determination under Section 3 of this Article VIII, a person shall be deemed to have acted in good faith and in a manner such person reasonably believed to be in or not opposed to the best interests of the Corporation, or, with respect to any criminal action or proceeding, to have had no reasonable cause to believe such person’s conduct was unlawful, if such person’s action is based on good faith reliance on the records or books of account of the Corporation or another enterprise, or on information supplied to such person by the officers of the Corporation or another enterprise in the course of their duties, or on the advice of legal counsel for the Corporation or another enterprise or on information or records given or reports made to the Corporation or another
enterprise by an independent certified public account or by an appraiser or other expert selected with reasonable care by the Corporation or another enterprise. [sic] 241

The indemnification provisions of ConocoPhillips, McKesson, Citigroup, Google, Rite Aid and Occidental Petroleum should serve as a model for other corporations. They are delicately tailored to comply with the statute, establish a standard of conduct for corporate officers, and protect the corporation from indemnifying individuals for acts that are non-exculpable and non-indemnifiable.

B. Advancement

Unfortunately ten years after the Homestore decision, many corporations still confer mandatory and unconditional advancement rights to corporate officers and directors. Even those that explicitly define good faith in their indemnification provisions fail to require it for advancement of expenses. However, notable advancement provisions include Hewlett Packard and Hess Corporation.

Hess Corporation advancement provision provides,

Any person claiming indemnification under the first paragraph of this Article VIII shall be reimbursed by the Corporation for his reasonable expense and for any liability (other than any amount paid to the Corporation) if a Referee shall deliver to the Corporation his written finding that such person acted in good faith in what the[y] reasonably believed to be in the best interests of the Corporation, and, in addition, with respect to any criminal action or proceeding, reasonably believed that his conduct was lawful... The person claiming indemnification shall at the request of the Referee appear before him to answer questions which the Referee deems relevant and shall be given ample opportunity to present to the Referee evidence upon which he relied for indemnification; and the Corporation shall, at the request of the Referee, make available for the Referee facts, opinions or other evidence in any way relevant for his finding which are within the possess or control of the Corporation. The “Referee” shall mean independent legal counsel (who may be regular counsel of the Corporation), or other disinterested person or persons, selected by the Board of Directors of the Corporation (whether or not a disinterest quorum exists) to act as such hereunder. 242

Hewlett Packard advancement provisions provides,
Notwithstanding the foregoing, unless otherwise determined pursuant to Section 6.5, HP will not advance or continue to advance expenses to any person (except by reason of the fact that such person is or was a director of HP in which event this paragraph will not apply) in any proceeding if a determination is reasonably and promptly made (i) by the Board of Directors by a majority vote of Disinterested Directors, even though less then a quorum (ii) if there are no Disinterested Directors or the Disinterested Directors so direct, by Independent Counsel in a written opinion or (iii) by a majority vote of a committee of Disinterested Directors designated by a majority vote of Disinterested Directors, that the facts known to the decision-making party at the time such determination is made demonstrate clearly and convincingly that such person acted in bad faith or in a manner that such person did not believe to be in or not opposed to the best interests of HP. 243

The advancement provision of Hess Corporation is comprehensive and requires good faith, and approval by legal counsel, or the Board of Directors prior to the advancement of expenses. As already noted, advancement proceedings, under Delaware law, do not require a showing of good faith or success on the merits. The courts simply look to the wording of the drafted provisions to determine the advancement rights. Under § 145, the advancement of expenses is permissive and corporations are permitted to determine the procedure for advancement. Here, Hess Corporation has established its own criteria for its “in-house” advancement proceedings, which requires an indemnitee to establish his good faith by providing evidence to the Board. Hewlett Packard’s advancement provisions are noteworthy; however, they are a distant second. Hewlett Packard’s advancement provision is noteworthy because it allows the corporation, through its Board of Directors, to make an initial decision of whether advancement is proper, and the latitude, after the initial determination has been made, to reconsider whether the company should continue to advance funds at any point during the litigation. Such a provision would have been beneficial during the Sun Times litigation.
One final note, many corporations include the following provision or something similar in their indemnification provisions.

Upon receipt by the corporation of a written request for indemnification, a determination, *if required by the Delaware General Corporation Law*, with respect to an Indemnitee’s request shall be made: (a) by the Board of Directors by a majority vote of a quorum consisting of directors who were not parties to such Proceeding, even though less than a quorum; or (b) by a committee of such directors designated by majority vote of such directors, even though less then a quorum; or (c) if there are no such directors, or is such directors so direct, by independent legal counsel in a written opinion; or (d) by the stockholder.  

The “*if required by the Delaware General Corporation Law*” language is significant because it establishes that most transactional attorneys do not understand the entirety of § 145. The statute only requires indemnification for a corporate official that has been “successful on the merits or otherwise,” otherwise indemnification and advancement rights are permissive. Further, section (f) provides that the indemnification and advancement of expenses provided by § 145 shall not be exclusive of any other rights an indemnitee may be entitled under any bylaw, agreement, vote of stockholders, or disinterested directors or otherwise. Therefore, should a corporation elect to utilize the option provided by subsection (f), it is counter-productive to use the “*if required by the Delaware General Corporation Law*” language. The goal of subsection (f) is to allow corporations to tailor indemnification and advancement provisions that suit their corporate objectives. If properly drafted, a corporation’s indemnification provision will supersede the statute. In the event, however, a corporation fails to draft indemnification and advancement provisions adequately, § 145, in its entirety, will apply. Therefore, it is imperative that corporations evaluate its indemnification and advancement provisions to ensure that it 1) complies with the statute, 2) establishes a standard of conduct for officers and directors, and 3) is delicately drafted to protect the corporation from indemnifying corporate personal from acts that are non-exculpable and non-indemnifiable.
In 1998, WorldCom’s CEO Bernard Ebbers persuaded WorldCom’s board of directors to provide him corporate loans and guarantees totaling more than $400 million to cover margin calls on his stock. Subsequently from 1999 through 2002, WorldCom (under the direction of Scott Sullivan (CFO), David Myers (Controller) and Buford Yates (Director of General Accounting)) used shady accounting methods to mask its declining financial condition by falsely professing financial growth and profitability to increase the price of WorldCom’s stock. In June 2002, the internal audit department uncovered approximately $3.8 billion of the fraud. By the end of 2003, it was estimated that the company’s total assets had been inflated by around $11 billion. On March 15, 2005, Bernard Ebbers was found guilty of all charges and convicted on fraud, conspiracy and filing false documents with regulators. He was sentenced to 25 years in prison. CFO Scot Sullivan entered a guilty plea on March 2, 2004 to one count each of securities fraud, conspiracy to commit securities fraud, and filing false statements. Former controller David Myers pleaded guilty to securities fraud, conspiracy to commit securities fraud and filing false statements on September 27, 2002. Former accounting managers Betty Vinson and Troy Normad both pleaded guilty to conspiracy and securities fraud on October 10, 2002.

EX-Tyco Executive Get up to 25 Years in Prison

(Former CEO, Dennis Kozlowski and former CFO, Mark H. Swartz, were sentenced to up to 25 years in prison for stealing hundreds of millions of dollars from the company. Kozlowski and Swartz were ordered to pay a total of $134 million in restitution. In addition, Kozlowski was fined $70 million, Swartz $35 million.)

Adelphia Founder gets 15-year Term; Son gets 20

(Adelphia Communications Corp. founder and former CEO, John Rigas, was convicted of fraud and conspiracy and sentenced to 15 years in prison for looting the company of more than $100 million, hiding more than $2 billion in debt the family incurred, and lying to the public about Adelphia’s operations and financial condition. His son and former finance chief, Timothy Rigas, received 20 years). The Enron scandal resulted from the use of accounting loopholes, special purpose entities, and poor financial reporting, by which corporate officers were able to hide billions in debt from failed deals and projects. The CEO and CFO, Andrew Faston, mislead Enron’s board of directors and audit committee on high-risk accounting practices.

2 http://Occupywallst.org/ (Occupy Wall Street is a protest that began September 17, 2011 in Zuccotti Park. The protest was initiated by the Canadian activist group Adbusters and led to Occupy protests and movements around the world. The main issues are social and economic inequality, greed, corruption and the undue influence of corporations on government—particularly from the financial services sector.)

protests-world-list-map, (Occupy Wall Street protests have span the globe including, Africa, British Columbia, the U.S., Argentina, Brazil, Chile, Columbia, Honduras, Hong Kong, Japan, Malaysia, Austria.)

4 Madelaine Droham, Scandals and their Aftermath Why we are Doomed to Repeat our Mistakes (2005), http://www.chumirethicsfoundation.ca/files/pdf/scandalsandtheiraftermath.pdf

5 See Droham, supra note 7. In a span of two months, the head of the Tyco International conglomerate was charged with tax evasion; accounting firm Arthur Anderson was found guilty of obstructing justice (the decision was overturned in 2005 after the company collapsed); cable television giant Adelphia Communications filed for bankruptcy amidst allegations of fraud; Xerox Corp. admitted it overstated sales by billions of dollars; telecom company Qwest confessed it improperly accounted for more than one billion in sales; and WorldCom Inc. revealed one of the largest accounting frauds in history and then filed for bankruptcy.

6 Sarbanes–Oxley Act of 2002, Pub.L. No. 107-204 § 307, 116 Stat. 745, 784, became effective July 30, 2002 and makes several changes in the securities regulation process to improve corporate governance and reporting. Several other provisions of the Act apply to lawyers, including Section 602 codified part of Rule 102(e) of the Commission’s Rules of Practice, establishing standards for disciplining professionals from practicing before the SEC; section 806 provided “whistleblower” protection for employees of public companies in fraud-related matters; and section 3(b) provided sanctions for violations of the Act or related rules.


8 Roger Cramton, et. al., Legal and Ethical Duties of Lawyers After Sarbanes-Oxley 1 (Boston U. School of Law, Working Paper No. 04-20 2010).

9 Christina R. Salem, The New Mandate of the Corporate Lawyer After the Fall of Enron and the Enactment of the Sarbanes-Oxley Act, 8 Fordham J. Corp. & Fin. L. 765, 777 (2003) (“Congress is redrafting corporate agenda and remodeling the corporate lawyer’s role in order to instill values and ethics that comport with communal standards, focusing less on material wealth and more on corporate lawyer accountability.”)


12 Campbell & Gaetke, supra note 12, at 13.


14 Campbell & Gaetke, supra note 12, at 14.

15 ABA Amends Ethics Rules on Confidentiality, Corporate Clients, to Allow More Disclosures, 19 ABA/BNA LAW. MANUEL ON PROF’L CONDUCT 467, 467 (2003) (quoting Lawrence Fox’s claim that proposed rules requiring a corporate lawyer to respond to client misconduct makes the lawyer an “uberdirector”); id. (quoting Judah Best’s characterization of proposed 1.13 (c) as “utterly wicked”); ABA Update of Model Ethics Rule All But Completed in Philadelphia, 18 ABA/BNA LAW. MANUEL ON PROF’L CONUCT 99, 101 (2002)(“Stephen A. Saltzburg… told the delegates that the ‘gatekeeper initiative’ is the ‘single most alarming threat to the attorney-client privilege to be seen in a long time.’”); Howard Stock, S-O’s Lawyer Rule May Chill Information Flow, Investor Rel. Bus., Aug. 18, 2003 (quoting Professor Jill Fisch to the effect that “[t]here are plenty of watchdogs already in place, and lawyers were poorly positioned to be gatekeepers.”); David E. Rovella, Going from Bad to Worse: Defense Bar Fears Jail Over ‘gatekeepers’ of the financial system may further impede ability of criminal defense lawyers to properly represent their clients”.


17 Id. at 3 (citing William C. Powers, Jr., et al., Report of Investigation by the Special Investigative Committee of the Board of Directors of Enron Corp. 17 (Feb. 1, 2002)).

18 Id. (citing Rebecca Blumenstein & Susan Pulliam, WorldCom Fraud was Widespread, Wall. St. J., June 10, 2003, at A3.)


22 *Id.*

23 Model Rule. 1.13: The entity theory grants corporations independent status as separate legal persons, distinct from their constituents. Yet, although the organizational entity is the client, the entity is a legal fiction that cannot function independently without representatives, and must act through its “authorized constituents.”


26 *Id.* (citing George C. Harris, *Taking the Entity Theory Seriously: Lawyer Liability for Failure to Prevent Harm to Organizational Clients Through Disclosure of Constituent Wrongdoing*, 11 GEO J. LEGAL ETHICS 597, 934-43 (1998) (discussing a lawyer’s obligation to act in a manner loyal to the interest of the entity and without regard to the direction of agents of the organization who may be engaged in wrongdoing.)


28 *Id.*

29 *Id.* (citing Restatement of the Law Governing Lawyers § 96, cmt d.)

30 *Id.* (citing Restatement of the Law Governing Lawyers §96, cmt b.)

31 *Id.*

32 *Id.*


34 *Id.*

35 *Id.*

36 *Id.* at 31.

37 *Id.*
Bainbridge, supra note 19, at 4 (citing Thomas G. Bost, Corporate Lawyers After the Big Quake: The Conceptual Fault Line in the Professional Duty of Confidentiality, 1 J. Bus. Entrep. & L. 335, 347 (2008) (quoting Baston). (One explanation for the [Enron] attorneys’ failure may be that they lost sight of the fact that the corporation was their client. It appears that some of these attorneys considered the officers to be their clients when, in fact, the attorneys owned duties to Enron).


Kim, supra note 25, at 181.

Harvey Pitt, Chairman, Securities and Exchange Comm’n, Speech by Remarks Before the Annual Meeting of the American Bar Association’s Business Law Section (Aug. 8, 2002). (“While a management team has the power to hire or fire lawyers who represent a corporation, lawyers must ask themselves – as well as management – how what they’re being asked to do is intended to further the company’s and shareholders’ interests. Corporate lawyers must be vigilant and protect against conflicts arising between management and shareholders. Most corporate lawyers recognize and fulfill that duty – but the profession, as a whole, must hold that duty paramount.”)

Peter Kostant, From Lapdog to Watchdog: Sarbanes-Oxley Section 307 and a New Role for Corporate Lawyers, 52 N.Y.L. Sch. L. Rev. 535, 537 fn. 11 (citing John C. Coffee Jr. Gatekeepers: The Professions and Corporate Governance 1, 229 (2006). (“Because legal ethics at its core views the attorney as a client-serving professional who is not permitted to dominate the relationship, legal ethics does not hold out a practical remedy for gatekeeper failure.”)

Additionally:

within the bar, the dominant view has long been that legal ethics commands lawyers to engage in zealous advocacy on behalf of their clients’ positions and permits them to take any action up to the point where such behavior becomes unlawful. Thus, the lawyer may pursue any lawful goal of the client, however socially or morally unappealing, and may raise any non-frivolous legal claim or assert any permissible procedural defense on its behalf.


that states should regulate professionals within their jurisdiction. However, in this case, the state bars as a whole have failed. They have provided no specific ethical rule of conduct to remedy this kind of situation. Even if they do have a general rule that applies, it often goes unenforced.”

48 Godfrey, supra note 20, at 1.

49 Id.


51 Kostant, supra note 43, at 544.

52 Id.

53 Id.

54 Id. at 536. (“Lawyers representing corporations, both as employees and as outside counsel, can no longer justify their role as the loyal servants of powerful senior corporate managers. The Sarbanes-Oxley legislation clearly expresses the public recognition that the duties of all corporate lawyers include using their critical intelligence to help ensure legal compliance and not to stand mute when senior corporate managers breach fiduciary duties or cause the corporation to violate the law.”)

55 Id.

56 Id.

57 See 148 Cong. Rec. at S 6551 (Jul. 10, 2002) (statement of Sen. Edwards). (“One of the problems we have seen occurring with this sort of crisis in corporate misconduct is that some lawyers have forgotten their responsibility… If you are a lawyer for a corporation, your client is the corporation and you work for the corporation and you work for the shareholders, the investors in that corporation; that is whom you owe your responsibility and loyalty. And you have a responsibility to zealously advocate for the shareholders and investors in that corporation.”)

58 In re Walt Disney Co. Derivative Litig., (Disney V), 907 A.2d 693, 752 (Del. Ch. 2005), aff’d Brehm v. Eisner (In re Walt Disney Co. Litig.), 906 A.2d 27 (Del. 2006) (citing Emerald Partners, 787 A. 2d at 90 (emphasis is original) – “The purpose of Section 102(b)(7) was to permit shareholders – who are entitled to rely upon directors to discharge their fiduciary duties at all times – to adopt a provision in the certificate of incorporation to exculpate directors from any personal liability for the payment of monetary damages for breaches of their duty of care, but not for duty of loyalty violation, good faith violations and certain other conduct.”

58
See Del. Code Ann tit 8, § 102 (b)(7) (2012) (allowing a Delaware corporation to include a provision in its certificate of incorporation shielding its directors from personal liability from certain breaches of fiduciary duty, provided the breach did not involve an act or omission “not in good faith.”)

Del. Code Ann. Tit. 8, § 102 (b)(7) (2002) allows for [a] provision eliminating or limiting the personal liability of a director to the corporation or its stockholders for monetary damages for breach of fiduciary duty as a director. See In re Walt Disney Co. Derivative Litig, 825 A. 2d 275, 286 (Del 2006) (“A section 102 (b)(7) provision shall not eliminate or limit the liability of a director: (i) For any breach of the director’s duty of loyalty to the corporation or its stockholder; (ii) for acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of law; (iii) under § 174 of this title [i.e., liability for directors for unlawful payment of dividend or unlawful stock purchase or redemption]; or (iv) for any transaction from which the director derived an improper personal benefit.”)

In re Walt Disney Co. Derivative Litig. (Disney III), 825 A. 2d 275, 286 (Del. Ch. 2003), aff’d 906 A. 2d 27 (Del. 2006).

Disney V, 907 A. 2d at 750. (In the duty of care context with respect to corporate fiduciaries, gross negligence has been defined as a “reckless indifference to or a deliberate disregard of the whole body of stockholders’ or actions, which are without the bounds of reason.”)

Id. at 755. (“A failure to act in good faith is shown where the fiduciary intentionally acts with a purpose other than that of advancing the best interest of the corporation, where the fiduciary acts with the intent to violate applicable positive law, or where the fiduciary intentionally fails to act in the face of a known duty, demonstrating a conscious disregard for his duties.”)

Brehm v. Eisner (In re Walt Disney Co. Derivative Litig.) (Disney VI), 906 A. 2d 27, 65 (Del. 2006)( … [there are] three categories of fiduciary behavior, which are candidates for “bad faith” perjorative label… the second category, [which was quickly rejected] … involves “fiduciary action taken solely by reason of gross negligence and without any malevolent intent.”)

Id. at 93, n 102. The Chancellor so recognized. 2005 Del. Ch. LEXIS 113, [Post-trial Op.] at *35. (“An action taken with the intent to harm the corporation is a disloyal act in bad faith.” See McGowen v. Ferro, 859 A.2d 1012, 1036 (Del. Ch. 2004) (“Bad faith is not simply bad judgment or negligence, but rather implies the conscious doing of a wrong because of dishonest purpose or moral obliquity… it contemplates a state of mind affirmatively operating with furtive design or ill will.”)) (quoting Desert Equities, Inc. v. Morgan Stanley Leveraged Equity Fund, II, L.P., 624 A.2d 1199, 1208, n.16 (Del. 1993).

Disney VI, 906 A.2d. at 96.

Id. at 97.
Id.

Disney V, 907 A.2d at 752. (citing Prod. Res. Group, L.L.C. v. NCT Group, Inc., 863 A.2d 772, 777 (Del. Ch. 2004) (“One of the primary purposes of § 102(b)(7) is to encourage directors to undertake risky, but potentially value-maximizing business strategies, so long as they do so in good faith. Section 102(b)(7) is most useful.”))

Id. at 755. (The concept of intentional dereliction of duty, a conscious disregard for one’s responsibilities, is an appropriate (although not the only) standard for determining whether fiduciaries have acted in good faith. Deliberate indifference and action in the face of a duty to act is, in my mind, conduct that is clearly disloyal to the corporation. It is the epitome of faithless conduct.”)(emphasis in original)

Id. n. 459. Indeed, §102(b)(7) on its face seems to equate bad faith with intentional misconduct. See 8 Del. C. §102(b)(7)(ii).

Disney V, 907 A. 2d at 749. (“To constitute a breach of the duty of care, a director’s inaction must be so great to show a lack of good faith as evidenced by sustained or systematic failure of a director to exercise reasonable oversight.”)

Disney VI, 906 A.2d at 27 (Purposeful wrongdoing, such as intentionally acting “with the purpose other than that of advancing the best interests of the corporation,” acting “with the intent to violate applicable positive law,” or “intentionally fail[ing] to act in the face of a known duty to act.”)

Disney III, 825 A. 2d at 290. (“…knowing and deliberate indifference to a potential risk of harm to the corporation. Where a director consciously ignores his or her duties to the corporation, thereby causing economic injury to its stockholders, the director’s actions are either ‘not in good faith’ or ‘involve intentional misconduct’… [and] fall outside the liability waiver provided under [§102(b)(7)].”)


Id. at 22. (“Sections (a) and (b) of the statute permit – but do not require—indemnification. Section (e) permits, -- but does not require – advancement of defense expenses.”

§§ 145 (a) and (b) authorize corporations to indemnify their officers, directors, and other agents in proceedings brought against them “by reason of the fact” of the indemnitee’s position as long as the indemnitee “acted in good faith and in a manner the person reasonably believed to be in, or not opposed to the best interests of the corporation”. *See Stockman v. Heartland Indus. Partners, L.P.* 2009 Del. Ch. LEXIS 131, (Del. Ch. 2009).

Del. Code. Ann. tit. 8 §145 (2012). Section 145 (c) requires a corporation to indemnify any director, officer, employee, or agent of the corporation “to the extent that” he was successful “on the merits or otherwise,” in defense of any threatened, pending, or completed action, suit or proceeding in which he was a party.

Delaware Revised Uniform Partnership Act, DEL CODE ANN. Tit. 6 § 15-103 (d) (“It is the policy of this chapter to give maximum effect to the principle of freedom of contract…”); *See David Rosenberg, Making Sense of Good Faith in Delaware Corporate Fiduciary Law: A Contractarian Approach,* 29 Del. J. Corp. L. 491, 491 (2004) (“Delaware is the most contractarian jurisdiction […]”); *Jones Apparel Grp. V. Maxwell Shoe Co.,* 883 A.2d 837, 845 (Del. Ch. 2004) (noting that “Delaware’s corporate statute is widely regarded as the most flexible in the nation because it leaves the parties to the corporate contract (manager and shareholders) with great leeway to structure their relations, subject to relatively loose statutory constraints and to the policing of director misconduct through equitable review”); see also *Edward P. Welch & Roberts S. Saunders, Freedom and its Limits in the Delaware General Corporation Law,* 33 DEL. J. CORP. L. 845, 848-55 (2008) (summarizing DELAWARE GENERAL CORPORATION LAW enabling provisions found in Sections 102(b)(1), 141(a), 151(a), 212, 102(b)(7), and 122(17)).

Del. Code. Ann. Tit. 8 § 145 (2012). (“The indemnification and advancement of expenses provided by, or granted pursuant to, the other subsections of this section shall not be deemed exclusive of any other rights to which those seeking indemnification or advancement of expenses may be entitled under any bylaw, agreement, vote of stockholders or disinterested directors or otherwise, both as to action in such person’s official capacity and as the action in any other capacity while holding such office.”)

*Homestore Inc. v. Tafeen,* 888 A.2d 204, 211 (Del. 2005).

See *Green v. Westcap Corp. of Delaware,* 492 A. 2d 260 (noting subsection (a) applies to a broad variety of proceedings, other than lawsuits by or on behalf of the corporation, including civil, criminal, administrative and investigative proceedings in which any person was or is a party “by reason” of having been a director, officer, employee, or agent of the corporation).
Del. Code. Ann. Tit. 8 § 145 (2012) “A corporation shall have power to indemnify any person who was or is party or is threatened to be made a party to any threatened, pending or completed action, suit or proceeding, whether civil, criminal, administrative or investigative (other than an action by or in the right of the corporation) by reason of the fact that he is or was a director, officer, employee or agent of the corporation, or is or was serving at the request of the corporation as a director, officer, employee, or agent of another corporation, partnership, joint venture, trust or other enterprise, against expenses (including attorneys’ fees), judgments, fines and amounts paid in settlement actually and reasonably incurred by him in connection with such action, suit or proceeding if he acted in good faith and in a manner he reasonably believed to be in or not opposed to the best interests of the corporation, and with respect to any criminal action or proceeding, had no reasonable cause to believe his conduct was unlawful.” (emphasis added)


Id. at * 6. Co-founder of Heartland and the Managing Member of both its General Partner and Investment Manager. Stockman was the CEO of C & A from 2003 – 2005

Id. J. Michael Stepp was a Senior Managing Director of Heartland and Vice President and CFO from 2002 – 2004.

Id.

Id.

Id.

Id. at *7. The doctrine of nolle prosequi involves dismissal at the request of the prosecutor and the nolle prosequi order constitutes a dismissal without prejudice. The U.S. Attorney may bring the same charges against Stockman and Stepp, but would be required to do so through a new indictment.

Id.

Id. at * 35. The drafters of the Partnership Agreement used their contractual freedom to craft an approach to indemnification that employed language drawn from § 145, but in a selective way that created some room for confusion. The Indemnification Provision adopted § 145’s standard for good faith and lawful conduct, but was silent about the effect of a disposition of the underlying proceeding in favor of the Indemnitee, which is a key consideration when determining whether a corporate official is entitled to indemnification under § 145.

Id. at * 36.
Id. at * 39. (citing S. Samuel Arsht & Walter K. Stapleton, Delaware’s New General Corporation Law: Substantive Change, 23 Bus. Law. 75, 78 (1967). (“As explained by members of the committee that drafted § 145: It was also apparent that revision was appropriate with respect to the limitations which must reasonably be placed on the power to indemnify in order to prevent the statute from undermining the substantive provisions of the criminal law and corporation law. If indemnification in criminal proceedings were to be included within the scope of the statute, the full deterrent effect of the anti-trust law, for example, could be maintained only where the party involved has no reasonable cause to believe his conduct was lawful… The need for a similar provision to protect the corporation law’s requirement of loyalty to the corporation was equally apparent…”)

Id. at * 62.

Id. at * 40-41.

Id. at *41 – An indemnitee in a criminal proceeding is successful any time he avoids conviction: “success is vindication… any result other than conviction must be considered success.”; see also Merritt-Chapman & Scott Corp. Wolfson, 321 A. 2d 138, 141 (Del. Super 1974) (“success under § 145 (c), does not mean moral exoneration. Escape from an adverse judgment or other detriment, for whatever reason, is determinative.”); Zaman v. Amedeo Holdings, Inc., 2008 Del. Ch. LEXIS 60, 2008 WL 2168397, at *22 (Del. Ch. 2008) (“The success on the ‘merits or otherwise’ standard is one that grants indemnification to corporate officials even when they have not been adjudged innocent in some ethical or moral sense.”)

Id. at * 59. (“[t]he language of §§ 145 (a) and (b) applies comfortably only to cases where there has been a finding that the party seeking indemnification has violated some legal or equitable duty to someone, the party has made an admission of culpability, or the party has settled a case by making a payment. In the first two of these situations, there is a strong basis to believe the indemnitee acted against the interests of the corporation or society, and therefore providing indemnification would dampen the incentives of corporate officials to comply with their legal and fiduciary duties, a result at odds with public policy.”)

A corporate indemnitee is successful when an action is dismissed without prejudice. See Levy v. Hayes Lemmerz International, Inc. 2006 Del. Ch. LEXIS 68 (Del. Ch. 2006) (The court held that plaintiffs did not have to await the outcome of an SEC investigation into alleged accounting irregularities in order to receive indemnification for a settled class action suit); Zaman v. Amedeo Holdings, Inc. 2008 Del. Ch. LEXIS 60 (Del. Ch. 2008) (The court held that indemnities were entitled to indemnification on federal claims that were dismissed without prejudice for lack of subject matter jurisdiction and indemnitees did not have to wait until the dismissed claims were resolved in state court).


Id. at *2. (citing Stifel Fin. Corp. v. Cochran, 809 A.2d 555, 561 (Del. 2002).
Del. Code tit 8 § 145 (2012). (“The indemnification and advancement of expenses provided by, or granted pursuant to, the other subsections of this section shall not be deemed exclusive of any other rights to which those seeking indemnification or advancement of expenses may be entitled under any bylaw, agreement, vote of stockholders or disinterested directors or otherwise, both as to action in such person’s officials capacity and as to action in another capacity while holding such office… “)

Waltuch v, Conticommodity Services, Inc. 88 F. 3d 87 (2nd Cir. 1996).

Waltuch, 88 F. 3d at 89.

See Hibbert v. Hollywood Park, Inc. 457 A.2d 339 (Del. 1983) (citing S. Samuel Arsht, Indemnification Under Section 145 of Delaware General Corporation Law, 3 Del. J. Corp. L 176, 176-77 ( 1978) “The question most frequently asked by practicing lawyers is what subsection (f), the non-exclusive clause, means…. The question which subsection (f) invariable raises is whether a corporation can adopt a by-law or make a contract with its directors providing that they will be indemnified for whatever they may have to pay if they are sued and lose or settle. The answer to this question is “no.” Subsection (f)… permits additional rights to be
created, but it is not a blanket authorization to indemnify directors against all expenses, fines, or settlements of whatever nature and regardless of the director’s conduct. The statutory language is circumscribed by limits of public policy.” (emphasis added); see also Citadel Holding Corp. v. Roven, 603 A. 2d 818, 823 (Del. 1992): see also Shearin v E.F. Hutton Group, Inc. 652 A. 2d 578, 593-94 & n. 19 (Del. Ch. 1994) (Allen, Ch.) (bylaw that provided indemnification “to the fullest extent permissible under Section 145 must be interpreted in a way that is consistent with substantive provisions of § 145 (a); nonexclusively provision of § 145 (f) not mentioned by the court); Merritt – Chapman & Scott Corp. v. Wolfson, 321 A. 2d 138, 142 (Del. Super. Ct. 1974) (bylaw provided for mandatory entitlement to indemnification unless officer was “derelict in the performance of his duty”; although the court considered this entitlement to be “independent of any right under the statute,” it did not hold that the bylaw was inconsistent with the “good faith” standard of § 145 (a).

121 Waltuch, 88 F. 3d at 93. (“subsection (f) merely acknowledges that one seeking indemnification may be entitled to “other rights” (of indemnification or otherwise); it does not speak in terms of corporate power, and therefore cannot be read to free a corporation from the “good faith” limit explicitly imposed in subsections (a) and (b).”)

122 Hibbert v. Hollywood Park, Inc. 457 A. 2d 339, 344 (1983) (The provisions for indemnification and advances of expense set forth in § 145 are not the director’s exclusive remedy as the corporation may provide greater protection than that granted by statute.) See 8 Del. C. § 145 (f): Entitlement to indemnification and advancement of expenses may be conferred on the director, inter alia, by the corporate bylaws or a separate agreement).


124 Tafeen v. Homestore, Inc. 2004 Del. Ch. LEXIS 38, * 44 (Del. Ch. 2004). (“Given the high incidence of advancement proceedings, directors should be mindful of their fiduciary duties to stockholders, and the possibility of stockholder action, when reviewing and adopting advancement and indemnification bylaws.”)


126 Id. See Del. Code. Att. Tit. 8 § 145 (d) (2012) (“Any indemnification under subsections (a) and (b) (unless ordered by a court) shall be made by the corporation only as authorized in the specific case upon a determination that indemnification of the present or former director, officer, employee, or agent is proper in the circumstances because the person has met the applicable standard of conduct set forth in subsection (a) and (b). Such determination shall be made: 1) By a majority vote of the directors who are not parties to such action, suit, or proceeding, even though less than a quorum; or 2) By a committee of such directors designated by majority vote of such directors, even though less than a quorum; or 3) If there are no such directors designated by majority vote of such directors, even though less than a quorum; or 4) By the stockholders.”)
Advanced Mining Sys. v. Fricke, 623 A. 2d 82 (Del. Ch. 1992). See also Veasey, supra note 127. (If the contract or by-law provides only that indemnification “shall” be made “to the full extent permitted by law,” the decision-maker would seem to be obliged to indemnify once the determination has been made that the indemnitee “has made the applicable standard of conduct set forth in subsection (a) and (b).” In the absence of such a provision, however, indemnification is permissive and is at the discretion of the decision-maker.)

Del. Code. Ann. Tit. 8 §145 (e) (2012) (“Expenses (including attorneys’ fees) incurred by [a] director of the corporation in defending any… suit or proceeding may be paid by the corporation in advance of the final disposition of such action… upon receipt of an undertaking by or on behalf of such director… to repay such amount if it shall ultimately be determined that such person is not entitled to be indemnified by the corporation….”)

Homestore, Inc v. Tafeen, 888 A. 2d 204, 211 (Del. 2005)


Id.

Id.

Id. (citing Homestore Inc v. Tafeen, 888 A. 2d 204, 212 (Del. 2005)).

Id. (citing Homestore Inc. v. Tafeen, 888 A. 2d 204, 218 (Del. 2005)).


Del. Code. Ann. Tit. 8 §145 (d) (2012) (“…Such determination shall be made: 1) By a majority vote of the directors who are not parties to such action, suit, or proceeding, even though less than a quorum; or 2) By a committee of such directors designated by majority vote of such directors, even though less than a quorum; or 3) If there are no such directors designated by majority vote of such directors, even though less than a quorum; or 4) By the stockholders.”) See Advanced Mining Sys. v. Fricke, 623 A.2d 82 (Del. Ch. 1992). (“The use of mandatory advancement provisions deprive the board [of directors] of the opportunity to evaluate the important credit aspects of a decision to advance expenses.”)

Del. Code. Ann. Tit. 8 § 145 (2012) (“Expenses… may be paid by the corporation in advance… upon receipt of an undertaking by or on behalf of such director or officer to repay such amount if it shall ultimately be determined that such person is not entitled to be indemnified by the corporation as authorized by this section…”)

Homestore, Inc. v Tafeen, 888 A. 2d 204, 211 (Del. 2005) (emphasis added).

See Donald J. Wolfe, Jr., Corporate and Commercial Practice in the Delaware Court of Chancery, § 8-2 (2004) (“Until 1994, suits to enforce the right to indemnification and advancement were litigated in the Delaware Superior Court, because “such actions by their nature sought an award for money damages pursuant to contract.”) (“Wolfe & Pittenger”) See Salaman v. Nat’l Media Corp., 1992 Del. Ch. LEXIS 4, 1992 WL 8795 (Del. Ch. Jan 14, 1992) (holding that this court did not have subject matter jurisdiction over a claim for advancement where there was a sufficient remedy at law.). The Court of Chancery did not have subject matter jurisdiction over such claims until section 145 of the Delaware General Corporation Law was amended to vest the Court of Chancery with exclusive jurisdiction over actions for advancement and indemnification.

Homestore, 888 A. 2d at 211. (Generally, corporate documents, such as bylaws, have the force of a contract between the corporation and the directors, and are subject to the same rules of construction as statutes and contracts.) See Salaman v. National Media Corp., C.A. 92C-01-161, 1992 Del. Super LEXIS 564 at * 12 (Del. Super Ct. 1992) (citing Bishop Law of Corporate Officers and Directors, Ch. 7.05 (1991); 8 W. Fletcher Cyclopedia of the Law of Private Corporations § 4177 (rev. perm. Ed. 1991)).

Hibbert, 457 A. 2d at 343 (citing Ellingwood v. Wolf’s Head Oil Ref. Co., 38 A. 2d 743, 747 (Del. 1944); Lawson v. Household Fin. Corp., 152 A. 723, 726 (Del. Ch. 1930); In re Osteopathic Hosp. Ass’n, 191 A. 2d 333, 335 (Del. Ch. 1963)).

Radin, supra note 132, at 253.

Homestore, 888 A. 2d 204, 206.

Id.

Id.

Id.

Peter Tafeen was employed from September 1997 through November 30, 2001, first as Vice President of Business Development and later as Executive Vice President of Business Development, Ads and Sales.

Id.

Id.

Homestore, 888 A. 2d at 213.

Id. at 212 (emphasis added).
Id. (emphasis added).

Id. at 206.


Homestore, 888 A. 2d 204, 214.

Id. at 218.

Id. at 218 – 219.


See Homestore III, 2004 WL 3053129, at 4 (stating that Tafeen was “entitled to payment of his attorney’s fees for bringing this lawsuit”); Homestore IV, 2005 WL 789065, at 4, 7 (awarding fees); see also Stifel, 809 A. 2d at 561-62 (awarding fees for plaintiff’s who successfully sought indemnification); DeLucca v. KKAT Mgmt., L.L.C. No, Civ. A 1384-N, 2006 WL 224058, at 2, 15-16 (Del. Ch. 2006) (extending Stifel rule to award fees to plaintiffs who successfully sought advancement).

Radin, supra note 132, at 253.

Radin, supra note 132, at 253

Id.

Id.

Id.


The indictment alleged the deliberate filing of false financial statements and the creation of fraudulent employment agreements that purported to obligate the Company to pay certain employees, including Bergonzi, millions of dollars upon termination of their employment from the Company,
Bergonzi, 2003 Del. Ch. LEXIS at *5.

Id.

Id. at * 6.

Id. at *7.

Id. at * 9.

Id.

Id. at 9 – 10.

Id.

Id.


The former CEO and Chairman of the Board of Directors.

Boulbee and Atkinson are former Executive Vice Presidents

Kipnis is a former Vice President, Corporate Counsel and Secretary

Id. at 384.

Id.

Id. (Kipnis was granted acquittal on one of those counts as the result of a post-trial motion for judgment of acquittal. In addition to the federal mail fraud convictions, Black alone was convicted of obstruction of justice. In summary, Black was convicted on four of thirteen counts, Boulbee on three of eleven, Atkinson on three of seven, and Kipnis on two of eleven. As a result of those convictions, Black was sentenced to 78 months in prison, Boulbee to 27 months in prison, Atkinson to 24 months in prison, and Kipnis to five years of probation with six months of home detention.)

Id.

Id. at 384.

Id. at 384-385.
Id. at 385. ("Section 4.6. Expenses Payable in Advance. Expenses (including attorney’s fees) incurred by a director or officer in defending or investigating any threatened or pending civil, criminal, administrative or investigative action, suit, or proceeding shall be paid by the Corporation in advance of the final disposition of such action, suit or proceeding, upon receipt of an undertaking by or on behalf of such director or officer to repay such amount if it shall ultimately be determined that he is not entitled to be indemnified by the Corporation as authorized by this Article…")

Id. at 389.

The Certificate and Bylaws limited the Company’s obligation to provide advancement or indemnification in proceedings initiated by a director or officer.

Section 4.13, Limitation on Indemnification. Notwithstanding anything contained in this Article IV to the contrary, except for proceedings to enforce rights to indemnification (which shall be governed by Section 4.5), the Corporation shall not be obligated to indemnify any director or officer in connection with any proceeding (or part thereof) initiated by such person unless such proceeding (or part thereof) was authorized or consented to by the Board of Directors of the Corporations. (emphasis added).

Sun-Times Media Group, Inc., 954 A. 2d at 389.

Id. at 395. ("The provision states that expenses incurred in defending a”civil [or] criminal… action, suit or proceeding” shall be paid to the corporation, upon receipt of an undertaking that the amount shall be repaid if the recipient “shall ultimately be determined” not to be entitled to indemnification.”)

Id. See Donald J. Wolfe and Michael A. Pittenger, Corporate and Commercial Practice in the Delaware Court of Chancery, § 8.02 [a][1](2008) ("A determination of whether a person is entitled to indemnification generally must await a non-appealable, final judgment in connection with the underlying litigation.")


Disney V, 907 A.2d at 752.


Veasey, supra note 127, at.
Id.


Id. at * 2. Plaintiffs Michael A. Weinstock, Lazard Managing Director, and plaintiff Andrew J. Herenstein, a Lazard Director, were assigned to be the co-portfolio managers of two Lazard investment funds, Lazard Debt Recovery Funds, L.P. and Lazard Debt Recovery Fund, Ltd. They severed their relations with the funds very abruptly, by terminating their employment on February 28, 2002 without prior notice. In response to their action, the defendant brought two lawsuits against the plaintiffs. These are the suits for which the plaintiffs seek advancement.

Id.

2003 Del. Ch. Lexis 83, at *7 – 9.  (emphasis added)

Id. at *12.

Id.

Id. See Greco v. Columbia/HCA Healthcare Corp., No. 16801, 1999 Del. Ch. LEXIS 24 (Del. Ch. Feb. 12, 1999). The court rejected a narrow construction of “indemnification”, finding that the term “indemnification” could refer to both “indemnification” and “advancement” in the certificate where that would make sense and be linguistically economical.


Id. at 1159.

Id. at 1160.

Id.

The relevant part of the prior bylaw read: “The Corporation shall pay the expenses incurred by any present or former director….” Following the amendment the provision reads: “Losses reasonably incurred by a director or officer in defending any threatened or pending Proceeding… shall be paid by the Corporation in advance of the final disposition…” Id

Id. at 1161.

Id. at 1168.
Id. (emphasis added)

Radin, supra note 132, at 292.


Radin, supra note 132, at 228

Advanced Mining Systems, 623 A.2d at 84.


Id. See §145 (d).

Havens, Del. Ch. LEXIS 12 at *43.


Id.

Id. at *2 -3.

Id. at * 7 -8.

Id. at *6


Id. at 326.

Id. at 326, fn 7
Id. fn 8 (The indemnification agreement states as section 1(b) that the company shall provide indemnification and advancement “to the fullest extent permitted by law,” and the company’s bylaws section 9.1 and 9.3 provide for mandatory indemnification and advancement “to the fullest extent permitted by [the] General Corporation Law of Delaware.” Both the indemnification agreement and the company’s bylaws contained a “by reason of fact” limitation that tracks section 145 of the Delaware General Corporation Law.)

Id. at 328.; See Stockman v. Heartland Indus Partners, L.P., 2009 Del. Ch. LEXIS 131 * 47 (The “to the fullest extent permitted by law” language is common in both corporate bylaws and in alternative entity operating agreements, and is “an expression of the intent for the promise of indemnity to reach as far as public policy will allow.”)


Id. (The broad uses of “indemnification” included titling the article that grants both advancement and ultimate indemnification using only “indemnification” and using the language “indemnification provided by this Article Fifth” in extending both advancement and ultimate indemnification rights to former corporate officials.)

Id. (The narrow uses of “indemnification” include, among other things, the actual creation of the ultimate indemnification rights. That the language… is a reference to the broad use of “indemnification” is clear from the language’s reference to “indemnify to the fullest extent permitted by ….the organizational documents.” Moreover, the NASD admits that the most analogous phrase in “indemnification” broadly, in the sense that it encompasses both advancement and ultimate indemnification rights granted under that Article.)

Id. at 39.

Id. at 39. See Weinstock v. Lazard Debt Recovery GP, LLP 2003 Del. Ch. LEXIS 83, 2003 WL 21843254, at *4 (Del. Ch. Aug. 1, 2003) (The Court held that language stating that the “indemnification”… shall continue as to former affiliates included the right to advancement as well as ultimate indemnification.); Greco v. Columbia/HCA Healthcare Corp., 1999 Del. Ch. LEXIS 24, 1999 WL 1261446 at * 13 (Del. Ch. Feb. 12,1999). (The court interpreted a fees on fees provision stating that the corporation shall indemnify a covered corporate official’s “cost and expenses incurred in connection with successfully establishing his or her right to indemnification” as granting fees on fees for advancement proceedings as well as ultimate indemnification proceedings. The court noted that the certificate itself used the term “indemnification” broadly by using “indemnification” and not “advancement” in the title of several subsections that dealt with both advancement and ultimate indemnification and explained that “the term ‘indemnification’ could refer to both ‘indemnification’ and ‘advancement’ in the certificate where that would make sense and be linguistically economical.”) Nakahara v NS 1991 Am. Trust, 739 A.2d 770,779 n. 52 (Del. Ch. 1998) (“Although indemnification and advancement are distinct rights, they are related concepts that are commonly addressed in neighboring statutory provisions.”)(emphasis omitted).

Id. at 218 – 219.

Del. Code. Ann. Tit. 8 § 145 (2012) (“A corporation shall have power to indemnify any person who was or is party or is threatened to be made a party to any threatened, pending or completed action, suit or proceeding, whether civil, criminal, administrative or investigative (other than an action by or in the right of the corporation) by reason of the fact that he is or was a director, officer, employee or agent of the corporation, or is or was serving at the request of the corporation as a director, officer, employee, or agent of another corporation, partnership, joint venture, trust or other enterprise, against expenses (including attorneys’ fees), judgments, fines and amounts paid in settlement actually and reasonably incurred by him in connection with such action, suit or proceeding if he acted in good faith and in a manner he reasonably believed to be in or not opposed to the best interests of the corporation, and with respect to any criminal action or proceeding, had no reasonable cause to believe his conduct was unlawful.”) (emphasis added)

Conocophillips Bylaws (amended May 11, 2011).

Hess Corporation Bylaws (amended February 17, 2011).


Delta Air Lines Bylaws (amended May 19, 2008).