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## COMMENT

# INDEMNIFICATION OF DIRECTORS AND OFFICERS AGAINST LIABILITIES IMPOSED UNDER FEDERAL SECURITIES LAWS

### INTRODUCTION

Indemnification of directors and officers against liabilities incurred as a consequence of their position as corporate managers is commonly provided for in the bylaws of corporations and is regulated by state corporation statutes.<sup>1</sup> The broad indemnification provisions of the Revised Model Business Corporation Act (RMBCA)<sup>2</sup> have been substantially adopted by state legislatures, including Wisconsin.<sup>3</sup> Thus, the trend in indemnification has been expansion of director and officer rights.<sup>4</sup> However, this expanded application of corporate indemnification has not proceeded unchecked. The scope of permissible indemnification against certain liabilities is subject to constraints imposed through government regulation and public policy.<sup>5</sup>

The competing concerns involving whether to permit indemnification in the corporate setting are: (1) protection of the system of corporate governance; (2) protection of the corporation and its stakeholders; and (3) protection of directors and officers.<sup>6</sup> The Securities and Exchange Commission (SEC) has posited that indemnification of corporate man-

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1. JOSEPH W. BISHOP, JR., *THE LAW OF CORPORATE OFFICERS AND DIRECTORS: INDEMNIFICATION AND INSURANCE* chs. 6-7 (1982 & Supp. 1994) (reviewing state corporation statutes regulating indemnification); *see also* WIS. STAT. §§ 180.0850-180.0859 (1991-92).

2. *See* Robert S. Lavet, *Indemnification of Corporate Directors and Officers in Insider Trading Litigation*, 19 SEC. REG. L. J. 402, 410 n.25, 411 (1992) (noting the liberal standard for permissive indemnification of RMBCA § 8.51(a)(2)).

3. BISHOP, *supra* note 1, ¶ 6.85 (Wisconsin's statutory scheme follows the RMBCA, but with several unique features); *see also* WILLIAM E. KNEPPER & DAN A. BAILEY, *LIABILITY OF CORPORATE OFFICERS AND DIRECTORS* § 20.04 (4th ed. 1988) (twenty-two states pattern their indemnification statutes on the 1980 amendments of the Model Act or the 1984 RMBCA).

4. *See* KNEPPER & BAILEY, *supra* note 3, § 20.04.

5. Limits on indemnification may be codified or uncoded. *See infra* note 35 (providing examples of each).

6. JOHN F. OLSON & JOSIAH O. HATCH III, *DIRECTOR & OFFICER LIABILITY: INDEMNIFICATION AND INSURANCE* § 4.04[1] (1990); *see also* Joseph F. Johnston Jr., *Corporate Indemnification and Liability Insurance for Directors and Officers*, 33 BUS. LAW. 1993 (1978) (discussing fundamental policy concerns of indemnification).

agers for liabilities imposed by the federal securities laws is against public policy, and any such agreement is unenforceable.<sup>7</sup> This position is premised on the view that securities laws are intended to stimulate diligence and deter violations, and that indemnification would undermine these objectives.<sup>8</sup>

In 1987, the Wisconsin legislature adopted an indemnification provision in its Business Corporation Laws which provides that the public policy of Wisconsin permits corporate indemnification against liabilities imposed under federal securities laws.<sup>9</sup> The express policy provision is unique<sup>10</sup> and has not been directly opposed by the SEC or challenged in court.<sup>11</sup> However, Wisconsin law is in apparent conflict with the SEC policy regarding indemnification. This Comment suggests an appropriate balance for permissible indemnification based on prevailing law and policy considerations.

Using the Wisconsin corporate indemnification statutes as an example, Part I of this Comment examines corporate indemnity law and the policy concerns promoting state-regulated indemnification. Part II analyzes the SEC position on indemnification and its application to public corporations, followed by a discussion in Part III of the standard for federal preemption of state indemnity laws. Part IV reviews the judiciary's attempt at resolving the conflict and its response to the SEC position. Finally, in light of the precedent and policy, Part V provides an appropriate resolution of the conflict and a standard for permissible indemnification is submitted.

## I. CORPORATE INDEMNITY LAW

Indemnification of directors and officers through the use of corporate funds is one of the primary means of protecting managers against liabili-

7. Items 510, 512 of Regulation S-K, 17 C.F.R. §§ 229.510, 229.512(h)(3) (1994); *see also* BISHOP, *supra* note 1, ¶ 9.05 (summarizing SEC position).

8. *Globus v. Law Research Serv., Inc.*, 418 F.2d 1276, 1288 (2d Cir. 1969), *cert. denied*, 397 U.S. 913 (1970); *see also* Brief for SEC as Intervenor, *Feit v. Leasco Data Processing Equip. Corp.*, 332 F. Supp. 544 (E.D.N.Y. 1971) (citing dicta from Second Circuit in *Globus*).

9. WIS. STAT. § 180.059 (1987-88), *renumbered*, WIS. STAT. § 180.0859 (1991-92).

10. Although the policy statement of § 180.0859 is unique, other states incorporate non-exclusive indemnification provisions that provide liberal indemnification rights where the director or officer has acted in good faith and "in a manner he reasonably believed to be in or not opposed to the best interests of the corporation." *See* DEL. CODE ANN. tit. 8, § 145(a) (1992); RMBCA § 8.51(a) (1983); *see also* WIS. STAT. § 180.0851 (1991-92) (mandating broad indemnification under different language). These statutes, and the bylaw provisions modeled after them, presumably encompass federal securities liabilities to the extent that indemnification is permissible. *See* Lavet, *supra* note 2, at 409-14.

11. *See* BISHOP, *supra* note 1, ¶ 9.05.

ties incurred as a result of their position in the corporation.<sup>12</sup> Thus, indemnification is generally provided for in a corporation's bylaws or through separate indemnity agreements between the corporation and its managers. Corporate indemnification is subject to the competing concerns of: (1) protection of the system of corporate governance; (2) protection of the corporation and its stakeholders; and (3) protection of directors and officers.<sup>13</sup>

The law of the state of incorporation governs a corporation's internal affairs; thus, states commonly regulate and provide for indemnification of directors and officers in their corporation laws.<sup>14</sup> State indemnification statutes evolved primarily because of the states' interest in insuring that liabilities imposed on directors and officers would not deter competent individuals from serving as managers.<sup>15</sup> Additionally, the higher threshold of director and officer liability imposed through corporate indemnification protects the use of business judgment by the management.<sup>16</sup> Thus, state regulation of indemnification focuses primarily on the protection of directors and officers.

Although the state has a legitimate, heightened interest in indemnification as a result of its corporate chartering power,<sup>17</sup> the federal government also has an interest in regulating the scope of corporate indemnification.<sup>18</sup> The federal government's interest is primarily in protecting the system of corporate governance, the corporation, and stakeholders of the corporation.<sup>19</sup> Consequently, corporate indemnification invokes the competing concerns of the federal and state governments.

Wisconsin law has followed the general trend, providing liberal rights of indemnification to corporate directors and officers.<sup>20</sup> Wisconsin broadly mandates indemnification of directors and officers, while al-

12. The other primary method for protecting corporate managers is through director and officer liability insurance (D&O insurance). See generally BISHOP, *supra* note 1, ch. 8.

13. See *supra* note 6 and accompanying text.

14. See generally KNEPPER & BAILEY, *supra* note 3, § 20.04.

15. OLSON & HATCH, *supra* note 6, § 4.05. For example, the Wisconsin Special Committee on Liability Law and Insurance expressed concern that, without additional statutory protection of directors and officers, recruitment and retention of competent managers would remain difficult, corporations would change their incorporation to states with more favorable indemnity laws, and Wisconsin's ability to attract new businesses would be reduced. WISCONSIN LEGISLATIVE COUNCIL, DESCRIPTION OF 1987 ASSEMBLY BILL 301, at 9 (1987).

16. See Dale A. Oesterle, *Limits on a Corporation's Protection of its Directors and Officers from Personal Liability*, 1983 Wis. L. Rev. 513, 560-61 (1983).

17. KNEPPER & BAILEY, *supra* note 3, § 20.04; OLSON & HATCH, *supra* note 6, § 4.04[1].

18. OLSON & HATCH, *supra* note 6, § 4.04[1]; see also Oesterle, *supra* note 16, at 559-61.

19. See *infra* part II (discussing SEC position on indemnification).

20. See *supra* notes 3-4 and accompanying text.

lowing corporations to expand or limit the right of its managers to indemnity.<sup>21</sup> Section 180.0851(1) of the Wisconsin statutes provides for mandatory indemnification of reasonable expenses incurred in successfully defending an action on the merits or otherwise.<sup>22</sup> Where a director or officer is unsuccessful, subsection (2)(a) mandates indemnification of corporate managers for liabilities<sup>23</sup> incurred as a result of their corporate responsibilities, unless the liability was incurred because of a breach of duty which constitutes:

1. A willful failure to deal fairly with the corporation or its shareholders in connection with a matter in which the director or officer has a material conflict of interest.
2. A violation of the criminal law, unless the director or officer had reasonable cause to believe that his or her conduct was lawful or no reasonable cause to believe that his or her conduct was unlawful.
3. A transaction from which the director or officer derived an improper personal profit.
4. Willful misconduct.<sup>24</sup>

Section 180.0852 provides that a corporation may opt out, or limit its obligation to indemnify under the broad default provisions of section 180.0851.<sup>25</sup> Additionally, the Wisconsin statutes provide that corporations may expand director and officer indemnification rights under section 180.0851, subject to the four enumerated prohibitions.<sup>26</sup>

In 1987, the Wisconsin legislature enacted a statute which expressly provides for indemnification of corporate managers against liabilities incurred under the federal securities laws.<sup>27</sup> Section 180.0859 provides:

- (1) It is the public policy of this state to require or permit indemnification, allowance of expenses and insurance for any liability incurred in connection with a proceeding involving securities reg-

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21. See WIS. STAT. §§ 180.0850-180.0859 (1991-92). The Wisconsin mandatory indemnity statute is one of the most liberal of any state's corporate indemnification provisions. See BISHOP, *supra* note 1, ch. 6 (comparing state statutes).

22. WIS. STAT. § 180.0851(1) (1991-92).

23. WIS. STAT. § 180.0851(2)(a) (1991-92). The term "liabilities" is defined to include judgments, settlements, penalties, and reasonable expenses. WIS. STAT. § 180.0851(4) (1991-92).

24. WIS. STAT. § 180.0851(2)(a) (1991-92); *cf.* DEL. CODE ANN. tit. 8, § 145(a) (1992); RMBCA § 8.51(a) (1983) (parallel standard under different language).

25. WIS. STAT. § 180.0852 (1991-92).

26. WIS. STAT. § 180.0858 (1991-92). This provision of the Wisconsin statutes is, in effect, largely redundant as § 180.0851(2) includes indemnification of all liabilities incurred by directors and officers in their capacity as corporate managers, subject to the four enumerated prohibitions. See WIS. STAT. § 180.0851(2).

27. WIS. STAT. § 180.059 (1987-88), *renumbered*, WIS. STAT. § 180.0859 (1991-92).

ulation described under sub. (2) to the extent required or permitted under ss. to 180.0858.

(2) Sections 180.0850 to 180.0858 apply, to the extent applicable to any other proceeding, to any proceeding involving a federal or state statute, rule or regulation regulating the offer, sale or purchase of securities, securities brokers or dealers, or investment companies or investment advisors.<sup>28</sup>

Section 180.0859 provides no substantive right of indemnification, but it is a reiteration of public policy in Wisconsin.<sup>29</sup> The right of indemnification under section 180.0859 is premised on a right contained in the other indemnity provisions of the Business Corporation Laws, namely section 180.0851 (mandatory indemnification)<sup>30</sup> and section 180.0858 (permissive additional indemnification).<sup>31</sup>

The right to indemnification under the Wisconsin statute for liabilities under federal securities law is not, therefore, absolute, but is limited by the four exclusions enumerated in section 180.0851(2).<sup>32</sup> These limits are significant in reconciling the antithetical Wisconsin statute and SEC policy.<sup>33</sup>

28. *Id.*; cf. *supra* note 10.

29. The language of § 180.0859 provides for indemnification against securities liabilities under §§ 180.0850 to 180.0858, but does not itself establish a right of indemnification. Wis. STAT. § 180.0859. This application has led some commentators to suggest that § 180.0859 is "poor drafting because the provision is redundant, is probably ineffective and may be confusing." DRAFTER'S NOTE FROM THE LEGISLATIVE REFERENCE BUREAU, Letter from Suzanne L. Hagopian to Don Dyke (Feb. 10, 1987). This statement was, however, removed from the final Note to the Wisconsin Legislature. DRAFTER'S NOTE FROM THE LEGISLATIVE REFERENCE BUREAU, Letter from Suzanne L. Hagopian to Don Dyke (Apr. 10, 1987).

30. Wis. STAT. § 180.0851 (1991-92); see *supra* notes 22-24 and accompanying text.

31. Wis. STAT. § 180.0858 (1991-92).

32. See Wis. STAT. § 180.0851(2)(a). In its analysis of Wisconsin Assembly Bill 301, the Legislative Reference Bureau noted that current law permits indemnification when the director or officer has acted in good faith and in a manner he or she believed to be in the best interests of the corporation. Wis. A.B. 301, Analysis by the Legislative Reference Bureau (1987). With respect to criminal violations, the standard is whether the officer or director had reasonable cause to believe the conduct was unlawful. *Id.* This language is not applied in the codified indemnification provisions of §§ 180.0850 to 180.0859. Cf. DEL. CODE ANN. tit. 8, § 145(a) (1992); RMBCA § 8.51(a) (1983). Therefore, its application as a practical limit on indemnification is somewhat unclear. See discussion *infra* part V (submitting as standard for permissible indemnification).

33. See *infra* part V (suggesting that such an implicit limit in the Wisconsin provisions is fundamental in reconciling the positions of the SEC and the Wisconsin legislature). This analysis is equally applicable to other state statutes, and bylaw provisions modeled after them, that encompass indemnification of federal securities liabilities. See *supra* notes 10, 32.

## II. THE SECURITIES AND EXCHANGE COMMISSION'S POSITION

Corporate indemnification of directors and officers may impede the federal government's ability to regulate corporations.<sup>34</sup> As a result, codified and uncodified public policy limitations are imposed to restrict corporate indemnification.<sup>35</sup> One such limitation is the SEC's long-standing position that indemnification of directors and officers for federal securities law violations is against public policy.<sup>36</sup> This position is premised on the view that the federal securities laws are intended to stimulate diligence and deter violations, and that indemnification would undermine these objectives.<sup>37</sup>

The broad purpose cited for the federal securities laws is deterrence. Congress created the SEC following the enactment of the Securities Act of 1933<sup>38</sup> and the Securities Exchange Act of 1934<sup>39</sup> (Securities Acts) to further establish regulations and police the securities industry.<sup>40</sup> The regulatory pattern which preceded the Securities Acts was a fragmented system of state laws that facilitated abuses and securities fraud.<sup>41</sup> The SEC has contended that "the overriding purpose of Congress was not so much to impose liability for the benefit of investors injured by a defective registration statement but rather to stimulate diligence on the part of those persons who are actually responsible for the preparation of registration statements."<sup>42</sup> Therefore, "[a] fundamental purpose, common to [the Securities Acts], was to substitute a philosophy of full disclosure

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34. OLSON & HATCH, *supra* note 6, § 4.04[1]; Oesterle, *supra* note 16, at 560-61.

35. An example of a codified limit is § 180.0851(2), which prohibits indemnification where liability is imposed on the basis of a breach of duty owed to the corporation, and the breach constitutes enumerated conduct. WIS. STAT. § 180.0851(2) (1991-92). An uncodified limit, based on policy concerns, is the premise that agents can not be reimbursed by their principals for fraudulent or willful violations. FLOYD R. MECHEM, *OUTLINES OF THE LAW OF AGENCY* §§ 570-73 (4th ed. 1952).

36. Items 510, 512 of Regulation S-K, 17 C.F.R. §§ 229.510, 229.512(h)(3) (1994); *see* BISHOP, *supra* note 1, ¶ 9.05.

37. *See* cases cited *supra* note 8.

38. The Securities Act of 1933 primarily adapted a disclosure philosophy by requiring registration of distributions of securities with the SEC. LOUIS LOSS, *FUNDAMENTALS OF SECURITIES REGULATION* 36 (2d ed. 1988).

39. The Securities Exchange Act of 1934 addresses post-distribution trading and focuses on continuous disclosure. *Id.*

40. *See* Loss, *supra* note 187, ch. 1D.

41. *Id.* ch. 1B; *see* Louis Loss, *The Conflict of Laws and the Blue Sky Laws*, 71 HARV. L. REV. 209 (1957).

42. Brief for SEC as Intervenor, *Feit v. Leasco Data Processing Equip. Corp.*, 332 F. Supp. 544 (E.D.N.Y. 1971), *quoted in* BISHOP, *supra* note 1, ¶ 9.10.

for the philosophy of *caveat emptor* and thus to achieve a high standard of business ethics in the securities industry."<sup>43</sup>

The Securities Acts<sup>44</sup> do not directly address the issue of indemnification of directors and officers.<sup>45</sup> Regulation S-K, however, states the SEC's position:

Insofar as indemnification for liabilities arising under the Securities Act of 1933 may be permitted to directors, officers or persons controlling the registrant pursuant to the foregoing provisions, the registrant has been informed that in the opinion of the Securities and Exchange Commission such indemnification is against public policy as expressed in the Act and is therefore unenforceable.<sup>46</sup>

Although the SEC's position is expressly limited to the Securities Act of 1933, the policy statement has generally been interpreted to apply to both Securities Acts.<sup>47</sup>

The SEC position is implemented in two ways.<sup>48</sup> The first method of implementation is through the SEC's discretionary power to grant or deny acceleration of the effective date of registration.<sup>49</sup> Item 512 re-

43. SEC v. Capital Gains Research Bureau, Inc., 375 U.S. 180, 186 (1963).

44. This Comment is limited to the Securities Acts of 1933 and 1934, which contain the relevant federal securities provisions affecting directors and officers. See BISHOP, *supra* note 1, ¶ 9.13 (listing pertinent director and officer liability provisions of the Securities Acts).

45. The Investment Company Act of 1940 and the Trust Indenture Act of 1939 do, however, provide limited treatment of indemnification. Loss, *supra* note 187, at 1035-36.

46. Item 510 of Regulation S-K, 17 C.F.R. § 229.510 (1994); see also 17 C.F.R. § 229.512(h)(3)(1994).

47. See BISHOP, *supra* note 1, ¶ 9.13. For example:

There is nothing in the regulations under the 1933 Act, to indicate the Commission's views, if any, on the validity of provisions for indemnification against liability or expense incurred in connection with litigation under the other federal securities statutes which it administers, although there seems to be no very obvious reason why its policy should be different with respect at least as to liability under the Securities Exchange Act of 1934.

*Id.* at 29; see, e.g., Heizer Corp. v. Ross, 601 F.2d 330 (7th Cir. 1979) (expanding the SEC policy to provisions of the 1934 Act); but cf. OLSON & HATCH, *supra* note 6, § 6.03[3] (citing precedent that the purpose of some provisions of the 1934 Act is compensatory).

48. Corporate indemnification provisions also are disclosed to the SEC through the proxy regulations that require corporations with securities registered under the Exchange Act to seek stockholder approval of agreements, bylaws, or charter amendments on indemnification. Loss, *supra* note 187, at 1037 n.134.

49. See 17 C.F.R. §§ 229.512, 230.461 (1994). The importance of acceleration to corporations has been noted by commentators:

As a final step in the registration process, companies set a price of the securities in light of current market data and amend the registration statement to reflect this price. The 1933 Act would normally delay the effectiveness of any registration statement for 20 days after any amendment is made, but, in recognition of the volatility of the markets



quires a corporation seeking acceleration to disclose in the registration statement that it has been advised that in the SEC's opinion indemnification of directors and officers for liabilities incurred under the federal securities laws is against public policy and is, therefore, unenforceable.<sup>50</sup> The regulation further requires disclosure to, and agreement with, the SEC that upon a claim for such indemnification, "unless in the opinion of [corporate] counsel the matter [of indemnification] has been settled by controlling precedent," the corporation will submit to the judiciary the question of whether such indemnity would violate public policy.<sup>51</sup> These requirements are generally referred to as the *Johnson & Johnson* formula.<sup>52</sup>

The second method applies to corporations not seeking acceleration under Item 512.<sup>53</sup> Item 510 requires disclosure of the SEC position against indemnification in the prospectus, in conjunction with "a brief description of the indemnification provisions relating to directors, officers and controlling persons of the registrant against liability arising under the Securities Act."<sup>54</sup> This shareholder disclosure provision differs from the requirements of the *Johnson & Johnson* formula under Item 512.<sup>55</sup> Presumably, the disclosure provision is an attempt to compel compliance through the threat of shareholder derivative action when indemnification contrary to the SEC position is contemplated.<sup>56</sup>

Although the SEC opposes indemnification against federal securities liabilities, it has not similarly opposed reducing director or officer exposure to federal securities liability through director and officer liability insurance (D&O insurance) or contribution. Rule 461 states that insurance against federal securities liabilities, whether paid for by the corporation, the insured, or a third party, is not considered a bar to acceleration of the registration date.<sup>57</sup> Contribution under federal secur-

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and the instability of the pricing data, the Commission has the discretion to accelerate the effective date of the registration statement so that the pricing and sale of the securities may take place almost simultaneously.

OLSON & HATCH, *supra* note 6, § 6.03[1]n.7; *see* Loss, *supra* note 187, at 128-29; BISHOP, *supra* note 1, ¶ 9.08. Because of this price instability, most public corporations are forced to seek acceleration, and thus, comply with Item 512. *Id.*

50. 17 C.F.R. § 229.512(h)(3)(1994).

51. *Id.*

52. The reference is based on an early registration statement in which the requirements were applied. Loss, *supra* note 187, at 129 n.21.

53. *See* 17 C.F.R. § 229.510 (1994).

54. *Id.*

55. *See supra* notes 50-51 and accompanying text.

56. *See generally* BISHOP, *supra* note 1, ¶ 9.14 (discussing purpose of disclosure).

57. 17 C.F.R. § 230.461(c) (1994).

ities law is also not precluded by the SEC based upon provisions in the Securities Acts.<sup>58</sup> "Those civil liability provisions of the 1933 and 1934 Acts that contemplate more than one defendant do contain provisions on contribution."<sup>59</sup> In addition to the regulatory provisions on contribution, contractual and implied rights of contribution have generally been held to support the policy of the federal securities laws.<sup>60</sup>

The SEC's position that indemnification undermines the deterrent policies of the Securities Acts is not in itself law, but is the policy opinion of a federal agency.<sup>61</sup> Therefore, the effectiveness of the SEC's position as a limit on corporate indemnification depends on the extent federal securities laws prohibit indemnification or preempt state indemnity laws.<sup>62</sup>

### III. STANDARD FOR FEDERAL PREEMPTION OF STATE INDEMNITY LAWS

The SEC's position on indemnification of directors and officers raises the issue of whether or not state indemnity laws may be preempted based on the purported conflict with the underlying purposes of federal securities laws. It is well-settled that regulations promulgated by a federal agency may preempt state law.<sup>63</sup> Preemption is not, however, lightly presumed, but is based on the intent of the act or regulation.<sup>64</sup> The intent to preempt can be either express, or inferred from "the pervasiveness of the federal scheme, the need for uniformity, or the danger of

58. See Section 11(f) of the 1933 Act, 15 U.S.C. § 77k(f) (1988); Sections 9(e) and 18(b) of the 1934 Act, 15 U.S.C. §§ 78i(e), 78r(b) (1988).

59. Loss, *supra* note 187, at 1036; see also *infra* note 60.

60. BISHOP, *supra* note 1, ¶ 9.10; see also *Musick, Peeler & Garrett v. Employers Ins.*, 113 S. Ct. 2085 (1993) (implied right to contribution in a Rule 10b-5 action as a matter of federal law). Contribution generally supports the public policy of the Securities Acts because it facilitates compensation of injured parties and prevents the injustice of imposing a penalty on only some who merit it. *Globus, Inc. v. Law Research Serv., Inc. (Globus II)*, 318 F. Supp. 955, (S.D.N.Y. 1970), *aff'd*, 442 F.2d 1346 (2d Cir. 1971), *cert. denied*, 404 U.S. 941 (1971); see also *Heizer Corp. v. Ross*, 601 F.2d 330, 334 (7th Cir. 1979).

61. See *supra* note 46 and accompanying text.

62. Similar to the Wisconsin provisions on indemnification, the actual application of the SEC policy statement enables the opposing positions to be reconciled. See *supra* note 33 and accompanying text; see also *infra* part V.

63. See *Fidelity Fed. Sav. & Loan Ass'n v. De La Cuesta*, 458 U.S. 141 (1982). "When Congress gives an administrator or agency discretion to regulate a field of commercial activity the agency's decision to preempt state regulations should be upheld unless it is clear that Congress would *not* have sanctioned a preemption of state authority in the area regulated by the agency." JOHN E. NOWAK ET AL., *CONSTITUTIONAL LAW* § 9.4, at 299 n.5 (3d ed. 1986).

64. See *New York State Dep't of Social Servs. v. Dublino*, 413 U.S. 405 (1973).

conflict between the enforcement of state laws and the administration of federal programs."<sup>65</sup>

The conflict between the policies of the federal Securities Acts and state indemnity law initially appears to constitute a basis for preemption.<sup>66</sup> However, the federal and state systems of corporate and securities regulation coexist. Federal law does not exercise complete dominion in the field of securities, and the states reserve broad powers to regulate within the industry.<sup>67</sup> Still, as one commentary has noted:

[e]ven where Congress has not entirely displaced state regulation in a specific area, state law is preempted to the extent that it actually conflicts with federal law. Such a conflict arises when compliance with both federal and state regulations is a physical impossibility, . . . or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.<sup>68</sup>

Under this standard, state corporate regulations may be preempted by the federal securities laws to the extent an actual conflict exists, or where the state act effectively undermines the policy underlying the federal regulations.<sup>69</sup> Thus, the preservation of state regulation of indemnification depends on balancing the competing concerns of indemnification and regulation.<sup>70</sup>

65. NOWAK ET AL., *supra* note 63, § 9.4, at 299 (footnotes omitted); see *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190, 203-04 (1983).

66. The Securities Acts' cited policy of deterrence appears to conflict with state indemnification. See *supra* part II; see also *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984), *reh'g denied*, 465 U.S. 1074 (1984), *on remand*, 769 F.2d 1451 (10th Cir. 1985), *cert. denied*, 476 U.S. 1104 (1986), *quoted in* NOWAK ET AL., *supra* note 63, § 9.4, at 299 n.5 (noting that state law is invalid if it "stands as an obstacle to the accomplishment of the full purposes and objectives of Congress").

67. Loss, *supra* note 187, at 8; see, e.g., *Baker, Watts & Co. v. Miles & Stockbridge*, 876 F.2d 1101, 1106-08 (4th Cir. 1989) (discussing limited federal preemption of state indemnification by Securities Acts).

68. NOWAK ET AL., *supra* note 63, §9.4, at 300 (quoting *Pacific Gas & Elec. Co.*, 461 U.S. at 204).

69. Cf. Section 28(a) of the 1934 Act, 15 U.S.C. § 78bb(a) (1988) ("The rights and remedies provided by this chapter shall be in addition to any and all other rights and remedies that may exist at law or in equity . . ."); see also *Baker, Watts & Co.*, 876 F.2d at 1108 (holding that the "right to indemnification may not be preempted in each and every circumstance"); *King v. Gibbs*, 876 F.2d 1275, 1279 n.5 (7th Cir. 1989) (noting defendant waived claim for indemnification under Delaware law).

70. Oesterle, *supra* note 16, at 560-61 (discussing problem posed by federal preemption of state law and balancing thresholds of liability); see also BISHOP, *supra* note 1, § 9.06, at 12 (positing the issue of whether liabilities imposed by Congress and the SEC are "so severe that a court will sympathize with an attempt to restore more comfortable modes of doing business?"). Although the judiciary evaluates the *validity* of an indemnification agreement or

## IV. JUDICIAL RESOLUTION OF THE CONFLICT

The SEC's current position has been stated for over forty years,<sup>71</sup> yet there has been no square judicial holding on whether the position preempts the states' right to govern corporate indemnification.<sup>72</sup> The SEC's position is not law.<sup>73</sup> Thus, whether state-regulated indemnification is preempted by the Securities Acts is based on the judiciary's case-by-case attempt to balance the competing concerns of indemnification and regulation.<sup>74</sup> The cases may be distinguished based on the issue involved: (1) the *right* to indemnification; (2) the indemnification of legal expenses; (3) the indemnification against egregious securities violations; and (4) the indemnification against negligent and strict liability securities violations.

A. *The Right To Indemnification Under Federal Securities Law*

One of the few issues the courts have concurred on, albeit for different reasons, is the lack of any implied right to indemnification under the Securities Acts. However, the courts have divided on the rationale for disallowing an implied right of indemnification against liabilities imposed under the federal securities laws.<sup>75</sup>

A majority of the courts have denied implied indemnification based on the underlying policies of the federal securities laws, in conjunction with the absence of any such remedy in the laws and regulations. In *Heizer Corp. v. Ross*,<sup>76</sup> the Seventh Circuit affirmed the district court's dismissal of cross-claims for indemnity against liabilities imposed under Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder.<sup>77</sup> The court stated "[w]hereas contribution supports the policy of securities legislation, indemnification tends to frustrate and defeat

statute in light of the federal law, it has not held that public policy precludes all indemnification. See, e.g., cases discussed *infra* part IV.D.

71. SEC Release No. 33-3519, 19 Fed. Reg. 6729 (Oct. 11, 1954), codified at 17 C.F.R. §§ 229.510, 229.512(h)(3) (1993).

72. BISHOP, *supra* note 1, ¶ 9.10.

73. See *supra* note 46 and accompanying text.

74. See *supra* parts I-II. Balancing the competing concerns resolves (1) permissibility and (2) preemption of indemnification against federal securities law violations, since both are governed by the underlying policy of the federal securities laws. See *supra* part III (discussing standard for preemption).

75. This division creates ambiguity as to the reconciliation of indemnification for securities violations, and demonstrates the inherent difficulty in formulating a resolution in light of the competing policies and issues of preemption. See discussion *infra* part V.

76. 601 F.2d 330 (7th Cir. 1979), *modified*, King v. Gibbs, 876 F.2d 1275 (7th Cir. 1989).

77. *Heizer Corp.*, 601 F.2d at 331; 15 U.S.C. § 78j(b) (1988); SEC Rule 10b-5, 17 C.F.R. § 240.10b-5 (1993).

it. A securities wrongdoer should not be permitted to escape loss by shifting his [or her] entire responsibility to another party."<sup>78</sup> The court additionally supported its holding, citing the general principle of indemnification: a person charged with seriously wrongful conduct is barred from restitution.<sup>79</sup> Lastly, the court of appeals held, whereas the Securities Acts provide for some measure of contribution, they do not provide for indemnification.<sup>80</sup> A majority of the federal circuit courts have followed the *Heizer Corp.* decision and its policy-based logic.<sup>81</sup>

Alternatively, some courts have held that no right to indemnification exists, while expressly ignoring the role of public policy. In *King v. Gibbs*,<sup>82</sup> the Seventh Circuit modified its position in *Heizer Corp.*<sup>83</sup> In *King*, a corporate controller sought indemnification from the corporation and other defendants for liabilities imposed under Section 10(b) of the Securities Exchange Act and Rule 10b-5 thereunder.<sup>84</sup> The court noted the controller did not seek indemnity pursuant to a contract. Thus, the court held indemnification would be available only if a right could be implied, or alternatively as a matter of federal common law.<sup>85</sup>

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78. *Heizer Corp.*, 601 F.2d at 334; see also *Globus v. Law Research Serv., Inc.*, 418 F.2d 1276, 1288 (2d Cir. 1969), cert. denied, 397 U.S. 913 (1970) (holding that "it would be against the public policy embodied in the federal securities legislation to . . . enforce [the] indemnification agreement" (quoting *Globus v. Law Research Serv., Inc.*, 287 F. Supp. 188, 199 (S.D.N.Y. 1968))).

79. *Heizer Corp.*, 601 F.2d at 334 (citing RESTATEMENT OF RESTITUTION § 88 (1937)).

80. *Heizer Corp.*, 601 F.2d at 334-35.

81. "Courts have rejected indemnity for a variety of securities violations because indemnity contravened 'the public policy enunciated by the federal securities laws.'" *First Golden Bancorporation v. Weizmann*, 942 F.2d 726, 728 (10th Cir. 1991) (quoting 2 A. BROMBERG & L. LOWENFELS, *SECURITIES FRAUD & COMMODITIES FRAUD* (2d ed.) § 5.7 (277), at 5:82:78); see *Baker, Watts & Co. v. Miles & Stockbridge*, 876 F.2d 1101, 1108 (4th Cir. 1989) (part of holding based on policy); *Stewart v. American Int'l Oil & Gas Co.*, 845 F.2d 196, 200 (9th Cir. 1988); *Stowell v. Ted S. Finkel Inv. Servs., Inc.*, 641 F.2d 323, 325 (5th Cir. 1981), reh'g denied, 647 F.2d 1123 (5th Cir. 1981); *Laventhol, Krekstein, Horwath & Horwath v. Horwitch*, 637 F.2d 672, 676 (9th Cir. 1980), cert. denied, 452 U.S. 963 (1981); *Globus*, 418 F.2d at 1288 (establishing framework for *Heizer Corp.* analysis).

82. 876 F.2d 1275 (7th Cir. 1989).

83. *Id.* at 1282-83; see also *Baker, Watts & Co.*, 876 F.2d at 1104-06 (part of holding based on implied right analysis). In modifying its position, the Seventh Circuit noted that the ultimate result remained "consistent with the only other circuit court cases dealing with the question of indemnification in the context of the federal securities laws." *King*, 876 F.2d at 1282; but cf. *infra* part V (analyzing the limits of public policy and preclusion of indemnification under federal securities laws).

84. *King*, 876 F.2d at 1276; 15 U.S.C. § 78j(b) (1988); SEC Rule 10b-5, 17 C.F.R. § 240.10b-5 (1993).

85. *King*, 876 F.2d at 1278-79. The court limited the controller's claim to federal law, holding that the state claims for indemnification were waived by failure to rely on Delaware law in the district court. *Id.* at 1279 n.5.

In *King*, the court of appeals did not base its decision on the underlying policies of the Securities Acts, as in *Heizer Corp.*,<sup>86</sup> but instead determined whether a right to indemnification existed.<sup>87</sup> In dismissing the possibility for remedy under an implied right, the court applied the four-part "implied right of action test" set forth in *Cort v. Ash*.<sup>88</sup> In light of the *Cort* test, the court held that Congress did not *intend* to create a private right of action for indemnification, nor were Section 10(b) and Rule 10b-5 enacted for the "especial benefit" of corporate directors and officers.<sup>89</sup> Therefore, no implied private cause of action for indemnification exists under the statute or the rule.<sup>90</sup> The court also dismissed any federal common law claim for indemnification, noting the general lack of federal common law remedies.<sup>91</sup>

### B. Indemnification of Legal Expenses

Unlike the *right* to indemnification, the permissibility of corporate reimbursement of director and officer expenses incurred in defending against an action brought under the federal securities laws is unclear. The SEC's position excludes from its "against public policy" language

86. *Heizer Corp. v. Ross*, 601 F.2d 330, 334 (7th Cir. 1979).

87. The court expressly dismissed policy concerns in determining the existence of an implied right to indemnification. *King*, 876 F.2d at 1283.

88. *Cort v. Ash*, 422 U.S. 66 (1975); *King*, 876 F.2d at 1279-82. The Court in *Cort* established a four-part test to determine whether a private right of action should be implied from a statute:

First, is the plaintiff "one of the class for whose *especial* benefit the statute was enacted," . . . ? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?

*Id.* at 1280 (quoting *Cort*, 422 U.S. at 78 (citations omitted)). The Seventh Circuit further noted the decision of the Supreme Court in *California v. Sierra Club*, 451 U.S. 287, 298 (1981), which places the principal consideration of the *Cort* test on congressional intent. *King*, 876 F.2d at 1281-82.

89. *King*, 876 F.2d at 1281. The legislative history of Section 10(b) and Rule 10b-5 demonstrates that the fundamental concern of the drafters was protection of investors, rather than the protection of directors and officers. *Id.*

90. *Id.* at 1282.

91. *Id.* The court cited *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), for the premise that there is generally no federal common law. *King*, 876 F.2d at 1282. Two exceptions are where a federal rule is necessitated to protect a federal interest, and where Congress provides the courts with the power to develop substantive law. *Id.* However, "[t]he right to indemnification falls into neither of those categories." *Id.*

and the *Johnson & Johnson* formula<sup>92</sup> expenses "incurred or paid by a director, officer or controlling person of the registrant in the successful defense of any action, suit or proceeding."<sup>93</sup>

This position has not been interpreted by the courts,<sup>94</sup> and raises two issues: (1) what constitutes a "successful" defense, and (2) does the SEC's enumerated position preclude indemnification of expenses incurred in an unsuccessful defense.<sup>95</sup> The first concern is whether a defendant who prevails on grounds other than the merits is entitled to indemnification.<sup>96</sup> Some commentators submit that indemnification of expenses is permissible only when an action is successfully defended on the merits.<sup>97</sup> Others have interpreted the provision as requiring mere success.<sup>98</sup> The lack of guidance by the SEC and the courts may be somewhat clarified by the Commission's position on indemnification of expenses incurred in an unsuccessful defense, as set forth below.<sup>99</sup>

The second issue is whether indemnification against expenses incurred in an unsuccessful defense is permissible. Indemnification against expenses incurred by a director or officer in the unsuccessful defense of

92. See *supra* notes 50-51 and accompanying text.

93. Item 512 of Regulation S-K, 17 C.F.R. § 229.512(h)(3) (1994); see *Goldstein v. Alodex Corp.*, 409 F. Supp. 1201 (E.D. Pa. 1976); see also BISHOP, *supra* note 1, ¶ 9.09 (discussing SEC position on expenses and the issues raised by the position).

94. BISHOP, *supra* note 1, ¶ 9.09; cf. *Heffernan v. Pacific Dunlop GNB Corp.*, 965 F.2d 369 (7th Cir. 1992); *Citadel Holding Corp. v. Roven*, 603 A.2d 818, 826 (Del. 1992) (discussing right to advances for reasonable expenses pursuant to a contract, but not addressing the ultimate right to indemnification of such expenses).

95. BISHOP, *supra* note 1, ¶ 9.09.

96. The short statute of limitations provided in Section 13 of the Securities Act, for example, constitutes such a basis. See *id.* The Wisconsin provision mandates indemnification for reasonable expenses incurred where the director or officer has been "successful on the merits or otherwise." WIS. STAT. § 180.0851(1) (1991-92).

97. BISHOP, *supra* note 1, ¶ 9.09 (citing 3 LOSS, SECURITIES REGULATION 277-83 (2d ed. 1961)).

98. BISHOP, *supra* note 1, ¶ 9.09.

Item 512 of Regulation S-K contains no [merit] limitation, and the very existence of Section 13 would seem to indicate that one who is eligible for its benefits ought to be able to take them without being penalized by losing his or her status as a "successful" defendant and thereby whatever right he or she might have to be indemnified for expenses—which will probably be much less than if he or she had to litigate the issues on the merits.

*Id.* Requiring success on the merits, thus, places pressure on directors and officers to pursue litigation to a final resolution, rather than settling or seeking dismissal. See *id.*

99. Permissive indemnification of expenses incurred successfully defending on grounds other than the merits arguably should not be precluded if unsuccessful defense expenses are indemnifiable. See *infra* notes 101-05 and accompanying text.

an egregious securities violation would likely be prohibited.<sup>100</sup> However, the SEC has suggested that indemnification for some unsuccessful defense expenses is permissible. In an *amicus curiae* brief submitted in a bankruptcy action,<sup>101</sup> the SEC stated: "Indemnification for costs incurred in the defense of the good faith exercise of their business judgment is an appropriate and necessary expense in order to attract qualified persons to serve in that capacity."<sup>102</sup> The judiciary has also indicated that indemnification of unsuccessful defense expenses would be sustained.<sup>103</sup> In *Commissioner v. Tellier*,<sup>104</sup> the United States Supreme Court held that public policy does not prohibit an income tax deduction for expenses incurred in the unsuccessful defense of criminal charges under the Securities Act of 1933.<sup>105</sup>

### C. Indemnification Against Egregious Securities Violations

The courts have concurred on the issue of whether corporate indemnification against federal securities liabilities requiring culpability greater than ordinary negligence is permissible. In *Globus v. Law Research Serv., Inc.*,<sup>106</sup> the Second Circuit established the fundamental principle that such indemnification is against public policy and is, therefore, impermissible, and any such agreement is unenforceable.<sup>107</sup>

In *Globus*, the Second Circuit was confronted with an underwriter's claim for indemnification from the issuing corporation for liabilities imposed by Section 17(a) of the 1933 Act and Section 10(b) of the 1934 Act.<sup>108</sup> The underwriter sought indemnification pursuant to a contractual provision for indemnity between the corporation and the underwriter.<sup>109</sup> The court dismissed the claim for indemnification on the basis that the contract violated public policy, citing both the SEC position and the rudimentary rule that reimbursement is prohibited for reckless, will-

100. See *infra* part IV.C (discussing permissibility of corporate indemnification against egregious securities law violations); see also *infra* note 117 and accompanying text.

101. Brief for SEC, *In re Baldwin-United Corp.*, 43 B.R. 443 (S.D. Ohio 1984).

102. Brief for SEC at 2-3, quoted in *Baldwin-United Corp.*, 43 B.R. at 447.

103. See BISHOP, *supra* note 1, ¶ 9.10; KNEPPER & BAILEY, *supra* note 3, § 20.02.

104. 383 U.S. 687 (1966).

105. *Id.* at 694-95; but cf. BISHOP, *supra* note 1, ¶ 9.10, at 20 (stating, "perhaps the Court would have given less weight to the desirability of enabling defendants in civil suits to procure the best possible defense.").

106. 418 F.2d 1276 (2d Cir. 1969), cert. denied, 397 U.S. 913 (1970).

107. *Id.* at 1288-89. The rule established in *Globus* is in accord with the SEC's position on indemnification. See *supra* part II (discussing SEC position).

108. *Id.* at 1278-79; 15 U.S.C. §§ 77q(a), 78j(b) (1988).

109. *Globus*, 418 F.2d at 1287; see also *id.* at 1287 n.14 (quoting the text of indemnity clause).



ful, or criminal misconduct.<sup>110</sup> However, the Second Circuit stated: “[I]t is important to emphasize at the outset that at this time we consider *only* the case where the underwriter has committed a sin graver than ordinary negligence.”<sup>111</sup> The court concluded that the underwriter’s actual knowledge of material misstatements, as found by the district court, constituted sufficient culpability to preclude indemnification against the securities violations under the rule.<sup>112</sup>

*Globus* is one of the few cases that deals with indemnification against federal securities violations pursuant to a contract,<sup>113</sup> and is the case cited most often for the proposition that indemnification is not available under the federal securities laws.<sup>114</sup> Indeed, no circuit court has attempted to limit the policy holding of *Globus*,<sup>115</sup> and some courts have sought to expand it.<sup>116</sup> As one commentator noted: “It is safe to assume that individuals held liable for fraudulent or willful misrepresentation in a registration statement would not be *entitled* to recover litigation expenses from the corporation, much less the amount of the judgment against them, under even the most generous [state indemnity] statute.”<sup>117</sup>

#### *D. Indemnification Against Negligent and Strict Liability Securities Violations*

The judiciary’s response to indemnification of liabilities imposed under the federal securities laws in cases where the director or officer’s culpability falls below the focus of *Globus*<sup>118</sup> has been both inconsistent and marked with ambiguity.

110. *Id.* at 1288-89. The Second Circuit held that prevention, not compensation, is the policy behind the securities laws. *Id.* Additionally, the court noted that corporate indemnification economically injures shareholders. *Id.*

111. *Id.* at 1288 (emphasis added).

112. *Id.*

113. Most of the cases which the judiciary has dealt with are attempts by parties to be indemnified as an implied right. *See, e.g.*, cases discussed *supra* part IV.A.

114. *See OLSON & HATCH, supra* note 6, § 6.03[3].

115. *See generally* BISHOP, *supra* note 1, ¶ 9.06.

116. *See* Gould v. American-Hawaiian S.S. Co., 387 F. Supp. 163 (D. Del. 1974), *vacated on other grounds*, 535 F.2d 761 (3d Cir. 1976); Odette v. Shearson, Hammill & Co., Inc., 394 F. Supp. 946 (S.D.N.Y. 1975) (relying on dicta of *Globus* to prohibit indemnification against liability incurred under negligent securities law provision).

117. BISHOP, *supra* note 1, ¶ 9.06, at 11.

118. *Globus*, 418 F.2d at 1288 (holding expressly limited to “sin[s] graver than ordinary negligence.”).

In *Globus*, the Second Circuit provided dicta on the issue of indemnification against negligent securities violations.<sup>119</sup> Several courts and the SEC have subsequently relied on these statements.<sup>120</sup> The *Globus* court stated that the fundamental goal of the Securities Act of 1933 was not to compensate, but rather to promote enforcement and deter negligence, and that the “*in terrorem* effect” of securities liability would be thwarted by indemnification<sup>121</sup>—including violations of Section 11 of the 1933 Act.<sup>122</sup>

Some courts have sought to expand the “above ordinary negligence” rule of *Globus*<sup>123</sup> by restricting indemnification against even negligent securities violations. In *Gould v. American-Hawaiian Steamship Co.*,<sup>124</sup> the district court held that the purpose of Section 14(a)<sup>125</sup> is regulatory, not compensatory, and “[o]nly a realistic possibility of liability for damages will encourage due diligence . . . .”<sup>126</sup> As a result, the court resolved that indemnity is impermissible and would “vitiate” the deterrence purpose of Section 14(a).<sup>127</sup>

The holding in *Gould* was further expanded in *Odette v. Shearson, Hammill & Co., Inc.*<sup>128</sup> In *Odette*, the court precluded indemnification against liabilities imposed under Rule 10b-5, Sections 12(2), 15(c), and

119. *Id.* at 1288-89.

120. *See Odette*, 394 F. Supp. at 954-55; *see also* Brief for SEC as Intervenor, *Feit v. Leasco Data Processing Equip. Corp.*, 332 F. Supp. 544 (E.D.N.Y. 1971) (reliance by SEC on *Globus* dicta).

121. *Globus*, 418 F.2d at 1288 (quoting 3 LOSS, SECURITIES REGULATION 1831 (2d ed. 1961)).

122. *Globus*, 418 F.2d at 1288. Section 11 of the Securities Act imposes a standard of ordinary negligence. 15 U.S.C. § 77k (1988).

123. 418 F.2d at 1288-89.

124. 387 F. Supp. 163 (D. Del. 1974), *vacated on other grounds*, 535 F.2d 761 (3d Cir. 1976).

125. Securities and Exchange Act of 1934, 15 U.S.C. § 78n(a) (1988). Section 14(a) regulates proxy regulations, and Rule 14a-9 establishes liability for false or misleading statements in proxies. 17 C.F.R. § 240.14a-9 (1994).

126. *Gould*, 387 F. Supp. at 168; *but cf. id.* at 167 (“most of the cases on indemnity under the Securities Acts can be read to support the proposition that an unsuccessful defendant may obtain indemnity from one significantly more responsible . . .”).

127. *Id.* at 168. The *Gould* court’s decision was based on indemnity as a matter of common law, not on a contract or bylaw provision. *Id.* at 166 n.4. Furthermore, the court presumably prohibited application of the broad Delaware indemnity statutes by holding that indemnification in securities cases is a matter of federal law. *Id.* at 167 n.7; *but cf.* *Koch Indus., Inc. v. Vosko*, 494 F.2d 713, 725 (10th Cir. 1974) (indemnification under the laws of the Commonwealth of the Bahamas); *King v. Gibbs*, 876 F.2d 1275, 1279 n.5 (7th Cir. 1989) (defendant waived claim for indemnification under Delaware law).

128. 394 F. Supp. 946 (S.D.N.Y. 1975).

17(a) of the 1933 Act.<sup>129</sup> The court based its prohibition on the *Globus* rule, holding that Rule 10b-5, Section 17(a), and Section 15(c) required a showing of knowledge or reckless disregard for the truth.<sup>130</sup> Additionally, the court noted that Section 12(2) imposes strict liability subject to the reasonable-care defense,<sup>131</sup> and ultimately reasoned that the public policy objections to indemnification cited in *Globus*<sup>132</sup> extended to individual federal securities laws requiring only negligent conduct.<sup>133</sup>

In *First Golden Bancorporation v. Weiszmann*,<sup>134</sup> the Tenth Circuit addressed both implied and contractual indemnification against Section 16(b)<sup>135</sup> insider trading liabilities.<sup>136</sup> The court in *First Golden Bancorporation* denied any implied right to indemnity under Section 16(b), because indemnification would contravene "the public policy enunciated by the federal securities laws."<sup>137</sup> The court held that the deterrence concerns cited by other jurisdictions applied to Section 16(b), although Section 16(b) does not require any proof of fraudulent intent.<sup>138</sup> Thus, the court opined that the public policy of Section 16(b)<sup>139</sup> prohibited

129. *Id.* at 954-56; 17 C.F.R. § 240.10b-5 (1994); 15 U.S.C. §§ 77l, 77q(c), 77o (1988).

130. *Odette*, 394 F. Supp. at 954-56. This requirement of scienter precludes any indemnification under the *Globus* rule. See *Globus*, 418 F.2d at 1288-89; see also discussion *supra* part IV.C.

131. *Odette*, 394 F. Supp. at 956. The standard of Section 12(2) is in essence ordinary negligence. *Id.*

132. *Id.* at 956; see also *Globus*, 418 F.2d at 1288-89 (purpose of Securities Acts is deterrence).

133. *Odette*, 394 F. Supp. at 957. "Indemnification must also be denied to encourage the reasonable care required by § 12(2)." *Id.* However, the district court relied on the indemnitee's egregious conduct. Thus, the court limited its holding by sidestepping the issue of preclusion of indemnification for merely negligent conduct; "[i]f Shearson were held liable under § 12(2) on a showing of mere negligence, [*Globus*] might not necessarily preclude the court from awarding indemnification." *Id.* at 956; see *id.* at 954 n.9 ("relevant fact" is egregious culpability); but cf. *Arden Way Assoc. v. Boesky*, 664 F. Supp. 863, 865 (S.D.N.Y. 1987) (indemnification against federal securities violations depends on questions of fact pertaining to relative culpability); *Adalman v. Baker, Watts & Co.*, 599 F. Supp. 752, 754-55 (D. Md. 1984).

134. 942 F.2d 726 (10th Cir. 1991).

135. Securities and Exchange Act of 1934, 15 U.S.C. § 78p(b) (1988).

136. *First Golden Bancorporation*, 942 F.2d at 728-29.

137. *Id.* at 728 (quoting 2 A. BROMBERG & L. LOWENFELS, SECURITIES FRAUD & COMMODITIES FRAUD § 5.7 (277), at 5:82:78). The court, however, limited the scope of its opinion to Section 16(b). *First Golden Bancorporation*, 942 F.2d at 729 n.2.

138. *Id.* at 729. The purpose of Section 16(b) was to deter transactions with a high potential for fraud. *Id.*

139. "We find a 'clear congressional intent to provide a catch-all, prophylactic remedy, not requiring proof of actual misconduct . . .'" *Id.* (quoting L. HAZEN, THE LAW OF SECURITIES REGULATION § 12.3, at 417 (1985)).

“any attempt by an insider to seek indemnification for his liability under section 16(b).”<sup>140</sup>

The legal precedent set by the case-by-case judicial review of permissible indemnification of directors and officers is difficult to discern, since many of the cases brought to the judiciary deal with implied rights of indemnification.<sup>141</sup> Further, the federal circuit courts have not substantially embraced the reasoning and broad extension of the *Globus* rule sought in *Gould* and *Odette*.<sup>142</sup> Some courts have held that indemnification is permissible where liability is imposed as a matter of law.<sup>143</sup> The Seventh Circuit has also suggested that indemnification may not be prohibited where the difference in the penalty imposed and degree of culpability are too disparate.<sup>144</sup>

140. *First Golden Bancorporation*, 942 F.2d at 729 (emphasis added). The term “any” includes express contractual indemnification based on the court’s citation of *Bunker Ramo-Eltra Corp. v. Fairchild Indus., Inc.*, 639 F. Supp. 409, 419 (D. Md. 1986), *dismissed without opinion*, 801 F.2d 393 (4th Cir. 1986) (agreement to indemnify against Section 16(b) liability is void as against public policy); *see also Diamond v. Oreamuno*, 301 N.Y.S.2d 78 (1969), *cited in Lavet*, *supra* note 2, at 414 (director found liable for insider trading cannot be deemed to have acted in good faith and in a manner not opposed to the best interests of the corporation).

141. *See cases cited supra* part IV.A.

142. *See Baker, Watts & Co. v. Miles & Stockbridge*, 876 F.2d 1101, 1108 (4th Cir. 1989) (“right to indemnification may not be [rejected] in each and every circumstance”); *King v. Gibbs*, 876 F.2d 1275, 1279 n.5 (7th Cir. 1989); *OLSON & HATCH, supra* note 6, § 6.03[3]; *but cf. Laventhol, Krekstein, Horwath & Horwath v. Horwitch*, 637 F.2d 672, 676 (9th Cir. 1980), *cert. denied*, 452 U.S. 963 (1981) (denying right of indemnification under Section 12(2) of the 1933 Act, relying on *Gould*). Additionally, neither case precludes indemnification pursuant to an agreement or statute where the director’s or officer’s culpability is low. *See supra* notes 126-27, 133. Indeed, the district courts subsequently adopted a test based on the relative culpability of the director or officer. *See Arden Way Assoc. v. Boesky*, 664 F. Supp. 863, 865 (S.D.N.Y. 1987) (permissible indemnification is a question of fact based on a director or officer’s personal fault, actual knowledge, contribution to the injury, and whether the liability is imputed or vicarious); *Adalman v. Baker, Watts & Co.*, 599 F. Supp. 752, 754-55 (D. Md. 1984).

143. *Arden Way Assoc.*, 664 F. Supp. at 865; *Maryville Academy v. Loeb Rhoades & Co., Inc.*, 530 F. Supp. 1061, 1071 (N.D. Ill. 1981); *Thomas v. Duralite Co., Inc.*, 386 F. Supp. 698, 727-28 (D. N.J. 1974), *aff’d in part, vacated in part*, 524 F.2d 577 (3d Cir. 1975), *aff’d without opinion*, 559 F.2d 1209 (3d Cir. 1977); *cf. Greenwald v. American Medicare Corp.*, 666 F. Supp. 489, 493 (S.D.N.Y. 1987) (defendant entitled opportunity to prove that he or she is without fault); *Odette v. Shearson, Hammill & Co., Inc.*, 394 F. Supp. 946, 957 n.14 (S.D.N.Y. 1975) (no resolution of whether defendant held liable without fault may recover indemnity); *but cf. EDWARD BRODSKY & M. PATRICIA ADAMSKI, LAW OF CORPORATE OFFICERS AND DIRECTORS: RIGHTS, DUTIES, AND LIABILITIES* § 19:07 (1984) (vicarious liability under the Securities Acts is based on controlling person provisions which require some culpability).

144. *See Madigan, Inc. v. Goodman*, 498 F.2d 233, 237-38 (7th Cir. 1974); *see also id.* at 238 (“If the . . . plaintiffs are too culpable to be entitled to indemnification, they may nonetheless be entitled to contribution.”).

Additional uncertainty has resulted from the courts' parallel resolution of whether state indemnity laws are preempted by the federal securities laws to the extent they permit indemnification against nonregional federal securities violations. The ambiguous precedent set by the federal circuit courts in *Baker, Watts & Co. v. Miles & Stockbridge*<sup>145</sup> and *King v. Gibbs*<sup>146</sup> establishes the possibility of preemption, but does not provide the limits of such preemption.<sup>147</sup>

In *Baker, Watts & Co.*, the Fourth Circuit held that no implied right of indemnification existed under Section 12(2) of the 1933 Act.<sup>148</sup> The court then considered the plaintiff's pendent state-law indemnity claims.<sup>149</sup> Citing the policy concerns raised in *Globus*, the Fourth Circuit held that the state law claims for indemnification were preempted by federal law.<sup>150</sup> However, the court continued, noting: "[a]lthough a right to indemnification may not be preempted in each and every circumstance, we reject plaintiff's assertion that the federal policy against indemnification extends only to intentional wrongdoing."<sup>151</sup>

Similarly, in *King*, the Seventh Circuit held that no implied or common law right of indemnification exists under the Securities Acts.<sup>152</sup> In *King*, the court held that the cross-claim for indemnification under Delaware law was waived by the defendant.<sup>153</sup> Further, the court noted that in *Koch Industries, Inc. v. Vosko*,<sup>154</sup> the Tenth Circuit recognized a right to indemnification under non-federal law.<sup>155</sup>

145. 876 F.2d 1101 (4th Cir. 1989).

146. 876 F.2d 1275 (7th Cir. 1989).

147. See *supra* part III (preemption limited to where state law conflicts with or undermines the fundamental purpose of the federal law).

148. *Baker, Watts & Co.*, 876 F.2d at 1104-06; 15 U.S.C. § 771 (1988).

149. *Baker, Watts & Co.*, 876 F.2d at 1106-08.

150. *Id.* at 1108. "[I]t would run counter to the basic policy of the federal securities laws to allow a securities wrongdoer such as Baker, Watts to shift its entire responsibility for federal violations on the basis of a collateral state action for indemnification." *Id.*

151. *Id.* Thus, the court failed to establish any standard for preemption below the culpability of the *Globus* rule, but instead relied on the "plainly adjudicated" wrongdoing of the plaintiff. *Id.*

152. *King*, 876 F.2d at 1283.

153. *Id.* at 1279 n.5. The court here, similar to *Baker, Watts & Co.*, failed to establish any standard for preemption, while implying that indemnification under state law may not be preempted.

154. 494 F.2d 713, 725 (10th Cir. 1974).

155. *King*, 876 F.2d at 1283 n.12. The court again intimates that indemnification may not be preempted by the federal securities laws. See *supra* note 153 and accompanying text.

## V. ANALYSIS

Although the public policies cited by the Wisconsin legislature and the SEC appear to be diametrically opposed, the actual application of the statute and the federal securities laws can be reconciled. The issue raised by the Wisconsin statutes on indemnification is: to what extent is statutorily sanctioned corporate indemnification of directors and officers permissible?<sup>156</sup> Section 180.0859 has not been challenged by the SEC, nor have the courts addressed the issue of the section's permissibility.<sup>157</sup> The resolution of the conflict is unclear based on the judiciary's limited treatment of indemnification against federal securities liabilities. Any reconciliation must take into account the fragmented judicial resolve, as well as the fundamental, competing concerns of indemnification.<sup>158</sup>

Indemnification under section 180.0859 is likely permissible to the extent it does not undermine the underlying policies of the federal securities laws. The federal securities laws enjoy limited preemption of state law; however, state indemnity law is preempted only to the extent that the provision actually conflicts with or undermines the federal law.<sup>159</sup> The policy opinion of the SEC is not dispositive, in and of itself, since it is merely the opinion of a federal agency. However, whether a state law effectively conflicts with or undermines federal law is based on the underlying policy of the individual law or regulation.<sup>160</sup>

Deterrence is cited as the underlying policy of a majority of the provisions of the Securities Acts applicable to directors and officers.<sup>161</sup>

This position has been posited by the SEC,<sup>162</sup> Congress,<sup>163</sup> and the courts.<sup>164</sup> Although indemnification cases have generally held that de-

156. The same issue arises as to contractual rights to indemnification, and is common to other states' laws as well. See *supra* notes 10, 74; *supra* part I (Wisconsin provision is a policy statement only, not a substantive right to indemnification); see also BISHOP, *supra* note 1, ch. 6 (summarizing state statutes and adoption by many states of non-exclusivity provisions).

157. See *supra* note 11.

158. The SEC, through the *Johnson & Johnson* formula, recognizes that the judiciary must provide the ultimate resolution. See *supra* text accompanying notes 50-52; see also *infra* note 173.

159. See *supra* part III.

160. *Id.*; see also discussion *supra* part IV.D.

161. See BISHOP, *supra* note 1, ¶ 9.13 (listing provisions of Securities Acts which bear particular relevance to director and officer liability).

162. Brief for SEC as Intervenor, *Feit v. Leasco Data Processing Equip. Corp.*, 332 F. Supp. 544 (E.D.N.Y. 1971).

163. H.R. REP. NO. 85, 73d Cong., 1st Sess. 3, 5, 9 (1933).

164. See, e.g., *Globus v. Law Research Serv., Inc.*, 418 F.2d 1276, 1289 (2d Cir. 1969), *cert. denied*, 397 U.S. 913 (1970).

terrence is the policy behind the individual securities provisions, there is authority to the contrary.<sup>165</sup>

Courts have often considered that the 1933 Act and the 1934 Act are closely related for purposes of construction.<sup>166</sup> However, other than the 1934 Act's antifraud provisions, "[t]he methodology of the 1934 Act—full disclosure of material information to shareholders on a timely basis—may itself form the principal deterrent to wrongdoers, making the primary goal of enforcement under the Act compensatory rather than punitive."<sup>167</sup> Thus, if the purpose of specific regulations of the Securities Acts is not deterrence, but compensation, indemnification pursuant to an agreement or state statute would not undermine these regulations.<sup>168</sup>

The SEC's broad prohibition of indemnification and concern for deterrence is further compromised by related provisions of the securities regulations. The express allowance of D&O insurance<sup>169</sup> and contribution<sup>170</sup> somewhat undermines the purported strict deterrence purpose of the Securities Acts.<sup>171</sup> Furthermore, the SEC's *Johnson & Johnson* formula of Item 512<sup>172</sup> recognizes that the judiciary maintains the ultimate authority to preclude indemnification, thus implicitly suggesting that limited indemnification may be permissible.<sup>173</sup>

165. See OLSON & HATCH, *supra* note 6, § 6.03[3] (citing congressional and judicial authority that deterrence is not, in fact, the policy underlying all of the provisions of the Securities Acts).

166. *Id.* (citing *Basic Inc. v. Levinson*, 485 U.S. 224 (1988); *Globus*, 418 F.2d at 1286).

167. OLSON & HATCH, *supra* note 6, § 6.03[3] (footnotes omitted); see *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 195 (1976) (comparing the principal purposes of the Securities Acts as cited in H.R. REP. NO. 85, 73d Cong., 1st Sess. 1-5 (1933) and S. REP. NO. 792, 73d Cong., 2d Sess. 1-5 (1934)).

168. See *supra* part III (standard for federal preemption applicable to Securities Acts).

169. Rule 461 of Regulation S-K, 17 C.F.R. § 230.461(c) (1994).

170. See *supra* notes 58-60 and accompanying text.

171. Contribution, in most cases, supports the purposes of the Securities Acts. See *supra* note 170. However, allowance of insurance appears to undermine those provisions of the Securities Acts that claim deterrence as the underlying purpose. Thus, some commentators have noted the irony between the SEC's position on indemnification and insurance:

"If it is against public policy for directors to make contractual arrangements relieving themselves of fear of liability for negligent violations of the 1933 Act, that public policy should forbid insurance. . . . But it has never been thought in such other contexts as automobile insurance that the role of civil liability in deterring careless driving makes it illegal for drivers to insure themselves against liability."

OLSON & HATCH, *supra* note 6, § 6.03[3], (quoting Joseph W. Bishop, Jr., *New Problems in Indemnifying and Insuring Directors: Protection Against Liability Under the Federal Securities Laws*, 1972 DUKE L.J. 1153, 1165).

172. 17 C.F.R. § 229.512(h)(3) (1994); see *supra* notes 50-51 and accompanying text.

173. Upon a claim for indemnification, a corporation agrees to, "unless . . . the matter has been settled by controlling precedent, submit to a court of appropriate jurisdiction the question

Another consideration in weighing the undermining effect of indemnification on the Securities Acts' provisions is whether the necessity of regulatory deterrence is diminished by other forms of corporate control. Deterrence of egregious managerial conduct is derived, in part, from the "market for corporate control."<sup>174</sup> The securities industry has become increasingly sophisticated since the 1930s, and the market is recognized as providing substantial control over director and officer conduct.<sup>175</sup> Thus, market efficiency provides additional managerial regulation through stock price adjustments, stockholder coups, and the threat of a takeover.<sup>176</sup>

To the extent that the purpose of the Securities Acts is held to be deterrence, the issue is whether indemnification undermines this purpose. The Wisconsin indemnity statutes preclude indemnification for self dealing, criminal violations, improper personal profits, and willful misconduct.<sup>177</sup> These restrictions run parallel to the egregious conduct of the *Globus* rule.<sup>178</sup> However, the Wisconsin mandatory provision,<sup>179</sup> unlike other states' statutory indemnification provisions, contains no general conduct limitation such as "good faith" and "in a manner he reasonably believed to be in or not opposed to the best interests of the corporation."<sup>180</sup> Therefore, based on the concurrence among the federal courts, Wisconsin statutory permission for indemnification for egregious

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whether such indemnification by it is against public policy . . ." 17 C.F.R. § 229.512(h)(3) (emphasis added). The italicized language implies that indemnification may not be preempted or precluded in all cases.

174. See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* § 14.7 (4th ed. 1992); see also Dennis Honabach & Roger Dennis, *The Seventh Circuit and the Market for Corporate Control*, 65 CHI.-KENT L. REV. 681 (1989); Richard S. Ruback, *An Economic View of the Market for Corporate Control*, 9 DEL. J. CORP. L. 613 (1984).

175. "If management is disregarding the shareholders' interests, the market price of the firm's common stock will fall." POSNER, *supra* note 174, § 14.7, at 412.

176. In balancing the policies of the SEC and the protection of corporate managers, the existence of additional controls should be considered to determine the scope of the purpose of the regulations, and their current application. See *supra* part III (preemption limited based on underlying purpose of federal law).

177. WIS. STAT. § 180.0851(2) (1991-92).

178. *Globus* precluded indemnification for violations of federal securities laws where the director or officer's scienter was above ordinary negligence. *Globus*, 418 F.2d at 1288-89.

179. WIS. STAT. § 180.0851(2).

180. See DEL. CODE ANN. tit. 8, § 145(a) (1992); RMBCA § 8.51(a) (1983). Although the express provisions of section 180.0851 do not contain such language, the Legislative Reference Bureau has noted that the current application of the indemnification statutes is limited to "good faith and in a manner he or she believed to be in the best interests of the corporation." See *supra* note 32 and accompanying text.



securities violations, should be preempted, and bylaw provisions modeled after it should be found unenforceable.<sup>181</sup>

The permissibility of indemnification against securities violations—pursuant to the Wisconsin statutes or other agreements—which fall below the egregious conduct standard of *Globus* likely depends on the culpability of the director or officer. The courts have not prohibited all indemnification of corporate managers for securities violations, but have generally relied on the conduct of the director or officer.<sup>182</sup> In *Odette*,<sup>183</sup> the court sidestepped the issue, relying in part on the egregious conduct of the officer, even though liability was imposed under Section 12 of the Securities Act—a negligence provision.<sup>184</sup> Additionally, the Southern District of New York subsequently held that whether indemnification is permissible depends on the specific culpability of the corporate manager.<sup>185</sup> Similarly, in *First Golden Bancorporation v. Weizmann*,<sup>186</sup> the holding was limited to Section 16(b) violations,<sup>187</sup> which are recognized as never being committed in good faith or in the best interests of the corporation.<sup>188</sup>

The reconciliation of the contrary positions, therefore, depends on establishing an appropriate threshold of liability which promotes the deterrence purposes of the Securities Acts,<sup>189</sup> as well as the state's legitimate interest in providing indemnity.<sup>190</sup>

Once more we must apply our tests of good faith, fair dealing, and maintenance of reasonable standards. Assuming that in a particular case the tests of good faith and fair dealing have been satisfied, we must proceed to investigate the area of permissible

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181. Based on both the express and implied limitations of section 180.0851(2), such indemnification is unlikely under the statute. See WIS. STAT. § 180.0851(2); *supra* note 180 and accompanying text.

182. See, e.g., *Baker, Watts & Co. v. Miles & Stockbridge*, 876 F.2d 1101, 1108 (4th Cir. 1989) ("Although a right to indemnification may not be preempted in each and every circumstance, we reject plaintiff's assertion that the federal policy against indemnification extends only to intentional wrongdoing."); *Globus*, 418 F.2d at 1288-89 (holding limited to conduct above ordinary negligence).

183. *Odette v. Shearson, Hammill & Co., Inc.*, 394 F. Supp. 946 (S.D.N.Y. 1975).

184. *Id.* at 956; see *supra* note 133.

185. *Arden Way Assoc. v. Boesky*, 664 F. Supp. 863, 865 (S.D.N.Y. 1987); see also *Adalman v. Baker, Watts & Co.*, 599 F. Supp. 752, 754-55 (D. Md. 1984).

186. 942 F.2d 726 (10th Cir. 1991).

187. Section 16(b) of the 1934 Act imposes strict liability. 15 U.S.C. § 78p(b) (1988).

188. *First Golden Bancorporation*, 942 F.2d at 729; see also *Diamond v. Oreamuno*, 301 N.Y.S.2d 78 (1969), cited in *Lavet*, *supra* note 2, at 414 (violation of Section 16(b) never in good faith or not opposed to the best interests of the corporation).

189. BISHOP, *supra* note 1, ¶ 9.06; see *Oesterle*, *supra* note 16, at 560-61.

190. *Oesterle*, *supra* note 16, at 560-61; see *supra* note 13 and accompanying text.

relaxation of standards. Are the standards imposed by the federal legislation so high that the lowered ceiling which is to be substituted will still be equal to or above normal levels of business conduct? Are the liabilities imposed by Congress so severe that a court will sympathize with an attempt to restore more comfortable modes of doing business?<sup>191</sup>

Some commentators suggest that the standard of negligence imposed by provisions of the Securities Acts, particularly in light of the "reasonable care" defense, is not so high as to permit modification.<sup>192</sup> However, as noted above, the federal courts have not embraced a strict prohibition against indemnification.<sup>193</sup> Further, the public policy of deterrence is not likely to be undermined by indemnification of directors and officers who act in good faith and in a manner not opposed to the best interests of the corporation.<sup>194</sup>

Imposing a standard of good faith, fair dealing, and nonopposition to the interests of the corporation would establish an appropriate balance between the purposes of the federal securities laws and the states' interest in providing liberal rights of indemnification to directors and officers.<sup>195</sup> Applying the broad indemnification provisions of the Wisconsin Business Corporation Laws, subject to this standard and the express limitations of section 180.0851(2),<sup>196</sup> comports with the rule set forth in *Globus* and the limited judicial precedent under other provisions of the Securities Acts.<sup>197</sup> Indemnification against liabilities imposed under the federal securities laws should, therefore, be permissible where the conduct of a director or officer complies with this standard.

Moreover, there is support for permitting indemnification against unsuccessful defense expenses under the above standard. Both the SEC

191. BISHOP, *supra* note 1, ¶ 9.06, at 12; *see* Oesterle, *supra* note 16, at 560-61.

192. Oesterle, *supra* note 16, at 560-61. Note however, not all liability imposed under the Securities Acts is subject to a "reasonable care" defense.

193. *See, e.g.*, cases discussed *supra* part IV.D.

194. This is particularly true in light of the compromised deterrent purpose of the federal securities laws and the legitimate policy of providing an adequate standard of protection to directors and officers. *See supra* notes 167-76 and accompanying text.

195. As noted, it is unlikely that indemnification of conduct which complies with such a standard would undermine the Securities Acts; while it concurrently satisfies the state and private requirements of protection of corporate managers. *See supra* part I. RMBCA, as well as Delaware and other states, expressly incorporate such a standard for indemnification of directors and officers. *See* RMBCA § 8.51(a) (1983); DEL. CODE ANN. tit. 8, § 145(a) (1992); BISHOP, *supra* note 1, ch. 6-7; *see also supra* note 180 (standard is implicit in § 180.0859 of the Wisconsin statutes).

196. WIS. STAT. § 180.0851(2) (1991-92).

197. *See* cases discussed *supra* notes 182-87.

and the judiciary have suggested such a standard as being necessary for the protection of directors and officers,<sup>198</sup> and no court has barred indemnification where the director or officer meets the "good faith" and other requirements of state law.<sup>199</sup>

#### CONCLUSION

Section 180.0859 of the Wisconsin Business Corporation Laws cites the public policy of the state on corporate indemnification against liabilities incurred under the federal securities laws. The enforceability of the provision or similar agreements is currently unclear, as the statute has not been challenged. The statute directly contradicts the public policy statement of the SEC. Although the judiciary has not provided a full resolution of the conflict, the current precedent and efforts to balance the competing interests provide a foundation for reconciling the opposing policy statements.

Indemnification is permissible only to the extent that it does not contravene public policy or the policies of the Securities Acts. Whether indemnification of managerial conduct undermines these policies depends on establishing an appropriate threshold of liability. The implicit standard of good faith, fair dealing, and non-opposition to the interests of the corporation satisfies judicial precedent and provides an appropriate balance between federal regulation and state indemnification. Therefore, indemnification for federal securities violations under the broad provisions of the Wisconsin statutes, or pursuant to an agreement or another state's corporate indemnity laws, is likely permissible to the extent that it complies with such a standard.

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198. See *supra* part IV.B.

199. BISHOP, *supra* note 1, ¶ 9.11; see also *id.* at 23 ("After all, lawyers' bills, however painful, are not usually intended to be a punishment or deterrent.").