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A COMPREHENSIVE APPROACH: DIRECTOR AND OFFICER INDEMNIFICATION IN WISCONSIN

I. INTRODUCTION

Directors and officers of profit and not-for-profit corporations are required to make numerous decisions each year. While these individuals believe they are acting in the best interest of the corporation, there may be others who disagree. As a result, legal proceedings are often instituted for the primary purpose of holding the corporate official liable for these decisions. Is it fair to require directors and officers to make corporate decisions and later hold them personally liable for these decisions?

The director and officer liability crisis of recent years¹ has led to the expansion of corporate laws which give added protection to corporate officials who act within the scope of their corporate duties.² These statutes often take the form of indemnification provisions, in which the corporation guarantees that any expenses incurred in the defense of an action will be paid by the corporation, as well as provisions which limit the personal liability of directors. Wisconsin has recently joined numerous other states in passing protective statutes of this kind.³ With the adoption of these statutes, directors and officers of Wisconsin corporations can make decisions without the unreasonable threat of outrageous litigation expenses or personal liability.

This Comment begins with a general overview of the development of director and officer indemnification and the problems which have arisen in the past few years. Next, the

1. See, e.g., *The D&O Crisis: Corporate Boardroom Woes Grow*, Nat'l L.J., Aug. 4, 1986, at 1; *Directors Insurance Drying Up*, N.Y. Times, Mar. 7, 1986, § D, at 1, col. 3; *Directors Feeling Trapped As Liability — Insurance Walls Close In*, Wis. Bus. J. Mag., July 21, 1986, at 3; *Risky Business: Liability Insurance is Difficult to Find Now For Directors, Officers*, Wall St. J., July 10, 1985, at 1.

2. During 1986, the states of Delaware, Indiana, New York and Ohio amended their corporation laws to include provisions for indemnification of corporate directors and officers. See *infra* text accompanying notes 47-92.

3. In the spring of 1987, the Wisconsin legislature passed Engrossed 1987 Assembly Bill 301 relating to the indemnification and liability of corporate directors and officers of profit and not-for-profit corporations. See *infra* text accompanying notes 103-43.

various approaches to statutory indemnification in four different states are analyzed, followed by a discussion of Wisconsin's approach to this subject. This section will include a discussion of Wisconsin's past and present indemnification and liability statutes, as well as a comparison of Wisconsin's new statutes with the approaches taken by the other states. This Comment concludes with a section dealing with alternative solutions to the statutory approach to director and officer indemnification.

II. REASONS FOR THE STATUTORY SOLUTION

A. *Director and Officer Liability Crisis*

Historically, at common law, a director had no right to indemnification⁴ of expenses incurred in an unsuccessful defense of an action, for it was believed that a director who was unsuccessful deserved to finance the litigation.⁵ On the other hand, when the defense proved successful, authorities were divided on the question of whether a common law right to indemnification existed.⁶ In 1941, New York adopted the first indemnification statute to rectify this inequality.⁷ Soon other states followed New York, and now all fifty states and the District of Columbia have enacted some type of indemnification legislation.⁸ Under these statutes, it was generally ac-

4. Indemnification in the corporate context generally means that the corporation protects a director or officer against liabilities which the individual may incur by reason of their service to the corporation. 13 W. FLETCHER, CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 6045.1 (rev. perm. ed. 1984). See generally Oesterle, *Limits on a Corporation's Protection of Its Directors and Officers from Personal Liability*, 1983 WIS. L. REV. 513.

5. This bar to indemnification at common law was for actions brought by shareholders, although exceptions to this might have existed where the corporation was substantially benefited. See, e.g., *Marine Midland Trust v. Forty Wall St. Corp.*, 215 N.Y.S.2d 720, 180 N.E.2d 909 (1961); Comment, *Indemnification of Management for Litigation Expenses*, 52 MICH. L. REV. 1023 (1954).

Under the common law, officers and employees might qualify as agents of the corporation and thus might obtain indemnification under agency principles. RESTATEMENT (SECOND) OF AGENCY § 439 (1981).

6. H. HENN & J. ALEXANDER, LAWS OF CORPORATIONS § 379, at 117 (3rd ed. 1983). See, e.g., *New York Dock Co. v. McCollem*, 173 Misc. 106, 16 N.Y.S.2d 844 (1939).

7. 13 W. FLETCHER, *supra* note 4, at § 6045.2.

8. *Id.* at § 6045.2. For an overview of the various provisions adopted by the 50 states and the District of Columbia, see *id.* at §§ 6045.2.05 - 6045.2.255.

cepted that corporate executives could receive indemnification for expenses incurred by reason of their position in the corporation.

However, these indemnification statutes were not always the answer. Some of the statutes conditioned a corporation's power to indemnify on whether the party was "successful" in defending the action, while others permitted indemnification only if the official was free from negligence.⁹ As a result, corporations began purchasing director and officer liability insurance (D&O insurance)¹⁰ in order to protect the officials when statutory relief was unavailable. This insurance coverage provided the corporate official with peace of mind when faced with the risks of litigation for an alleged breach of a corporate duty.

The number of D&O insurance claims have risen in recent years. This increase is due to several factors dealing with the courts and their interpretations of the law. Recent decisions have cast doubt upon the security afforded to directors by the business judgment rule.¹¹ These decisions have imposed novel and stringent interpretations of a director's duties of care¹² and loyalty.¹³ Additionally, there have been a number of cases which have tested the exposure of directors and officers under statutory law. Recent expansive interpretations of federal securities laws,¹⁴ including class action suits,¹⁵

9. *Id.* at § 6045.3.

10. "This insurance typically provides dual coverage in a single package: (1) reimbursement to the corporation for lawful indemnification payments to the executive under the applicable law; and (2) reimbursement to the executive for certain unindemnified losses." *Id.* at § 6045.4.

11. The business judgment rule exists to protect and promote the full and free exercise of the managerial power granted to corporate directors. *Zapata Corp. v. Maldonado*, 430 A.2d 779, 782 (Del. 1981). The rule itself "is a presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company." *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984).

12. *See, e.g., Hanson Trust PLC v. ML SCM Acquisition, Inc.*, 781 F.2d 264 (2d Cir. 1986); *Smith v. Van Gorkom*, 488 A.2d 858 (Del. 1985).

13. *See, e.g., Revlon, Inc. v. MacAndrews & Forbes Holdings*, 506 A.2d 173 (Del. 1985).

14. *See, e.g., Dirks v. Securities & Exch. Comm'n*, 463 U.S. 646 (1983).

15. *See, e.g., In re Baldwin United Corp.*, 607 F. Supp. 1312 (S.D.N.Y. 1985); *In re Marsh & McLennon Shareholder Litig.*, No. 13921-84 (N.Y. Sup. Ct. 1984).

and federal banking laws¹⁶ have been particularly troublesome. However, developments in the area of director and officer liability in the takeover context have had the most dramatic effect on the D&O insurance crisis. Courts have paid particular attention to the actions of directors and officers in a takeover situation, often scrutinizing takeover decisions more closely than ordinary business decisions.¹⁷

As a result of these happenings, D&O insurers drastically altered the coverage available to corporations. D&O insurers began raising insurance premiums¹⁸ while at the same time decreasing policy coverage.¹⁹ Even when corporations were still able to afford these policies, they found that D&O insurers were also increasing the deductible amounts of the policies²⁰ and excluding certain events from policy coverage.²¹

16. See, e.g., *del Junco v. Conover*, 682 F.2d 1338 (9th Cir. 1982), *cert. denied*, 459 U.S. 1146 (1983).

17. See, e.g., *Hanson Trust PLC*, 781 F.2d 264; *Unilever Acquisition Corp. v. Richardson-Vicks*, 618 F. Supp. 407 (S.D.N.Y. 1985); *Unocal Corp. v. Mesa Petroleum*, 493 A.2d 946 (Del. 1985).

In *Unocal*, the Delaware Supreme Court went so far as to rule that directors are not entitled to the normal presumption of the business judgment rule in the takeover context, but must show that their decision was reasonable. *Unocal*, 493 A.2d at 955.

18. A 1985 study of 592 corporations found that of those policies up for renewal, 68% faced premium increases which averaged 362%. Nat'l L.J., Aug. 4, 1986, at 29, *cited in* DiBlasi & Petricone, *Causes of the D&O Insurance Crisis in STRATEGIES FOR RESPONDING TO THE D&O INSURANCE CRISIS* 3 (1986). See also Behar & Clifford, *Kibitzing from the Board Room*, *FORBES*, Feb. 10, 1986 at 70.

19. According to industry sources, in 1985, policy coverage dropped from a range of between \$50 million and \$150 million to a range of between \$10 million and \$35 million. *L.A. Times*, July 14, 1985, at 5, col. 1, *cited in* DiBlasi & Petricone, *supra* note 18, at 3. See generally *The D&O Crisis: Corporate Boardroom Woes Grow*, Nat'l L.J. Aug. 4, 1986, at 1; *Risky Business: Liability Insurance is Difficult to Find Now for Directors and Officers*, *Wall St. J.*, July 10, 1985, at 1.

20. Once the standard deductible amount in a D&O insurance policy was five percent. The trend has been to rapidly increase this amount. *Legal Times*, Mar. 3, 1986, at 23. *cited in* DiBlasi & Petricone, *supra* note 18, at 4. In a 1986 study by the Wyatt Company, it was reported that during the second quarter of 1985, corporate deductibles were increased in 57% of renewals and the average charge was an increase of 221%. WYATT COMPANY, 1985 SUPPLEMENTARY REPORT ON DIRECTORS & OFFICERS LIABILITY INSURANCE *cited in* DiBlasi & Petricone, *supra* note 18, at 4.

21. D&O insurers have added a number of exclusions which have become the source of litigation. These include contests for corporate control, public offerings of securities and actions brought by a corporation against its insured officers or directors. WYATT COMPANY, 1985 SUPPLEMENTARY REPORT ON DIRECTORS & OFFICERS LIABILITY INSURANCE, *cited in* DiBlasi & Petricone, *supra* note 18, at 4. For a discussion of these exclusions in regard to hostile takeovers see Olson & Morgan, *D&O Exclusions Extend to Takeover Context*, *Legal Times*, Mar. 10, 1986, at 23.

Soon, D&O insurance policies became unavailable at any price.²² The entire D&O insurance industry began to deteriorate requiring corporations to seek alternatives in protecting its officials from increasing liability.

The crisis in the D&O insurance industry became apparent in many ways. Because of the unavailability of D&O insurance, corporate directors began resigning from their positions rather than risk exposure to personal liability.²³ Corporations have considered, and have even taken steps toward changing their corporate domicile to states with more protective legislation.²⁴ Finally, state legislatures have responded to the requests of corporations by adopting statutory measures aimed at providing further protection to directors and officers of corporations.²⁵ Because of these events, a massive effort has been undertaken to find a solution to this liability crisis.

B. Problems Facing Wisconsin Corporations

The problems associated with the director and officer liability crisis have had a significant impact on corporations domiciled in Wisconsin. Many directors and officers in Wisconsin corporations have felt the threat of personal liability during a time when corporate lawsuits are increasing in number.²⁶ Because of this dramatic increase in legal action, the availability and cost of D&O insurance has had an as-

22. WYATT COMPANY, 1985 SUPPLEMENTARY REPORT ON DIRECTORS & OFFICERS LIABILITY INSURANCE, *cited in* DiBlasi & Petricone, *supra* note 18, at 5.

23. During 1986, eight of Armada Corporation's ten directors, eight of Continental Steel's twelve directors, and three of South Texas Drilling's six directors resigned due to the increased legal risks of their positions. Herzel, Shepro & Katz, *Next-to-Last Word on Endangered Directors*, HARV. BUS. REV. 38 (Jan.-Feb. 1987). *See generally* *The Job Nobody Wants*, BUS. WEEK, Sept. 8, 1986, at 56-60.

24. A.O. Smith, a New York corporation, submitted a proxy statement to its shareholders to authorize, approve and adopt a Delaware reincorporation plan. Ware & Williams, *Director & Officer Liability: A Concern of Wisconsin Lawyers & Corporations*, 59 WIS. B. BULL. 8, 11 (Dec. 1986). Several major Wisconsin corporations have evaluated the alternative of reincorporating in another state in order to avoid director liability in Wisconsin. *Id.* at 12.

25. *See generally* Sommer & Goshi, *State Indemnification and Liability Statutes: A Study of Contrasts*, 10 DIRECTOR'S MONTHLY 3 (Nov. 1986).

26. *See generally* *The Job Nobody Wants*, BUS. WEEK, Sept. 8, 1986, at 56-60.

tounding effect on the type and amount of coverage Wisconsin corporations have been able to obtain.²⁷

Early in 1986, concern began to mount that unless the Wisconsin legislature provided some statutory protection for Wisconsin's directors and officers, certain adverse consequences would result.²⁸ Wisconsin corporations would have difficulty in recruiting and retaining competent people to serve in the roles of directors and officers. The possibility of Wisconsin corporations changing their state of incorporation to a more favorable jurisdiction was of growing concern. Many predicted, furthermore, that Wisconsin would continually be unable to attract new business.²⁹ It was clear the current law was inadequate to prevent these adverse consequences from occurring.

The problems Wisconsin corporations were experiencing under the repealed statute can best be visualized by examining three hypothetical corporations and the limited protection each experienced under the pre-1987 statutes.

1. Corporation X

Corporation X is a large publicly held business incorporated under the Wisconsin Business Corporation Law (WBCL).³⁰ This corporation has a board of directors, as well

27. An officer of one major Wisconsin corporation stated that its D&O insurance in 1985 required a \$28,000 premium for \$30 million in D&O insurance coverage. In 1986, the premium rose to \$280,000 with the amount of the policy dropping to \$10 million. *Boards Look to Outside Directors for Vitality*, Wis. Bus. J., Jan. 9, 1987, at 13. Another major Wisconsin corporation has experienced similar results. During a 12 year period in which no D&O claims were made, the corporation's coverage was cut, its deductibles increased and its premiums increased 5,000 %. *Directors Feeling Trapped as Liability — Insurance Walls Close In*, Wis. Bus. J., July 21, 1986, at 3.

28. Since early 1986, the Corporate and Business Law Committee of the State Bar of Wisconsin and its Director and Officer Subcommittee have accelerated their research efforts in an attempt to address the current needs of Wisconsin profit and not-for-profit corporations relating to director and officer liability and indemnification. Ware & Williams, *supra* note 24, at 9-10. About this same time, general counsel for six major Wisconsin corporations formed an ad hoc committee for the purpose of reviewing legislation and legal options pertaining to director liability and related matters. *Id.* at 63 n.33.

29. These adverse consequences were addressed in Committee Report No. 1 to the Legislative Council. LEGISLATIVE COUNCIL SPECIAL COMMITTEE ON LIABILITY LAW AND INSURANCE RECOMMENDATION 4-5 (Feb. 7, 1987) [hereinafter COMMITTEE REPORT].

30. WIS. STAT. ch. 180 (1985-86).

as a number of corporate officers, some of which also serve on the board.

Subsequent to a hostile takeover, a number of former directors are sued by shareholders of the corporation for an alleged breach of their fiduciary duties as directors.³¹ If these directors were serving without an indemnification contract³² or adequate insurance coverage, they would have to seek indemnification from the new board of directors. Assuming that the former directors were unsuccessful on the merits of their case,³³ under the indemnification statute in effect, the new board of directors have the discretion to indemnify the former directors, but only for expenses incurred.³⁴ Under the circumstances involved, such indemnification would be unlikely since the new board of directors would have nothing to gain. The new board of directors also has the ability to make the determination whether to indemnify,³⁵ as long as the new board members are not named in the shareholders' suit. However, if the new board denies indemnification, the former directors have no alternative but to accept this adverse determination and personally pay expenses due.

In addition to the director's difficulty in obtaining indemnification, the pre-1987 WBCL did not have a provision limit-

31. Such a suit is actually a derivative action:

The derivative action developed in equity to enable shareholders to sue in the corporation's name where those in control of the company refused to assert a claim belonging to it. The nature of the action is two-fold. First, it is the equivalent of a suit by the shareholders to compel the corporation to sue. Second, it is a suit by the corporation, asserted by the shareholders on its behalf, against those liable to it.

Aronson v. Lewis, 473 A.2d 805, 811 (Del. 1984).

32. An indemnification contract is an agreement between a corporation and one of its directors or officers in which the corporation agrees to pay any and all monetary liabilities of the individual in the event of an unsuccessful legal proceeding. See *infra* text accompanying notes 178-81.

33. If the directors were "successful on the merits" of their case, the Wisconsin statute required indemnification. WIS. STAT. § 180.05(3) (1985-86) (repealed 1987). See *infra* text accompanying note 94.

34. If the former directors were sued in an action brought by a third party, the new board of directors would still have the choice of whether to indemnify. However, such indemnification could also extend to fines, judgments and settlements incurred by the indemnified party. WIS. STAT. § 180.05(1)(1985-86) (repealed 1987).

35. Before indemnification may occur, a determination must be made that such is in fact proper. The Wisconsin Statutes provide for a number of ways in which the determination may be made, one of which is by a quorum of disinterested directors. *Id.* at § 180.05(4) (1985-86) (repealed 1987).

ing the director's personal liability in such circumstances. If the director was unsuccessful on the merits, he or she would be personally liable for any expenses or judgments incurred. The only protection the director would have would be his limited coverage under a D&O insurance policy, if available.

2. Corporation Y

Corporation Y is a small Wisconsin business incorporated under section 180.995, Wisconsin's close corporation statute.³⁶ This corporation operates without a board of directors and the day-to-day business decisions are made by four corporate officers who are also shareholders.

Because of a few poor business decisions by the president of the corporation, the other officers/shareholders bring suit alleging that the president breached his duty to act in good faith and in the best interests of the corporation. Under the indemnification statutes in effect at this time,³⁷ the corporation could indemnify the president for expenses in the event the president was not successful on the merits in defense of the action. However, such indemnification is not allowed if the president is adjudged to be liable for negligence or misconduct in his duties as an officer.³⁸ Therefore, the president has little chance of being indemnified for his expenses, since the decision whether to indemnify is left to the shareholders who brought the suit.³⁹

Even if indemnification is allowed, the corporation must be solvent, because if a corporation is insolvent, it would have no money with which to pay the president's expenses. Because of this limited indemnification provision⁴⁰ and the possibility of insolvency, many corporations need to seek

36. *Id.* at § 180.995. In order to qualify as a closely held corporation in Wisconsin, a corporation must have 50 or fewer shareholders and must include a statement in its articles of incorporation that the corporation is in fact closely held. *Id.*

37. *Id.* at § 180.05 (1985-86) (repealed 1987). For a complete discussion of the repealed Wisconsin indemnification provisions, see *infra* text accompanying notes 93-102.

38. WIS. STAT. § 180.05(2).

39. *Id.* at § 180.05(4).

40. *Id.* at § 180.05.

alternative protection through D&O insurance.⁴¹ This insurance will protect the directors or officers to the extent they are insured, and most importantly, in the event the corporation becomes insolvent. However, D&O insurance is especially difficult for smaller corporations to obtain since it is often unavailable. When it is available, it usually requires high premiums which the smaller corporations often cannot afford.

3. Corporation Z

Corporation Z is a not-for-profit corporation incorporated under Chapter 181 of the Wisconsin Statutes. The daily operation of this corporation is conducted by both a board of directors and officers who act for the benefit of the members.⁴²

Based upon an alleged failure of the directors and officers to take certain action, a third party institutes a legal proceeding.⁴³ This third party alleges that because of the failure to act, the corporate officials are liable for negligence. Under the Wisconsin statutes in effect prior to the 1987 changes,⁴⁴ the corporation could have indemnified its directors and officers against expenses, judgments, fines and settlements incurred in connection with the proceeding.⁴⁵ In these circumstances, it is very likely that the directors of this not-for-profit corporation would indemnify the corporate officials,⁴⁶ since the action was brought by a third party. With no hostile feelings between the

41. Through indemnification insurance a third party assumes the risk of indemnifying the insured party against monetary liabilities arising from an unsuccessful legal proceeding. *See infra* text accompanying notes 172-77.

42. Examples of this type of corporation might be charitable organizations, educational institutions or associations which conduct business for the benefit of its members, but without expectation of profits.

43. *See, e.g., Frances T. v. Village Green Owner's Ass'n*, 42 Cal. 3d 490, 723 P.2d 573, 229 Cal. Rptr. 456 (1986) (plaintiff sued non-profit condominium corporation for negligently deciding not to install exterior yard lights prior to plaintiff being attacked on the premises).

44. WIS. STAT. § 181.045 (1985-86) (repealed 1987).

45. *Id.* at § 181.045(1). Indemnification was possible as long as the director or officer acted in good faith and in the best interests of the corporation. Under no circumstances could the director or officer be indemnified if his or her conduct was found to be grossly negligent. *Id.*

46. Like profit corporations, a not-for-profit corporation must make a determination that indemnification is proper under the circumstances before it will be allowed. *Id.* at § 181.045(4).

directors and the accused officials, indemnification probably would be granted.

However, the pre-1987 director and officer statutes did not have any provision regarding the limitation of the director's or officer's personal liability. Under these circumstances, the party bringing the action could name each director and officer individually, thus exposing the corporate official to personal liability. The Wisconsin statute provided no protection against this. Therefore, the directors and officers named in the suit would not be protected unless they were already covered by a liability insurance policy; a policy which few not-for-profit corporations maintain.

III. OTHER STATE APPROACHES TO STATUTORY INDEMNIFICATION OF DIRECTORS AND OFFICERS

A. Delaware

The Delaware legislature has enacted legislation which allows a Delaware corporation to limit or eliminate the personal liability of a director⁴⁷ for monetary damages for breach of a fiduciary duty, subject to certain limitations.⁴⁸ Such a provision must appear in the corporation's certificate of incorporation, thus requiring shareholder approval.⁴⁹ To obtain shareholder approval, it is necessary for the existing corporation to submit proxy statements to its shareholders to initiate a vote to amend its charter. In this manner, a corporation could adopt a provision which places a ceiling on a director's liability for certain breaches of the director's duty, rather than

47. The Delaware legislature has decided to extend this limitation of liability to directors only. The liability of corporate officers, employees and agents is not affected. DEL. CODE ANN. tit. 8, § 102(b)(7) (Supp. 1986).

48. *Id.* The Delaware legislature has determined that the liability of a director cannot be limited in the following situations:

(i) For any breach of the director's duty of loyalty to the corporation or its shareholders; (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 [unlawful payment of dividends, stock purchase or redemption]; or (iv) for any transaction from which the director derived an improper personal benefit. No such provision shall eliminate or limit the liability of a director for any act or omission occurring prior to the date when such provision becomes effective.

Id.

49. *Id.*

eliminating such liability altogether.⁵⁰ By allowing the shareholders the ability to limit liability, rather than having liability limited by statute, the Delaware legislature has made it possible for such limitations to be rather flexible.⁵¹ In all likelihood, such flexibility will encourage corporations to limit liability to the fullest extent permitted by law.

Depending upon the circumstances of an action, the Delaware statutes provide for both mandatory and permissive indemnification of directors and officers.⁵² To the extent a director or officer is successful on the merits in defense of any lawsuit, the corporation must indemnify that director or officer for expenses actually incurred.⁵³ However, if a director or officer is not successful on the merits, the corporation may choose to indemnify that person as long as such official acted in good faith and in a manner he reasonably believed to be in the best interests of the corporation.⁵⁴ When such permissive indemnification occurs, a determination must be made that such indemnification is proper under the circumstances because the person to be indemnified has met the applicable standards of conduct. This determination shall be made by a quorum of disinterested directors, by independent legal counsel or by the stockholders.⁵⁵

At any time during the course of pending litigation, a corporation may advance payment of expenses to a director or officer.⁵⁶ This payment may be advanced on a case-by-case determination, or the corporation may adopt a general authorization of advancement of expenses, provided that the di-

50. AMERICAN CORPORATE COUNSEL ASSOCIATION TASK GROUP ON LIABILITY OF DIRECTORS AND OFFICERS, REPORT ON LEGISLATIVE MODELS 10 (1987) [hereinafter TASK GROUP REPORT].

51. *Id.*

52. Such indemnification may also be extended to employees and agents. DEL. CODE ANN. tit. 8, § 145 (Supp. 1986).

53. *Id.* at § 145(c). Such expenses also include attorneys' fees. *Id.*

54. *Id.* at § 145(a). The extent of such indemnification depends on the type of action involved. If the action was brought by a third party, the corporation may indemnify that director or officer against judgments, settlements and/or expenses. *Id.* However, if the action is derivative in nature, the corporation may only indemnify that official for reasonable expenses, provided that the official is not adjudged to be liable to the corporation, although a court may award reasonable expenses if it deems appropriate despite an adjudication of liability. *Id.* at § 145(b).

55. *Id.* at § 145(d).

56. *Id.* at § 145(e).

rector or officer promises to repay "if it shall ultimately be determined that he is not entitled to be indemnified."⁵⁷ By allowing such an advancement of expenses, a director or officer can be assured of the financial assistance required for an adequate defense.

Delaware, like many states, does not prohibit indemnification in situations beyond the boundaries explicitly authorized by the statutes. In adopting a nonexclusive indemnification statute,⁵⁸ the Delaware legislature permits a corporation to provide for broad, permissive indemnification and advancement of expenses pursuant to by-law, agreement, or a vote of the shareholders or directors.⁵⁹

B. Indiana

In drafting director liability statutes, the Indiana legislature has adopted an objective standard of care for directors⁶⁰ which is based upon "an ordinarily prudent person in a like position."⁶¹ By conforming to this standard, a director will avoid liability⁶² for actions taken within his capacity as director, unless he breaches or fails to perform his duties as a director and such breach constitutes willful misconduct or recklessness.⁶³ Because of this "willful misconduct or recklessness" requirement, a director will be shielded from liability for any negligent or inadvertent breach of duty of care, including all legal and equitable remedies.

Indiana has adopted mandatory indemnification of its directors and officers in situations in which the director or of-

57. *Id.*

58. *Id.* at § 145(f).

59. *Id.*

60. The Indiana statutes do not contain a standard of conduct for officers.

61. IND. CODE ANN. § 23-1-35-1(a) (Burns Supp. 1987). A director is also required to discharge his duties in "good faith" and "in a manner the director reasonably believes to be in the best interests of the corporation." *Id.*

62. The limitation of a director's personal liability is presumptively available in all legal and equitable actions since the statutory liability provisions list no exception. *See id.* at § 23-1-35-1(e).

63. *Id.* This section exempts directors from all forms of liability stemming from good faith conduct, even if such conduct is arguably negligent, so long as there is no wilful misconduct or recklessness. TASK GROUP REPORT, *supra* note 50, at 8.

ficer is wholly successful⁶⁴ on the merits in any litigation dealing with his role as a director or officer.⁶⁵ While this statutory provision is mandatory, the Indiana legislature does allow the shareholders of a corporation to limit this mandatory indemnification in its articles of incorporation.⁶⁶

Indiana, unlike other states, does not make a distinction between third party and derivative actions when it comes to permissive indemnification.⁶⁷ Under Indiana law, a corporation may indemnify a director or officer so long as the individual's conduct was in good faith and the individual reasonably believed that the official conduct was in the best interests of the corporation, or that his conduct was at least not opposed to its best interests.⁶⁸ However, prior to such indemnification, a determination is necessary with respect to whether the director or officer has met the applicable standard of conduct.⁶⁹

During the course of the proceedings, a corporation may advance to a director or officer reasonable expenses, provided that the director or officer furnishes the corporation with a written affirmation of the official's good faith belief that he or she has met that standard of conduct required for permissive indemnification.⁷⁰ The director or officer is also required to

64. The requirement that the individual be "wholly successful" on the merits limits indemnification to situations in which an entire proceeding is disposed of on a basis which involves a finding of non-liability. TASK GROUP REPORT, *supra* note 50, at 15.

65. IND. CODE ANN. § 23-1-37-9 (Burns Supp. 1987). The right to mandatory indemnification of a director is also extended to officers, employees and agents. *Id.* at § 23-1-37-13. As long as a director or officer is successful in his or her defense, and the expenses are reasonable, that officer or director shall be entitled to mandatory indemnification. *Id.* at § 23-1-37-9.

66. *Id.* at § 23-1-37-9.

67. Because of this lack of distinction, a corporation is not limited in its ability to reimburse a director or officer for reasonable expenses, as well as for judgment or settlement amounts.

68. IND. CODE ANN. § 23-1-37-8(a) (Burns Supp. 1987). In criminal proceedings, the corporation may indemnify an individual if the individual had reasonable cause to believe the individual's conduct was lawful or had no reasonable cause to believe the individual's conduct was unlawful. *Id.*

69. *Id.* at § 23-1-37-12. This section provides for these determinations to be made by either (1) a majority vote of a quorum of members of the board of directors who are not parties to the action; (2) if such quorum cannot be obtained, by a majority vote of a committee of non-party directors; (3) by special legal counsel selected by non-party board members; or (4) by the shareholders, except that shares of directors or officers who are parties to the suit cannot be voted. *Id.*

70. *Id.* at § 23-1-37-10(a)(1). For the standard of conduct required for permissive indemnification, see *supra* note 68.

furnish a written promise to repay the advance in the event it is ultimately determined that the director or officer did not meet the standard of conduct.⁷¹

At all times under Indiana law, the shareholders or directors have the right to adopt other methods of indemnification covering directors, officers and employees. The Indiana statute expressly "does not exclude any other rights to indemnification and advance for expenses" that a person may have under the articles of incorporation or by-laws, a resolution of the board of directors or shareholders, or any other authorization ratified by a majority vote of all the voting shares then issued and outstanding.⁷² Thus, a director or officer will not have to rely solely on the provisions of the statute, but may also be indemnified by contract or by a provision in the corporation's charter.

C. *New York*

The most significant distinction between the New York legislation and the approach taken by Delaware and Indiana is that the New York Business Corporation Law makes no specific provision limiting a director's personal liability. The New York legislature addresses the liability issue by increasing the indemnification rights of directors and officers.⁷³ Such an approach certainly broadens the areas in which indemnification may be allowed, but does not address a director's exposure to excessively high risks of personal liability by serving on corporate boards.⁷⁴

Like other states, New York has adopted a mandatory indemnification provision. This provision requires a corporation to indemnify a director or officer in the defense of a civil or criminal action whenever that person is successful, whether on the merits or otherwise.⁷⁵

The New York approach to permissive indemnification in third party actions, like numerous other states, allows a corporation to indemnify a director or officer if that person "ac-

71. IND. CODE ANN. § 23-1-37-10(a)(2) (Burns Supp. 1987).

72. *Id.* at § 23-1-37-15.

73. TASK GROUP REPORT, *supra* note 50, at 3.

74. *Id.* at 1.

75. N.Y. BUS. CORP. LAW § 723(a) (McKinney Supp. 1987).

ted in good faith [and] for a purpose which he reasonably believed to be in . . . the best interests of the corporation.”⁷⁶ Such indemnification may be for judgments, fines, amounts paid in settlement and reasonable expenses, including attorney’s fees.⁷⁷ Thus, even if a director or officer is adjudged to be liable in a third party action, he or she may still be indemnified by the corporation.

In derivative actions, a New York corporation may indemnify a person against amounts paid in settlement and reasonable expenses under the same standards as in third party actions.⁷⁸ However, such permissive indemnification is further limited. Under New York law, a corporation is not allowed to indemnify its directors or officers for “a threatened action, or a pending action which is settled or otherwise disposed of, or any claim, issue or matter as to which such person shall have been adjudged to be liable to the corporation.”⁷⁹

In any type of permissive indemnification, proper authorization must be granted before indemnification can be effective. Under New York law, this authorization is to be made by the corporation itself.⁸⁰ By allowing the corporation to determine whether or not indemnification is proper, maximum flexibility is achieved in determining whether or not the individual to be indemnified has met the applicable standard of conduct.⁸¹ Like most states, New York allows a corporation to advance expenses prior to the final disposition of such action or pro-

76. *Id.* at § 722(a). New York’s permissive indemnification statute adds that conduct undertaken in service for any entity other than the corporation (both profit and not-for-profit) need only be “not opposed to, the best interests of the corporation.” In criminal actions, the corporation may indemnify if the person “had no reasonable cause to believe that his conduct was unlawful.” *Id.*

77. *Id.*

78. *See supra* text accompanying note 76.

79. N.Y. BUS. CORP. LAW § 722(c) (McKinney Supp. 1987). However, this section does allow a court, upon application, to determine that the person is entitled to indemnification for such portion of the settlement and expenses as the court deems proper. *Id.*

80. *Id.* at § 723(b). This provision allows authorization to be made by (1) the board of directors acting by a quorum consisting of directors who are not parties to such action or proceeding; (2) by the board of directors upon a written opinion by independent legal counsel that indemnification is proper in the circumstances because the applicable standard of conduct has been met; or (3) by the shareholders upon finding that the director or officer has met the applicable standard of conduct. *Id.*

81. For the “applicable standard of conduct,” see *supra* text accompanying note 76.

ceeding.⁸² However, "all expenses . . . shall be repaid in case the person receiving such advancement or allowance is ultimately found . . . not to be entitled to indemnification or, where indemnification is granted, to the extent the expenses so advanced . . . exceed the indemnification to which he is entitled."⁸³

Other non-statutory methods of indemnification are allowed under New York law, giving a corporation other available options under which it can indemnify its directors and officers.⁸⁴ However, such alternative methods of indemnification are prohibited in instances of personal gain and/or bad faith on the part of the individual to be indemnified.⁸⁵

D. Ohio

The Ohio legislature has adopted a provision in which a director of an Ohio corporation will not be liable in damages⁸⁶ for action or inaction by a director unless it is proved by clear and convincing evidence that the director's conduct was the product of deliberate intent to cause injury to the corporation or reckless disregard for the best interests of the corporation.⁸⁷ This "clear and convincing evidence" standard places the burden of proof on what is already a high standard of "reckless disregard" or "deliberate intent." Therefore, a director will

82. N.Y. BUS. CORP. LAW § 723(c) (McKinney Supp. 1987). This section requires the director or officer to submit to the corporation a promise to repay expenses advanced in the event the director or officer is not successful. *Id.*

83. *Id.* at § 725(a).

84. *Id.* at § 721. This section allows for the provision of other rights of indemnification in the certificate of incorporation, by-laws, a resolution of the shareholders or directors, or by an indemnification agreement. *Id.*

85. *Id.* Section 721 provides in part:

[N]o indemnification may be made to or on behalf of any director or officer if a judgment or other final adjudication adverse to the director or officer establishes that his acts were committed in bad faith or were the result of active and deliberate dishonesty and were material to the cause of action so adjudicated, or that he personally gained in fact a financial profit or other advantage to which he was not legally entitled.

Id.

86. The limitation of liability applies only to personal liability for monetary damages. Equitable remedies are not affected. OHIO REV. CODE ANN. § 1701.59(D) (Page Supp. 1986).

87. *Id.* This provision automatically applies to all Ohio corporations, unless the corporation decides to "opt out" by adopting a provision in its articles of incorporation or regulations. *Id.*

be protected against liability for any negligent or inadvertent breaches of his or her duty as a director.

The Ohio indemnification provisions are very similar to those of Delaware and New York.⁸⁸ An officer or director must be indemnified to the extent that he or she has been successful on the merits in defense of any claim.⁸⁹ In a third party action, a corporation may choose to indemnify the director or officer as long as the official acted in good faith and in a manner he or she reasonably believed to be in the best interests of the corporation.⁹⁰ In derivative actions,⁹¹ the standards are generally similar, but a corporation cannot indemnify the director or officer if the individual has been adjudged liable for negligence or misconduct in the performance of his or her official duty.⁹²

IV. WISCONSIN'S APPROACH TO STATUTORY INDEMNIFICATION AND THE LIMITATION ON PERSONAL LIABILITY

In order to better understand the effect that the recently passed director and officer indemnification and liability legislation will have on Wisconsin corporations, it is first necessary to review the repealed provisions of the Wisconsin statutes. Next, this section will discuss the current indemnification and limitation of liability statutes, referring to provisions dealing with both profit and not-for-profit corporations.

A. Pre-1987 Statute

Prior to the passage of the 1987 director and officer indemnification legislation,⁹³ the Wisconsin statute required a corporation to indemnify officers and directors for the expense of

88. Actually, the Ohio indemnification statutes are virtually identical to those recently repealed by the Wisconsin legislature. Compare WIS. STAT. § 180.05(1)-(3) (1985-86) (repealed 1987) with OHIO REV. CODE ANN. § 1701.13(E)(1)-(3) (Page Supp. 1986).

89. OHIO REV. CODE ANN. § 1701.13(E)(3).

90. *Id.* at § 1701.13(E)(1).

91. *Id.* at § 1701.13(E)(2). Indemnification in derivative actions may only be for expenses, including attorneys' fees. *Id.*

92. *Id.* However, a court could otherwise determine that the individual is fairly and reasonably entitled to indemnification. *Id.*

93. The legislature passed Engrossed 1987 Assembly Bill 301 during the spring of 1987. Governor Thompson signed this legislation into law on June 9, 1987.

any defense in any action to the extent the individual was successful on the merits.⁹⁴ This mandatory indemnification provision still exists in the 1987 version of the statute.

In the event the director or officer was not successful in an action, the Wisconsin statute permitted a corporation to indemnify the individual in certain circumstances.⁹⁵ If the action was filed by a third party,⁹⁶ the corporation was permitted to indemnify the individual against expenses, judgments, fines and amounts paid in settlement, as long as the individual acted in good faith and in a manner he or she believed to be in or not opposed to the best interests of the corporation.⁹⁷ In shareholder derivative actions,⁹⁸ the

94. WIS. STAT. § 180.05(3) (1985-86) (repealed 1987) provided:

To the extent that a director, officer, employe or agent of a corporation has been successful on the merits or otherwise in defense of any action, suit or proceeding referred to in sub. (1) or (2), or in defense of any claim, issue or matter therein, he shall be indemnified against expenses, including attorneys' fees, actually and reasonably incurred by him in connection therewith.

Id.

95. WIS. STAT. § 180.05(1) (1985-86) (repealed 1987) provided:

A corporation may indemnify any person who was or is a party or 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 or she is or was a director, officer, employe or agent of the corporation, or is or was serving at the request of the corporation as a director, officer, employe or agent of another corporation, partnership, joint venture, trust or other enterprise, against expenses including attorney fees, judgments, fines and amounts paid in settlement actually and reasonably incurred by the person in connection with such action, suit or proceeding if the person acted in good faith and in a manner he or she 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 or her conduct was unlawful. The termination of any action, suit or proceeding by judgment, order, settlement, conviction, or upon a plea of no contest or its equivalent, shall not, of itself, create a presumption that the person did not act in good faith and in a manner which he or she 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 reasonable cause to believe that his or her conduct was unlawful.

Id.

96. A third party action is one which is not brought by a shareholder, the corporation or on behalf of the corporation, but rather brought by some outside party, such as a creditor or the victim of some negligent act.

97. WIS. STAT. § 180.05(1) (1985-86) (repealed 1987). In criminal actions, in order to be indemnified, the individual must have had no reasonable cause to believe his or her conduct was unlawful. *Id.*

98. For a discussion of derivative actions, see *supra* note 31.

corporation was allowed to indemnify only against expenses actually and reasonably incurred and only if the director or officer had not been adjudged to be liable for negligence or misconduct.⁹⁹

Before permissive indemnification was allowed to a corporation in either third party suits or shareholder derivative actions, the Wisconsin statute required that a determination be made that indemnification was in fact proper.¹⁰⁰ Such determination could be made by the board of directors, by independent legal counsel or by the shareholders.¹⁰¹ Under the repealed Wisconsin statute, a corporation was allowed to advance expenses incurred in defending a legal action, provided the individual involved in the action promised to repay the

99. WIS. STAT. § 180.05(2) (1985-86) (repealed) provided:

A corporation shall have power to indemnify any person who was or is a party or is threatened to be made a party to any threatened, pending or completed action or suit by or in the right of the corporation to procure a judgment in its favor 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, actually and reasonably incurred by him in connection with the defense or settlement of such action or suit 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 except that no indemnification shall be made in respect of any claim, issue or matter as to which such person shall have been adjudged to be liable for negligence or misconduct in the performance of his duty to the corporation unless and only to the extent that the court in which such action or suit was brought shall determine upon application that, despite the adjudication of liability but in view of all circumstances of the case, such person is fairly and reasonably entitled to indemnity for such expenses which such court shall deem proper.

Id.

100. *Id.* at § 180.05(4). Section 180.05(4) provided as follows:

Any indemnification under sub. (1) or (2), 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 director, officer, employee or agent is proper in the circumstances because he has met the applicable standard of conduct set forth in sub. (1) or (2). Such determination 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 action, suit or proceeding;
- (b) If such a quorum is not obtainable, or, even if obtainable a quorum of disinterested directors so directs, by independent legal counsel in a written opinion; or
- (c) By the shareholders.

WIS. STAT. § 180.05(4) (1985-86) (repealed 1987).

101. *Id.*

amount advanced, unless it was ultimately determined that the individual was in fact entitled to be indemnified.¹⁰²

B. 1987 Statute

In response to the increasing liability imposed upon directors and officers during the 1980's, along with the dramatic decrease in the availability of director and officer insurance, the Wisconsin legislature, together with various sections of the Wisconsin State Bar and business community,¹⁰³ drafted 1987 Assembly Bill 301.¹⁰⁴ This legislation was signed into law by Governor Thompson on June 9, 1987, with an effective date of June 13, 1987. The purpose of this new legislation is to provide some statutory solutions to the numerous issues that have plagued directors and officers during the past decade. While the 1987 legislation has a sweeping effect on various "organizations" under Wisconsin law,¹⁰⁵ the following subsections will deal with the effect on "profit"¹⁰⁶ and "not-for-profit"¹⁰⁷ corporations in Wisconsin.

1. Profit Corporations

Under the 1987 legislation, Wisconsin has for the first time statutorily limited the liability of a corporate official. Section

102. Section 180.05(5) provided:

Expenses, including attorneys' fees, incurred in defending a civil or criminal action, suit or proceeding may be paid by the corporation in advance of the final disposition of such action, suit or proceeding as authorized in the manner providing in sub. (4) upon receipt of an undertaking by or on behalf of the director, officer, employee or agent to repay such amount unless it shall ultimately be determined that he is entitled to be indemnified by the corporation as authorized in this section.

Id.

103. See *supra* note 28.

104. 1987 WIS. LAWS 13.

105. This legislation also applies in different degrees to entities organized under WIS. STAT. ch. 185 (cooperatives); WIS. STAT. ch. 148 (the State Medical Society of Wisconsin and county medical societies); WIS. STAT. ch. 611 (stock & mutual insurance corporations); WIS. STAT. ch. 612 (town mutuals); WIS. STAT. ch. 614 (fraternal benefit societies); and WIS. STAT. ch. 613 (service insurance corporations). COMMITTEE REPORT, *supra* note 29, at 7.

106. "Profit" corporations are generally capital stock corporations organized under WIS. STAT. ch. 180.

107. "Not-for-profit" corporations are non-stock corporations organized under WIS. STAT. ch. 181.

180.307 of the Wisconsin Statutes¹⁰⁸ provides that directors¹⁰⁹ of Wisconsin corporations will not be personally liable to the corporation, its shareholders, or any person asserting rights on behalf of the corporation or its shareholders,¹¹⁰ for damages, settlements, fees, fines or other kinds of monetary liability arising from a breach of the director's duty as a director of the corporation.¹¹¹ However, the director will remain personally liable to the corporation if it can be established that the individual breached or failed to perform his or her duties to the corporation and that such breach or failure to perform constituted any of the following:

- (a) A wilful failure to deal fairly with the corporation or its shareholders in connection with a matter in which the director has a material conflict of interest;
- (b) A violation of criminal law, unless the director had reasonable cause to believe his or her conduct was lawful or no reasonable cause to believe his or her conduct was unlawful;
- (c) A transaction from which the director derived an improper personal profit; or

108. 1987 WIS. LAWS 13, § 180.307 provides in part:

(1) Except as provided in subs. (2) and (3), a director is not liable to the corporation, its shareholders, or any person asserting rights on behalf of the corporation or its shareholders, for damages, settlements, fees, fines, penalties or other monetary liabilities arising from a breach of, or failure to perform, any duty resulting solely from his or her status as a director, unless the person asserting liability proves that the breach or failure to perform constitutes any of the following:

- (a) A wilful failure to deal fairly with the corporation or its shareholders in connection with a matter in which the director has a material conflict of interest.
- (b) A violation of criminal law, unless the director had reasonable cause to believe his or her conduct was lawful or no reasonable cause to believe his or her conduct was unlawful.
- (c) A transaction from which the director derived an improper personal profit.
- (d) Wilful misconduct.

Id.

109. Under section 180.307, the state legislature has chosen not to include officers of profit corporations within this limitation of personal liability. 1987 WIS. LAWS 13, § 180.307.

110. *Id.* This limitation of personal liability does not apply to actions initiated by a third-party. *Id.*

111. *Id.* at § 180.307(1). Section 180.307 does not apply to the liability of a director which may result from the authorization of an illegal dividend, redemption of shares, distribution of assets or loans to officers or directors of the corporation under WIS. STAT. § 180.40(1) (1985-86). 1987 WIS. LAWS 13, § 180.307(2).

(d) Wilful misconduct.¹¹²

These liability limitations apply automatically to all corporations incorporated under the Wisconsin Business Corporation Law. However, the statute does allow a corporation to "opt out" of limiting a director's personal liability by adopting a provision in the corporation's articles of incorporation which would limit the immunity provided under the statute.¹¹³ Rather than adopting a strict mandatory limitation on a director's personal liability, the Wisconsin legislature has decided to provide for an automatic statutory limitation which will be effective unless the corporation provides otherwise.

In codifying its indemnification provisions for directors and officers, the Wisconsin legislature took a rather unique approach. While most states have adopted mandatory indemnification provisions in limited situations and permissive indemnification in all others, Wisconsin has combined both approaches into a single mandatory indemnification section. Wisconsin continues to require a corporation to indemnify its directors and officers to the extent they were successful on the merits in the defense of a proceeding.¹¹⁴ However, the difference under the 1987 legislation can be seen in circumstances which do not fall within this "success on the merit" language. Section 180.044(2) of the Wisconsin Statutes¹¹⁵ now provides that a corporation shall indemnify a director or officer against

112. 1987 WIS. LAWS 13, § 180.307(1). The secondary spelling of the word "wilful" will be used throughout the text of this article to be consistent with its statutory spelling.

113. *Id.* at § 180.307(3).

114. *Id.* at § 180.044(1). Section 180.044(1) provides as follows:

A corporation shall indemnify a director or officer, to the extent he or she has been successful on the merits or otherwise in the defense of a proceeding, for all reasonable expenses incurred in the proceeding if the director or officer was a party because he or she is a director or officer of the corporation.

Id.

115. *Id.* at § 180.044(2). This section reads as follows:

[A] corporation shall indemnify a director or officer against liability incurred by the director or officer in a proceeding to which the director or officer was a party because he or she is a director or officer of the corporation, unless liability was incurred because the director or officer breached or failed to perform a duty he or she owes to the corporation and the breach or failure to perform constitutes any of the following:

1. A wilful 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.

liability¹¹⁶ unless it is determined that the director or officer breached or failed to perform a duty he or she owed to the corporation and the breach or failure to perform constitutes:

- (a) A wilful 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;
- (b) A violation of criminal law, unless the director or officer has reasonable cause to believe his or her conduct was lawful or no reasonable cause to believe his or her conduct was unlawful;
- (c) A transaction from which the director or officer derived an improper personal profit; or
- (d) Wilful misconduct.¹¹⁷

If any of these criteria occur, the director or officer cannot be indemnified under Wisconsin law. Like the statute dealing with the limitation of a director's liability, this provision applies to all Wisconsin corporations unless the corporation provides otherwise.¹¹⁸

In determining whether a director's or officer's conduct in discharging his or her corporate duties justifies indemnification under Section 180.044, the new Wisconsin legislation allows for a director or officer to rely on certain information. Section 180.303 of the Wisconsin Statutes¹¹⁹ provides that a director or officer may rely on information, opinions, reports

2. A violation of criminal law, unless the director or officer had reasonable cause to believe his or her conduct was lawful or no reasonable cause to believe his or her conduct was unlawful.

3. A transaction from which the director or officer derived an improper personal profit.

4. Wilful misconduct.

Id.

116. " 'Liability' generally includes personal monetary expenses and obligations incurred in connection with the proceeding." COMMITTEE REPORT, *supra* note 29, at 7.

117. 1987 WIS. LAWS 13, § 180.044(2). Wisconsin no longer makes a distinction between indemnification with respect to a third party claim versus indemnification with respect to a shareholder derivative action. *Id.* See *supra* text accompanying notes 96-99 for a discussion of the extent of indemnification under the repealed legislation depending upon who brings the action against the director or officer.

118. A corporation may adopt a provision in its articles of incorporation which could limit or totally eliminate the indemnification provisions of WIS. STAT. § 180.044. 1987 WIS. LAWS 13, § 180.048.

119. 1987 WIS. LAWS 13, § 180.303(1) provides:

Unless the director or officer has knowledge that makes reliance unwarranted, a director or officer, in discharging his or her duties to the corporation, may rely on information, opinions, reports or statements, any of which may be written or

or statements of third parties, including officers and employees of the corporation, in discharging their duty of care to the corporation. In order for this reliance to be allowed, the director or officer must have a good faith belief that the source of the information is reliable. This reliance provision will not apply if the director or officer has knowledge concerning the matter in question which makes such reliance unwarranted.¹²⁰ In adding this type of provision to Wisconsin's corporation statutes, the legislature recognized the reality of corporate officials having to rely on information provided by other parties given the enormous amounts of data necessary to conduct modern day business affairs.

Prior to a director or officer being indemnified under section 180.044(2), a determination must be made as to whether that indemnification is in fact proper.¹²¹ With the adoption of the 1987 Act, the legislature has provided for a more objective and defined standard for determining whether or not indemnification should be allowed. Section 180.046 of the Wisconsin Statutes provides for a number of methods¹²² by which the individual to be indemnified may select the means for determining his or her right to indemnification.¹²³ However, other

oral, formal or informal, including financial statements and other financial data, if prepared or presented by any of the following:

- (a) An officer or employee of the corporation whom the director or officer believes in good faith to be reliable and competent in the matters presented.
- (b) Legal counsel, public accountants or other persons as to matters the director or officer believes in good faith are within the person's professional or expert competence.
- (c) In the case of reliance by a director, a committee of the board of directors of which the director is not a member if the director believes in good faith that the committee merits confidence.

Id.

A reliance provision such as this did not exist in pre-1987 Wisconsin Statutes. COMMITTEE REPORT, *supra* note 29, at 10.

120. 1987 WIS. LAWS 13, at § 180.303(1).

121. *Id.* at § 180.044(2)(b).

122. Various statutory options available for determination of the right to indemnification include: (1) by a majority vote of a quorum of the board of directors consisting of directors not at the time parties to the same or related proceedings; (2) by independent legal counsel selected by a quorum of the board of directors; (3) by a panel of three arbitrators; (4) by an affirmative vote of shares which are not owned or controlled by a person who is a party to the proceeding in question; or (5) by court order under § 180.051. *Id.* at § 180.046.

123. The unique aspect of this statute is the ability of the person to be indemnified to choose the method of determination, allowing the individual flexibility and a greater

limitations to this determination can be provided for in the articles of incorporation or by-laws or by written agreement between the director or officer and the corporation.¹²⁴ This rather broad discretion allows the corporation, through its board of directors or its shareholders, great flexibility in deciding how these statutory indemnification provisions will operate.

Wisconsin has also adopted a rather unique indemnification approach which has yet to be included in any other state indemnification statutes. Section 180.059 of the Wisconsin Statutes¹²⁵ allows for indemnification for any liability incurred in connection with a proceeding involving securities regulation.¹²⁶ Because of this statute, a director or officer may be indemnified in any proceeding involving a federal or state statute regulating the offer, sale or purchase of securities, securities brokers or dealers, investment companies or investment advisors.¹²⁷

During the course of a pending action, a director or officer can make a request that the corporation advance or reimburse reasonable expenses which the individual incurs.¹²⁸ Such requests must be in writing and must include not only a promise to repay,¹²⁹ but also a written affirmation of the indi-

chance of indemnification. *Committee Report, supra* note 29, at 8. In the event of an adverse determination, a director or officer may request a review by a court, with the possibility of indemnification being ordered if the court determines the director or officer is entitled to indemnification under § 180.044(1) or (2). 1987 WIS. LAWS 13, § 180.051.

124. 1987 WIS. LAWS 13, § 180.046.

125. *Id.* at § 180.059. This section reads as follows:

(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 regulation described under sub. (2) to the extent required or permitted under ss. 180.042 to 180.058.

(2) Sections 180.042 to 180.058 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.

Id.

126. *Id.* This section also allows for the allowance of expenses and for insurance.

Id.

127. *Id.* at § 180.059(2).

128. *Id.* at § 180.047.

129. *Id.* at § 180.047(2). Of course, repayment will only be required if it is determined that the individual is not entitled to indemnification under § 180.044(2) or 180.051(2)(b). *Id.*

vidual's good faith belief that he or she did not breach or fail to perform his or her duties to the corporation.¹³⁰

Wisconsin, like Delaware and Indiana, has adopted a non-exclusive statute which allows a Wisconsin corporation to use alternative methods of indemnifying its officials.¹³¹ However, the Wisconsin approach is unique in that it prohibits indemnification in certain circumstances, regardless of whether the corporation has adopted any additional rights of indemnification.¹³² With this provision added to the indemnification statute, the Wisconsin legislature has actually adopted an "exclusive" statute in these limited circumstances.

2. Not-for-Profit Corporations

For the past few decades, Wisconsin has had separate provisions in its statutes for profit corporations¹³³ and not-for-profit corporations.¹³⁴ With the recent changes in director and officer liability statutes, both types of corporations have been affected. However, the differences between the two pri-

130. *Id.* at § 180.047(1).

131. *Id.* at § 180.049(1). This section provides:

Except as provided in sub. (2), ss. 180.044 and 180.047 do not preclude any additional right to indemnification or allowance of expenses that a director or officer may have under any of the following:

- (a) The articles of incorporation or bylaws.
- (b) A written agreement between the director or officer and the corporation.
- (c) A resolution of the board of directors.
- (d) A resolution, after notice, adopted by a majority vote of all of the corporation's voting shares then issued and outstanding.

Id.

132. *Id.* at § 180.049(2). This section provides:

Regardless of the existence of an additional right under sub. (1), the corporation may not indemnify a director or officer, or permit a director or officer to retain any allowance of expenses unless it is determined by or on behalf of the corporation that the director or officer did not breach or fail to perform a duty he or she owes to the corporation which constitutes conduct under s. 180.044(2)(a) 1, 2, 3 or 4. A director or officer who is a party to the same or related proceeding for which indemnification or an allowance of expenses is sought may not participate in a determination under this subsection.

Id.

Any additional right to indemnification or allowance is not effective unless a determination is made that indemnification is appropriate because the director or officer has not been found to have engaged in conduct that would otherwise prohibit indemnification. COMMITTEE REPORT, *supra* note 29, at 9.

133. These corporations are governed by WIS. STAT. ch. 180 (1985-86).

134. These corporations are governed by WIS. STAT. ch. 181 (1985-86).

marily deal with the personal liability of corporate officials rather than the indemnification of those officials.¹³⁵ In drafting a limited liability statute for not-for-profit corporations,¹³⁶ the Wisconsin legislature decided to include officers of not-for-profit corporations in its limitation of personal liability.¹³⁷ This limitation on personal liability for directors and officers of not-for-profit corporations is virtually identical to the limitations on a director's liability under the profit corporation liability statutes.¹³⁸ A director or officer of a not-for-profit corporation will be shielded from liability as long as their conduct does not fall within one of the breaches of duty outlined in the statute.¹³⁹ Unlike a profit corporation's ability to adopt

135. Under Wisconsin's recently revised indemnification statutes, directors and officers of both profit and not-for-profit corporations are provided with generally identical rights of indemnification and advancement of expenses. Compare 1987 Wis. LAWS 13, §§ 180.045-180.056 with 1987 Wis. LAWS 13, §§ 181.042-181.051.

136. 1987 Wis. LAWS 13, § 181.287(1) provides in part:

[A] director or officer is not liable to the corporation, its members or creditors, or any person asserting rights on behalf of the corporation, its members or creditors, or any other person, for damages, settlements, fees, fines, penalties or other monetary liabilities arising from a breach of, or failure to perform, any duty resulting solely from his or her status as a director or officer, unless the person asserting liability proves that the breach or failure to perform constitutes any of the following:

(a) A wilful failure to deal fairly with the corporation or its members in connection with a matter in which the director or officer has a material conflict of interest.

(b) A violation of criminal law, unless the director or officer had reasonable cause to believe his or her conduct was lawful or no reasonable cause to believe his or her conduct was unlawful.

(c) A transaction from which the director or officer derived an improper personal profit.

(d) Wilful misconduct.

Id.

137. Officers of profit corporations are excluded from the limitation of personal liability under Chapter 180 of the Wisconsin Statutes. See *supra* note 109.

138. See *supra* text accompanying notes 108-12. The only differences are the persons to whom liability may extend. 1987 Wis. LAWS 13, § 181.287 also limits officer or director liability with respect to third parties, including creditors. However, because of the extension of liability limitations to the claims of third parties and creditors, such limits to liability will not apply to any civil or criminal proceedings brought by or on behalf of any governmental agency, to a proceeding brought by any person for a violation of state or federal law where the proceeding is brought pursuant to an express private right of action created by state or federal statute, or to a director's liability on loans to officers and directors. 1987 Wis. LAWS 13, at § 181.287.

139. Limitation of liability of a director or officer of a not-for-profit corporation is subject to the same breach of duty limitations as a director of a profit corporation.

a provision in its articles of incorporation limiting the immunity of its directors,¹⁴⁰ a not-for-profit corporation may not limit the application of section 181.287 by adopting such a provision.

The 1987 Act also provides for the limitation of personal liability for those people who serve as "volunteers"¹⁴¹ within a not-for-profit corporation. Such a volunteer will not be personally liable for any act or omission arising from the individual's duty as a volunteer, unless the person asserting liability proves the act or omission constituted:

- (a) A violation of criminal law, unless the volunteer had reasonable cause to believe his or her conduct was lawful or no reasonable cause to believe his or her conduct was unlawful;
- (b) Wilful misconduct;
- (c) If the volunteer is a director or officer of the corporation, an act or omission within the scope of the volunteer's duty as a director or officer; or
- (d) An act or omission for which the volunteer received compensation or any thing of substantial value in lieu of compensation.¹⁴²

If the volunteer's conduct falls within one of these criteria, then liability cannot be limited. Section 181.297(3) of the Wisconsin Statutes also cites specific proceedings in which a volunteer's liability will not be limited.¹⁴³

C. Wisconsin's Approach vs. Other State Approaches

With the growing concern over the director and officer liability crisis, a number of state legislatures have responded by adopting a variety of statutes addressing this problem.¹⁴⁴ While the director and officer liability revisions adopted by

Compare 1987 WIS. LAWS 13, § 181.287(1) with 1987 WIS. LAWS 13 § 180.307(1). For the breach of duty limitations of a profit corporation, see *supra* note 108.

140. 1987 WIS. LAWS 13, § 180.307(3). See *supra* text accompanying note 113.

141. A volunteer is "a natural person, other than an employee of the corporation, who provides services to or on behalf of the corporation without compensation." 1987 WIS. LAWS 13, § 181.297(1).

142. *Id.* at § 181.297(2).

143. *Id.* at § 181.297(3).

144. As of February, 1987, 18 states had enacted statutes addressing director liability, and bills had been introduced in 15 more. TASK GROUP REPORT, *supra* note 50, at 1.

Wisconsin incorporate a number of provisions already adopted by other states, a few provisions are unique to Wisconsin. This section will discuss the similarities and differences between the various state approaches, as well as the policy reasons behind the new Wisconsin statutes.

In drafting its director and officer liability legislation, Wisconsin's decision to adopt a mandatory limitation on a director's liability is similar to the approach taken by Ohio.¹⁴⁵ Under these two state approaches, the director's limitation of personal liability is automatic, unless the corporation "opts out" by adopting a charter provision that the limitation will not apply. This approach is thus a middle ground between the approach taken by Indiana, in which the limitation of liability is automatic with no ability by a corporation to opt out, and Delaware, in which prior shareholder approval is required before limited liability applies.¹⁴⁶

The Wisconsin provision, like that of Delaware, applies to the limitation of a director's personal liability to the shareholders or the corporation. Ohio, on the other hand, extends this limitation to include actions initiated by third parties.¹⁴⁷ Because the Indiana liability provisions list no exceptions,¹⁴⁸ it presumably allows such limitation to apply in any action. Ideally, the limitation of a director's personal liability should apply to any action brought against the director, regardless of whether it is brought by shareholders, the corporation, or third parties.¹⁴⁹ However, the Wisconsin legislature chose not to extend the limitation of a director's personal liability to actions instituted by third parties.

145. See generally text accompanying notes 108-11 (Wisconsin) and notes 86-87 (Ohio).

146. TASK GROUP REPORT, *supra* note 50, at 8. The automatic application of a limitation on personal liability is preferred so that all corporations within the state will have one standard limitation. States such as Delaware, which require prior shareholder approval, will be subject to a variety of limitation standards within that jurisdiction. *Id.* at 9.

147. However, this limitation of a director's personal liability applies only to monetary damages and not to equitable remedies. OHIO REV. CODE ANN. § 1701.59(D) (Page Supp. 1986).

148. See IND. CODE ANN. § 23-1-35-1(e) (Burns Supp. 1987).

149. TASK GROUP REPORT, *supra* note 50, at 11. Protection is available to a director or officer in third party actions under Wisconsin's mandatory indemnification statute. See 1987 WIS. LAWS 13, § 180.044.

The area of director and officer indemnification is one in which the Wisconsin legislature has adopted a vastly different approach than that adopted by other states. Most states require indemnification to the extent a director or officer is successful on the merits of his or her actions and they permit indemnification in most other circumstances.¹⁵⁰ Wisconsin, on the other hand, requires indemnification in instances when the officer or director is successful on the merits and in situations in which the corporate official is not successful on the merits, as long as the individual's conduct does not fall within the statutory exclusions.¹⁵¹ This indemnification provision is unique in that it provides a director or officer the assurance that indemnification will be available, unless the corporation limits this right in its articles of incorporation.¹⁵²

In adopting its indemnification provision regarding securities law claims,¹⁵³ Wisconsin has become the frontrunner of this type of provision. Neither Delaware, Indiana, New York nor Ohio have adopted such provisions, although their permissive indemnification statutes might be applied to these types of cases. With this type of statute in effect, directors and officers of Wisconsin corporations may be granted added protection in an area which has experienced a tremendous amount of litigation in the past few years.¹⁵⁴ Minor differences do exist between the various state approaches with regard to the determination of indemnification. The other state approaches cited require that before indemnification can take place, it is necessary that a determination be made as to whether or not indemnification is in fact proper. Wisconsin also requires such a determination to be made, but allows the

150. For other state approaches to mandatory and permissive indemnification, see *supra* text accompanying notes 52-55 (Delaware), notes 64-69 (Indiana), notes 75-81 (New York), and notes 88-92 (Ohio).

151. 1987 WIS. LAWS 13, § 180.044(2). For text of the statute, see *supra* note 115.

152. 1987 WIS. LAWS 13, § 180.048.

153. *Id.* at § 180.059. For text of the statute, see *supra* note 125.

154. Since this type of indemnification statute has never been tested in the courts, the added protection of this statute may not be very clear.

The SEC has taken the position that indemnification of certain liabilities under federal securities laws is against public policy. See, e.g., 17 C.F.R. § 229.512(i) (1987).

individual to be indemnified to choose the means for determining indemnification.¹⁵⁵

With regard to the advancement of expenses prior to the disposition of the action, each state has adopted very similar provisions. The only difference is Wisconsin's and Indiana's requirement that the corporate official who is to receive the advance, submit a written affirmation that he or she acted in good faith and promise in writing to repay the advance in the event that it is ultimately determined that indemnification is not proper.¹⁵⁶ By including the advancement of expenses provision in each state approach, a director or officer can be assured an adequate defense.

D. Impact on Wisconsin Corporations

The Wisconsin legislature, with the assistance of the State Bar of Wisconsin and a number of business community leaders, has made a resounding effort to correct the many inadequacies that existed in the Wisconsin Business Corporation Law regarding the indemnification of officers and directors of Wisconsin corporations. This effort has led to one of the most comprehensive director and officer liability statutes in this country. The impact which this new statutory scheme will have on Wisconsin corporations can best be seen by taking another look at the three hypothetical corporations presented earlier.

1. Corporation X

Corporation X is a large publicly held corporation which has recently experienced a hostile takeover. Shareholders of Corporation X have brought a derivative action against the former directors for an alleged breach of their fiduciary duties. Since these directors did not have an indemnification contract, nor were they protected by adequate D&O insurance, they must now rely on statutory alternatives.

155. The official to be indemnified can choose any of the means identified in the statute, unless otherwise provided by the articles of incorporation, the by-laws or an agreement between the director or officer and the corporation. 1987 Wis. LAWS 13, § 180.046. See *supra* notes 122-23.

156. See *supra* notes 71, 129-30 and accompanying text.

Fortunately for these directors, Wisconsin's new director and officer indemnification statute provides for mandatory indemnification. Regardless of whether or not the directors are found to be successful on the merits, indemnification is required as long as the directors did not breach one of the duties outlined in the statute.¹⁵⁷ While it is still necessary for a determination of whether or not indemnification is in fact proper, the method of determination may be selected by the individual to be indemnified.¹⁵⁸ As a result, the former directors can guarantee that a fair determination will take place.

Under the revised director and officer legislation, the former directors will also enjoy statutory protection from personal liability. These directors will not be liable to the shareholders or the corporation as long as the alleged breach of their duty does not fall within one of the exceptions codified in the statute.¹⁵⁹ This added protection assures these directors that they will no longer be subjected to personal liability for decisions made in their capacity as corporate directors.

2. Corporation Y

The president of Corporation Y, a Wisconsin close corporation, was sued by the other corporate officers for an alleged breach of duty to act in good faith and in the best interests of the corporation. It was alleged that this breach consisted of a number of poor business decisions.

Under Wisconsin's new director and officer indemnification statute, the president is guaranteed indemnification

157. 1987 WIS. LAWS 13, § 180.044(2). Under the repealed statutes, the corporation was only required to indemnify the director or officer if he or she was "successful on the merits." WIS. STAT. § 180.05(3) (1985-86) (repealed 1987). For the text of this statute, see *supra* note 94. If unsuccessful, only permissive indemnification was available. WIS. STAT. § 180.05(1). For the text of this statute, see *supra* note 95.

158. 1987 WIS. LAWS 13, § 180.046. The statute does provide that the articles of incorporation, by-laws or a written agreement between the individual and the corporation may state the manner in which the determination will be made. *Id.* In any event, under the new statute the individual to be indemnified can usually seek court ordered indemnification in the event of an adverse determination. *Id.* at § 180.051. See *supra* notes 122-23.

159. 1987 WIS. LAWS 13, § 180.307(1). The statute does provide a corporation the ability to "opt-out" of this limitation by adopting a provision in its articles of incorporation. *Id.* at § 180.307(3).

against liability,¹⁶⁰ regardless of whether or not he was successful on the merits, unless his conduct is prohibited by statute.¹⁶¹ Wisconsin no longer bars indemnification in instances where a director or officer is adjudged to be liable for negligence or misconduct.¹⁶² Therefore, the officer will be assured indemnification as long as his alleged poor business decisions do not fall within the prohibited conduct of the Wisconsin indemnification statute.

The new provisions of the Wisconsin statute solve many of the problems of indemnification for directors and officers where the corporation is solvent. In situations of insolvency, however, the statutory provisions do not provide any solution. Under the new Wisconsin legislation, a corporation must still seek alternative methods of indemnification of its directors and officers if insolvency is a possibility for the corporation.¹⁶³ This will generally be a concern for small corporations, as smaller corporations have a greater chance of experiencing financial hardship as a result of poor business management.

3. Corporation Z

The officers, and directors of Corporation Z, a not-for-profit corporation, were sued in a third party action for negligently failing to take a certain action which the third party believed the corporate officials had a duty to do. Under the revised 1987 legislation, the corporate officials have little to worry about. Corporation Z is required to indemnify both the directors and officers against liability incurred as a result of the proceeding, as long as their conduct was not prohibited by statute.¹⁶⁴ Like the result under the repealed legislation,¹⁶⁵ the officials of Corporation Z would probably choose to in-

160. The revised Wisconsin statute now indemnifies a director against any liability, whereas the repealed indemnification statute limited indemnification to expenses, settlements, judgments or fines (in third party actions) or to expenses reasonably incurred (in derivative actions). See *supra* text accompanying notes 95, 99.

161. 1987 WIS. LAWS 13, § 180.044(2). See *supra* text accompanying note 117.

162. See WIS. STAT. § 180.05(2) (1985-86) (repealed 1987).

163. See *infra* text accompanying notes 172-77 (D&O insurance as an alternative).

164. 1987 WIS. LAWS 13, § 181.042.

165. WIS. STAT. § 181.045 (1985-86) (repealed 1987).

demnify themselves, since the action was brought by a third party and not by the corporation or one of its members.¹⁶⁶

The most important impact of the revised not-for-profit statute actually occurs in the area of personal liability. With the 1987 legislation, the state legislature has provided the directors and officers of not-for-profit corporations with additional protection in the form of limited personal liability. Because of this, the directors and officers¹⁶⁷ of Corporation Z will not be personally liable to any person¹⁶⁸ for damages, settlement, fees, fines or other monetary liabilities arising from their breach, unless it is found that their failure to act constituted conduct prohibited by the revised statute.¹⁶⁹ With this type of statute in force in Wisconsin, the directors and officers of not-for-profit corporations will no longer have to rely on liability insurance, which is already difficult or impossible to obtain, in order to be protected from personal liability.

V. ALTERNATIVES TO STATUTORY SOLUTIONS

In achieving a goal of maximum protection against a director's or officer's personal liability, a corporation should not rely solely on the statutory provisions of indemnification, but should also rely on non-statutory alternatives which protect its directors and officers. States like Wisconsin have encouraged this by passing nonexclusive statutes.¹⁷⁰ Wisconsin corporations are allowed and encouraged to adopt non-statutory alternatives to indemnification, such as indemnification contracts, D&O insurance and by-law provisions.¹⁷¹ This section will discuss the indemnification contract and D&O insur-

166. Actually, the third party is really not concerned whether the directors or officers are indemnified against expenses, as long as these officials are adjudged to be liable.

167. The Wisconsin legislature has chosen to include officers of not-for-profit corporations in its protection against personal liability of not-for-profit corporate officials. 1987 WIS. LAWS 13, § 181.287.

168. When drafting the statute regarding the limitation of personal liability for directors and officers of not-for-profit corporations, the legislature chose to extend this limitation to actions brought by third parties. *Id.*

169. *Id.*

170. 1987 WIS. LAWS 13, § 180.049. See *supra* text accompanying notes 131-32.

171. For examples of by-law provisions used to expand statutory indemnification rights, see Olson, Bogden & Magill, *Negotiated Indemnification Contracts & Other Alternatives for Director and Officer Protection*, in STRATEGIES FOR RESPONDING TO THE D&O INSURANCE CRISIS 222-25 (1986) [hereinafter Olson].

ance alternatives with respect to the benefits each can provide a corporation in protecting its directors and officers from personal liability.

A. Insurance

The indemnification provisions provided by state law do a great deal to protect corporate officials from expenses incurred in the defense of an action. This is especially true in Wisconsin where indemnification of directors and officers is mandatory, except for certain breaches of conduct.¹⁷² However, such indemnification is only effective if the corporation is financially able to indemnify its corporate officials for expenses incurred. Therefore, if possible, corporations should obtain D&O insurance as added protection.¹⁷³

The primary advantage of this insurance over other indemnification alternatives is the fact that, in return for annual premiums, a third party agrees to pay all monetary liability incurred by a director or officer, if that individual is not successful in a legal proceeding. While this is very beneficial protection, D&O insurance remains difficult to obtain.¹⁷⁴

With the D&O insurance crisis of the past few years, corporations which have lost their coverage have undertaken creative efforts to find an alternative.¹⁷⁵ Some corporations have created programs to self-insure their various insurance needs. This self-insurance has taken the form of captive insurance companies¹⁷⁶ and pooled insurance by an industry group.¹⁷⁷

172. See *supra* text accompanying note 112.

173. Even though D&O insurance is difficult to obtain, this does not mean that it is not a viable alternative. Corporations which are still able to obtain D&O insurance should continue to do so in order to provide its directors and officers with the maximum protection available.

174. See *supra* notes 18-22 and accompanying text.

175. For a general discussion of various D&O insurance alternatives, see *Responses to Director and Officer Liability*, 16 *The Lawyer's Brief* No. 19, 15-16 (Oct. 15, 1986) [hereinafter *Lawyer's Brief*]. For a discussion of the problems associated with the use of captive insurance subsidiaries, see Olson, *supra* note 171, at 231-34.

176. Captive insurance companies achieve the same benefits as indemnification, as the corporation deposits its own funds in the captive insurance company, thus allowing the corporation to expense the premiums. *Lawyer's Brief*, *supra* note 175, at 15.

177. With pooled insurance, members of the pool agree to spread the risk among themselves. *Id.* at 16. See also Olson, *supra* note 171, at 234-36. Pooled insurance arrangements have become increasingly popular in the banking industry. The result has been the creation of new insurance companies by state and national associations and

However, both forms lack the advantage of shifting the insurance burden to an independent party who assumes the risk.

B. Contract

Another alternative to the statutory method of indemnification is the indemnification contract. These contracts often parallel the indemnification provided by a corporation's by-laws.¹⁷⁸ While the contract may not add any additional protection to that already available under the by-laws, it does provide a director or officer with some peace of mind in that this contract is a legally binding agreement between the corporate official and the corporation. Thus, the contract is not subject to unilateral modification by the corporation, as a by-law may be.¹⁷⁹

Indemnification contracts have both positive and negative attributes. In addition to the general indemnification provisions available, either by statute or by-law, indemnification contracts can certainly be beneficial in the event of a change in corporate management. If the officer or director has a contract with the corporation, the contract cannot be changed by the successor management. However, if a by-law provision is relied on for indemnification, the by-law could be amended by the new management.¹⁸⁰ On the other hand, like other indemnification provisions, the indemnification contract is only effective if the corporation is solvent. In cases of bankruptcy or insolvency, the corporation would not have any assets to use in indemnifying the holder of the contract.¹⁸¹ As a result, the only protection against insolvency is for an independent party to assume the risk through some sort of liability insurance.

groups of banks. Created in 1986 by the state bank associations of Oklahoma, Minnesota, Wisconsin, North Dakota, South Dakota, Arkansas and Montana, Banc Insure Inc. now insures more than 500 midwestern banks. The company currently sells up to \$2 million of blanket bank coverage and up to \$1 million of director and officer liability coverage per bank. Bermuda based Banker's Insurance Co. provides even greater coverage of up to \$10 million of D&O insurance and up to \$10 million in banker's blanket bond insurance. Brenner, *More Banks Insuring Own Officers*, AMERICAN BANKER, Jan. 19, 1987, at 18.

178. *Lawyer's Brief*, *supra* note 175, at 34.

179. Olson, *supra* note 171, at 225-26.

180. *Lawyer's Brief*, *supra* note 175, at 34.

181. TASK GROUP REPORT, *supra* note 50, at 17.

VI. CONCLUSION

The director and officer indemnification and liability legislation for profit and not-for-profit corporations passed by the Wisconsin legislature in 1987¹⁸² represents one of the most comprehensive statutes of its kind. This legislation "represents a balanced approach, carefully drafted to address the erosion of deference to the good faith business judgments of corporate directors and officers, and the current crisis in the D&O insurance market."¹⁸³ In a time of uncertain liability protection for corporate directors and officers, the Wisconsin statutory response has restored the level of protection from personal liability that existed until recently, by allowing Wisconsin corporations to indemnify their directors and officers against liability that was previously covered by indemnification insurance.¹⁸⁴ The protections afforded by this legislation are critical to Wisconsin's ability to attract and maintain the competent people vital to the survival and success of corporations located in the state.

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182. Engrossed 1987 Assembly Bill 301, signed into law on June 9, 1987.

183. *The Need for Legislation Addressing the Personal Liability Concerns of Corporate Directors & Officers*, THE CORPORATION AND BUSINESS LAW COMMITTEE OF THE WISCONSIN STATE BAR AND THE AD HOC COMMITTEE OF CORPORATE LEGAL COUNSEL (Feb. 13, 1987).

184. See *supra* text accompanying notes 172-77.

