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CORPORATE INDEMNIFICATION AND LIABILITY INSURANCE FOR CORPORATION OFFICERS AND DIRECTORS

by

*William E. Knepper**

FORTY-SEVEN states, the District of Columbia, Puerto Rico, and the Virgin Islands have statutes providing for the indemnification of corporate officers, directors, employees, and agents by their respective corporations. Only Idaho, Illinois, and Vermont have no such statutory provisions.¹ Seventeen states have enacted statutory provisions for the purchase and maintenance of liability insurance covering corporate officers, directors, and employees. They are Alabama, California, Delaware, Georgia, Kansas, Louisiana, Massachusetts, Minnesota, Nevada, New Jersey, New York, Ohio, Oklahoma, Rhode Island, Utah, Virginia, and Washington.² The concern of the business community over the potential liabilities of corporate officers, directors, employees, and agents is reflected in these legislative enactments, intended to facilitate the providing of protection against such hazards. The purpose of this Article is to examine the nature and scope of corporate indemnification and of liability insurance, which is popularly known as "D and O" coverage.

I. CORPORATE INDEMNIFICATION

A. *Model Act and Delaware Form of Statute*

The statutory enactments permitting a corporation to indemnify its officers, directors, employees, and agents constitute the foundation of the indemnification process. Most of the states that have enacted such legislation have followed the American Bar Association and the American Law Institute Model Business Corporation Act.³ This model act was prepared by the Committee on Corporate Laws of the ABA Section of Corporation, Banking and Business Law and has been amended from time to time to meet current demands. As an example, its section 4A, which amended former section 4(o) in 1967, is particularly appropriate in the light of recent litigation involving the liabilities of corporate officers and directors.⁴ The Model Business Corporation Act provisions are of the nonexclusive type. They permit the corporation to provide the indemnification as prescribed in the Act, but specify that the indemnification provided by the Act shall not be deemed exclusive of any other rights to which one indemnified may be entitled under any bylaw, agreement, vote of share-

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¹ See Appendix A for statutory references.

² See Appendix B for statutory references.

³ ABA-ALI MODEL BUS. CORP. ACT (1953, as amended).

⁴ See, e.g., *id.* § 4A(f) (1967 amend.). See also Sebring, *Recent Legislative Changes in the Law of Indemnification of Directors, Officers, and Others*, 23 BUS. LAW. 95 (1967).

holders, or disinterested directors, or otherwise, both as to action in his official capacity and as to action in another capacity while holding such office.⁵

The Model Act provisions are similar to section 145 (f) of the Delaware Code,⁶ which will be discussed in some detail in the next section of this Article. In fact, as to its subsections (a) through (g), the entire Delaware indemnification statute is fundamentally the same as section 4A of the Model Business Corporation Act. In 1970 a new subsection (h) was added to the Delaware indemnification statute, which has no counterpart in the corporation law of any other state.⁷ The amendment stipulates that a corporation surviving a merger or resulting from a consolidation shall be obligated to the personnel of an absorbed or merged corporation as if such personnel had served the surviving or resulting corporation in the same capacity as they served the absorbed corporation. The new provision permits the surviving or resulting corporation to take such action as it deems appropriate to provide continuing indemnification to personnel of an absorbed or merged corporation who otherwise would probably have no statutory rights against the surviving or resulting corporation. Until some decisions have been rendered by the Delaware courts, it cannot be stated positively whether or not the mandatory indemnification provisions of the Delaware statute will be applicable to persons covered by the new subsection (h). Professor Joseph W. Bishop, Jr., discussing the intent of the Delaware indemnification statute, has written: "The objective . . . is apparently not to place limits on the protection of guilty management, but to make explicit the power of management to indemnify itself in situations where, under the artless enactment of an untutored legislature, courts and commentators had questioned the propriety of indemnification."⁸

Despite some earlier criticism of the Delaware indemnification statute, it, and section 4A of the Model Business Corporation Act from which it is taken, have served as the pattern for similar enactments in forty other jurisdictions.⁹ In each of five recent additions to that list, the Delaware act has served as the prototype.¹⁰ Because the Delaware, California, and New York forms constitute the predominant types of indemnification statutes, they will be separately discussed.

Analysis of the Delaware Indemnification Statute. Mandatory indemnification of a director, officer, employee, or agent of a Delaware corporation is required if he has been successful on the merits or otherwise in the defense of any derivative or nonderivative action, suit, or proceeding, or in the defense of any claim, issue, or matter therein.¹¹ Such mandatory in-

⁵ But see text accompanying note 52 *infra*.

⁶ DEL. CODE ANN. tit. 8, § 145 (f) (Supp. 1968).

⁷ *Id.* § 145 (h) (Supp. 1970).

⁸ Bishop, *Sitting Ducks and Decoy Ducks: New Trends in the Indemnification of Corporate Directors and Officers*, 77 YALE L.J. 1078, 1081 (1968).

⁹ See Appendix A.

¹⁰ E.g., statutes of Alabama, Hawaii, Kansas, Oklahoma, and Rhode Island, cited in Appendix A.

¹¹ DEL. CODE ANN. tit. 8, § 145 (c) (Supp. 1968).

demnification extends to expenses, including attorneys' fees, actually and reasonably incurred in connection therewith.¹² Since the statute extends a right of indemnity to a director, officer, employee, or agent "of a corporation,"¹³ and new section 145 (h) defines a corporation to include "all constituent corporations absorbed in a consolidation or merger,"¹⁴ there is substantial justification for taking a position that this right of indemnity will be applicable to persons covered by the new section. Permissive indemnification may be made by a corporation only as authorized in a specific case, upon a determination that such indemnification is proper because the director, officer, employee, or agent has met the applicable standard of conduct.¹⁵ Such determination must be made:

- (1) [B]y the board of directors by a majority vote of a quorum of directors who were not parties to the action, suit or proceeding; or
- (2) [I]f 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
- (3) By the stockholders.¹⁶

*Derivative Actions.*¹⁷ In the event of a derivative action the applicable standard of conduct is that the director, officer, employee, or agent acted in good faith and in a manner he reasonably believed to be in or not opposed to the best interests of the corporation.¹⁸ No indemnification may be made in respect of a claim, issue, or matter as to which such person was adjudged to be liable for negligence or misconduct in the performance of his duty to the corporation, unless and only to the extent that a court determines that, in view of all the circumstances, such person is fairly and reasonably entitled to indemnification. In a derivative action situation, the indemnification extends only to expenses, including attorneys' fees, actually and reasonably incurred.

*Nonderivative Actions.*¹⁹ Nonderivative actions involve an identical standard of conduct in civil matters. Indemnification may be made if the director, officer, employee, or agent acted in good faith and in a manner he reasonably believed to be in or not opposed to the best interests of the corporation. In any criminal action or proceeding, he must have had no reasonable cause to believe his conduct was unlawful. The termination of any action, suit, or proceeding by judgment, order, settlement, conviction, or upon a plea of nolo contendere or its equivalent, will not, of itself, create any presumption that the director, officer, employee, or agent did not meet that standard of care.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.* § 145 (h) (Supp. 1970).

¹⁵ *Id.* § 145 (d) (Supp. 1968).

¹⁶ *Id.* In both the Delaware and New York forms of statutes, there is inadequate definition of "independent legal counsel."

¹⁷ Indemnification provisions applicable to derivative actions are found in DEL. CODE ANN. tit. 8, § 145 (b) (Supp. 1968).

¹⁸ The significance of the phrase "or not opposed to" must be recognized. It is also contained in the Model Act.

¹⁹ Indemnification provisions applicable to nonderivative actions are found in DEL. CODE ANN. tit. 8, § 145 (a) (Supp. 1968).

In a nonderivative action situation the indemnification may extend to expenses, including attorneys' fees, and also to judgments, fines, and amounts paid in settlement. Advance payment of expenses is permitted, if authorized by the board of directors in a specific case and upon the furnishing of a bond for repayment unless it is ultimately determined that indemnification was authorized by the statute.²⁰

B. California Form of Statute

Section 830 of California's Corporations Code contains provisions for both mandatory and permissive indemnification.²¹ In either event it appears that the right to indemnification is determined after the principal action has been decided.²² *Mandatory* indemnification of a present or former director, officer, or employee may be imposed by a court, if both of the following conditions exist: "(1) The person sued is successful in whole or in part, or the proceeding against him is settled with the approval of the court. (2) The court finds that his conduct fairly and equitably permits such indemnity."²³

The above provisions apply to any proceeding arising out of the alleged misfeasance or nonfeasance of a director, officer, or employee in the performance of his duties, or out of any alleged wrongful act against the corporation or by the corporation.²⁴ These rights and remedy are *exclusive* and are not governed by any provision in the articles or bylaws of the corporation, or by any resolution or agreement of the corporation, its directors or its shareholders.²⁵ The amount of indemnity will be so much of the expenses, including attorneys' fees, incurred in the defense of the proceeding, as the court determines to be reasonable.²⁶

Permissive indemnification of a present or former corporate director, officer, or employee may be authorized under the California statute by the board of directors, if it determines in good faith that such director, officer, or employee was acting in good faith, within what he reasonably believed to be the scope of his employment or authority and for a purpose which he reasonably believed to be in the best interests of the corporation or its shareholders.²⁷ Permissive indemnification does not apply to an action instituted or maintained in the right of the corporation by a shareholder or holder of a voting trust certificate representing shares of the corporation.²⁸ However, it may include not only expenses, but also the amount of a judgment or fine rendered or levied against such director, officer, or employee, and amounts paid in settling an action or threatened action.²⁹

²⁰ DEL. CODE ANN. tit. 8, § 145(e) (Supp. 1968).

²¹ CAL. CORP. CODE § 830 (West Supp. 1971).

²² See *Kaiser v. Easton*, 151 Cal. 2d 307, 311 P.2d 108, 9 Cal. Rptr. 507 (1957).

²³ CAL. CORP. CODE § 830(a) (West Supp. 1971). See also *Brokate v. Kehr Mfg. Co.*, 243 Cal. 2d 133, 52 Cal. Rptr. 672 (1966).

²⁴ CAL. CORP. CODE § 830(a) (West Supp. 1971).

²⁵ *Id.* § 830(e).

²⁶ *Id.* § 830(a).

²⁷ *Id.* § 830(f). Note that the phrase "or not opposed to" does not appear in the California statute. As to the Delaware statute, see text accompanying note 18 *supra*.

²⁸ CAL. CORP. CODE § 830(f) (West Supp. 1971).

²⁹ *Id.*

California also provides another and quite different type of remedy in section 834 of its Corporations Code.³⁰ That section imposes conditions on the prosecution of unfounded litigation by disgruntled shareholders against corporate directors. The plaintiff may be required to provide indemnity in favor of the individual defendants and, in a proper case, indemnity for the corporation to save it harmless from liability assessed against it under section 830. Under section 834, as under section 830, the right to indemnification is determined after the action has been tried, and indemnification is mandatory only in case the court determines that those seeking indemnity have been successful in the litigation and are fairly and equitably entitled to recourse against the indemnitor.³¹

C. New York Form of Statute

A somewhat elaborate enactment, set forth in five separate sections of New York's Business Corporation Law,³² the New York indemnification statutes have served as the pattern for similar provisions in New Hampshire and Tennessee.³³ Section 722 of the New York act states the exclusive circumstances under which a person may be entitled to indemnification for his reasonable expenses, including attorneys' fees, incurred by him in connection with a derivative action.³⁴ Such indemnification may not extend to any amounts paid in settling or otherwise disposing of a threatened or pending action.³⁵ Expenses may not be included if the action was settled or otherwise disposed of without court approval.³⁶ Section 723 sets forth the exclusive circumstances under which a person may be entitled to indemnification for his reasonable expenses incurred, including attorneys' fees, and for judgments, fines, and amounts paid in settlement of a suit or proceeding, civil or criminal, other than a derivative action.³⁷

Section 725 provides that a person who has been wholly successful, on the merits or otherwise, in the defense of any action mentioned in sections 722 and 723 is absolutely entitled to such indemnification, which is mandatory when awarded by court order upon application.³⁸ Section 725 also permits the court to allow a person such reasonable expenses, including attorneys' fees, during the pendency of the litigation as are necessary in connection with his defense therein, if the court finds he has raised genuine issues of fact or law.³⁹

Permissive indemnification, under the New York law, is dependent upon particular authorization.⁴⁰ When a person has not been wholly successful in his defense, and indemnification has not been made mandatory by court order, it is necessary that permissive indemnification be authorized:

³⁰ *Id.* § 834.

³¹ *Id.* § 834(a). See *Kaiser v. Easton*, 151 Cal. 2d 307, 311 P.2d 108, 9 Cal. Rptr. 507 (1957).

³² N.Y. BUS. CORP. LAW §§ 722-26 (McKinney 1963).

³³ See statutory references in Appendix A.

³⁴ N.Y. BUS. CORP. LAW § 722(a) (McKinney 1963).

³⁵ *Id.* § 722(b)(1).

³⁶ *Id.* § 722(b)(2).

³⁷ *Id.* § 723.

³⁸ *Id.* § 725(a); see *id.* § 724(a).

³⁹ *Id.* § 725(c).

⁴⁰ *Id.* § 724(b).

- (1) By the board of directors, acting by a quorum consisting of directors who were not parties to the action or proceeding, upon a finding that the director or officer has met the applicable standard of conduct; or
- (2) If a quorum . . . is not obtainable with due diligence; (A) By the board of directors upon the written opinion of independent legal counsel that indemnification is proper because the applicable standard of conduct has been met; or (B) By the shareholders upon a finding that the applicable standard of conduct has been met.⁴¹

However, section 726 contains strict requirements precluding indemnification under specified circumstances.⁴² The particular restrictions are:

- (1) That the indemnification would be inconsistent with the law of the jurisdiction of incorporation of a foreign corporation which prohibits or otherwise limits such indemnification;
- (2) That the indemnification would be inconsistent with a provision of the certificate of incorporation, a bylaw, a resolution of the board or of the shareholders, an agreement or other proper corporate action, in effect at the time of the accrual of the alleged cause of action asserted in the threatened or pending action or proceeding in which the expenses were incurred or other amounts paid, which prohibits or otherwise limits indemnification; or
- (3) That where a settlement was approved by the court, the indemnification would be inconsistent with any condition with respect to indemnification expressly imposed by the court in approving the settlement.⁴³

One unique provision of the New York law is contained in section 726(c).⁴⁴ If indemnification is paid other than pursuant to a court order or action by the shareholders, the corporation must mail to its shareholders of record a statement specifying the persons paid, the amounts paid, and the nature and status of the litigation or threatened litigation at the time of such payment. Time limits for the mailing are prescribed in the section.

By an amendment of section 726, effective September 1, 1969, New York's indemnification statutes and the insurance provisions thereof are made applicable to domestic corporations and foreign corporations doing business in New York, with certain exceptions.⁴⁵ These exceptions, provided in section 1320 of the Business Corporation Law, appear to exempt from the indemnification statutes such foreign corporations as (1) have their shares listed on a national securities exchange, or (2) allocate less than one half their business income for the preceding fiscal years to New York for franchise tax purposes.⁴⁶

Exclusive Statutory Provisions: Comparison between Delaware and New York. New York declares that its statutory indemnification provisions are exclusive.⁴⁷ In view of this declaration, it may be contended that in New York no charter or bylaw provision on indemnification is necessary.⁴⁸ In

⁴¹ *Id.*

⁴² *Id.* § 726.

⁴³ *Id.* § 726(b). No such restrictions are found in the Delaware statute, taken from ABA-ALI MODEL BUS. CORP. ACT § 4A (1967 amend.), DEL. CODE ANN. tit. 8, § 145(a) (Supp. 1968).

⁴⁴ N.Y. BUS. CORP. LAW § 726(c) (McKinney 1963).

⁴⁵ Ch. 1007, § 2, [1969] N.Y. Laws 1550.

⁴⁶ N.Y. BUS. CORP. LAW § 1320 (McKinney 1963).

⁴⁷ *Id.* § 721.

⁴⁸ See Israels, *A New Look at Corporate Directorship*, 24 BUS. LAW. 727, 736-37 (1969).

Delaware a bylaw identical to the statute, but making indemnification mandatory, has been upheld,⁴⁹ as has a bylaw broader in scope than the statute.⁵⁰ A bylaw more restrictive than the Delaware statute was upheld by the Delaware court, which observed that a corporation "is free to invoke less than all the indemnification power granted it under this particular statute"⁵¹ Conversely, the Ninth Circuit ignored the nonexclusive provision of the Delaware statute⁵² and denied indemnification in a case decided in 1963.⁵³ Shareholders had already commenced a derivative action against several directors and officers, charging misconduct and negligence, when the board of directors passed a resolution to indemnify all directors and officers against every kind of liability. The Ninth Circuit found that this resolution violated the "negligence or misconduct" provisions of the statute,⁵⁴ because the shareholders were successful in their derivative action. This decision indicates that the "nonexclusive" provision of the Delaware statute and others like it will probably be held subject to the "negligence and misconduct" clause under most circumstances.⁵⁵ On the other hand, such a result is substantially the same as that which should be anticipated under the mandatory indemnification provision of the California form of statute, which requires a court determination that the conduct of the person sued "fairly and equitably merits" indemnification.⁵⁶

D. *The Texas Statute*

In Texas the indemnification statute is substantially the same as former section 4(o) of the Model Business Corporation Act before it was superseded by new section 4A, which is the foundation of the Delaware provision. Article 2.02(16) of the Texas Business Corporation Act empowers corporations to indemnify present and former directors, officers, and others for expenses incurred in defending any proper official act.⁵⁷ This statute is of the nonexclusive type and is, in this respect, comparable to the present Model Act and the Delaware statute. Also, the Texas statute expressly prohibits indemnification in relation to matters where the person involved is adjudged to be liable for negligence or misconduct in performance of duty. Thus, as noted in the preceding section of this Article, the nonexclusive provision is subject to the negligence and misconduct clause. Industrial growth in Texas has resulted in expansion of corporate activity. A natural result may be an increase in shareholders' suits, derivative actions, and other proceedings affecting the liability of corporate officers and directors. Thus, it would seem appropriate for the legislature to act to bring

⁴⁹ *Essential Enterprises Corp. v. Automatic Steel Prods., Inc.*, 39 Del. Ch. 371, 164 A.2d 437 (Ch. 1960).

⁵⁰ *Mooney v. Willys-Overland Motors, Inc.*, 204 F.2d 888 (3d Cir. 1953).

⁵¹ *Essential Enterprises Corp. v. Dorsey Corp.*, 40 Del. Ch. 343, 182 A.2d 647 (Ch. 1962).

⁵² DEL. CODE ANN. tit. 8, § 145(f) (Supp. 1968).

⁵³ *Teren v. Howard*, 322 F.2d 949 (9th Cir. 1963).

⁵⁴ DEL. CODE ANN. tit. 8, § 145(b) (Supp. 1968).

⁵⁵ Cf. *Globus Law Research Serv., Inc.*, 418 F.2d 1276, 1288 (2d Cir. 1969); *SEC v. Continental Growth Fund*, CCH FED. SEC. L. REP. ¶ 91,437 (S.D.N.Y. 1964).

⁵⁶ See CAL. CORP. CODE § 830(a)(2) (West Supp. 1971).

⁵⁷ TEX. BUS. CORP. ACT ANN. art. 2.02(16) (1956).

the Texas indemnification and liability insurance statutes in line with the country-wide trend.

E. *Indemnification in SEC Transactions*

Liability arising out of actions under sections 11 and 12 of the Securities Act of 1933,⁵⁸ under section 17(a) of that Act,⁵⁹ or under section 10(b) of the Securities Exchange Act of 1934⁶⁰ and rule 10b-5⁶¹ promulgated pursuant thereto, may present special problems of corporate indemnification as well as with respect to liability insurance. Carlos Israels has written: "[I]f a corporation has paid the premium costs . . . I suggest that it has indemnified the director in a manner which the SEC at least has clearly indicated it considers contrary to public policy."⁶²

By a note to its rule 260 under the 1933 Act, the SEC has made it a condition to the acceleration of a registration statement that the registrant must, unless all claims for indemnification are waived, state that the SEC deems indemnification arrangements to be against public policy as expressed in the Act and, therefore, unenforceable.⁶³ The registrant must also agree that, unless the matter is settled by controlling precedent, it will submit any claim for indemnification for Securities Act liabilities (other than for the expenses of a successful defense) to a court for adjudication, and will consent to be bound by the court's decision.⁶⁴ The language of the note indicates it applies to compromises and settlements as well as judgments.

The only significant reported case dealing with public policy and corporate indemnification is *Globus v. Law Research Service, Inc.*⁶⁵ It is notable not only for its denial of indemnity to an underwriter, but also for its determination that punitive or exemplary damages would not be awarded for a violation of section 10(b) of the Securities Exchange Act of 1934⁶⁶ or section 17(a) of the Securities Act of 1933.⁶⁷ In the opinion Circuit Judge Irving R. Kaufman mentioned the SEC attitude toward indemnification and suggested that directors, officers, controlling persons, and underwriters perhaps should be treated alike in respect to indemnification.⁶⁸

As is noted in other parts of this Article, serious question exists as to the extent that directors' and officers' liability insurance policies afford coverage for liabilities arising under the SEC statutes and rules. Professor Joseph W. Bishop, Jr., who has written extensively in this field, noted the hazards of such claims during a 1969 symposium:

[I]t must be admitted that no one today can accurately forecast the size of

⁵⁸ 15 U.S.C. §§ 77k, 77l (1971).

⁵⁹ *Id.* § 77q(a).

⁶⁰ *Id.* § 78j(b).

⁶¹ 17 C.F.R. § 240.10b-5 (1968).

⁶² Israels, *supra* note 48, at 738. See also Comment, *Indemnification of the Corporate Insider: Directors' and Officers' Liability Insurance*, 54 MINN. L. REV. 667 (1970).

⁶³ Note to rule 260 under the Securities Act of 1933, 17 C.F.R. § 230.460 (1968).

⁶⁴ *Id.*

⁶⁵ 287 F. Supp. 188 (S.D.N.Y. 1968), *aff'd in part*, 418 F.2d 1276 (2d Cir. 1969).

⁶⁶ 15 U.S.C. § 78j(b) (1971).

⁶⁷ *Id.* § 77g(a).

⁶⁸ 418 F.2d at 1288.

the risk which is created by the prospect of increasingly vigorous enforcement of the federal securities laws, both by the Securities and Exchange Commission and by private litigants. That risk includes, of course, not only fines and amounts paid in satisfaction of judgment or to compromise claims, but also legal expenses, which are likely to be high in this kind of litigation.⁶⁹

It is not likely that the public policy question will be settled soon. Most observers see nothing improper in the indemnification of corporate officers and directors when they are successful in their defenses. Even in the case of unsuccessful defenses, there are indications that indemnification against expenses would be sustained.⁷⁰ Indemnification against judgments, amounts paid in settlement, and especially fines and penalties presents a more difficult problem. Perhaps the primary question for determination is whether compensation or deterrence is the intended objective of the laws that impose liability upon corporate officers and directors.

The Penn Central failure has brought forth considerable litigation against that railroad's officers and directors as well as some extensive investigations by the Committee on Banking and Currency of the House of Representatives.⁷¹ The committee's chairman, Representative Wright Patman (D.-Tex.), is reported to have "launched a vigorous campaign to halt the increasing acceptance by states of laws specifically allowing corporations to pay for insurance against wrong doing by their directors and officers."⁷² According to further reports he contends that "state laws permitting the purchase of such policies undermine numerous federal statutes, including the Securities Act of 1933, the Securities Exchange Act of 1934, the Sherman Act, the Internal Revenue Code and various federal statutes imposing civil liability on responsible corporate officials."⁷³

As noted earlier, forty-seven states, the District of Columbia, Puerto Rico, and the Virgin Islands now provide by statute for the indemnification of corporate officers, directors, employees, and agents, while only seventeen states to date expressly provide by statute for liability insurance for such purposes. At least until the Penn Central failure the trend appeared favorable to such indemnification and liability insurance in supplementation of it. Representative Patman's "campaign" appears to be directed against D and O insurance, especially where the violation of federal laws is involved. In Canada, however, the new Business Corporations Act which became effective January 1, 1971, prohibits indemnification unless the directors achieve "complete or substantial success" in actions brought against them.⁷⁴ That requirement is similar to the present law of Texas.⁷⁵ The Patman "campaign" and the Ontario statute are suggestive of things to come in re-

⁶⁹ Bishop, *Protecting Corporate Executives Against Liability and Expense Under the Federal Security Laws*, in *EMERGING FEDERAL SECURITIES LAW: POTENTIAL LIABILITY* 155-69 (Institute of Continuing Legal Education 1969).

⁷⁰ Cf. *Commissioner v. Tellier*, 383 U.S. 687 (1966).

⁷¹ STAFF REPORT OF THE HOUSE COMM. ON BANKING AND CURRENCY, 90TH CONG., 2D SESS., *THE PENN CENTRAL FAILURE AND THE ROLE OF FINANCIAL INSTITUTIONS* (Comm. Print 1970 (2 parts), 1971 (2 parts)).

⁷² *BUSINESS INSURANCE*, Mar. 1, 1971, at 4.

⁷³ *Id.*

⁷⁴ ONTARIO BUS. CORP. ACT § 147(2) (1971).

⁷⁵ TEX. BUS. CORP. ACT ANN. § 2.02(16) (1956).

gard to indemnification as well as liability insurance. Meanwhile, on the other hand, New York has a relatively new statute which declares it to be the public policy of that state to spread the risk of corporate management, notwithstanding any other general or special law of New York, or of any other jurisdiction, including the federal government.⁷⁶ Perhaps this New York statute indicates what other states will do in the future.

II. LIABILITY INSURANCE

Liability insurance is tending to become a moderately popular means of supplementing statutory and bylaw indemnification of corporate officers, directors, and employees, although its effectiveness to accomplish its intended purpose has been the subject of considerable controversy. The original form of blanket policy for a corporation and its officers and directors was provided by Lloyd's of London, which is still the principal source of this type of coverage.⁷⁷ This form is in two inseparable parts. The first part reimburses the corporation for payments actually made by it in the indemnification of its directors and officers. The second part insures the individual officers and directors against losses for which they have not been otherwise indemnified. There is a deductible feature and a co-insurance feature.⁷⁸ In addition to the Lloyd's policies, there are also several different D and O policies being written by American insurers,⁷⁹ some of which are tailored for specific purposes, as will be noted.

A. Statutory Provisions

In all of the indemnification statutes discussed above except that of Texas express provisions authorizing the purchase and maintenance of such insurance will be found.⁸⁰ Altogether seventeen states have enacted statutory provisions of this nature.⁸¹ In most instances the insurance policy authorized by statute may cover liability asserted against or incurred by a corporate officer, director, or employee, whether or not the corporation would have the power to indemnify him against such liability under the provisions of the indemnification statute.⁸² Nevertheless, the policy itself may exclude some such elements of liability. The Second Circuit has reiterated the rule that "one cannot insure himself against his own reckless, willful or criminal misconduct."⁸³ And the general counsel of one of the leading underwriters of such insurance⁸⁴ has noted that "any act which

⁷⁶ N.Y. BUS. CORP. LAW § 727 (McKinney 1969).

⁷⁷ W. KNEPPER, LIABILITY OF CORPORATE OFFICERS AND DIRECTORS § 10.01, at 173 (1969) [hereinafter cited as KNEPPER].

⁷⁸ *Id.* §§ 10.03, 10.05-12. See also Kroll, *Some Reflections on Indemnification Provisions and S.E.C. Liability Insurance in the Light of BarChris and Globus*, 24 BUS. LAW. 681, 685-86 (1969).

⁷⁹ KNEPPER § 10.03.

⁸⁰ ABA-ALI MODEL BUS. CORP. ACT § 4A(g) (1953); CAL. CORP. CODE § 830(h) (West Supp. 1971); DEL. CODE ANN. tit. 8, § 145(g) (Supp. 1968); N.Y. BUS. CORP. LAW § 727 (McKinney 1970).

⁸¹ See Appendix B.

⁸² See, e.g., DEL. CODE ANN. tit. 8, § 145(g) (Supp. 1968).

⁸³ *Globus v. Law Research Serv., Inc.*, 418 F.2d 1276, 1288 (2d Cir. 1969).

⁸⁴ Gordon H. Snow, Senior Vice President and General Counsel of Pacific Indemnity Company, Los Angeles.

offends the public policy is uninsurable in most cases, such as acts of willful neglect, gross negligence, and fraud, with certain exceptions."⁸⁵

The Recent New York Statute. In one instance the statutory provisions authorizing corporations to purchase and maintain directors' and officers' liability insurance are so specific that they merit particular mention. Effective September 1, 1969,⁸⁶ section 727 of New York's Business Corporation Law was enacted to permit a corporation to purchase and maintain insurance:

(1) to indemnify the corporation for any obligation it incurs as a result of the indemnification of directors and officers under the provisions of section 722 and 726.

(2) to indemnify directors and officers in instances in which they may be indemnified by the corporation under those sections; and

(3) to indemnify directors and officers in instances in which they may not otherwise be indemnified by the corporation under the above sections, provided the insurance policy allows for a retention amount and for co-insurance in a manner acceptable to the superintendent of insurance.⁸⁷

Such insurance is subject to specified restrictions spelled out in section 727. While the insurance may be included in a single contract or supplement thereto, retrospective rating is prohibited. No insurance may provide for payment other than the cost of defense (1) in relation to any risk the insurance of which is prohibited by New York law, or (2) if a final adjudication adverse to the insured director or officer establishes that his acts of active and deliberate dishonesty were material to the cause of action, or that he personally gained in fact a financial profit or other advantage to which he was not legally entitled. Within the time prescribed in section 726 the corporation must mail to its shareholders a statement specifying the insurance carrier, date of the contract, cost of insurance purchased or renewed, corporate positions insured, and a statement explaining all sums (not previously reported in a statement to shareholders) paid under any indemnification insurance contract.⁸⁸

In this enactment the New York legislature stated that it was the public policy of that state to spread the risk of corporate management, notwithstanding any other general or special law of New York or of any other jurisdiction—including the federal government. This provision apparently constitutes an official response to questions such as those raised by Professor Joseph W. Bishop, Jr., for example, as to the validity of such insurance in the light of public policy.⁸⁹

B. *The Pillsbury Incident*

The Model Act provision permitting a corporation to purchase and maintain insurance on its officers, directors, and other employees⁹⁰ may

⁸⁵ Snow, *Liability of Directors and Officers of Corporations*, 17 DEFENSE L.J. 521, 541 (1968).

⁸⁶ Ch. 1007, § 1, [1969] N.Y. Laws 1550.

⁸⁷ N.Y. BUS. CORP. LAW § 727 (McKinney 1970).

⁸⁸ *Id.*

⁸⁹ Bishop, *supra* note 8, at 1091.

⁹⁰ ABA-ALI MODEL BUS. CORP. ACT § 4A(g) (1953).

conflict with a corporation's charter, regulations, or bylaws. Such a potential conflict was dealt with in the Notice of Annual Meeting of Stockholders of The Pillsbury Company held September 9, 1969. The Pillsbury Corporation exists under the General Corporation Law of Delaware, section 145 (g) of which is identical to the above-mentioned Model Act provision. The subsection permits the corporation to purchase and maintain such insurance whether or not the corporation would have the power to indemnify the officer, director, or employee under the provisions of section 145.

The power of The Pillsbury Company to indemnify its officers and directors was contained in section 6 of article VIII of its bylaws, which prohibited indemnification of a director or officer found to be derelict in the performance of his duty to the company, or for any amounts paid to the company in settlement or judgment in derivative suits by a director or officer. The board of directors was considering insurance coverage of the type permitted by section 145 of the Delaware law, which would extend to the two areas where indemnity by the company was prohibited. To avoid any possibility of conflict with section 6 of article VIII of the company's bylaws, the board of directors deemed it desirable to obtain stockholder authority to pay the entire premium for such insurance. In requesting and recommending the affirmative vote of the holders of a majority of the common and preferred shares to approve the insurance proposal, the board of directors stated to the stockholders:

There are no actions or proceedings now pending to which the proposed insurance would apply, and the Board of Directors has no knowledge of any threatened action or proceeding of any kind. Nonetheless, the widespread activities of the Company necessarily subject its officers and directors to the complexities and uncertainties of an ever growing body of State and Federal laws and regulations, thus resulting in an increased exposure to extensive and expensive legal proceedings. As a matter of fairness to its officers and directors, and in order that the Company may retain capable people in these positions and continue to attract such people, the Board of Directors recommends that the Company be specifically empowered to pay the full premium on such insurance in the event such insurance is purchased.⁹¹

Although the Internal Revenue Service had ruled in the summer of 1969 that the premiums on such policies were proper business expenses of the company,⁹² the potential conflict between the insurance coverage and the company's bylaws made stockholder approval of the transaction an advisable course—especially since the estimated annual cost of such insurance was \$40,000.

C. Validity and Effectiveness of D and O Policies

Professor Bishop wrote in 1969 that the "draftsmanship of the Directors' and Officers' Liability policies now on the market is so ambiguous and obscure that it is difficult to say whether and to what extent" they cover

⁹¹ The Pillsbury Company, Notice of Annual Meeting of Stockholders to be held September 9, 1969, at 8.

⁹² Rev. Rul. 69-491, 1969-2 CUM. BULL. 22.

certain liabilities.⁹³ The policies available today are in substantially the same forms as in 1969. In the same article Professor Bishop also wrote: "Aside from the appalling draftsmanship, which makes it nearly impossible to determine the extent of the coverage, there are no reliable statistics on the incidence of the risk, and there cannot be until the scope of that risk has been more clearly demarcated by the federal courts."⁹⁴ While Professor Bishop was writing about liabilities arising principally under the federal securities laws, other writers have been highly critical of the scope and effectiveness of the D and O coverage, especially under part II relating to the individual officers and directors.⁹⁵

On February 16, 1971, representatives of Lloyd's of London brought suit in Philadelphia to rescind D and O policies issued to the Penn Central Company effective July 3, 1968, with limits of \$10 million, for a premium of \$305,660 paid by the corporation.⁹⁶ That litigation induced *Business Insurance* to editorialize: "We, as others, have long questioned the value of D and O. We do so again."⁹⁷ And that editorial, in turn, brought a vigorous response from Thomas F. Sheehan, President of Excess Underwriters, Inc., who analyzed the Lloyd's litigation at some length and wrote, in part: "Rescission or cancellation of insurance is appropriate to all classes of insurance. The availability of the remedy of rescission to the underwriter who has been deceived by the applicant does not signify that those classes of insurance are not essential to the protection of forthright insureds."⁹⁸ Noting that on February 17, 1971, certain present and former officers of Penn Central sued the underwriters for injunction and denied any negligence or wrongdoing, Mr. Sheehan pointed out: "D & O policies do not exclude practically everything. Specially [*sic*] they do not exclude the charge of conflict of interest. Further, if all your readers ask themselves the question 'Am I innocent of the charges made?' where they can answer 'Yes' they can expect their D & O insurance to respond."⁹⁹ The dispute between Penn Central's directors and the Lloyd's underwriters will probably not be resolved for some years, but in the meantime many others are concerned with obligations and rights under policies of this type.

Stewart, Smith & Co., Inc., is a leader in marketing D and O insurance. Policy forms bearing the "SS" symbol are commonly known as "Lloyd's forms" and are issued through Stewart, Smith facilities. The Stewart, Smith brochure, published in 1970 to assist in promoting the sale of such policies, reports that more than \$2.5 billion of directors' and officers' liability coverage has been effected through the Stewart, Smith offices since 1963, involving "some seven hundred of the largest corporations in the United States."¹⁰⁰ And the Internal Revenue Service has ruled that a corporation

⁹³ Bishop, *supra* note 69, at 165.

⁹⁴ *Id.* at 166.

⁹⁵ Olson, *D & O Liability Coverage—Fact or Fiction*, BUSINESS INSURANCE, Oct. 13, 1969, at 37-38.

⁹⁶ Bird v. Penn Central Co., Civil No. 71-358 (E.D. Pa., filed Feb. 16, 1971).

⁹⁷ BUSINESS INSURANCE, Mar. 15, 1971, at 16.

⁹⁸ *Id.*, Apr. 12, 1971, at 16.

⁹⁹ *Id.*

¹⁰⁰ Stewart, Smith & Co., Inc., Brochure (1970).

may pay the premiums on such policies "to protect its business by limiting its liability for such wrongful acts and to assure the taxpayer that its officers and directors can make necessary corporate decisions without fear of legal entanglement."¹⁰¹ Whatever may be the result of the judicial interpretation of the policy language, a review of some of the various types of policies may be helpful at this juncture.

D. Types of Coverage

The "Mini" Program. Late in 1969 the American States Insurance Company introduced what it called a "mini" directors and officers policy for "small" commercial, financial, and industrial risks. It announced that this policy was designed for financial institutions with assets of \$40 million or less and for modest-sized nonfinancial corporations with assets of \$10 million or less but with minimum assets of at least \$5 million.¹⁰² American Home Assurance Company writes a similar "mini" policy, as does Pacific Indemnity Company¹⁰³ through the Stewart, Smith offices. Wohlreich & Anderson, Ltd., markets a policy of like type especially designed for savings and loan associations. Undoubtedly other insurers make comparable offerings.

Stewart, Smith makes its "mini" program available to financial institutions with deposits of \$5 million to \$100 million, corporations with assets not over \$7.5 million and a net worth of at least \$1 million, and nonprofit organizations having assets not over \$100 million.¹⁰⁴ A maximum coverage of \$1 million is written in this "mini" program. In some instances, the "mini" policy is written as a single policy, instead of in two parts as in the case of the so-called "maxi" policy on the original Lloyd's of London form. Thus, the "mini" policy of Pacific Indemnity Company includes coverage for directors and officers and for company reimbursement in the same insuring clause.¹⁰⁵ This style is somewhat similar to the form in general use by St. Paul Fire and Marine Insurance Company, which includes both types of risks in the same insuring clause.¹⁰⁶ Also, the American Home Insurance Company combines into one policy its coverages for directors' and officers' liability and organization reimbursement insurance.¹⁰⁷

In most cases the minimum retention¹⁰⁸ under the "mini" policy is \$5,000. Co-insurance, with five per cent participation by the insured, is customary. Minimum three-year prepaid premiums may be as low as \$5,000 to \$7,500. One company noted this as a reduction from a premium of \$17,500 previously charged for similar D and O coverage.¹⁰⁹

¹⁰¹ Rev. Rul. 69-491, 1969-2 CUM. BULL. 22.

¹⁰² BUSINESS INSURANCE, Dec. 8, 1969, at 53.

¹⁰³ *Id.*, Jan. 19, 1970, at 58.

¹⁰⁴ In its form letter outlining the qualifications and information required for quotations, Stewart, Smith points out that closely held corporations are not acceptable, and that a company must have been in business for at least five years, with a profit history and a record of dividend payments.

¹⁰⁵ Stewart, Smith Form SS/2.

¹⁰⁶ St. Paul Form 16253COP—Rev. 1-67.

¹⁰⁷ American Home Form 3195.

¹⁰⁸ The "retention" is an amount deducted from a loss and paid by the insured before the insurer is required to pay; *i.e.*, a "deductible."

¹⁰⁹ BUSINESS INSURANCE, Dec. 8, 1969, at 53.

The "Maxi" Program. Except for the policy issued by St. Paul Fire and Marine Insurance Company, most of the D and O insurance (sometimes referred to as the "maxi" program) is written in the two-part form mentioned above.¹¹⁰ Stewart, Smith informs those who inquire that the requirements for consideration include "a publicly owned corporation that has a steady history of earnings with \$5,000,000 or more in assets, \$10,000,000 or more in sales and has been in business at least five years. There must also be continuity of management, a low, long-term indebtedness ratio compared to capitalization, and absence of current litigation."¹¹¹

This type of coverage is individually underwritten and rated by all insurers. Quotations are usually for three years. A minimum retention of \$20,000 is usually required, although in some cases the deductible may be varied on the basis of underwriting judgment and increased to \$100,000 or more. Higher corporate retentions might be applied to risks which are subject to considerable litigation, such as conglomerates, real estate holding and development corporations, and companies susceptible to antitrust charges. There is usually five per cent participation by the insured, which cannot be covered by insurance. Reports are that "the average purchase has been for a limit of \$5,000,000."¹¹²

It is difficult to suggest the ranges of premium rates for this type of liability insurance because all such coverages are individually underwritten and rated. In 1966 it was reported that a premium of \$15,000 to \$50,000 might be charged for a limit of \$5 million for three years.¹¹³ During the period between 1965 and early 1969 the premium rates approximately tripled.¹¹⁴ In a booklet published in early 1970 Dr. Thomas F. Sheehan stated that the three-year minimum premiums on "maxi" policies are:

\$1 million	\$12,500
2 million	15,000
3 million	17,500
4 million	20,000
5 million	22,500 ¹¹⁵

However, those rates are described as minimum rates and may not exemplify what the policies would actually cost after individual underwriting and rating.

Also, there are strong indications that further rate increases may be in the offing. In an advertisement in *Business Insurance* last summer one American insurer reported:

But the London underwriters who reinsure most or all Directors' and Officers' policies sold in the United States are very unhappy with their experience to date. They are alarmed by sky-rocketing 'advised losses' (British

¹¹⁰ See Bishop, *supra* note 8, at 1086; Note, *Liability Insurance for Corporate Executives*, 80 HARV. L. REV. 648 (1967).

¹¹¹ Form letter supplied Aug. 20, 1970, by Paul W. Sult, Vice President, Stewart, Smith Mid America, Inc., Chicago.

¹¹² *Id.*

¹¹³ BUSINESS WEEK, July 2, 1966, at 56.

¹¹⁴ Knepper, *Let the Director Beware*, 37 INS. COUNS. J. 27, 34 (1970).

¹¹⁵ T. SHEEHAN, THE LIABILITIES OF DIRECTORS AND OFFICERS: WITH PRACTICAL SOLUTIONS FOR THEIR DISCHARGE 18 (1970).

for reserves). They are shocked by pyramiding legal costs. Last May's rate boost already appears to have been inadequate. Some of them are tinkering with revisions that would narrow the coverage, or reduce available limits, or incorporate substantial deductibles with no increase of premium.¹¹⁶

The Coverage Provided. In a general way the "mini" and "maxi" policies provide similar coverage that is not a duplication of the protection afforded by any other type of liability insurance policy. The comprehensive general liability form does not contemplate risks such as are insured against by the D and O policy, and the professional liability and errors and omissions coverages are not applicable, except in rare instances.

The term "Wrongful Act" is an essential element in defining coverage of most D and O policies except that offered by St. Paul Fire and Marine Insurance Company. "Wrongful Act" is defined in the Stewart, Smith "maxi" policy as follows:

Wrongful Act shall mean any actual or alleged error or misstatement or misleading statement or act or omission or neglect or breach of duty by the Assureds while acting in their individual or collective capacities or any matter, not excluded by the terms and conditions of this policy, claimed against them solely by reason of their being Directors or Officers of the Company.¹¹⁷

In the Stewart, Smith "mini" policy the language defining this term states: "Wrongful Act shall mean any actual or alleged error or misstatement or misleading statement or act or omission or neglect or breach of duty by the Directors and Officers in the discharge of their duties, individually or collectively, or any matter claimed against them solely by reason of their being Directors or Officers of the Company."¹¹⁸ The American Home Assurance Company states the definition in some different terms, as follows: "The term 'Wrongful Act' shall mean any breach of duty, neglect, error, misstatement, misleading statement, omission or other act done or wrongfully attempted by the Insureds or any of the foregoing so alleged by any claimant or any matter claimed against them solely by reason of their being such Directors or Officers . . ."¹¹⁹ The definition used by American States Insurance Company¹²⁰ is substantially the same as the American Home definition.¹²¹

In the D and O policy offered by the St. Paul Fire and Marine Insurance Company¹²² the term "Wrongful Act" does not appear and, instead, the indemnification is against any claim "caused by any negligent act, any error, any omission or any breach of duty while acting in their capacities as Directors or Officers."¹²³ The foregoing policy terms are substantially

¹¹⁶ BUSINESS INSURANCE, Aug. 17, 1970, at 5.

¹¹⁷ Stewart, Smith Forms SS-3A, SS-3B. The word "Assureds" is changed to "Directors or Officers" in Form SS-3B (the Company Reimbursement part).

¹¹⁸ Stewart, Smith Form SS/2.

¹¹⁹ American Home Forms 2085, 2086 11/67. "Insureds" is changed to "Directors or Officers" in Form 2085 (the Company Reimbursement part).

¹²⁰ American States Form 9-597 12-69.

¹²¹ *Id.* Form 3195 is also similar. See text accompanying note 107 *supra*.

¹²² See St. Paul Form 16253COP—Rev. 1-67.

¹²³ "Directors or Officers" is changed to "such" in Coverage A, which relates to company reimbursement.

the same as in earlier drafts of these policy forms.¹²⁴ They have not yet undergone court tests but appear to be sufficiently broad to cover most hazards contemplated by such insurance.

The Exclusions. As is frequently the situation with respect to liability insurance policies, the exclusions in both the "mini" and "maxi" programs are of considerable significance. Because there are language differences in the two-part "maxi" policy as compared with the single policy, it may be helpful to deal first with the separate exclusions in the two-part policy.¹²⁵

In the Company Reimbursement part¹²⁶ there are only three exclusions. The first exclusion makes the policy excess insurance over any other existing valid policy or policies under which payment of the loss is actually made. Other D and O coverage, professional liability insurance, or errors and omissions policies might afford other insurance in some respects. The second exclusion under this part applies if a prior policy, which has expired, is available for coverage. The language of this exclusion is somewhat ambiguous, but it would probably apply only if liability could be enforced under the prior policy. It is intended to avoid the pyramiding of coverages. The third exclusion relates to claims based on personal injury, death, or property damage. This exclusion is obvious, because the D and O policy was never intended to cover such claims. This exclusion is not contained in many policy forms probably because it is deemed unnecessary and superfluous. The first and second exclusions, in effect, are found in most D and O policies, whether "mini" or "maxi" and whether two-part or single policies, and are applicable both to company reimbursement and directors' and officers' individual or collective liability.

In the Directors' and Officers' Liability part of the two-part "maxi" policy¹²⁷ are the three exclusions mentioned above and six more. These exclusions apply separately to each officer and director. A fact pertaining to one insured may not be imputed to any other insured for the purpose of determining the applicability of any exclusion. The apparent intent of this provision is to indemnify an innocent director, even though he may be held vicariously liable for the wrongdoing of a fellow director.

Libel or slander is not covered by this policy. It must be insured against in some other form of corporate insurance, such as the general public liability policy. If the insured officers or directors have been indemnified by their corporation, they cannot recover again under this part of the policy. On the other hand, if they have not been indemnified, their rights may be maintained under this part. And, as noted above,¹²⁸ in most statutes permitting a corporation to purchase and maintain liability insurance, authority is granted to insure whether or not the corporation could lawfully indemnify.¹²⁹

¹²⁴ See KNEPPER § 10.06, at 182.

¹²⁵ This discussion is based on Stewart, Smith Forms SS-3A and SS-3B.

¹²⁶ Stewart, Smith Form SS-3B.

¹²⁷ *Id.* Form SS-3A.

¹²⁸ See text accompanying notes 82, 87 *supra*.

¹²⁹ See also Brook, *Officers and Directors Liability Insurance*, 2 THE FORUM 228, 235-37 (1967).

Another important exclusion denies coverage if a claim is "based upon or attributable to their gaining in fact any personal profit or advantage to which they were not legally entitled." Substantially that same language appears in all of the various policy forms. However, it presents some problems of construction. It is, of course, intended to deny coverage to any director or officer who employs the corporate facilities for his own advantage or profit. This exclusion is different from some others in that they relate to claims "for" certain matters while this provision excludes a claim "based upon or attributable to" gaining such profit or advantage. Thus, this exclusion may apply even though the complaint against the director does not expressly assert that he gained such profit or advantage. Moreover, section 727 of the New York Business Corporation Law requires that such an exclusion be read into every policy, except as to the cost of defense.¹⁸⁰

Another significant exclusion denies coverage if a claim is "brought about or contributed to by the dishonesty of the Assureds." In most policy forms¹⁸¹ this exclusion contains a proviso that there will be coverage "unless a judgment or other final adjudication thereof adverse to the Assureds shall establish the acts of active and deliberate dishonesty committed by the Assured with actual dishonest purpose and intent were material to the cause of action so adjudicated."¹⁸² This proviso contains four elements which must be established by the insurance company in order to escape liability under the dishonesty exclusion, namely (1) a judgment or other final adjudication adverse to the assureds, (2) which established that the assureds committed acts of active and deliberate dishonesty, (3) that such acts were committed with actual dishonest purpose and intent, and (4) that such acts were material to the cause of action so adjudicated. The courts would be expected to construe any ambiguities in that proviso most strongly against the insurance company. Hence, it will take a strong case to avoid coverage on this ground. In New York, section 727 of the Business Corporation Law prohibits payment other than the cost of defense if a final adjudication adverse to the insured director or officer establishes that his acts of active and deliberate dishonesty were material to the cause of action.¹⁸³

The policy does not require the insurer to pay for the return by the assureds of any remuneration paid to them without the previous approval of the shareholders if the courts have held such payment illegal. And no payment is required for an accounting of profits made under the short-swing provisions of section 16(b) of the Securities Exchange Act of 1934¹⁸⁴ or similar provisions of any state statutory or common law.¹⁸⁵

Allowing for differences in context, most of the foregoing exclusions,

¹⁸⁰ N.Y. BUS. CORP. LAW § 727 (McKinney 1970).

¹⁸¹ This is not so in American Home Form 3195. See text accompanying note 107 *supra*.

¹⁸² Stewart, Smith Forms SS/2, SS/3A; American Home Forms 2086, 3062; American States Form 9-594. The language is not identical in all forms.

¹⁸³ N.Y. BUS. CORP. LAW § 727 (McKinney 1970).

¹⁸⁴ 15 U.S.C. § 78p(b) (1971).

¹⁸⁵ N.Y. BUS. CORP. LAW § 727 (McKinney 1970).

in quite similar language, will be found in the various policy forms previously mentioned.

Proposal Forms, Applications, and Warranties. In view of the *Penn Central* litigation mentioned above,¹³⁶ some attention should be directed to the forms of application and proposal required to be completed by applicants for D and O insurance, and to the warranties by those issued in relation to statements in the proposal. The Lloyd's primary policy involved in the *Penn Central* litigation consisted of Forms SS-3A and SS-3B, which have been under discussion, and certain endorsements. The proposal form, which constituted a part of the insurance contract, stated: "[I]t is agreed that this form shall be the basis of the contract should a policy be issued, and this form will be attached and become part of the policy." Clause 6 in both Forms SS-3A and SS-3B stated: "It is warranted that the particulars and statements contained in the written proposal, copy of which is attached hereto, and the Declarations are the basis of this policy and are to be considered as incorporated in and constituting part of this policy."

The Lloyd's complaint against Penn Central and seventy present or past directors or officers of the corporation alleged that item 10 of the proposal form posed this question: "No person proposed for this insurance is cognizant of any act, error, or omission which he has reason to suppose might afford grounds for any future claim such as would fall within the scope of the proposed insurance, except as follows"¹³⁷

The response to that question, signed by the chairman of Penn Central's Finance Committee, was: "None known." His signature constituted a declaration "that to the best of his knowledge" the statements set forth in the proposal form were true. In the rescission action¹³⁸ the representatives of Lloyd's alleged that: "This response was false and was known to be false . . . and was made in bad faith with actual intent to deceive the plaintiffs by concealing from the plaintiffs material facts which, if disclosed, would have resulted in plaintiffs' refusal to issue the subject policies."¹³⁹ It is true in most such actions that the final decision will depend upon the resolution of disputed facts. Meanwhile the *Penn Central* litigation has provided an opportunity for proponents and opponents of D and O insurance to make charges and countercharges that will probably cause public and governmental agencies to take a renewed interest in this type of coverage.¹⁴⁰

While the identical interrogatory propounded in the *Penn Central* proposal form does not appear in all D and O proposal forms, most such applications do contain similar questions. For example, American Home Form 3092 inquires:

20. Does any Director or Officer have knowledge or information of any act,

¹³⁶ See text accompanying note 96 *supra*.

¹³⁷ Complaint at 11, *Bird v. Penn Central Co.*, Civil No. 71-358 (E.D. Pa., filed Feb. 16, 1971).

¹³⁸ *Bird v. Penn Central Co.*, Civil No. 71-358 (E.D. Pa., filed Feb. 16, 1971).

¹³⁹ Complaint at 14, ¶ 17.

¹⁴⁰ E.g., *BUSINESS INSURANCE*, Mar. 1, 1971, at 4, 39; *id.*, Mar. 15, 1971, at 16; *id.*, Apr. 12, 1971, at 16.

error, or omission which might give rise to a claim under the proposed policy?

St. Paul's form of application states:

16(b) No officer or director has knowledge or information of any negligent act, error or omission which might give rise to a claim against them.

No exceptions _____

Except as follows:

It is agreed that if such knowledge or information exists, any claim or action subsequently arising therefrom shall be excluded from this proposed coverage.

(Answer — Yes or No) _____

The words, "grounds for any future claim," in the Penn Central proposal form appear as "valid grounds for any future claim" in some proposals.¹⁴¹

In his letter to the editor of *Business Insurance*, Thomas F. Sheehan, President of Excess Underwriters, Inc., asserts that the holding in the *Penn Central* case will not necessarily apply to all D and O policies.¹⁴² He states: "The applications in use by some companies merely state that the signer declares that to the best of his knowledge and belief the statements set forth therein are true. Also, the application is not incorporated into the policy. There is then no such warranty."¹⁴³ Such is the stuff of which lawsuits are made. However, counsel for both an insurer and those to be insured will do well to be aware of the hazards inherent in the interrogatories propounded in D and O proposal forms.

SEC Liability Insurance. Corporate directors and officers, their corporation, and underwriters involved in a primary distribution or secondary or combined offering may obtain specific-issue coverage against claims arising out of the transaction.¹⁴⁴ Also, it is reported that blanket coverage may be obtained by an underwriter, insuring it against civil liability under the securities laws arising out of all underwritings in which it participated during the period.¹⁴⁵

There are two forms of such policies in fairly common use. The so-called "London" form, written through Lloyd's brokers as well as American agents,¹⁴⁶ is not substantially different from the "American" form, issued by Seaboard Surety Company and a few other companies. In either instance minor changes in the forms may be negotiated. Such insurance is often required by the underwriter of a primary offering. The availability of the insurance will depend in large measure upon the competence of the underwriters and of the attorneys and accountants representing the various parties, as appraised by the insurers. Deductibles, varying with the quality of the case, may be required. Premium rates are on the high side and may

¹⁴¹ Stewart, Smith proposal form D40 1023 11/69; Form ALS (D. PPL) 2/1/67.

¹⁴² *BUSINESS INSURANCE*, Apr. 12, 1971, at 16.

¹⁴³ *Id.*

¹⁴⁴ Brochure of Stewart, Smith, Haidinger, Inc., Los Angeles, identified as SEC 201691, S-1, S-2, and Addendum No. 1 (1969).

¹⁴⁵ Kroll, *supra* note 78, at 685-86.

¹⁴⁶ Stewart, Smith Form S-½, SEC 201691.

not be negotiable. As a rule such a policy will be written for fifty per cent of the offering price, but may go as high as one hundred per cent. Since the issuing corporation has the primary liability, the risk with respect to the officers and directors probably has little effect on the premium charged.

In the London form the exclusions are for (1) actions by the SEC or any other governmental agency; (2) loss, liability, cost or expense based on or arising in connection with any criminal proceeding; (3) any liability assumed under a contractual agreement; and (4) losses based on insider trading.¹⁴⁷ Clause III(b) of this policy form involves the whole theory of this type of insurance and the manner in which claims are handled. It provides, in part:

The Insured may employ attorneys to investigate, defend or negotiate for the settlement of any claim, provided always that they shall at all times cooperate to the fullest extent with the Insurer and the attorneys designated by the Insurer and give due regard to opinions expressed by them. The Insured shall not admit or assume any liability or incur any expenses in connection with such claim without the written consent of the Insurer, but such consent shall not be unreasonably withheld. All reasonable disbursements and fees of the Insured's attorneys incurred in connection with such claim shall be considered a part of the loss with reference to which such fees and disbursements were incurred.¹⁴⁸

The London and American forms have different provisions concerning attorneys. The American form limits the sums payable for attorney fees; the London form requires all the assureds to use the same attorney. If they cannot agree, he will be selected by a person named in the declarations of the policy and by attorneys for the insurer. There are some other differences in the forms which should be examined, especially such as relate to the order of payment of claims when the claims exceed the policy coverage limit.

Individual Director's Liability Policy. At least one insurance company issues an Individual Director's Liability Policy.¹⁴⁹ It is intended to protect an individual serving on one or more outside boards of directors. The word "director" is defined in the contract to mean "only an outside director and shall not include such Insured acting in a dual capacity as Chairman of the Board, salaried corporate officer, or employee of the Corporation(s) named If during the policy period, the position of the insured Director shall change from that described above, then coverage in reference to that Corporation shall cease to apply." The coverage provided and the exclusions contained in this policy are similar to the Directors' and Officers' Liability part of the two-part D and O policy. However, it is well to pay particular attention to two specific provisions. Paragraph III(2) extends coverage to negligent acts occurring prior to the policy period, but adds the proviso "(a) the Insured at the effective date of the Policy had no knowledge or could not have reasonably foreseen any circumstance which

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* cl. III(b).

¹⁴⁹ St. Paul Fire and Marine Insurance Co. Form 16254 DLP-Rev. 1-67.

might result in a claim or suit, or (b) there is no other insurance applicable to such negligent act, error, omission or breach of duty." That proviso is related to item 7 of the proposal form for the policy upon which the company relies in issuing the policy. That item states: "No person proposed for insurance is cognizant of any act, omission or error which he has reason to suppose might afford valid grounds for any future claim such as would fall within the scope of the proposed insurance except as follows" Thus, an individual director insured under that policy faces the same duty of disclosure as in the regular D and O forms, and may be confronted with questions similar to those now before the courts in the *Penn Central* litigation.¹⁵⁰

III. CONCLUSION

Especially since the *BarChris* decision,¹⁵¹ the questions relating to indemnification and insurance of corporate officers and directors have become increasingly complicated. Seeking only to raise questions, not to answer them, it seems appropriate to consider the applicability of D and O liability insurance to corporate directors who function in dual capacities. The attorney-director, the accountant-director, the engineer-director, the underwriter-director all may face special problems.

As is noted above, many of the D and O policies restrict coverage to liability imposed upon insureds "solely by reason of their being such Officers and Directors."¹⁵² If, then, the liability of an underwriter-director is greater or different than that of a director who is not an underwriter,¹⁵³ will such additional or different responsibility be covered by the D and O policy? If, perchance, an attorney-director has undertaken the preparation of a prospectus, and thereby incurs special liability as an attorney-director, is he protected?¹⁵⁴

Without engaging in "scare tactics," it is quite proper to recognize that an individual director—be he "inside," or "outside," or "expert," or in a dual capacity, or what—is accountable to his corporation's shareholders, to corporate creditors and to governmental agencies and departments. How well he can be protected against personal loss by proper indemnification and adequate, reasonably-priced liability insurance, may be the measure of how well he will be able to do his job.

¹⁵⁰ See text accompanying notes 136-42 *supra*.

¹⁵¹ *Escott v. BarChris Constr. Corp.*, 283 F. Supp. 643 (S.D.N.Y. 1968).

¹⁵² See discussion of the definition of "Wrongful Act," in text accompanying notes 117-24 *supra*.

¹⁵³ Perhaps by virtue of § 11 of the Securities Act of 1933, 15 U.S.C. § 77k (1971).

¹⁵⁴ *Escott v. BarChris Constr. Corp.*, 283 F. Supp. 643, 695-96 (S.D.N.Y. 1968).

APPENDIX A

Statutory Provisions Authorizing Indemnification

State	Statute	Type
Alabama	Code of Alabama tit. 10, § 21 (Supp. 1969)	Model
Alaska	Alaska Statutes § 10.05.009(15) (1962)	Model
Arizona	Arizona Revised Statutes § 10-198B (Supp. 1970)	
Arkansas	Arkansas Statutes § 64-309 (1966)	Model
California	California Corporations Code Annotated § 830 (West Supp. 1971)	Model
Colorado	Colorado Revised Statutes § 31-2-1 (1963)	Model
Connecticut	Connecticut General Statutes Annotated § 33-320 (Supp. 1969)	
Delaware	Delaware Code Annotated tit. 8, § 145 (Supp. 1968)	Model
District of Columbia	District of Columbia Code Encyclopedia Annotated § 29-904 (1968)	Model
Florida	Florida Statutes Annotated § 608.13 (Supp. 1971)	
Georgia	Georgia Code Annotated § 22-717 (1970)	Model
Hawaii	Hawaii Revised Statutes § 416-26(16) (1968)	Model
Idaho	no statute	
Illinois	no statute	
Indiana	Burns' Annotated Statutes § 25-209 (1970)	Model
Iowa	Iowa Code § 496A.4 (1967)	Model
Kansas	Kansas Statutes Annotated § 17-3010 (Supp. 1970)	Model
Kentucky	Kentucky Revised Statutes Annotated §§ 271.25(11), 271.375 (1969)	Model
Louisiana	West's Louisiana Statutes Annotated tit. 12, § 83 (1969)	Model
Maine	Maine Revised Statutes Annotated tit. 13, § 146 (Supp. 1970)	Model
Maryland	Maryland Annotated Code art. 23, § 64 (Supp. 1970)	Model
Massachusetts	Massachusetts General Laws Annotated ch. 156B, § 67 (1959)	
Michigan	Michigan Compiled Laws § 450.10(1) (1967)	Model
Minnesota	Minnesota Statutes Annotated § 301.09 (1969)	Model
Mississippi	Mississippi Code 1942, § 5309-04 (Supp. 1971)	Model
Missouri	Missouri Revised Statutes § 351.355 (1966)	Model
Montana	Montana Revised Codes 1947 Annotated § 15-2204 (1967)	
Nebraska	Nebraska Revised Statutes § 21-2004(15) (1970)	Model
Nevada	Nevada Revised Statutes § 78.070 (1969)	Model
New Hampshire	New Hampshire Revised Statutes Annotated § 294:4(IX) (Supp. 1970)	New York
New Jersey	New Jersey Statutes Annotated § 14A:3-5 (1969)	Model
New Mexico	New Mexico Statutes 1953 Annotated § 51-24-4	Model
New York	McKinney's Consolidated Laws of New York, Business Corporation Law §§ 721-26 (1963)	New York
North Carolina	North Carolina General Statutes §§ 55-19 to -21 (Supp. 1969)	Model
North Dakota	North Dakota Century Code § 10-19-04, subsec. 15 (1960)	Model
Ohio	Ohio Revised Code Annotated § 1701.13(E) (Page Supp. 1970)	Model
Oklahoma	Oklahoma Statutes tit. 18, § 1.43a (Supp. 1970)	Model
Oregon	Oregon Revised Statutes § 57.030 (1969)	Model
Pennsylvania	Purdon's Statutes Annotated tit. 15, § 1516 (1967)	Model
Puerto Rico	Puerto Rico Laws Annotated tit. 14, § 1202	
Rhode Island	Rhode Island General Laws Annotated § 7-1.1-4.1 (Supp. 1970)	Model
South Carolina	South Carolina Code 1962, § 12-12.2(18) (Supp. 1970)	Model
South Dakota	South Dakota Compiled Laws 1967, § 47-2-58(15) (1967)	Model
Tennessee	Tennessee Code Annotated § 48-407 (Supp. 1970)	New York
Texas	Texas Business Corporation Act Annotated art. 2.02A(16) (1956)	Model
Utah	Utah Code Annotated § 16-10-4(o) (Supp. 1969)	Model
Vermont	no statute	
Virginia	Virginia Code Annotated § 13.1-3.1 (Supp. 1970)	Model
Virgin Islands	Virgin Islands Code tit. 13, § 30(10) (1966)	
Washington	Washington Revised Code § 23A.08.025 (Supp. 1970)	Model
West Virginia	West Virginia Code § 31-1-18a (1966)	Model
Wisconsin	Wisconsin Statutes Annotated § 180.407 (Supp. 1971)	Model
Wyoming	Wyoming Statutes 1957, § 17-36.4(o)	Model

APPENDIX B

Statutory Provisions Authorizing Liability Insurance

Alabama	Code of Alabama tit. 10, § 21(g) (Supp. 1969)
California	California Corporations Code Annotated § 830(h) (West Supp. 1971)
Delaware	Delaware Code Annotated tit. 8, § 145(g) (Supp. 1968)
Georgia	Georgia Code Annotated § 22-717(g) (1970)
Kansas	Kansas Statutes Annotated § 17-3010(g) (Supp. 1970)
Louisiana	West's Louisiana Statutes Annotated § 83(f) (1969)
Massachusetts	Massachusetts General Laws Annotated ch. 156B, § 67 (1959)
Minnesota	Minnesota Statutes Annotated § 301.095, subdiv. 7 (1969)
Nevada	Nevada Revised Code § 78.070-3(7) (1969)
New Jersey	New Jersey Statutes Annotated § 14A:3-5(9) (1969)
New York	McKinney's Consolidated Laws of New York, Business Corporation Law § 727 (Supp. 1970)
Ohio	Ohio Revised Code Annotated § 1701.13(3) (Page Supp. 1970)
Oklahoma	Oklahoma Statutes tit. 18, § 1.43(g) (Supp. 1970)
Rhode Island	General Laws of Rhode Island § 7-1.1-4.1(g) (Supp. 1970)
Utah	Utah Code Annotated § 16-10-4(o)(7) (Supp. 1969)
Virginia	Virginia Code Annotated § 13.1-3.1(g) (Supp. 1970)
Washington	Washington Revised Code § 23A.08.025(7) (Supp. 1970)