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REPORT

CORPORATE GOVERNANCE

Corporate Governance Developments in a Recessionary Environment

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What a difference a year makes. As we sat down last year to write our annual summary of Delaware corporation law developments for this publication, companies and their counsel were focusing on developments arising from the wave of private-equity transactions, and were only beginning to grapple with the legal developments arising from the downturn in the economy (initially in the form of ''busted deal'' litigation). As the recession deepened, we found the focus of our clients moving from catching the next ''go-private'' transaction to looking inward at their own governance structure. At the same time, the Delaware courts released a number of opinions touching on the issues at the very forefront of the minds of our clients—the corporation's governance documents, defensive mechanisms, and indemnification structure. With the recession stubbornly persisting, we believe now is an important time for corporations to review and shore up (if necessary) their corporate governance documents, as well as their defensive mechanisms and indemnification scheme. To aid corporations and their counsel, this article will survey some of the recent developments in Delaware law touching on corporate bylaws, charters, indemnification agreements, and rights plans.

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I. BYLAW PROVISIONS

A. Advance Notice Bylaws.

As a general matter, the Delaware General Corporation Law (the ''DGCL'') does not require advance notice of a stockholder's nomination or business proposal to be provided to the corporation before a stockholder meeting.[1] The Delaware courts have recognized, however, that bylaws requiring a stockholder to provide the corporation with advance notice of its intention to nominate a director or propose business at a stockholder meeting—so-called ''advance notice bylaws''—serve valid corporate interests. In particular, they aid in the orderly conduct of stockholder meetings and provide relevant information to stockholders.

In fact, advance notice bylaws, whether by intent or solely by impact, also serve as a defensive mechanism. Advance notice bylaws require stockholders to disclose

[1] *Levitt Corp. v. Office Depot, Inc.*, 2008 Del. Ch. LEXIS 47, at *12 (Apr. 14, 2008) (observing that under Delaware law, ''no advance notice of a stockholder's intent to nominate directors at an annual meeting need be given''). Of course, public companies are subject to stringent advance notice requirements under federal securities laws. Such requirements are outside the scope of this article.

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their intent to the corporation well before a scheduled stockholder meeting date, thus limiting the times at which a proxy contest may be launched and allowing the incumbent directors time to mount an effective defense. In light of this characteristic of advance notice bylaws, jurisprudence about them has focused on equitable principles, specifically imposing requirements that these bylaws be both facially reasonable and reasonable in their application to the set of facts at hand.[2]

In a pair of 2008 cases, the Delaware Court of Chancery focused not on the equitable validity of advance notice bylaws, but on their legal interpretation, emphasizing that if ''there is any ambiguity in interpreting bylaws, doubt is resolved in favor of the stockholders' electoral rights.''[3] Specifically, in both *JANA Master Fund, Ltd. v. CNET Networks, Inc.*[4] and *Levitt Corp. v. Office Depot, Inc.*,[5] the Court of Chancery interpreted narrowly the advance notice bylaw at issue, ultimately finding in each case that a stockholder was not required to provide advance notice to the corporation of its nominations or proposals. In *JANA*, the Court held that a corporation's advance notice bylaw applied only to stockholder proposals that were sought to be included in the company's proxy materials pursuant to Rule 14a-8 under the Securities Exchange Act of 1934,[6] and in *Levitt*, the Court held that under the company's advance notice bylaws, the business of nominating and electing an insurgent's slate was properly brought before the meeting even though the insurgent did not provide the company with advance notice of its nomination. *JANA* and *Levitt*, the lessons to be gleaned from these cases, and the current trends involving derivative interest disclosure and nominee questionnaires, will each be discussed in turn.

1. *JANA Master Fund, Ltd. v. CNET Networks, Inc.*

In *JANA*, investment fund JANA Master Fund, Ltd. sought to take control of the board of directors of CNET Networks, Inc. by soliciting proxies in favor of (1) replacing two directors, (2) amending the bylaws to expand the board by five directors and (3) nominating five individuals to fill the new seats. If successful, the sum of these actions would result in JANA nominees constituting a majority of the board.

CNET's advance notice bylaw required that stockholders hold at least $1,000 of CNET stock for at least a year to be eligible to give advance notice:

> Any stockholder of the Corporation that has been the beneficial owner of at least $1,000 of securities entitled to vote at an annual meeting for at least one year *may seek* to transact other corporate business at the annual meeting, provided that such business is set forth in a written notice . . . and received no later than 120 calendar days in advance of the date of the Corporation's proxy statement. . . . Notwithstanding the foregoing, such notice must also comply with any federal securities laws establishing the circumstances under which the Corporation is required to include the proposal in its proxy statement or form of proxy.[7]

CNET argued that JANA's proposals did not comport with CNET's advance notice bylaw because JANA had not held $1,000 worth of CNET stock for at least a year.[8]

The Court ruled in favor of JANA, finding that CNET's advance notice bylaw applied only to stockholder proposals that were sought to be included in CNET's proxy materials pursuant to Rule 14a-8.[9] Because JANA was distributing its own proxy materials and was not seeking to have its proposals included in CNET's proxy materials pursuant to Rule 14a-8, the Court ruled, JANA was not subject to the advance notice requirements in the bylaw. The Court based its ruling on the following: (1) the ''precatory'' nature of the sentence in the bylaw provision providing that stockholders ''may seek'' to transact other corporate business ''recalls the inherently precatory nature of Rule 14a-8'';[10] (2) it ''only [made] sense'' to conclude that CNET's bylaw applied only to proposals that stockholders wanted to include in management's proxy materials because the bylaw set the deadline for notice specifically with reference to the mailing of management's proxy materials;[11] and (3) the bylaw included ''all of the requirements of Rule 14a-8 . . . [that] far exceed the default rules under Delaware law and were designed by the [Securities and Exchange Commission (the ''SEC'')] only to apply in the context of Rule 14a-8.''[12] Accordingly, the Court held that the bylaw applied only to proposals that a stockholder sought to include in the company's proxy materials under Rule 14a-8. To the extent that a stockholder wished to present a proposal or nomination in an independently financed proxy solicitation, as JANA did in this case, the Court held, the federal securities laws and the advance notice bylaw would not require the stockholder to notify management in advance.

2. *Levitt Corp. v. Office Depot, Inc.*

Like *JANA*, *Levitt* involved a stockholder's attempt to nominate director candidates at a company's 2008 an-

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[2] *Hubbard v. Hollywood Park Realty Enter., Inc.*, 1991 Del. Ch. LEXIS 9, at *35 (Jan. 14, 1991).

[3] *JANA Master Fund, Ltd. v. CNET Networks, Inc.*, 954 A.2d 335, 339 (Del. Ch. 2008) (quotations and internal citations omitted), *aff'd*, 947 A.2d 1120 (Del. 2008). In affirming the opinion of the Court of Chancery, the Delaware Supreme Court did not issue a separate opinion.

[4] *Id.*

[5] 2008 Del. Ch. LEXIS 47 (Apr. 14, 2008).

[6] 17 C.F.R. § 240.14a-8 (''Rule 14a-8''). Rule 14a-8 requires a corporation to include certain stockholder proposals in its proxy materials if the proposal satisfies certain requirements.

[7] *JANA Master Fund, Ltd.*, 954 A.2d at 337-38 (emphasis added).

[8] *JANA* involved an unusual procedural posture. In advance of its solicitation of proxies, JANA requested inspection of the list of stockholders of CNET under Section 220 of the DGCL, which requires a stockholder to have a ''proper purpose'' in seeking inspection of a list of stockholders. CNET refused JANA's request because, it argued, JANA could not have a proper purpose because it had not complied with CNET's advance notice bylaw and thus could not properly bring its proposals at the upcoming stockholder meeting.

[9] Because the Court reached this conclusion, it did not address a second argument advanced by JANA—namely, that the bylaw, as written, ''is invalid under Delaware law because it is an unreasonable restriction on shareholder franchise.'' *Id.* at 338.

[10] *Id.* at 346.

[11] *Id.* This bylaw closely tracked similar provisions in Rule 14a-8 that are intended to provide an issuer sufficient time to incorporate stockholder proposals in its proxy materials. Additionally, the bylaw did not ''mirror any of the generally applicable advance notice bylaws that [the Court of Chancery] has previously found valid.'' *Id.*

[12] *Id.*

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nual meeting. In *Levitt*, the company, Office Depot, Inc., filed its proxy materials with the SEC and included in the notice of the meeting that an item to be considered at the meeting was: ''To elect twelve (12) members of the Board for the term described in the Proxy Statement.''[13] Shortly thereafter, a stockholder, Levitt Corp., filed its own proxy materials soliciting proxies in support of its two nominees to the Office Depot board of directors, but did not give timely advance notice to Office Depot of its intention to propose director candidates.

Levitt filed suit seeking a declaration that no additional notice was required for Levitt to nominate director candidates. Office Depot argued that Levitt failed to comply with Office Depot's advance notice bylaw and therefore was not permitted to nominate director candidates. The Office Depot bylaw provided:

> At an annual meeting of the stockholders, only *such business* shall be conducted as shall have been properly brought before the meeting. To be properly brought before an annual meeting, business must be (i) *specified in the notice of the meeting (or any supplement thereto) given by or at the direction of the Board of Directors*, (i) otherwise properly brought before the meeting by or at the direction of the Board of Directors or (iii) otherwise properly brought before the meeting by a stockholder of the corporation who was a stockholder of record at the time of giving of notice provided for in this Section, who is entitled to vote at the meeting and who complied with the notice procedures set forth in this Section.[14]

Levitt first argued that because the advance notice bylaw did not include reference to director nominations, and only referenced ''business,'' the advance notice bylaw did not apply to director nominations. The Court rejected this argument and held that the term ''business'' as used in the bylaw included the nomination and election of directors and thus the bylaw required advance notice of director nominations. This finding was based on: (1) the dictionary definition of the term ''business''; (2) prior caselaw that stated that ''the business of an annual meeting is the election and voting process''; and (3) statements in the DGCL and the Office Depot bylaws that an annual meeting was for ''the election of directors'' and ''such other business,'' finding that ''the use of the term 'other business' in conjunction with 'election of directors' indicates that the election of directors is itself a form of 'business.' ''[15]

The Court then held that Office Depot itself had brought the business of nominating and electing directors, including both its own nominations *as well as the competing slate*, before the annual meeting through its notice to stockholders that was included as part of the company's proxy materials. Specifically, Office Depot's advance notice bylaw provided that business could be conducted at the annual meeting if, among other methods, it was specified in the notice of meeting. Office Depot's annual meeting notice, which stated that the first item of business on the meeting agenda was to ''elect twelve (12) members of the Board of Directors,'' satisfied this method for placing nomination of directors at issue. Moreover, because this sentence was not limited by its terms to the election of the management slate, the Court found that it also covered Levitt's nominations.[16] Thus, the business of nominating and electing Levitt's slate was properly brought before the meeting even though Levitt did not provide the company with advance notice of its nominations.

3. Lessons Learned: *JANA* and *Levitt*.

The lessons from *JANA* and *Levitt* are clear: (a) draft, revise, and review advance notice bylaws (as well as notices of stockholder meetings) with great care as they will be closely scrutinized by the courts if they are challenged (with the stockholder likely getting the benefit of the doubt); and (b) an advance notice bylaw should be drafted so that it is unquestionable that the exclusive method for a stockholder to bring a nomination or proposal (other than pursuant to Rule 14a-8) requires advance notice to the company in compliance with the bylaws.

(a) Careful Drafting and Review.

Advance notice bylaws typically encompass several pages of complex text, rife with internal cross-references, defined terms, and pitfalls for anyone conducting less than an intense and thorough review of such provisions. Because provisions are often added or removed from already existing advance notice bylaws, on numerous occasions in our review of such bylaws, we have seen internal cross-references referring back to incorrect sections, capitalized terms that have never been defined, and other drafting inconsistencies. Although glitches of this nature may seem inconsequential at the time, errors can lead to an advance notice bylaw that operates in a way that was never intended. As the courts have evidenced their willingness to strictly construe advance notice bylaws, companies and their counsel should make sure the provisions that they have in place are effective, and as important, have the effect that the company intends them to have.

(b) Exclusive Method for Stockholders to Bring Nominations and Other Proposals.

To ensure that stockholders can only bring proposals or make nominations if they comply *either* with the prerequisites of Rule 14a-8 or with all of the requirements of an advance notice bylaw,[17] in the past year many companies have added language specifically stating that the exclusive method for stockholders to bring proposals or make nominations is by complying with the procedures set forth in the advance notice bylaw.[18]

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[13] *Levitt Corp.*, 2008 Del. Ch. LEXIS 47, at *3.

[14] *Id.* at *4-*6 (emphasis added). Contrary to earlier versions of the bylaw, as then in effect, the bylaw referred only to ''business'' and was silent with regard to nominations.

[15] *Id.* at *19 (citations and internal quotations omitted).

[16] Notably, the Court observed that careful drafting of the notice could have avoided this result: ''The Court notes that Office Depot, through careful drafting of the Notice, may have separated precisely the business of the election from the business of nomination. If the Notice had so provided, a different result may have obtained.'' *Id.* at *26 n.43.

[17] We are often asked how advance notice bylaws work in conjunction with Rule 14a-8. In general, Rule 14a-8 and a company's advance notice bylaws are separate and distinct in their purpose and procedure. An advance notice bylaw may not limit a stockholder's right to include proposals in a company's proxy materials pursuant to Rule 14a-8, and the procedures set forth in Rule 14a-8 need not necessarily limit the scope of an advance notice bylaw.

[18] This language typically appears after the section of the advance notice bylaw that sets forth the methods for bringing a proposal or making a nomination:

> Nominations of persons for election to the Board of Directors and the proposal of business to be transacted by the stock-

Companies should also take great care in drafting their proxy materials, and specifically their notice of meeting, to avoid inadvertently opening the door to stockholder proposals and nominations, as occurred in *Levitt*.

4. A General Note Regarding Derivative Interests and Nomination Questionnaires.

(a) Derivative Interest Disclosure.

Many companies have amended their advance notice bylaws to require a stockholder to provide the corporation with certain information regarding derivative ownership interests (of either the stockholder(s), the stockholder's nominee, or both).[19] Ownership of ''swap contracts'' and other derivative positions has been used by hedge funds and others to acquire an indirect economic or voting interest in a company. Derivative securities of this nature may provide a stockholder with a hidden economic or voting interest that might differ from the financial interest otherwise evidenced by the stockholder's stock ownership. Requiring disclosure of those interests is aimed at providing a clearer picture of the stockholder and any incentives of or reasons for such stockholder to make a proposal or nomination.[20]

(b) Nomination Questionnaires.

The advance notice bylaws of some companies now require nominees to complete a questionnaire as a prerequisite to being eligible for nomination. The need to submit such a questionnaire and the information required to be submitted, like advance notice bylaws themselves, may be subject to equitable limitations and could be susceptible to challenge. Questionnaires that effectively shorten the period for giving notice or that require nominees to make certain promises with respect to their service as director could be particularly susceptible by making the advance notice procedures more onerous and attempting to proscribe what a director would do in office.[21]

B. Proxy Access and Expense Reimbursement.

Proxy contest issues remained at the forefront in 2008, with the Delaware Supreme Court issuing an important ruling regarding proxy reimbursement bylaws—a ruling that led to proposed amendments to the DGCL. In *CA, Inc. v. AFSCME Employees Pension Plan*,[22] AFSCME, a CA stockholder, sought inclusion of a proposal to amend the CA bylaws in the company's proxy materials. The bylaw amendment, if implemented, would require CA to reimburse a stockholder for certain expenses incurred in connection with the nomination of a short slate of directors in a contested election. The text of the proposal was as follows:

> The board of directors shall cause the corporation to reimburse a stockholder or group of stockholders (together, the ''Nominator'') for reasonable expenses (''Expenses'') incurred in connection with nominating one or more candidates in a contested election of directors to the corporation's board of directors, including, without limitation, printing, mailing, legal, solicitation, travel, advertising and public relations expenses, so long as (a) the election of fewer than 50% of the directors to be elected is contested in the election, (b) one or more candidates nominated by the Nominator are elected to the corporation's board of direc-

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holders may be made at an annual meeting of stockholders (a) pursuant to the Corporation's proxy materials with respect to such meeting, (b) by or at the direction of the Board of Directors, or (c) by any stockholder of record of the Corporation at the time of the giving of the notice required in the following paragraph, who is entitled to vote at the meeting and who has complied with the notice procedures set forth in this section. *For the avoidance of doubt, the foregoing clause (c) shall be the exclusive means for a stockholder to make nominations or propose business (other than business included in the Corporation's proxy materials pursuant to Rule 14a-8 under the Securities Exchange Act of 1934, as amended), at an annual meeting of stockholders.*

[19] How these types of derivative interests will affect beneficial ownership reporting requirements under the federal securities laws is unclear. *See CSX Corp. v. The Children's Inv. Fund Mgmt. (UK) LLP*, 562 F. Supp. 2d 511 (S.D.N.Y. 2008) (discussing but not deciding one such issue).

A derivative position may be defined expansively as follows:

any option, warrant, convertible security, stock appreciation right, or similar right with an exercise or conversion privilege or a settlement payment or mechanism at a price related to any class or series of shares of the Corporation or with a value derived in whole or in part from the value of any class or series of shares of the Corporation, whether or not such instrument or right shall be subject to settlement in the underlying class or series of capital stock of the Corporation or otherwise (a ''Derivative Instrument'') directly or indirectly owned beneficially by each such party, and any other direct or indirect opportunity to profit or share in any profit derived from any increase or decrease in the value of shares of the Corporation.

[20] A recent report issued by Risk Metrics Group describes such disclosures as providing ''useful information to management, the board and shareholders about the extent to which a shareholder proponent's economic interest in the company's shares are aligned with the economic interests of other shareholders, provided they are not overly restrictive.'' Stephanie Mullette, *2009 Governance Background Report: Advance Notice Requirements*, p. 3 (Risk Metrics Group, Inc. Apr. 1, 2009).

Some attorneys have advocated a further amendment to advance notice bylaws that would essentially supplement federal disclosure obligations by making *continuous* disclosure of derivative ownership positions a prerequisite to compliance with advance notice bylaws. The benefit of such an approach is that it may fill what some view as a hole in the current regulatory framework (*i.e.*, the lack of a definitive disclosure requirement with respect to derivative positions); the detriment is that the approach may attract negative attention and may be attacked as straying too far from the benefit courts have traditionally cited in upholding advance notice bylaws—ensuring an orderly meeting.

[21] We are aware of at least one complaint alleging that a questionnaire portion of an advance notice bylaw was invalid. *See Complaint, TRT Holdings, Inc. v. Gaylord Entm't Co.*, C.A. No. 4320-VCL (Del. Ch. Jan. 29, 2009). This case settled out of court.

[22] 953 A.2d 227 (Del. 2008). Although the main thrust of our discussion will be on the implications to corporate governing documents, this case is also interesting in that it represents the first use by the SEC of a recent addition to Article IV, Section 11(8) of the Delaware Constitution allowing the SEC to certify questions of Delaware law to the Delaware Supreme Court. When the Delaware Constitution was amended to provide for such certification in 2007, it was unclear exactly how the certification would work, how long a response would take, and whether the SEC would utilize this process. This case shows that the SEC will indeed utilize the certification process and that the process itself can be accomplished fairly quickly. Indeed, the entire process took approximately three weeks: the SEC asked the Delaware Supreme Court to certify the question at issue on June 27, 2008, the Supreme Court accepted the request on July 1, 2008, expedited briefing took place thereafter, the matter was argued on July 9, 2008 and the decision of the Court was issued on July 17, 2008.

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tors, (c) stockholders are not permitted to cumulate their votes for directors, and (d) the election occurred, and the Expenses were incurred, after this bylaw's adoption. The amount paid to a Nominator under this bylaw in respect of a contested election shall not exceed the amount expended by the corporation in connection with such election.[23]

CA sought to exclude the proposal from its proxy materials on the grounds that it was not a proper subject for stockholder action and that, if implemented, it would violate Delaware law. The SEC, confronted with conflicting legal opinions on these questions, certified the issues to the Delaware Supreme Court.

Addressing the first question, the Court found that the proposal was a proper subject for action by stockholders under Delaware law. The Court found that, even though the proposed bylaw would require the corporation to expend funds, its main intent and effect would be to regulate the election process. The Court reasoned that because stockholders have a legitimate interest in the process for electing directors and because the bylaw would facilitate a stockholder's ability to participate in the selection of director nominees, the bylaw proposal was a proper subject for stockholder action.

With respect to the second question, the Court found that the proposal, if implemented, would violate Delaware law. This finding was premised on the absence of a reservation in the proposed bylaw of the right of the directors to exercise their fiduciary duties in deciding whether to award reimbursement. The Court stated the proposed bylaw was invalid because ''the Bylaw mandates reimbursement of election expenses in circumstances that a proper application of fiduciary principles could preclude.''[24]

The implications of the Court's decision are unclear at this time. In addressing the first question, the Court set forth a test to determine whether a bylaw proposal is a proper subject for stockholder action: the bylaw must be ''one that establishes or regulates a process for substantive director decision-making,'' and not ''one that mandates the decision itself.''[25] The Court explicitly observed that its holding was ''case specific'' and that it was not attempting to ''delineate the location of'' a bright line ''that separates the shareholders' bylaw-making power under Section 109 from the directors' exclusive managerial authority under Section 141(a).''[26] Accordingly, further development of this new jurisprudence will undoubtedly occur as the courts consider application of the test to bylaws regulating such issues as implementation of a stockholders rights plan or executive compensation.

With respect to the second issue considered by the Court, the Delaware legislature has approved legislation that will amend the DGCL to allow a bylaw to require both access to a corporation's proxy materials and proxy reimbursement. Unlike the Delaware legislature's response to other hot-button issues (*e.g.*, antitakeover legislation and majority voting), the proposed statute is an opt-in statute, and a bylaw adopted by stockholders pursuant to the new amendments could subsequently be repealed by the board, subject to the board's fiduciary duties and other equitable limitations.[27]

[23] *Id*. at 229-30.
[24] *Id*. at 239-40.
[25] *Id.* at 235.
[26] *Id.* at 234 n.14.

[27] The amendments add a new Section 112 to the DGCL, governing proxy access, and a new Section 113 to the DGCL, governing expense reimbursement. The amendments to the DGCL will be effective on August 1, 2009.

The new Section 112 provides as follows:

The bylaws may provide that if the corporation solicits proxies with respect to an election of directors, it may be required, to the extent and subject to such procedures or conditions as may be provided in the bylaws, to include in its proxy solicitation materials (including any form of proxy it distributes), in addition to individuals nominated by the board of directors, one or more individuals nominated by a stockholder. Such procedures or conditions may include any of the following:

(1) A provision requiring a minimum record or beneficial ownership, or duration of ownership, of shares of the corporation's capital stock, by the nominating stockholder, and defining beneficial ownership to take into account options or other rights in respect of or related to such stock;

(2) A provision requiring the nominating stockholder to submit specified information concerning the stockholder and the stockholder's nominees, including information concerning ownership by such persons of shares of the corporation's capital stock, or options or other rights in respect of or related to such stock;

(3) A provision conditioning eligibility to require inclusion in the corporation's proxy solicitation materials upon the number or proportion of directors nominated by stockholders or whether the stockholder previously sought to require such inclusion;

(4) A provision precluding nominations by any person if such person, any nominee of such person, or any affiliate or associate of such person or nominee, has acquired or publicly proposed to acquire shares constituting a specified percentage of the voting power of the corporation's outstanding voting stock within a specified period before the election of directors;

(5) A provision requiring that the nominating stockholder undertake to indemnify the corporation in respect of any loss arising as a result of any false or misleading information or statement submitted by the nominating stockholder in connection with a nomination; and

(6) Any other lawful condition.

Delaware House of Representatives, 145th General Assembly, House Bill No. 19 (passed by Delaware House of Representatives on March 18, 2009, passed by Delaware State Senate on April 8, 2009, signed by Governor of the State of Delaware on April 10, 2009 (the ''2009 DGCL Amendments'').

The new Section 113 provides as follows:

(a) The bylaws may provide for the reimbursement by the corporation of expenses incurred by a stockholder in soliciting proxies in connection with an election of directors, subject to such procedures or conditions as the bylaws may prescribe, including:

(1) Conditioning eligibility for reimbursement upon the number or proportion of persons nominated by the stockholder seeking reimbursement or whether such stockholder previously sought reimbursement for similar expenses;

(2) Limitations on the amount of reimbursement based upon the proportion of votes cast in favor of one or more of the persons nominated by the stockholder seeking reimbursement, or upon the amount spent by the corporation in soliciting proxies in connection with the election;

(3) Limitations concerning elections of directors by cumulative voting pursuant to § 214 of this title; or

(4) Any other lawful condition.

(b) No bylaw so adopted shall apply to elections for which any record date precedes its adoption.

C. Indemnification and Advancement Provisions.

In an environment of scrutiny of directors and officers rivaling the immediate post-Enron period, provisions in corporate charters and bylaws relating to indemnification and advancement of litigation expenses are increasingly important in attracting qualified directors to serve a corporation. As the Delaware Supreme Court has observed:

> [M]ost Delaware corporations . . . adopt advancement provisions as an inducement which promotes the same salutary public policy that is served by indemnification: attracting the most capable people into corporate service. Although advancement provides an individual benefit to corporate officials, it is actually a desirable underwriting of risk by the corporation in anticipation of greater corporate-wide rewards for its shareholders.[28]

The Delaware courts had many opportunities to interpret indemnification and advancement provisions in 2008. When reviewing or drafting indemnification and advancement provisions, it is helpful to know how the courts have actually interpreted certain words or phrases, so that, using the courts' interpretations as a baseline, indemnification and advancement provisions can be tailored to the exact needs of each particular client. Accordingly, in this Section, we will summarize the recent caselaw developments, including cases in which the courts (1) found that a bylaw providing a mandatory advancement right to a former director vested when an indemnifiable claim was asserted against him; (2) clarified that ''fees on fees'' must be proportionate to an indemnitee's level of success in seeking to enforce his or her indemnification and advancement rights; and (3) interpreted the terms ''defending,'' ''agent,'' ''proceeding'' and ''final disposition,'' which are routinely utilized in indemnification and advancement provisions and also appear in Section 145 of the DGCL, governing indemnification and advancement. In addition, we will touch on an amendment to Section 145 of the DGCL approved by the Delaware legislature, which effectively would reverse a recent Court of Chancery opinion.

1. Vesting of Indemnification and Advancement Rights.

In *Schoon v. Troy Corp.*,[29] the Court of Chancery upheld a board-approved bylaw amendment that effectively cut off advancement rights to a former director, holding that the former director's right to advancement did not vest until an indemnifiable claim was asserted against him and that, prior to such time, Troy Corporation could amend its bylaws to eliminate the right to advancement of expenses with respect to the former director.

The relevant facts were as follows. Steel Investment Company had the contractual right to designate one director each year to the Troy board of directors. William Bohnen served as Steel's designee on the Troy board until he resigned and was replaced by Richard Schoon. After Schoon took office, Steel and Schoon each separately made a ''books and records'' demand to Troy pursuant to Section 220 of the DGCL, and, unsatisfied with Troy's response to this request, thereafter sued Troy.[30] After Schoon had filed his complaint, the Troy board (excluding Schoon) approved an amendment to Troy's advancement bylaw, which had originally provided that ''the Corporation shall pay the expenses incurred by any present or former director,'' to delete the reference to ''former'' from its definition of directors—effectively eliminating Bohnen's right to advancement. Troy then brought a counterclaim against both Schoon and its former director, Bohnen, asserting both had breached fiduciary duties. Schoon and Bohnen both demanded advancement to cover the costs of defending such claims. Bohnen claimed that, notwithstanding the recent bylaw amendment, he was entitled to advancement of expenses in defending against Troy's suit on the theory that the right to mandatory advancement vested at the time he took office as a director.

The Court rejected Bohnen's theory, reasoning that a director's right to advancement vests only when litigation is filed. The Court distinguished this case from *Salaman v. National Media Corp.*,[31] which held that a board of directors could not unilaterally terminate a former director's right to advancement through a bylaw amendment *while litigation was pending*, because at the time of the Troy amendment, (1) Bohnen had not been named in the lawsuits, (2) Troy had not conducted discovery that it relied on in its claims against Bohnen, and (3) there was no evidence Troy contemplated bringing a claim against Bohnen.

The Troy bylaws included a provision that stated ''[t]he rights conferred by this Article shall continue as to a person who has ceased to be a director or officer and shall inure to the benefit of such person. . . .''[32] The Court explained that this provision ''is better understood as providing that a director, whose right to advancement is triggered while in office [because litigation has commenced], does not lose that right by ceasing to serve as a director'' and does ''not preserve a former director's right to advancement in the face of the November amendments.''[33] As Bohnen resigned prior to Troy's claim being brought against him, Bohnen was not entitled to advancement.[34]

2009 DGCL Amendments. A fuller discussion of these amendments is outside the scope of this article.

[28] *Homestore, Inc. v. Tafeen*, 888 A.2d 204, 218 (Del. 2005).

[29] 948 A.2d 1157 (Del. Ch. 2008).

[30] Schoon originally filed suit on September 29, 2005, Steel filed suit on November 7, 2005 and the Court consolidated the actions on November 9, 2005.

[31] 1992 Del. Super. LEXIS 564 (Oct. 8, 1992).

[32] *Schoon*, 948 A.2d at 1166.

[33] *Id.* at 1167.

[34] Schoon, as a current director, was found to be entitled to mandatory advancement for his defense of breach of fiduciary duty claims. On May 5, 2008, the Court of Chancery entered its final order and judgment and on June 3, 2008, Bohnen filed an appeal. In connection with the appeal, the National Association of Corporate Directors (''NACD'') sought, and was granted, leave to file a brief as *Amicus Curiae*. In its *amicus* brief, the NACD argued that the Court of Chancery's decision should be reversed and ''that the Supreme Court should confirm the central importance of director indemnification and advancement rights to corporate governance and reaffirm that bylaws that create these rights embody contractual obligations that cannot unilaterally and retroactively be set aside.'' Brief of NACD as *Amicus Curiae* Urging Reversal at 1, *Bohnen v. Troy Corp.*, No. 280, 2008 (Del. Aug. 28, 2008). The parties to the appeal ultimately settled and voluntarily dismissed the appeal. In light of the dismissal, the NACD filed a motion to vacate the Court of Chancery's opinion, which if granted would have eliminated the opinion's precedential effect. The Supreme Court denied the motion to vacate, however, and held that its approval of the parties' voluntary dismissal terminated its ju-

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Schoon meant that, prior to the commencement of proceedings involving an indemnittee, a corporation could unilaterally eliminate the very indemnification and advancement rights that might have enticed the indemnitee to sit on the board in the first place. This holding came as a surprise to many, and practitioners quickly addressed it by pursuing one of three courses of action. The first course was to add stronger ''vested rights'' language to corporate indemnification and advancement bylaws.[35] Because even that strong language could theoretically be eliminated by a board without the consent of a former director who could be directly affected, the second course of action was for directors to enter into separate indemnification and advancement agreements with the company. Such agreements (which could reference already-existing bylaw provisions and could thus be as short as one sentence) could provide that they only may be amended with the consent of the all of the parties to the agreement, so that a company could not alter a director's right to advancement or indemnification without the director's express consent. Third, indemnification and advancement language was, in limited instances, placed in a corporation's certificate of incorporation, which requires bilateral action of a board and the stockholders to amend.

Such actions may be less urgent (though perhaps still advisable) given that the Delaware legislature has passed an amendment to the DGCL that will effectively overrule *Schoon*. Specifically, pursuant to the proposed amendment:

> [A] right to indemnification or advancement of expenses under a provision of a certificate of incorporation or a bylaw shall not be eliminated or impaired by an amendment to such provision after the occurrence of the act or omission that is the subject of the civil, criminal, administrative or investigative action, suit or proceeding for which indemnification or advancement of expenses is sought, unless the provision in effect at the time of such act or omission explicitly authorizes such elimination or impairment after such action or omission has occurred.[36]

As written, the amendment appears to be retroactive, and to apply to previously adopted charter and bylaw provisions.

2. 'Fees on Fees'.

Schoon also provided guidance on so-called ''fees on fees'' awards. ''Fees on fees'' involves the awarding of attorneys fees to individuals who seek to enforce their indemnification and advancement rights. *Schoon* clarified that regardless of bylaw language providing broader fees on fees awards, those awards may only be proportionate to the indemnitee's level of success in the action to enforce indemnification and advancement rights. As discussed above, in *Schoon*, the claims to enforce Schoon's advancement rights were successful, but the claims to enforce Bohnen's advancement rights were not. The plantiffs sought fees on fees for the expenses incurred for seeking enforcement of all such rights, including Bohnen's. The company's bylaws provided:

> If a claim for indemnification or advancement of expenses under this article is not paid in full . . . the indemnitee may file suit to recover the unpaid amount of such claim and, *if successful in whole or in part*, shall be entitled to be paid the expense of prosecuting such claim.[37]

The Court found that, notwithstanding this bylaw language, plaintiffs were restricted to an award that was proportionate to their success in their action to enforce their advancement rights. Thus, the Court awarded only half of the amount sought. In response to this case, companies may wish to amend provisions that are similar to the fees on fees provision in the Troy bylaws so as to avoid having an indemnification provision that is not in accordance with Delaware law.

3. Interpretation of 'Defense', 'Agent', 'Proceeding', and 'Final Disposition'.

In addition to the broad rulings in *Schoon*, the Delaware courts have recently provided guidance on the meaning of a number of terms consistently used in indemnification and advancement provisions.

(a) 'Defense'

In *Reinhard v. The Dow Chemical Company*,[38] the Court of Chancery focused on advancement in the context of a counterclaim. The bylaws of Dow Chemical Company provided for indemnification and advancement to the fullest extent provided by Section 145 of the DGCL.[39] The Court held that the law compelled advancement of legal fees for compulsory counterclaims, but not permissive counterclaims.

Two former executives of Dow had been sued by Dow for breach of fiduciary duty and had counterclaimed for libel, breach of contract, and defamation. The executives entered into a stipulation with Dow based on Dow's advancement bylaw provisions which provided that Dow would pay for the plaintiffs' ''reasonable fees and expenses incurred in connection with plaintiffs' defense of claims brought against them by Dow.''[40] The dispute centered on the definition of ''defense''—the plaintiffs claimed that ''defense'' included the costs associated with their counterclaims against Dow, and Dow argued that when the parties used the word ''defense'' in the stipulation, they ''specifically intended to preclude fee advancement'' with respect to the plaintiffs' counterclaims.[41]

The Court found that, based on *Citadel Holding Corp. v. Roven*,[42] compulsory counterclaims constituted a de-

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risdiction over the appeal. *See* Order denying Mot. to Vacate, *Bohnen v. Troy Corp.*, No. 280, 2008 (Del. Nov. 13, 2008).

[35] Such language could read as follows:

> The rights conferred upon indemnitees in this Article shall be contract rights and such rights shall continue as to an indemnitee who has ceased to be a director, officer or trustee and shall inure to the benefit of the indemnitee's heirs, executors and administrators. Any amendment, alteration or repeal of this Article that adversely affects any right of an indemnitee or its successors shall be prospective only and shall not limit or eliminate any such right with respect to any proceeding involving any occurrence or alleged occurrence of any action or omission to act that took place prior to such amendment or repeal.

[36] § 145(f), 2009 DGCL Amendments.

[37] *Schoon*, 948 A.2d at 1176 (emphasis added).

[38] 2008 Del. Ch. LEXIS 39 (Mar. 28, 2008).

[39] ''Section 145 of the [DGCL] endows corporations with the power to indemnify and provide advancement of attorneys' fees to officers, directors, employees, or agents of the corporation. This provision is permissive, but its effect is purportedly made mandatory in Dow's bylaws.'' *Id.* at *4-*5.

[40] *Id.* at *7.

[41] *Id.*

[42] 603 A.2d 818 (Del. 1992).

fense. In *Citadel*, the Delaware Supreme Court held that the term ''defense'' included advancement for legal expenses incurred in connection with affirmative defenses as well as *compulsory* counterclaims. The *Dow* Court also reasoned that the term ''defense'' could not ''justifiably be construed'' to allow for advancement for legal expenses arising out of *permissive* counterclaims.[43] This distinction was drawn because compulsory counterclaims are ''necessarily part of the same dispute'' and ''must be asserted or be thereafter barred,'' whereas permissive counterclaims, which ''do not arise out of the transaction or occurrence that is the subject of the opposing party's claims,'' are not part of the executive's defense of claims brought by the corporation.[44] Thus, as a baseline, the term ''defense'' will be construed to cover an indemnittee's affirmative defenses and compulsory counterclaims. To the extent that a corporation wishes to deviate from this baseline understanding in its bylaws, express language to that effect should be present. As explained below, however, the status of the law with respect to advancement for permissive counterclaims became murkier as 2008 progressed.

In *Zaman v. Amedeo Holdings, Inc.*,[45] the Court faced a similar question, but found the ''in defending'' language to include some permissive counterclaims in addition to compulsory counterclaims and affirmative defenses. In *Zaman*, the company's bylaws provided for advancement ''in defending any proceeding'' that is indemnifiable.[46] This language was construed by the Court to include not only compulsory counterclaims under both Delaware and federal civil procedure, but also other counterclaims, although not considered compulsory in other jurisdictions, that would negate an affirmative claim against a director or officer. A counterclaim that would negate an affirmative claim could arise when the ''counterclaim so directly relates to a claim against a corporate official such that success on the counterclaim would operate to defeat the affirmative claims against the corporate official.''[47]

The lengthy facts of this case involve corporate issues relating to the family and business enterprises of the Sultan of Brunei. The advancement claim at issue was brought by two London barristers, the Derbyshires, who not only represented the Sultan's brother, Prince Jefri, but also had broad managerial and financial authority over Prince Jefri's American corporations. Alleging various breaches of fiduciary duties by the Derbyshires, Prince Jefri filed suit first in London and in the Southern District of New York, and after those cases concluded, in New York state court against the Derbyshires. The Derbyshires brought counterclaims in the state action, and sought indemnification and advancement under the bylaws of several Delaware corporations controlled by Prince Jefri for the fees incurred in defending the London and New York federal actions and for the future expenses that would be incurred in defending the New York state action, including advancement for their counterclaims.

In deciding whether the Derbyshires were entitled to advancement and indemnification for their defense of the London suit, the federal suit, and the New York state suit, the Court first determined that with regard to the London and federal actions, the Derbyshires, as agents of the relevant companies, had been successful on the merits and awarded indemnification. With respect to the issue of advancement in the ongoing state action, in contrast to *Dow*, the Court allowed for advancement for counterclaims that negated the viability of Prince Jefri's claims against the Derbyshires even though such counterclaims would have been considered permissive under New York civil procedure.[48] The Court found it ''difficult to believe'' that application of *Roven* was contingent upon an action not being brought in a state with different compulsory counterclaim laws than Delaware, noting that sixteen states ''either have no compulsory counterclaim requirement or have material carveouts from the traditional compulsory counterclaim test,'' including New York.[49] In noting the different interpretation of *Roven* in the *Dow* decision, the Court warned that the ''practical consequence of reading *Roven* literally . . . is illustrated'' by the *Dow* decision ''because, given the complicated litigation context'' in *Dow*, the parties were required to provide additional briefing as to the applicable governing law to determine whether a counterclaim was compulsory.[50] The Court concluded that the test for whether to provide advancement for counterclaims should be as follows:

> For these reasons, I believe that the interpretation of the ''in defending'' limitation most faithful to the Supreme Court's teachings in *Roven*, is that the costs of prosecuting a counterclaim should be subject to advancement if the counterclaim would qualify as a compulsory counterclaim under the traditional counterclaim test used by both Delaware and federal civil procedure *and* when that counterclaim so directly relates to a claim against a corporate official such that success on the counterclaim would operate to defeat the affirmative claims against the corporate official. In other words, a counterclaim fits within the ''in defending'' language if it defends the corporate official by directly responding to and negating the affirmative claims.[51]

The Court ultimately found that the Derbyshires were entitled to advancement for most of their state court counterclaims.

[43] *Dow*, 2008 Del. Ch. LEXIS 39, at *9 (citing *Citadel Holding Corp. v. Roven*, 603 A.2d 818, 824 (Del. 1992)).
[44] *Id.* (citing *Citadel Holding Corp.*, 603 A.2d at 824).
[45] 2008 Del. Ch. LEXIS 60 (May 23, 2008).
[46] *Id.* at *113.
[47] *Id.* at *121-*122.
[48] Although the Derbyshires' counterclaims would have been compulsory under Delaware or federal law, in New York courts, all counterclaims are permissive. *Id.* at *116.
[49] *Id.* at *123.
[50] *Id.* at *128 n.155.
[51] *Id.* at *121-*122 (citations omitted).

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The Court of Chancery took up the issue again, albeit in more summary fashion, in *Duthie v. CorSolutions Medical, Inc.*[52] In this case, the Court had previously found that the indemnitees were entitled to advancement of expenses for litigation in which they were accused of fraud and breach of contract. The company repeated its claims publicly, allegedly to embarrass the indmenitees. The indemnitees brought a defamation action, and sought advancement of expenses for such action. The Court found that the company's governing documents provided broadly for advancement and did not preclude assertion of an affirmative defamation claim, citing *Roven* and stating:

> Where a party holding a right to advancement is the target of defamation by his adversary, the ability to ''defend oneself'' includes the capacity to respond to such attacks by filing defamation actions . . . . This affirmative [defamation] action arises as an outgrowth of [the company's] litigation strategy and is a ''necessary part of the same dispute.'' Therefore the Plantiffs are entitled to advancement of fees and expenses reasonably incurred in asserting the defamation claims.[53]

Finally, rounding out the 2008 cases interpreting variations of the phrase ''defense,'' the Court of Chancery clarified that expenses incurred in an appeal are expenses incurred ''in defending'' oneself under Section 145 and relevant bylaw language. In *Sun-Times Media Group, Inc. v. Black*,[54] certain corporate executives had been convicted at the trial court level, and had appealed their convictions. The company argued that the governing documents only required mandatory advancement for expenses incurred in defending an action, suit or proceeding, and that the executives were not so ''defending'' on appeal. Applying *Roven*, the Court rejected this argument:

> Although Roven did not address the issue of whether filing an appeal of a criminal conviction is defending, appeals of criminal convictions fit squarely within Roven's definition of defending. Appeals are clearly designed to ''defeat or offset'' the prosecutor's claims against the defendant and are ''necessarily part of the same dispute. . . . '' Likewise, the ''necessarily part of the same dispute'' reasoning in *Roven* is satisfied by an appeal. An appeal must arise from the trial court dispute and generally involves the same facts and legal arguments as the trial court dispute. Furthermore, to the extent that *Roven* hinges on the ''use or lose it'' nature of compulsory counterclaims, appeals must similarly be filed in a timely manner. In sum, *Roven* suggests that appeal of a conviction is defending, in the sense of § 145(e)'s use of defending a proceeding.[55]

These four cases are notable because many advancement provisions, as well as Section 145 of the DGCL, contain the ''in defending'' language so that advancement pursuant to such provisions would only be available for expenses incurred in taking any action that would fall within the rubric of ''in defending'' as interpreted by the courts. Given that litigation can oftentimes include a plethora of counterclaims, cross claims, and the like, decisions such as *Dow*, *Zaman*, *Duthie*, and *Sun-Times* are helpful because they give some real-life meaning to the language. Although there may be some tension as to the breadth of the term ''defense,'' as interpreted in *Dow* and *Zaman*, it now appears that costs incurred with respect to affirmative defenses, certain defamation suits, the appellate process, compulsory counterclaims, and counterclaims that directly relate to the claims against the indemnitee may fall within the rubric of ''in defending.'' To the extent that a corporation seeks to provide advancement with respect to broader or more limited counterclaims,[56] such language can be included in the contract or bylaws.

(b) 'Agent'

Section 145 of the DGCL permits, but does not require, a corporation to extend indemnification and advancement rights to agents of the corporation. For a corporation that does extend such rights to agents, it is important to understand who will be considered an agent of the company. The Delaware courts have considered this question a number of times during the past six years, and particularly in two recent cases, *Jackson Walker LLP v. Spira Footwear, Inc.*,[57] and *Zaman*, the scope of the term ''agent'' with respect to a company's legal counsel. The gist of these opinions is that (1) where the company's litigation counsel acted on behalf of the company in relations with third parties, that counsel is likely to be deemed an agent of the corporation,[58] and (2) counsel that is provided extensive managerial and financial authority over a group of corporations may be deemed agents of such corporations.[59]

The Delaware courts first addressed whether a corporation's counsel is an ''agent'' of the corporation in 2003 in *Fasciana v. Electronic Data Systems Corp.*,[60] There, the Chancery Court held that outside counsel was not an ''agent'' with respect to all claims arising from his status as outside counsel. Instead, counsel was only an ''agent'' with respect to actions (a) within the scope of his retainer and (b) that were taken vis-à-vis third parties. The Court also stated that the term ''agent'' in this context should have ''a fairly limited purpose'' and be used ''in its most traditional sense as involving action by a person (an agent) acting on behalf of another (the principal) as to third parties.''[61]

Fasciana was applied by the Court of Chancery in *Bernstein v. TractManager, Inc.*,[62] when a corporation sued a director who had also served as the corporation's attorney. The corporation's claims against the director were rooted in constructive trust, malpractice,

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[52] 2008 Del. Ch. LEXIS 128 (Sept. 10, 2008).

[53] *Id*. at *3-*4 (quoting *Citadel Holding Corp.*, 603 A.2d at 824).

[54] 954 A.2d 380 (Del. Ch. 2008).

[55] *Id*. at 397-398 (internal citations omitted).

[56] For example, certain of our clients have expressed a desire expressly to exclude counterclaims from a director's advancement rights.

[57] 2008 Del. Ch. LEXIS 82 (June 23, 2008).

[58] *Id.*

[59] *Zaman*, 2008 Del. Ch. LEXIS 60.

[60] 829 A.2d 160 (Del. Ch. 2003).

[61] *Id.* at 170-171. A New Jersey Court, applying Delaware law, questioned the propriety of such a narrow interpretation of the term ''agent'' in this context while holding an attorney to be an ''agent'' of a corporation. In *Vergopia v. Shaker*, an attorney retained by a corporation in connection with the termination of a corporate officer, was subsequently sued for libel and intentional infliction of emotional distress by the former officer. 891 A.2d 664 (N.J. Super. Ct. App. Div. 2006). The Court held that, because the attorney gave advice on the proposed public disclosures to be issued in connection with the termination, the attorney ''gave advice that was intended to be used with third-parties'' and was thus an ''agent'' and entitled to advancement. *Id.* at 268.

[62] 953 A.2d 1003 (Del. Ch. 2007).

and unjust enrichment, and related in part to drafting and advisory services the director had provided as a lawyer. The Court declined to label the director an ''agent'' entitled to indemnification with respect to those claims. In so holding, the Court quoted *Fasciana*, writing:

> Although it is true that attorneys are often described as agents of their clients, this loose general usage is not a helpful or sensible ascription to use in implementing [indemnification provisions]. Otherwise, outside attorneys retained by corporations would be able to seek advancement whenever they are accused of malpractice so long as their employing corporations have adopted a maximal bylaw extending coverage to the limits of [Section 145].[63]

The *Fasciana* analysis was perhaps broadened in *Zaman*,[64] in which the Derbyshires, both English barristers, were broadly retained to manage Prince Jefri's American corporations. The Derbyshires sought indemnification and advancement under the bylaws of several corporations controlled by Prince Jefri as agents of the corporations. The defendants alleged that the Derbyshires were no more than outside legal advisors, but the Court rejected this claim, reasoning that the high level of managerial control and discretion the Derbyshires had over the various corporations made clear that they were agents of the corporations:

> [W]hatever titles they formally held—and for many periods they held directorships and officerships . . . —the Derbyshires possessed the same or greater managerial power and discretion in fact than directors and top officers do as a matter of legal formality. For this reason, it is apparent that the Derbyshires were at the very least agents of the corporation for which they acted within the meaning of [the indemnification provisions] of the defendants' bylaws and § 145 of the DGCL.[65]

This decision suggests that in determining whether an agency relationship exists for the purposes of an indemnification or advancement bylaw, the Delaware courts may look beyond a person's title as ''attorney'' to see what role the person actually played with respect to the corporation at issue.

The Court of Chancery reached a similar conclusion in *Jackson Walker*,[66] in which an attorney was retained by a corporation as local litigation counsel for an action in Texas. In that role, that attorney filed pleadings, performed other litigation related work, negotiated a settlement on behalf of the company, and also provided some legal services not directly related to the litigation. The crux of the case centered on whether this attorney was an agent of the corporation for the purposes of Section 145 of the DGCL and the corporation's bylaws. The Court found that as outside litigation counsel, the attorney was an agent acting on behalf of the company in relations with third parties, noting that ''[t]rial lawyers have the ability to bind their client in dealings with the court and other parties to the litigation.''[67] The Court found immaterial that some legal services provided did not directly relate to the litigation.[68] In so holding, the Court highlighted the fact that providing indemnification and advancement for agents was permitted but not required by the DGCL, and that a corporation was free to draft narrower provisions:

> [T]he General Assembly has provided Delaware corporations with the option of advancing and indemnifying litigation expenses for their agents. [The corporation] was, and is, free to craft a narrower bylaw, and then to provide narrower advancement and indemnification rights in its contracts with outside contractors. The Bylaws governing this dispute, however, contain no such limitations.[69]

The learning from these cases, which illustrate the varying interpretations of ''agent'' as applied to one specific context, once again, is that corporations should take great care in drafting indemnification and advancement provisions. In some instances, a company may well wish to provide mandatory indemnification or advancement to agents and include a broad definition of that term, whereas companies with numerous agents might find it more advisable not to do so, or to limit the scope of the definition of ''agent.'' Care must be taken in assessing each individual corporation so that the bylaws affirmatively reflect the needs and desires of that particular corporation.

(c) 'Proceeding'

The Delaware Court of Chancery also recently shed light on the meaning of ''proceeding'' in an indemnification context. Most bylaws and the DGCL are designed to provide indemnification or advancement for the costs incurred in defending oneself in an actual or threatened proceeding. Under these provisions, to the extent that there is no ''proceeding'', there would be no right to indemnification or advancement. In *Donohue v. Corning*,[70] a former managing member of an LLC brought an action in the Court of Chancery to determine who was in control of the LLC after being purportedly removed as a managing member. He also sought advancement for the action from the LLC. The relevant LLC Agreement[71] provided for advancement for defending oneself in an actual or threatened proceeding, but no proceeding had been threatened or brought against the former manager. The only outstanding threat made by the defendants was that they would remove the plaintiff for cause. The Court found that the threat of a for-cause removal did not amount to a proceeding, and thus the plaintiff was not entitled to advancement:

> The problem with [the plaintiff's] argument is that he cannot identify the threatened Proceeding that he is defending or disposing of by bringing this suit. The only explicit threat by the defendants was that they would remove him for cause. The defendants followed through on that threat and this suit is a direct response to [the plaintiff's] removal. But a for cause removal under the terms of the Agreement is not a Proceeding as contemplated by the Advancement Provision.[72]

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[63] *Id.* at 1013 (quoting *Fasciana*, 829 A.2d at 163).

[64] *See* Part I(C)(3)(a) of this article for a full description of the case.

[65] *Zaman*, 2008 Del. Ch. LEXIS 60, at *50-*51.

[66] 2008 Del. Ch. LEXIS 82 (June 25, 2008).

[67] *Id.* at *28.

[68] *Id.* at *29.

[69] *Id.* at *37.

[70] 949 A.2d 574 (Del. Ch. 2008).

[71] Although the advancement provision in this case appeared in an LLC agreement as opposed to a corporation's bylaws, we have included the discussion of this case since most bylaws include similar language and this interpretation of ''proceeding'' could have application in the context of corporate bylaws as well.

[72] 949 A.2d at 580.

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(d) 'Final disposition'

Rounding out the recent cases interpreting indemnification and advancement provisions, in *Sun-Times Media Group, Inc. v. Black*,[73] the Delaware Court of Chancery shed light on what will be deemed a ''final disposition'' of a proceeding. This finding is important because many advancement bylaw provisions, as well as Section 145(e) of the DGCL, require a company to advance litigation expenses in certain circumstances prior to the ''final disposition'' of the action, suit, or proceeding at issue, making clear that advancement obligations cease at the final disposition of the action. What constitutes a final disposition therefore impacts a company's total advancement obligations. The *Sun-Times* decision clarified that the ''final disposition'' of an action, suit, or proceeding means a ''final, non-appealable conclusion of that proceeding.'' Thus, to the extent that appeals could still be made, the company remained obligated to advance expenses.

In *Sun-Times*, former executives of Sun-Times had been convicted in the U.S. District Court for the District of Northern Illinois for numerous crimes connected to their corporate dealings. The former executives then appealed these convictions to the U.S. Court of Appeals for the Seventh Circuit, where the convictions were affirmed. After the District Court entered the conviction, Sun-Times told the executives that it would no longer advance expenses to them. The Court of Chancery's decision on the case came after the Court of Appeals had affirmed the convictions but before the period for making an appeal to the U.S. Supreme Court had expired.

The main issue in the case was whether the final disposition of the action had occurred so that Sun-Times was no longer obligated to advance expenses. Like Section 145 of the DGCL, the governing documents in this case provided for advancement prior to the final disposition of the action, suit, or proceeding. The Court found that because an appeal was part of the original action, suit, or proceeding, the final disposition of the action, suit, or proceeding did not occur until the appellate process was complete, that is, a '' 'final disposition' of an 'action, suit, or proceeding' is most plausibly read as meaning the final, non-appealable conclusion of a proceeding.''[74] Thus, Sun-Times was obligated to advance expenses until the appeals process was complete. Again, this decision serves as a reminder that corporations can, and, if desiring to limit credit risk, should, craft narrower bylaws that, for instance, make clear that appeals will not be covered.

II. CHARTER PROVISIONS

The amendment of charter provisions, unlike bylaw provisions, requires action by both a corporation's board of directors and its stockholders. Accordingly, charter provisions are less likely to be amended than bylaw provisions. Nevertheless, there are a few developments over the past year that are worthy of discussion.

A. Indemnification and Advancement Provisions.

Although many companies choose to include indemnification and advancement provisions in their bylaws only, such provisions, as discussed briefly above, can be included in a company's charter. Typically, a charter will include either an exact replica of the provisions in the bylaws, or will include a much shorter provision stating that the indemnification and advancement rights provided in the bylaws are contractual rights. The benefit to including such provisions in the charter is that doing so provides stronger protection to indemnitees because charter provisions cannot unilaterally be amended by the board (as occurred with bylaws in the *Schoon* case, discussed above), but this same characteristic can also prove to be a disadvantage where corporations want to update their provisions to be consistent with changes in the law, such as those discussed in this article, or to address any particular needs of the company. To the extent that such provisions are included in the charter, practitioners should ensure that the charter and bylaw provisions are consistent.[75] Additionally, the caselaw interpreting bylaw indemnification and advancement provisions should be kept in mind when drafting or reviewing such provisions in a charter because particular charter language may be given the same interpretation as that language has been given in other contexts, including in bylaws.[76]

B. Section 102(b)(7) Provisions.

Section 102(b)(7) of the DGCL allows a certificate of incorporation to include a provision limiting liability of directors for monetary damages to the corporation and its stockholders for breaches of the duty of care.[77] This section was adopted in large part as a response to the Delaware Supreme Court's decision in *Smith v. Van Gorkom*,[78] which found that directors had breached their duty of due care, despite acting in good faith, in approving a cash-out merger.

The exculpation from monetary liability arising from a Section 102(b)(7) provision is limited in that it does not reach liability arising out of a failure to act in ''good faith.''[79] Over the past several years, the Delaware courts have sharpened their focus on the duty to act in good faith, raising fears among some practitioners that this focus would undermine the protection offered by a

[73] 954 A.2d 380 (Del. Ch. 2008).

[74] *Id.* at 397. *Sun-Times* may be viewed as a natural outgrowth of the Court of Chancery's decision in *Bergonzi v. Rite Aide Corp.*, 2003 Del. Ch. LEXIS 117 (Oct. 20, 2003), where the Court held that a ''final disposition'' in a criminal proceeding did not occur at the entering of a guilty plea, but rather would occur at sentencing.

[75] To the extent that a bylaw provision conflicts with a charter provision, the charter provision will prevail. *See* 8 *Del. C.* § 109(b) (''The bylaws may contain any provision, not inconsistent with law or with the certificate of incorporation . . . . '').

[76] *Lions Gate Entm't Corp. v. Image Entm't, Inc.*, 2006 Del. Ch. LEXIS 108, at *12-*13 (June 5, 2006).

[77] Section 102(b)(7) does not allow a certificate of incorporation to extend the same protections to officers, notwithstanding that officers owe to a corporation and its stockholders ''fiduciary duties identical to those of directors.'' *Gantler v. Stephens*, 965 A.2d 695, 708-709 (Del. 2009). In *Gantler*, the Supreme Court noted this dichotomy, and observed that it would be ''legislatively possible'' to adopt a ''statutory provision authorizing comparable exculpation of corporate officers.'' *Id.* at 709 n.37.

[78] 488 A.2d 858 (Del. 1985).

[79] As the Supreme Court has observed, the terms ''bad faith'' and ''failure to act in good faith'' are often used interchangeably. *Lyondell Chemical Co. v. Ryan*, 2009 Del. LEXIS 152 (Jan. 14, 2009).

Section 102(b)(7) provision.[80] Those fears were heightened as a result of the Court of Chancery's decision in *Ryan v. Lyondell Chemical Co.*,[81] in which the Court declined to dismiss a claim that nonconflicted directors breached their duty to act in good faith in approving a transaction representing a 20% premium over market on the last trading day prior to announcement of the merger. However, two subsequent Court of Chancery opinions, as well as an opinion from the Delaware Supreme Court reversing and remanding *Lyondell*, should help allay these concerns.

In *Lyondell*, the board of directors of Lyondell received and later accepted an unsolicited offer for the company from a third party that represented a substantial premium over the market price of the company's shares, and the acquisition was overwhelmingly approved by the stockholders of Lyondell. A stockholder plaintiff alleged that the directors violated their fiduciary duties by only considering the offer for the period of a week, not shopping the company to see if a higher value was attainable, and locking up the deal with tight deal protections. The defendant directors sought summary judgment, arguing that even if the board had violated its fiduciary duties, such a violation only amounted to a breach of the duty of care and thus damages were precluded because Lyondell had a Section 102(b)(7) provision in its charter.[82] The Court denied this motion for summary judgment, stating that because the board of directors ''appear[ed] never to have engaged fully in the [sale] process to begin with, despite *Revlon's* mandate . . . the good faith aspect of the duty of loyalty may be implicated, which precludes a Section 102(b)(7) defense to [the plaintiff's] *Revlon* and deal protection claims.''[83] The Court ultimately found that whether the Section 102(b)(7) provision would limit liability in this case presented a question of fact that could not be resolved on summary judgment.

Two Court of Chancery decisions following on the heels of *Lyondell* went to great lengths to limit *Lyondell*. First, in *McPadden v. Sidhu*,[84] the Court found that a board's actions with respect to a sale of the company were ''properly characterized as either recklessly indifferent or unreasonable,'' but nonetheless held that the plaintiff had not adequately alleged that the directors acted in bad faith because their alleged conduct did not amount to an ''intentional dereliction of duty or the conscious disregard for one's responsibilities.''[85] Then, in *In re Lear Corporation Shareholder Litigation*,[86] litigation also involving director actions with respect to a sale of the company, the Court granted the defendant directors' motion to dismiss a breach of fiduciary duty claim, again on the grounds that the plaintiffs had failed to show that the directors' conduct was not exculpated by the company's Section 102(b)(7) charter provision. In so holding, the Court highlighted the importance of such provisions, warning that courts should be ''extremely chary about labeling what they perceive as deficiencies in the deliberations of an independent board majority over a discrete transaction as not merely negligence or even gross negligence, but as involving bad faith.''[87]

Finally, in March 2009, the Supreme Court reversed the Court of Chancery's *Lyondell* decision. Although the Court could have decided the case on narrower grounds,[88] the Court took the opportunity again to address its ''good faith'' jurisprudence. First, the Court summarized its good faith jurisprudence to date, focusing on two forms of lack of good faith—an ''intentional dereliction of duty'' claim and a lack of oversight claim. With respect to the former, the Court observed that its previous decisions had held that ''bad faith will be found if a 'fiduciary intentionally fails to act in the face of a known duty to act, demonstrating a conscious disregard for his duties' ''—the holding upon which the Court of Chancery based its decision in *Lyondell*. However, the Supreme Court went on to state that '' '[i]n the transactional context, [an] extreme set of facts [is] required to sustain a disloyalty claim premised on the notion that disinterested directors were intentionally disregarding their duties' '' and set a high (indeed, seemingly subjective) standard for such a claim:

> Only if [directors] *knowingly and completely* failed to undertake their responsibilities would they breach their duty of loyalty.[89]

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[80] The Court's focus on its ''good faith'' jurisprudence began sharpening earlier in the decade, as we discussed in our article in this publication two years ago. *See* Eric S. Wilensky & Angela L. Priest, *2006 Developments In Delaware Corporation Law On Directors: Good Faith, Duties In Zone Of Insolvency, And Structuring Deals*, (39 Securities Regulation & Law Report 476 (Mar. 26, 2007)).

There are a number of strands of ''good faith'' jurisprudence. In particular, the courts have recently addressed ''good faith'' as it relates to the transactional context, as well as it relates to the ''oversight'' context. Although this Section focuses on ''good faith'' in the transactional context, it is worthwhile to note that the Court of Chancery recently declined to find that the Citigroup board breached its duty of oversight, noting that a board's obligation to implement and monitor a system of oversight ''does not eviscerate the core protections of the business judgment rule—protections designed to allow corporate managers and directors to pursue risky transactions without the specter of being held personally liable if those decisions turn out poorly.'' *In re Citigroup Inc. S'holder Deriv. Litig.*, 964 A.2d 106 (Del. Ch. 2009).

[81] 2008 Del. Ch. LEXIS 105 (Del. Ch. July 29, 2008).

[82] The case was before the Court in an unusual procedural posture. The plaintiff alleged that the board had violated its so-called ''*Revlon*'' duty—a duty to act reasonably in seeking to maximize short-term value to stockholders in a change of control transaction. *See Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173 (Del. 1986). Most *Revlon* claims are litigated in the context of a preliminary injunction motion in which a Section 102(b)(7) provision would not be implicated because such a provision does not prohibit injunctive relief. In *Lyondell*, the transaction had already closed, and the plaintiffs were seeking damages from the defendant directors.

[83] *Lyondell*, 2008 Del. Ch. LEXIS 105, at *85.

[84] 964 A.2d 1262 (Del. Ch. 2008).

[85] *Id.* at 1274-1275.

[86] 2008 Del. Ch. LEXIS 121 (Sept. 2, 2008).

[87] *Id.* at *41-42.

[88] The Court of Chancery's opinion was based in large part on the director's inaction between the time of the suitor's initial indication of interest and the time the directors began negotiations with the suitor. The Supreme Court (in a ruling significant in itself) held that it was improper for the Court of Chancery to consider the actions (or inaction) of the board prior to the time the company ''embarked'' on a transaction. The Supreme Court could simply have remanded to the Court of Chancery with instructions to analyze the *Revlon* claim with this new guidance.

[89] *Lyondell Chemical Co.*, 2009 Del. LEXIS 152, at *21 (Jan. 14, 2009).

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This decision should provide substantial comfort that a Section 102(b)(7) charter provision continues to be relevant and offers a powerful shield against the imposition of monetary liability against directors in their personal capacity.[90]

III. INDEMNIFICATION AGREEMENTS AND POISON PILLS

In the previous two sections, we discussed issues associated with a corporation's key governing documents—its charter and its bylaws. In this final section we discuss two forms of agreement—indemnification agreements and poison pills—that, while not fundamental governing documents, serve key functions for a corporation and its directors and have been the subject of recent Delaware developments.

A. Indemnification Agreements.

As discussed above, following *Schoon*, many corporations entered into indemnification agreements with their directors and officers in an effort to shore up the ''vested contract right'' nature of the company's indemnification and advancement obligations. These agreements generally took two forms—the ''short'' form, which was essentially a single sentence agreement between a director and the company incorporating by reference the indemnification and advancement obligations in the company's charter or bylaws, and the ''long'' form, which set forth in great detail the indemnification and advancement obligations of the company, and touched on issues such as procedures for seeking indemnification and advancement and inferences with respect to entitlement to indemnification and advancement.

Although the 2009 amendments to the DGCL, when effective, may eliminate the need for the ''short form'' indemnification agreement, companies and directors and officers may still find such ''long form'' indemnification agreements, which Section 145(f) of the DGCL expressly authorizes, beneficial, especially to address the more detailed nuances of an indemnification and advancement scheme that might otherwise weigh down a company's bylaws.

In drafting such agreements, practitioners should keep in mind the interpretive caselaw discussed above in Part I(C), as those cases may be equally applicable to indemnification agreements. Additionally, practitioners should ensure that the corporation's bylaws or charter provisions do not purport to provide the exclusive means for indemnification and advancement for directors. Finally, practitioners should closely read a recent Court of Chancery decision, *Levy v. HLI Operating Co.*,[91] which addresses two key issues relating to indemnification agreements.

Levy first addresses the extent to which Section 145(f) of the DGCL may be relied upon to expand the scope of indemnification and advancement expressly contemplated by the DGCL. In full, Section 145(f) provides:

> The indemnification and advancement of expenses provided by, or granted pursuant to, the other subsections of this section shall not be deemed exclusive of any other rights to which those seeking indemnification or advancement of expenses may be entitled under any bylaw, agreement, vote of stockholders or disinterested directors or otherwise, both as to action in such person's official capacity and as to action in another capacity while holding such office.[92]

Thus, on its face, Section 145(f) seems to permit the extension of indemnification and advancement rights beyond those expressly contemplated by the DGCL. However, the Delaware courts have warned that Section 145(f) does not provide a foundation to abrogate all of the limitations on indemnification and advancement contained elsewhere in the statute (*e.g.*, the prohibition against providing indemnification to directors who have been found not to have acted in good faith[93]) or in caselaw interpreting the statute (*e.g.*, the requirement that ''fees on fees'' be tied to success on the merits of an underlying claim). In *Levy*, the Court found a contract provision allowing full ''fees on fees,'' even if a claim was only successful in part, to be invalid. The Court acknowledged the broad language in Section 145(f), but held that ''Section 145(f) cannot be interpreted to eviscerate [the indemnification statute], as doing so would violate well-established rules of statutory construction.''[94] Thus, practitioners should consider provisions in an indemnification agreement in light of the statutory and common law limitations on indemnification rights, and court jurisprudence, such as *Levy*, addressing the extent to which such limitations also limit the scope of agreements authorized pursuant to Section 145(f).

Levy also touched upon a very specific issue that is relevant to the private equity fund/portfolio company context. The context involves a private equity fund placing a designee on the board of directors of a portfolio company, and both the private equity fund and portfolio company providing indemnification and advancement rights to the designee. In *Levy*, a private equity fund designee sought to assert an indemnification claim against a portfolio company, notwithstanding the fact that the private equity fund had already indemnified the designee. The Court held that the designee lacked ''standing to assert an indemnification claim against the [portfolio company] in the [designee's] own right,'' and that the private equity fund instead was required to bring a claim for contribution against the portfolio company.[95] *Levy* highlights the benefit of entering into an agreement *ex ante* identifying the indemnitor of first resort and the residual indemnitor in this particular context. The National Venture Capital Association includes a sample provision in its form indemnification agreement:

> [The Company hereby acknowledges that Indemnitee has certain rights to indemnification, advancement of expenses and/or insurance provided by [Name of Fund/Sponsor] and

[90] Although, as discussed above, most *Revlon* claims are litigated through motion practice, the high bar set by the Supreme Court to overcome a Section 102(b)(7) provision may place an even higher premium on litigating a *Revlon* claim at the preliminary stage and seeking injunctive relief.

[91] 924 A.2d 210 (Del. 2007).

[92] 8 *Del. C.* § 145(f).

[93] But cf. *La. Mun. Police Employees' Ret. Sys. v. Crawford*, 918 A.2d 1172, 1180 n.8 (Del. Ch. 2007) (suggesting a Delaware corporation may agree contractually to provide indemnification and advancement rights to third parties without regard to the statutory limitation of such rights with respect to actions taken in bad faith).

[94] *Levy*, 924 A.2d at 226 n.59.

[95] *Id.* at 222-223.

certain of [its][their] affiliates (collectively, the ''Fund Indemnitors''). The Company hereby agrees (i) that it is the indemnitor of first resort (i.e., its obligations to Indemnitee are primary and any obligation of the Fund Indemnitors to advance expenses or to provide indemnification for the same expenses or liabilities incurred by Indemnitee are secondary), (ii) that it shall be required to advance the full amount of expenses incurred by Indemnitee and shall be liable for the full amount of all Expenses, judgments, penalties, fines and amounts paid in settlement to the extent legally permitted and as required by the terms of this Agreement and the Certificate of Incorporation or Bylaws of the Company (or any other agreement between the Company and Indemnitee), without regard to any rights Indemnitee may have against the Fund Indemnitors, and, (iii) that it irrevocably waives, relinquishes and releases the Fund Indemnitors from any and all claims against the Fund Indemnitors for contribution, subrogation or any other recovery of any kind in respect thereof. The Company further agrees that no advancement or payment by the Fund Indemnitors on behalf of Indemnitee with respect to any claim for which Indemnitee has sought indemnification from the Company shall affect the foregoing and the Fund Indemnitors shall have a right of contribution and/or be subrogated to the extent of such advancement or payment to all of the rights of recovery of Indemnitee against the Company. The Company and Indemnitee agree that the Fund Indemnitors are express third party beneficiaries of the terms of this Section 8(c).][96]

As the name of the document suggests, this text is simply a ''form'' and, if utilized as a starting off point, likely will be the subject of much negotiation among the portfolio company, the private equity fund, and the designee.

B. Poison Pills.

The number of United States companies with a poison pill in effect continued to drop in 2008 at about the same rate as it did in 2007 and has decreased almost fifty percent since the beginning of the decade.[97] Moreover, RiskMetrics Group continues to support stockholder proposals requesting a company either to submit its poison pill to a stockholder vote or redeem it, as well as withhold vote campaigns if a board adopts or renews a poison pill without shareholder approval or does not commit to put its pill to a stockholder vote within 12 months of adoption.[98] Nevertheless, poison pills (whether in place or on the shelf) continue to be a potent resource for corporations, and a few recent developments in their use bear mentioning.

1. Poison Pill Related Bylaws.

First, as discussed above, in *CA, Inc. v. AFSCME Employees Pension Plan*, the Delaware Supreme Court stated that in order for a bylaw to be a proper subject for stockholder action, it must be ''one that establishes or regulates a process for substantive director decision-making,'' and not ''one that mandates the decision itself.''[99] It is unclear how this test would be applied to, for example, a bylaw seeking to require a board to submit a poison pill to its stockholders. Such a proposed bylaw was the subject of litigation in *Bebchuk v. CA, Inc.*,[100] but that litigation was dismissed on ripeness grounds. Although the Court in *CA* suggested that such a bylaw was not ''obviously invalid,'' it remains to be seen whether such a bylaw would survive a *CA* analysis.

2. Derivative Interest Disclosure.

We observed above that ownership of ''swap contracts'' and other derivative positions have been used by hedge funds to acquire an indirect economic or voting interest in companies and that, as a result, a number of companies have amended their advance notice bylaws to require a proponent to provide the corporation certain information regarding derivative ownership interests. Over the past few months, we have received a number of inquiries from companies as to whether similar amendments should be made to poison pills—*i.e.*, whether ''beneficial ownership'' of shares should be implied to persons who hold derivative positions in a corporation.

The benefit of such a provision in a poison pill is similar to the benefit of such a provision in an advance notice bylaw—the provision will capture ownership positions that are oftentimes employed as a work-around of disclosure obligations. There are unique detriments to such a provision in a poison pill, however. Because defining ''derivative'' positions is difficult, and the concept generally amorphous, the possibility of inadvertently triggering a poison pill increases with the inclusion of such a provision. Of course, many poison pills have an ''escape hatch'' for an inadvertent trigger if the triggering position is subsequently divested; however, even in such cases many complex issues arise. Corporations should weigh this potential downside prior to including such a provision in their poison pills.

3. Net Operating Loss Poison Pills.

As the recession continues, many companies are accumulating net operating losses (''NOLs'') that will likely be valuable assets once those companies return to profitability. However, under the federal tax code, the value of those NOLs decreases significantly if beneficial ownership aggregates in the hands of certain owners.

To address this potential loss of value associated with a company's NOLs, some companies have adopted so-called ''NOL pills,'' with a low (e.g., 5.9%) triggering threshold whose stated purpose is solely to preserve the company's NOLs. The validity of such pills in currently the subject of litigation in the Delaware Court of Chancery.[101]

CONCLUSION

The moral of developments in Delaware in 2008, both jurisprudential and statutory, is that the DGCL provides much leeway for private ordering of a corporation's governing structure. Accordingly, attorneys must take great care to ensure a company's governing documents reflect that particular company's needs and advance that particular company's desires.

Transaction lawyers often rely on forms in drafting or updating corporate documents, but not every corpora-

[96] National Venture Capital Association, *Model Indemnification Agreement* (March 2008).

[97] SharkRepellant.net, Poison Pills in Force Year Over Year, http://www.sharkrepellant.net (last visited April 17, 2009).

[98] RiskMetrics Group, *US Corporate Governance Policy 2009 Updates* (Nov. 25, 2008).

[99] *CA*, 953 A.2d at 235.

[100] 902 A.2d 737 (Del. Ch. 2006).

[101] *See* Complaint, *Selectica, Inc. v. Versata Enters., Inc.*, C.A. No. 4241-VCN (Del. Ch. 2009).

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tion's needs fit neatly into a form. Charters, bylaws, indemnification agreements, and even rights plans to some extent, should be tailored to a corporation's needs when drafted, and should periodically be reviewed to ensure that they continue to have the effects intended and serve the needs of the company.