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COMMENTS

THE RIGHT IN WISCONSIN OF DIRECTORS, OFFICERS AND EMPLOYEES TO INDEMNIFICATION BY THEIR CORPORATION

I. INTRODUCTION

“(M)any state legislatures, motivated, at least in part, by a desire to encourage capable and responsible men to become directors and officers and at the same time to discourage so-called ‘strike’ suits by stockholders, have enacted statutes permitting or even requiring the corporation to indemnify or reimburse defendant directors or officers, under specified conditions.”¹ Wisconsin has statutes, one which is permissive² and the other which is mandatory,³ concerning the indemnification of a director or officer. The mandatory statute also provides for the indemnification of an employe. It also has a security-for-expense statute⁴ which would seem to be a deterrent to suits by impecunious minority shareholders and those of the “strike” variety.⁵ Their importance has been enhanced by the recent rash of anti-trust suits. The question of when and under what circumstances indemnification is to be made will be explored in this article. The exact answers to these questions are not always clear. One of the reasons for the interest pres-

¹ 39 A.L.R. 2d 580 at 583 (1955).

² WIS. STAT. §180.04(14) (1959). General powers. Each corporation, when no inconsistent provision is made by law or by its articles of incorporation, shall have the power; . . .

(14) To indemnify any director or officer or former director or officer of the corporation, or any person who may have served at its request as a director or officer of another corporation in which it owns shares of capital stock or of which it is a creditor, against expenses actually and necessarily incurred by him in connection with the defense of any action, suit or proceeding in which he is made a party by reason of being or having been such director or officer, except in relation to matters as to which he shall be adjudged in such action, suit or proceeding to be liable for negligence or misconduct in the performance of duty; but such indemnification shall not be deemed exclusive of any other rights to which such director or officer may be entitled, under any by-law, agreement, vote of stockholders, or otherwise.

³ WIS. STAT. §180.407 (1959), cited in full in text *infra*.

⁴ WIS. STAT. §180.405(4) (1959). In any action brought in the right of any foreign or domestic corporation by the holder or holders of less than 3 per cent of any class of shares issued and outstanding, the defendants shall be entitled on application to the court to require the plaintiff or plaintiffs to give security for the reasonable expenses, including attorney's fees. The amount of such security may thereafter from time to time be increased or decreased in the discretion of the court having jurisdiction of such action upon showing that the security provided has or may become inadequate or is excessive.

⁵ Revision Committee Note, 1953: This section is a substitute for §180.40(7) (STATS. 1951). The problem in the shareholders derivative action is the possibility of its abuse for personal profit. This possibility bears no relation to the number of shares held by the plaintiff or his ability to furnish security for expenses. This section is designed to handle the problem directly. The elimination of the chance for personal profit should discourage the strike suit without imposing any obstacles to the good faith action. (Bill 524-S).

ently in Wisconsin is the fact that the mandatory statute was amended in 1959 and now reads as follows:

Indemnifying directors, officers and employes. Any person made a party to *or threatened with any civil, criminal or administrative* action, suit or proceeding by reason of the fact that he, his testator or intestate, is or was a director, officer or employe of any corporation shall be indemnified by the corporation against the reasonable expenses, including attorney fees, actually and necessarily incurred by him in connection with⁶ such action, suit or proceeding, or in connection with any appeal therein, except as to matters as to which such director, officer or employe is guilty of negligence or misconduct in the performance of his duties. Such right of indemnification shall not be deemed exclusive of any other rights to which such director, officer or employe may be entitled apart from this section.⁷ (The italicized words indicate the change.)

Wisconsin would seem to be the only state which includes "criminal" in its mandatory statute.⁸

HISTORICAL BACKGROUND

Wisconsin seems to have been the first state to have the question of indemnification determined by the judiciary in *Figge v. Bergenthal*,⁹ decided in 1906. The case, perhaps, has been overemphasized as determining the right to indemnification, since the stockholders by resolution had given their consent to payment of the costs. The court said: "Clearly if no case is made against the defendants it is not improper or unjust that the corporation should pay for the defense of the action."¹⁰ Later, in *Jesse v. Four Wheel Drive Auto Company*,¹¹ decided in 1922, the Wisconsin Court denied indemnification to directors. Here, however, the court determined that they were acting for their own interests and not for the interests of the corporation, and, therefore, they would not be entitled to indemnification even under a very broad interpretation of any existing statute. At common law, the successful plaintiff usually was allowed to recover reasonable expenses on a benefit-to-the-corporation theory.¹² However, a federal case handed down in 1923¹³ stood for the principle that there can be no recovery where there has been a criminal charge. "In doing a perfectly legal thing, the agent may do it in such careless and negligent manner as to subject himself to a charge of crimi-

⁶ Here the Wisconsin Legislature in 1959 deleted the words "the defense of" from the statute of 1957.

⁷ WIS. STAT. §180.407 (1959).

⁸ MODEL BUS. CORP. ACT ANN. §4(o) ¶2.03(4) (1960).

⁹ 130 Wis. 594, 109 N.W. 581 (1906).

¹⁰ *Id.* at 625, 109 N.W. at 592.

¹¹ 177 Wis. 627, 189 N.W. 276 (1922).

¹² 29 ST. JOHN'S L. REV. 295 (1955).

¹³ *DuPuy v. Crucible Steel Co. of America*, 288 Fed. 583 (1923).

nality, and for the expenses of defending himself against such charge there can be no recovery in law."¹⁴

Wisconsin first passed a mandatory indemnification statute in 1949, drafted on the request of a Madison attorney who was lobbying for a large corporation.¹⁵ Contrary to the annotations¹⁶ this statute was not dropped in 1951 but rather turned up in another chapter.¹⁷ In 1953, therefore, Wisconsin had the dubious distinction of having two mandatory indemnification statutes¹⁸ and one permissive indemnification statute.¹⁹ The change in wording of the mandatory statute from the time it was adopted in 1949 until it again appeared in 1953 in Chapter 180 could be significant. In the first, it ordered indemnity for director²⁰ "except in relation to matters as to which it shall be *adjudged* . . . that such director . . . is liable for misconduct in the performance of his duties."²¹ The later version made indemnity mandatory "except as to matters as to which such director . . . is *guilty* of negligence or misconduct in the performance of his duties."²² (Emphasis added.) The permissive statute still says "shall be adjudged."²³

Just why the fuss over the changing of the statute wording to cover "criminal and administrative"²⁴ from the previous "any action, suit or proceeding"²⁵ which would seem to cover everything on the entire "waterfront?" The mandatory indemnification statute in Wisconsin was drafted with Section 64 of the New York General Corporation Law²⁶

¹⁴ *Id.* at 588.

¹⁵ 1950 WIS. L. REV. 160.

¹⁶ Commenting on §180.407 the Revision Committee (1953) states: This section was in the 1949 law as s. 180.34, but was omitted in 1951. It is felt that the section should be restored; that indemnification, if warranted, should be automatic and should not lie in the discretion of directors whose association with fellow directors is often too intimate to permit unbiased consideration, and who, in considering indemnification will be faced with the problem of self-dealing. . . .

¹⁷ WIS. STAT. §182.034 (1951).

¹⁸ WIS. STAT. §180.407 and §182.034 (1953). For all practical purposes they are identical with only the heading different; one including directors and the other omitting them in the heading.

¹⁹ WIS. STAT. §180.04(14) (1953).

²⁰ Whenever the word "director" is used subsequently in this article, it shall be presumed to cover officer and employe also unless otherwise stated or it is evident from the text itself.

²¹ WIS. STAT. §180.34 (1949).

²² WIS. STAT. §180.407 (1953).

²³ WIS. STAT. §180.04(14) (1959). This is the same as WIS. STAT. §182.01(9a) (1945).

²⁴ WIS. STAT. §180.407 (1959).

²⁵ WIS. STAT. §180.407 (1957).

²⁶ NEW YORK GENERAL CORPORATION LAW §64. Any person made a party to any action, suit or proceeding by reason of the fact that he, his testator or intestate, is or was a director, officer or employe of a corporation shall be entitled to have his reasonable expenses, including attorney's fees, actually and necessarily incurred by him in connection with the defense of such action, suit or proceeding, and in connection with any appeal therein, assessed against the corporation or against another corporation at the request of which he served as such director, officer or employe, upon court order, . . . , except in relation to matters as to which it shall be adjudged in such action, suit or proceeding that

serving as a guide.²⁷ Therefore we may look to their decisions for some guide as to how the Wisconsin courts might solve the problems. It would seem that the problem has never been litigated in Wisconsin under the statutes. In a leading New York case, *Schwarz v. General Aniline & Film Corp.*,²⁸ a director was indicted for alleged violations of the Sherman Anti-trust Act, pleaded *nolo contendere* and was fined \$500. He sued to recover the expenses involved and the lower courts denied him recovery because the *nolo contendere* plea and the fine constituted misconduct and barred any recovery. The Court of Appeals affirmed, but on the ground that it was a criminal action and that the statute did not cover criminal actions. “. . . (W)hile a plea of *nolo contendere* is not an admission of guilt, it none the less is a conviction and has the same consequence in the criminal cause in which it is entered, as a plea of guilty.”²⁹ They held that “any action, suit or proceeding” did not include criminal actions and therefore denied indemnification. This was a 4-3 decision with a strong dissent which will be referred to later in this article. The court later stated that: “It would be a very strange public policy, indeed, which would set up legal machinery whereby one charged with, or convicted of, a crime, of whatever kind, could require the corporation by whom he was employed to pay his legal expenses.”³⁰ This could be called an oversimplification because the director would hardly attempt to have the corporation defend him against the charge of murder, for example. This should not be a question of criminal activity but consideration should be given to the inherent nature of the wrongful acts, whether *malum in se* or *malum prohibitum*, the ultimate success or failure of the defense, and not the mere quirk of fate which determines whether the charge be criminal or civil and thus the right to indemnification. The holding has been criticized. “This interpretation [of the statutes] seems to restrict the scope of the statute unduly. . . . Furthermore, at least where the defendant is successful, the public policy in favor of reimbursing a director who has acted prudently would seem to be the same whether the action is civil or criminal.”³¹ It is interesting to note that here the court said it was against public policy and not within the rights conferred by statute to indemnify the director, but in the concurring opinion, in which the majority concurred also, it was expressly stated that the corporation could either in the articles of incorporation or by-laws allow reimbursement including “specifically not only civil but criminal actions.”³² One

such officer, director or employee is liable for negligence or misconduct in the performance of his duties.

²⁷ 1950 WIS. L. REV. 160.

²⁸ 305 N.Y. 395, 113 N.E. 2d 533 (1916).

²⁹ *Id.* at , 113 N.E. 2d at 534.

³⁰ *Id.* at 536.

³¹ 67 HARV. L. REV. 515.

³² *Supra* note 28, at 405, 113 N.E. 2d at 537.

writer said that the recovery here should have been sought not by statute but under the principles of agency: "that the director, as the corporation's agent for the carrying out of policies, not manifestly illegal, nor known to the director to be so, which got it and him into trouble with the government, is entitled to be made whole by his principal."³³ However, there may be a problem here in that the directors are hardly agents of the corporation, in the same sense that officers or employees are agents. "The problem of the protection of directors against substantial expenses incurred in defending suits brought against them for what they had done or failed to do in their capacity as directors is, apart from statute, different from the problem of such protection for officers and employees who, as agents of the corporation, enjoy protection under the principles of agency law. Some courts have held that directors are analogous to trustees and are therefore entitled to equitable indemnification under the principles of trust law. Other courts have held that directors are *sui generis* and not so entitled."³⁴ Thus it is evident that there is good reason for the concern over the addition of the word "criminal" in the statute, although I do not mean to suggest that this is the only method of handling this problem. Wisconsin, therefore, has amended its statute so that the problem of the *Schwarz* case should not arise in this jurisdiction, insofar as the question of the intent of the legislature is concerned because they have specifically covered criminal actions now in the mandatory statute. Public policy has been deemed by the legislature to not only allow indemnification in criminal actions but actually to demand it, with, of course, the proviso that such director is not "guilty of negligence or misconduct in the performance of his duties."³⁵

CONCERNING THE PLEA OF NOLO CONTENDERE

Since in various anti-trust situations the same state of facts may give rise to either criminal or civil charges, the director is at the mercy of the government attorneys who make the decision whether to prosecute the cause of action civilly or criminally. It is something analogous to "open season" on directors and the mere whim of the government determines if a man is to be tried as a criminal or not. After all, directors are human and liable to the frailties of humans and may at times find themselves subject to criminal proceedings because of a desire not to aid themselves but, rather, the corporation of which they are directors. "The director cannot safeguard himself by the simple process

³³ 69 HARV. L. REV. 1057 at 1075-76. This is an excellent discussion of director's rights to indemnification in general. This agency theory would seem to be in keeping with MECHEM ON AGENCY §1603: "Whenever an agent is called upon by his principal to do an act which is not manifestly illegal and which he does not know to be wrong, the law implies a promise on the part of the principal to indemnify the agent for such losses as flow directly and immediately from the very execution of the agency."

³⁴ MODEL BUS. CORP. ACT. ANN. §4(o) ¶4.01 (1960).

³⁵ WIS. STAT. §180.407 (1959).

of refraining from conscious wrongdoing. In the first place, there are sizable areas of corporation law in which it is not easy to tell in advance what a court will regard as permissible. In the second place, no matter how innocent the director, he will probably incur substantial counsel fees, payable win, lose, or draw, in the course of defending himself if charges are brought."³⁶ These anti-trust suits require much preparation, many exhibits, and the production of much evidence which is peculiarly time consuming and costly. For these reasons the courts are often times very ready to accept a plea of *nolo contendere* to expedite the disposition of the case and the corporation is happy to so plead to avoid the expense of a long drawn out trial. The plea is, however, within the discretion of the court to accept or reject. The problem arises as to what happens to the director who pleads *nolo contendere*. Can he be indemnified; must he be indemnified or is he just out the cost of counsel which can be quite formidable even with such a plea? Certainly the *Schwarz* case³⁷ intimates that such a plea would often preclude the director from indemnification. "[W]hile a plea of *nolo contendere* is not an admission of guilt, it none the less is a conviction and has the same consequences, in the criminal cause in which it is entered, as a plea of guilty."³⁸ However the court did not decide the case on this basis even though this had been the basis in the lower courts. They just said that in a criminal prosecution the New York statutes did not allow indemnification. They expressly stated "it is unnecessary to examine the interesting question of whether a plea of 'nolo contendere' in a Federal court is an 'adjudication' of 'misconduct.'"³⁹

Justice Fuld wrote a strong and scathing dissent in the *Schwarz* case in which he tells why he thinks that a plea of *nolo contendere* should not preclude the director from being indemnified.

While the judgment entered upon *nolo contendere* may, therefore, be regarded as a conviction under certain statutes applying to multiple offenses, such a judgment has never been considered an adjudication of guilt or even an admission of any fact contained in the indictment. . . .

Any doubt that a judgment entered upon a *nolo contendere* plea is in the nature of a compromise, a settlement of the controversy, rather than an adjudication of any fact asserted or a determination of any charge alleged is laid to rest by a Clayton Act Provision (38 U.S. Stat. 731, 15 U.S.C.A. §16); . . . even if I were to assume that a plea of *nolo contendere* is an acknowledgment of guilt, it still would not follow that a judgment entered upon such a plea amounts to an adjudication that the petitioner

³⁶ 69 HARV. L. REV. 1058 (1956).

³⁷ *Supra* note 28, at , 113 N.E. 2d 533.

³⁸ *Id.* at 534.

³⁹ *Id.* at 536.

was "liable for negligence or misconduct in the performance of his duties."⁴⁰

In *Simon v. Socony-Vacuum Oil Co.*, the court allowed recovery to a director convicted in a criminal anti-trust suit on the ground that by the plea of *nolo contendere* "a valuable consideration moved from the defendants to the corporation, and the corporation clearly benefited thereby."⁴¹ In fact this case went so far as to actually reimburse the directors for the fine paid.

WISCONSIN LAW

The mandatory statute for indemnification in Wisconsin⁴² requires indemnification except where the director "is *guilty* of negligence or misconduct in the performance of his duties."⁴³ [Emphasis added.] It also has the saving clause, "Such right of indemnification shall not be deemed exclusive of any other rights to which such director, officer or employe may be entitled apart from this section."⁴⁴ Certainly this would save the director who has won the case in the courts. There may be a problem with one who, for convenience and financial saving, pleads *nolo contendere*.

The mandatory statute expressly allows reasonable expenses, including attorney fees "in connection with any appeal."⁴⁵

The permissive statute⁴⁶ for indemnification allows the corporation to indemnify the director except where he "shall be adjudged . . . to be liable for negligence or misconduct in the performance of duty."⁴⁷ It also has a saving clause which while perhaps no broader, at least is somewhat more explicit as to how this indemnification may be permitted; "but such indemnification shall not be deemed exclusive of any other rights to which such director or officer may be entitled, *under any by-law, agreement, vote of shareholders, or otherwise.*"⁴⁸ [Emphasis added.]

This saving clause is similar to the saving clause in the Delaware statute⁴⁹ about which another writer stated: "Under the indemnity

⁴⁰ *Id.* at 541-542.

⁴¹ *Simon v. Socony-Vacuum Oil Co.*, 170 Misc. 202, 38 N.Y.S. 2d 270 at 275 (1942); *aff'd*, 47 N.Y.S. 2d 589 (1944).

⁴² WIS. STAT. §180.407 (1959).

⁴³ *Ibid.*

⁴⁴ *Ibid.*

⁴⁵ *Ibid.*

⁴⁶ WIS. STAT. §180.04(14) (1959).

⁴⁷ *Ibid.*

⁴⁸ *Ibid.*

⁴⁹ DEL. CODE ANN. Tit. 8, §122(10). Twenty-seven states, the District of Columbia, and Puerto Rico have now enacted indemnification statutes in order to induce qualified individuals to accept the responsibilities of corporate management. Alaska, ALASKA COMP. L. ANN. §36-2A-12(o); California, CAL. CORP. CODE ANN. §830, 834(b); Colorado, COLO. CORP. ACT §4(o); Connecticut, CONN. GEN. STATS. §33-320; Delaware, DEL. CODE ANN. Tit. 8, §122(10); Indiana, IND. ANN. STAT. §25-202(10); Iowa, IOWA CODE ANN. §496A.4(15); Kentucky, KY. REV. STATS. §§271.125(11), 271.375; Maine, ME. REV. STATS. ANN. c.53,

statutes having saving clauses . . . there is little doubt that a provision for indemnity on the contract of employment could be inserted into the by-laws. . . . For the individual director, a surer method of protection is an independent contract for that purpose. Such a contract is indirectly sanctioned by those statutes having saving clauses and should fully protect the director."⁵⁰ Although settlements are not expressly mentioned in the Wisconsin statutes, there should be no doubt that a director, acting in good faith and without any conscious wrongdoing, would be entitled to indemnification for the reasonable expenses therein incurred.

CONCLUSION

Regardless of the degree of caution with which a director may act, with the uncertainty of the laws in many areas of corporate activity, even with advice of counsel, a director may incur substantial expense in the defense of charges which may be brought against him. As a purely practical matter these men may have to be assured of indemnification by the corporation or they may refuse to act as directors, or, if they serve, may act with such caution that their effectiveness will be seriously curtailed. In many corporations the difficulty is not getting men to serve, but the problem is in getting a man who will act—one who will "take the bull by the horns" and get things done. As a corporate executive told this writer recently, they would rather have a "doer" with average ability than a man with extraordinary ability who finds it difficult to make decisions. He thought the "doer" would be right nine times out of ten and would get things done. Of course, all things being equal, they would prefer a "doer" with extraordinary ability. Since Wisconsin does have both the permissive and the mandatory statutes for indemnification, the question arises whether these, standing alone, are sufficient protection. I would submit that it would probably still be desirable to have an indemnification clause in the by-laws⁵¹ and even

§24; Maryland, MD. ANN. CODE art. 23, §64; Michigan, MICH. STATS. ANN. §21.10(1); Minnesota, MINN. REV. STATS. 302.09(7); Missouri, MO. REV. STATS. §351.355; Montana, MONT. REV. CODES ANN. §15-412; Nebraska, NEB. REV. STATS. §21-103; Nevada, NEV. REV. STATS. §78.070(6); New Jersey, N.J. REV. STATS. §14:3-14; New York, N.Y. GEN. CORP. LAW §61-b, 63-68; North Carolina, N.C. GEN. STATS. §§55-19 to 55-21; North Dakota, N.D. REV. CODE §10-1904(15); Ohio, OHIO REV. CODE ANN. §1701-13; Oregon, ORE. REV. STATS. §57.030(15); Pennsylvania, PA. STATS. ANN. Tit. 15, §2852-410, Tit. 12, §1323; Rhode Island, R.I. GEN. LAWS §7-9-12; Texas, TEX. BUS. CORP. ACT, Art. 2.02(16); Virginia, VA. CODE ANN. §13.1-3(n); Wisconsin, WIS. STATS. §§180.04(14), 180.407; District of Columbia, D.C. CODE ANN. §29-904(p); and Puerto Rico, P.R. LAWS ANN., Tit. 14, §1202(10).

⁵⁰ 56 MICH. L. REV. 453 (1958) at 455-456.

⁵¹ Cf. *Beneficial Industrial Loan Corp. v. Smith*, 170 F. 2d 44 (1948) at page 48, footnote #1; ". . . The Corporation shall indemnify and hold harmless each person who shall serve at any time hereafter as a director or officer of the Corporation from and against any and all claims and liabilities to which such person shall have become subject by reason of his having heretofore or hereafter been a director or officer of the Corporation, or by reason of any action alleged to have been heretofore or hereafter taken or omitted by him as such director or officer, and shall reimburse each such person for all legal and other

further for an officer or employe to have a provision right in his contract of employment. A further suggestion would be to try to have the wording of the statutes changed from expenses "actually and necessarily incurred"⁵² to those of the Model Business Corporation Act which were changed in the 1957 revision to "actually and reasonably incurred"⁵³ in the defense of an action. Both would require the director to act prudently and without negligence or misconduct, but the deletion of the word "necessarily" would not put such a premium on foresight and prognostication. The court will always be looking at the act with the omniscience of hindsight and certain expenses incurred a few years ago may have been reasonable at the time and seemingly necessary, but may now appear to have been reasonable but totally unnecessary. To those who say this would be flyspecking, just refer to the statute which in its present form uses both words, saying the director shall be indemnified for the "reasonable expenses . . . actually and necessarily incurred."⁵⁴ This change may not be necessary but it would reduce the possibility of litigation which is a duty a lawyer owes generally to his client. Since the purpose of these statutes is agreed to be to induce capable, qualified, responsible men to accept positions such as these and to encourage them to resist unjust charges in the confidence that they will be reimbursed by the corporation for their expenses of defending themselves when they are acting for the corporation and its welfare, rather than in their capacity as individuals, such changes which make indemnification more assured and positive seem to be well within the spirit and purpose of the law.⁵⁵

The plea of *nolo contendere* is allowed only with permission of the

expenses reasonably incurred by him in connection with any such claim or liability; provided, however, that no such person shall be indemnified against, or be reimbursed for any expense in connection with, any claim or liability arising out of his own negligence or wilful misconduct. The rights accruing to any person under the foregoing provisions of this Article shall not exclude any other right to which he may be lawfully entitled, nor shall anything herein contained restrict the right of the corporation to indemnify or reimburse such person in any proper case even though not specifically herein provided for. The Corporation, its directors, officers, employees and agents, shall be fully protected in taking any action or making any payment under this Article X, or in refusing so to do, in reliance upon the advice of counsel." *Caveat*: This is quoted here as an example of a by-law which makes indemnification mandatory and not as an example to be religiously or blindly copied. It must be remembered that there was litigation over this so that the astute and conscientious lawyer will undoubtedly want to improve upon it or draft a completely new one so as to eliminate as far as possible the dangers of litigation, which even if successful is time-consuming and expensive.

⁵² WIS. STATS. §§180.04(14) and 180.407 (1959).

⁵³ MODEL BUS. CORP. ACT ANN. §4(o) ¶2.01 (1960).

⁵⁴ WIS. STAT. §180.407 (1959).

⁵⁵ 56 MICH. L. REV. 453 at 454. Also, "It is an indispensable condition under the statute [similar to those in Wisconsin] . . . that a defendant who seeks to impose upon a corporation the responsibility of meeting the expenses of contesting the action against him must have been made a party defendant to the action by reason of his being or having been a director or officer or employee of the corporation." *People v. Uran Mining Corp.* 206 N.Y.S. 2d 455 (1960).

court⁵⁶ and is often used as a compromise which allows a speedy and inexpensive termination to the litigation. It does not establish prima facie evidence to be used in another case based on the same facts. It is submitted that if the judge allows the plea the director should be allowed indemnification from the corporation for his reasonable expenses.⁵⁷

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⁵⁶In *United States v. Socony-Vacuum Oil Co.* (D.C.W.D. Wis. 1938) 23 F. Supp. 531, the court in allowing a plea of *nolo contendere* said: "This case is before the Court for disposition upon pleas of *nolo contendere* entered by some of the defendants in this action, after negotiations over a considerable period of time between the parties. . . .

This case . . . lies in a field where the Government might, with equal propriety, have proceeded initially by a civil action in equity, or, as here, by a criminal prosecution, either being an action to enforce penalties for the violation of a statute. The Court is of the opinion that the wrong here complained of is not *malum in se*, but rather *malum prohibitum*, one peculiarly of an economic nature and one in which the attainment of a proper understanding between the parties is of itself a desirable end.

⁵⁷FLETCHER CYCLOPEDIA CORPORATIONS (1961) §6045.2 "The limitations on indemnification in most of the jurisdictions are negative. In other words, unless the party has been adjudged or finally adjudged liable for negligence or misconduct, etc., he is entitled to indemnification."