

See FBCA Section 607.0850(11) below

§ 8.50. SUBCHAPTER DEFINITIONS

In this subchapter:

- (1) "Corporation" includes any domestic or foreign predecessor entity of a corporation in a merger.
- (2) "Director" or "officer" means an individual who is or was a director or officer, respectively, of a corporation or who, while a director or officer of the corporation, is or was serving at the corporation's request as a director, officer, manager, partner, trustee, employee, or agent of another entity or employee benefit plan. A director or officer is considered to be serving an employee benefit plan at the corporation's request if the individual's duties to the corporation also impose duties on, or otherwise involve services by, the individual to the plan or to participants in or beneficiaries of the plan. "Director" or "officer" includes, unless the context requires otherwise, the estate or personal representative of a director or officer.

- (3) "Liability" means the obligation to pay a judgment, settlement, penalty, fine (including an excise tax assessed with respect to an employee benefit plan), or reasonable expenses incurred with respect to a proceeding.
- (4) "Official capacity" means: (i) when used with respect to a director, the office of director in a corporation; and (ii) when used with respect to an officer, as contemplated in section 8.56, the office in a corporation held by the officer. "Official capacity" does not include service for any other domestic or foreign corporation or any partnership, joint venture, trust, employee benefit plan, or other entity.
- (5) "Party" means an individual who was, is, or is threatened to be made, a defendant or respondent in a proceeding.
- (6) "Proceeding" means any threatened, pending, or completed action, suit, or proceeding, whether civil, criminal, administrative, arbitral, or investigative and whether formal or informal.

CROSS-REFERENCES

Act definitions, see § 1.40.

Effect of merger, see § 11.07(a).

"Entity" defined, see § 1.40.

"Expenses" defined, see § 1.40 (9AA).

Officers, see § 8.40(a).

Witness indemnification, see § 8.58(d).

OFFICIAL COMMENT

The definitions set forth in section 8.50 apply only to subchapter E and have no application elsewhere in the Model Act (except as set forth in section 2.02(b)(5)). The term "qualified director," which is used in section 8.53 and 8.55, is defined in section 1.43.

1. Corporation

A special definition of "corporation" is included in subchapter E to make it clear that predecessor entities that have been absorbed in mergers are included within the definition. It is

probable that the same result would be reached for many transactions under section 11.07(a) (effect of merger), which provides for the assumption of liabilities by operation of law upon a merger. The express responsibility of successor entities for the liabilities of their predecessors under this subchapter is broader than under section 11.07(a) and may impose liability on a successor although section 11.07(a) does not. Section 8.50(1) is thus an essential aspect of the protection provided by this subchapter for persons eligible for indemnification.

2. Director and Officer

A special definition of “director” and “officer” is included in subchapter E to cover individuals who are made parties to proceedings because they are or were directors or officers or, while serving as directors or officers, also serve or served at the corporation’s request in another capacity for another entity. The purpose of the latter part of this definition is to give directors and officers the benefits of the protection of this subchapter while serving at the corporation’s request in a responsible position for employee benefit plans, trade associations, nonprofit or charitable entities, domestic or foreign entities, or other kinds of profit or nonprofit ventures. To avoid misunderstanding, it is good practice from both the corporation’s and director’s or officer’s viewpoint for this type of request to be evidenced by resolution, memorandum or other writing. The definition covers an individual who is or was either a director or officer so that further references in the remainder of subchapter E to an individual who is a director or officer necessarily include former directors or officers.

The second sentence of section 8.50(2) addresses the question of liabilities arising under the Employee Retirement Income Security Act of 1974 (ERISA). It makes clear that a director or officer who is serving as a fiduciary of an employee benefit plan is automatically viewed for purposes of this subchapter as having been requested by the corporation to act in that capacity. Special treatment is believed necessary because of the broad definition of “fiduciary” and the requirement that a “fiduciary” must discharge his or her duties “solely in the interest” of the participants

and beneficiaries of the employee benefit plan. Decisions by a director or officer, who is serving as a fiduciary under the plan on questions regarding (a) eligibility for benefits, (b) investment decisions, or (c) interpretation of plan provisions respecting (i) qualifying service, (ii) years of service, or (iii) retroactivity, are all subject to the protections of this subchapter. See also sections 8.50(4) and 8.51(b) of this subchapter.

The last sentence of section 8.50(2) provides that the estate or personal representative of a director or officer is entitled to the rights of indemnification possessed by that director or officer. The phrase “unless the context requires otherwise” was added to make clear that the estate or personal representative does not have the right to participate in directorial decisions authorized in this subchapter.

3. *Liability*

“Liability” is defined for convenience in order to avoid repeated references to recoverable items throughout the subchapter. Even though the definition of “liability” includes amounts paid in settlement or to satisfy a judgment, indemnification against certain types of settlements and judgments is not allowed under several provisions of subchapter E. For example, indemnification in suits brought by or in the right of the corporation is limited to expenses (see section 8.51(d)(1)), unless indemnification for a settlement is ordered by a court under section 8.54(a)(3).

The definition of “liability” permits the indemnification only of expenses.” The definition of “expenses” in section 1.40(9AA) limits expenses to those that are reasonable. The result is that any portion of expenses falling outside the perimeter of reasonableness should not be advanced or indemnified. In contrast, unlike earlier versions of the Model Act and statutes of many states, section 8.50(4) provides that amounts paid to settle or satisfy substantive claims are not subject to a reasonableness test. Since payment of these amounts is permissive—mandatory indemnification is available under section 8.52 only where the defendant is “wholly successful”—a special limitation of “reasonableness” for settlements is inappropriate.

“Penalties” and “fines” are expressly included within the definition of “liability” so that, in appropriate cases, these items may also be indemnified. The purpose of this definition is to cover every type of monetary obligation that may be imposed upon a director, including civil penalties, restitution, and obligations to give notice. This definition also expressly includes as a “fine” the levy of excise taxes under the Internal Revenue Code pursuant to ERISA.

4. Official Capacity

The definition of “official capacity” is necessary because the term determines which of the two alternative standards of conduct set forth in section 8.51(a)(1)(ii) applies: If the action was taken in an “official capacity,” the individual to be indemnified must have reasonably believed that he or she was acting in the best interests of the corporation. In contrast, if the action in question was not taken in an “official capacity,” the individual need only have reasonably believed that the conduct was not opposed to the best interests of the corporation. See also the Official Comment to section 8.51(a).

5. Party

The definition of “party” includes every “individual who was, is, or is threatened to be made, a defendant or respondent in a proceeding.” Thus, the definition includes present and former parties in addition to individuals currently or formerly threatened with being made a party. An individual who is only called as a witness is not a “party” within this definition and, as specifically provided in section 8.58(d), payment or reimbursement of his expenses is not limited by this subchapter.

6. Proceeding

The broad definition of “proceeding” ensures that the benefits of this subchapter will be available to directors in new and unexpected, as well as traditional, types of litigation or other adversarial matters, whether civil, criminal, administrative, or investigative. It also includes arbitration and other dispute

resolution proceedings, lawsuit appeals and petitions to review administrative actions.

ANNOTATION

Note: This Annotation covers all statutory materials relating to sections 8.50 through 8.59, as amended in 1994. References to statutory materials of jurisdictions enacting provisions comparable to subchapter E, as originally enacted in the 1984 Model Act (consisting of sections 8.50 through 8.58), and to section 5 of the 1969 Model Act, as amended in 1980, and separate case annotations may appear under individual sections.

HISTORY

Model Act Derivation

1950 Act § 4(o)

1960 Act, § 4(o)

with
amendments

1969 Act § 5, amendment proposed, 34 BUS. LAW. 1595 (1979), adopted, 36 BUS. LAW. 99 (1980)

1984 Act §§ 8.50–8.59, added by amendment, proposed, 49 BUS. LAW. 741 (1994), adopted, 49 BUS. LAW. 1823 (1994)

§ 8.50(3) deleted and remaining sections renumbered, proposed 60 BUS. LAW. 341 (2004), adopted 60 BUS. LAW. 943 (2005)

§ 8.58(b) added by amendment, proposed 65 BUS. LAW. 1149 (2010), adopted 66 BUS. LAW. 367(2011)

607.0850. Indemnification of officers, directors, employees, and agents

(1) A corporation shall have power to indemnify any person who was or is a party to any proceeding (other than an action by, or in the right of, the corporation), by reason of the fact that he or she is or was a director, officer, employee, or agent of the corporation or is or was serving at the request of the corporation as a director, officer, employee, or agent of another corporation, partnership, joint venture, trust, or other enterprise against liability incurred in connection with such proceeding, including any appeal thereof, if he or she acted in good faith and in a manner he or she reasonably believed to be in, or not opposed to, the best interests of the corporation and, with respect to any

criminal action or proceeding, had no reasonable cause to believe his or her conduct was unlawful. The termination of any proceeding by judgment, order, settlement, or conviction or upon a plea of nolo contendere or its equivalent shall not, of itself, create a presumption that the person did not act in good faith and in a manner which he or she reasonably believed to be in, or not opposed to, the best interests of the corporation or, with respect to any criminal action or proceeding, had reasonable cause to believe that his or her conduct was unlawful.

(2) A corporation shall have power to indemnify any person, who was or is a party to any proceeding by or in the right of the corporation to procure a judgment in its favor by reason of the fact that the person is or was a director, officer, employee, or agent of the corporation or is or was serving at the request of the corporation as a director, officer, employee, or agent of another corporation, partnership, joint venture, trust, or other enterprise, against expenses and amounts paid in settlement not exceeding, in the judgment of the board of directors, the estimated expense of litigating the proceeding to conclusion, actually and reasonably, incurred in connection with the defense or settlement of such proceeding, including any appeal thereof. Such indemnification shall be authorized if such person acted in good faith and in a manner he or she reasonably believed to be in, or not opposed to, the best interests of the corporation, except that no indemnification shall be made under this subsection in respect of any claim, issue, or matter as to which such person shall have been adjudged to be liable unless, and only to the extent that, the court in which such proceeding was brought, or any other court of competent jurisdiction, shall determine upon application that, despite the adjudication of liability but in view of all circumstances of the case, such person is fairly and reasonably entitled to indemnity for such expenses which such court shall deem proper.

(3) To the extent that a director, officer, employee, or agent of a corporation has been successful on the merits or otherwise in defense of any proceeding referred to in subsection (1) or subsection (2), or in defense of any claim, issue, or matter therein, he or she shall be indemnified against expenses actually and reasonably incurred by him or her in connection therewith.

(4) Any indemnification under subsection (1) or subsection (2), unless pursuant to a determination by a court, shall be made by the corporation only as authorized in the specific case upon a determination that indemnification of the director, officer, employee, or agent is proper in the circumstances because he or she has met the applicable standard of conduct set forth in subsection (1) or subsection (2). Such determination shall be made:

(a) By the board of directors by a majority vote of a quorum consisting of directors who were not parties to such proceeding;

(b) If such a quorum is not obtainable or, even if obtainable, by majority vote of a committee duly designated by the board of directors (in which directors who are parties may participate) consisting solely of two or more directors not at the time parties to the proceeding;

(c) By independent legal counsel:

1. Selected by the board of directors prescribed in paragraph (a) or the committee prescribed in paragraph (b); or

2. If a quorum of the directors cannot be obtained for paragraph (a) and the committee cannot be designated under paragraph (b), selected by majority vote of the full board of directors (in which directors who are parties may participate); or

(d) By the shareholders by a majority vote of a quorum consisting of shareholders who were not parties to such proceeding or, if no such quorum is obtainable, by a majority vote of shareholders who were not parties to such proceeding.

(5) Evaluation of the reasonableness of expenses and authorization of indemnification shall be made in the same manner as the determination that indemnification is permissible. However, if the determination of permissibility is made by independent legal counsel, persons specified by paragraph (4)(c) shall evaluate the reasonableness of expenses and may authorize indemnification.

(6) Expenses incurred by an officer or director in defending a civil or criminal proceeding may be paid by the corporation in advance of the final disposition of such proceeding upon receipt of an undertaking by or on behalf of such director or officer to repay such amount if he or she is ultimately found not to be entitled to indemnification by the corporation pursuant to this section. Expenses incurred by other employees and agents may be paid in advance upon such terms or conditions that the board of directors deems appropriate.

§ 8.51. PERMISSIBLE INDEMNIFICATION

(a) Except as otherwise provided in this section, a corporation may indemnify an individual who is a party to a proceeding because the individual is a director against liability incurred in the proceeding if:

(1)

(i) the director conducted himself or herself in good faith; and

(ii) reasonably believed:

(A) in the case of conduct in an official capacity, that his or her conduct was in the best interests of the corporation; and

(B) in all other cases, that the director's conduct was at least not opposed to the best interests of the corporation; and

(iii) in the case of any criminal proceeding, the director had no reasonable cause to believe his or her conduct was unlawful; or

(2) the director engaged in conduct for which broader indemnification has been made permissible or obligatory under a provision of the articles of incorporation (as authorized by section 2.02(b)(5)).

(b) A director's conduct with respect to an employee benefit plan for a purpose the director reasonably believed to be in the interests of the participants in, and the beneficiaries of, the plan is conduct that satisfies the requirement of subsection (a)(1)(ii)(B).

(c) The termination of a proceeding by judgment, order, settlement, or conviction, or upon a plea of nolo contendere or its equivalent, is not, of itself, determinative that the director did not meet the relevant standard of conduct described in this section.

(d) Unless ordered by a court under section 8.54(a)(3), a corporation may not indemnify a director:

(1) in connection with a proceeding by or in the right of the corporation, except for expenses incurred in connection with the proceeding if it is determined that the director has met the relevant standard of conduct under subsection (a); or

(7) The indemnification and advancement of expenses provided pursuant to this section are not exclusive, and a corporation may make any other or further indemnification or advancement of expenses of any of its directors, officers, employees, or agents, under any bylaw, agreement, vote of

shareholders or disinterested directors, or otherwise, both as to action in his or her official capacity and as to action in another capacity while holding such office. However, indemnification or advancement of expenses shall not be made to or on behalf of any director, officer, employee, or agent if a judgment or other final adjudication establishes that his or her actions, or omissions to act, were material to the cause of action so adjudicated and constitute:

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

(b) A transaction from which the director, officer, employee, or agent derived an improper personal benefit;

(c) In the case of a director, a circumstance under which the liability provisions of s. 607.0834 are applicable; or

(d) Willful misconduct or a conscious disregard for the best interests of the corporation in a proceeding by or in the right of the corporation to procure a judgment in its favor or in a proceeding by or in the right of a shareholder.

(8) Indemnification and advancement of expenses as provided in this section shall continue as, unless otherwise provided when authorized or ratified, to a person who has ceased to be a director, officer, employee, or agent and shall inure to the benefit of the heirs, executors, and administrators of such a person, unless otherwise provided when authorized or ratified.

(9) Unless the corporation's articles of incorporation provide otherwise, notwithstanding the failure of a corporation to provide indemnification, and despite any contrary determination of the board or of the shareholders in the specific case, a director, officer, employee, or agent of the corporation who is or was a party to a proceeding may apply for indemnification or advancement of expenses, or both, to the court conducting the proceeding, to the circuit court, or to another court of competent jurisdiction. On receipt of an application, the court, after giving any notice that it considers necessary, may order indemnification and advancement of expenses, including expenses incurred in seeking court-ordered indemnification or advancement of expenses, if it determines that:

(a) The director, officer, employee, or agent is entitled to mandatory indemnification under subsection (3), in which case, the court shall also order the corporation to pay the director reasonable expenses incurred in obtaining court-ordered indemnification or advancement of expenses;

(b) The director, officer, employee, or agent is entitled to indemnification or advancement of expenses, or both, by virtue of the exercise by the corporation of its power pursuant to subsection (7); or

(c) The director, officer, employee, or agent is fairly and reasonably entitled to indemnification or advancement of expenses, or both, in view of all the relevant circumstances, regardless of whether such person met the standard of conduct set forth in subsection (1), subsection (2), or subsection (7).

(10) For purposes of this section, the term "corporation" includes, in addition to the resulting corporation, any constituent corporation (including any constituent of a constituent) absorbed in a consolidation or merger, so that any person who is or was a director, officer, employee, or agent of a constituent corporation, or is or was serving at the request of a constituent corporation as a director, officer, employee, or agent of another corporation, partnership, joint venture, trust, or other enterprise, is in the same position under this section with respect to the resulting or surviving corporation as he or she would have with respect to such constituent corporation if its separate existence had continued.

(11) For purposes of this section:

(a) The term "other enterprises" includes employee benefit plans;

(b) The term "expenses" includes counsel fees, including those for appeal;

(c) The term "liability" includes obligations to pay a judgment, settlement, penalty, fine (including an excise tax assessed with respect to any employee benefit plan), and expenses actually and reasonably incurred with respect to a proceeding;

(d) The term "proceeding" includes any threatened, pending, or completed action, suit, or other type of proceeding, whether civil, criminal, administrative, or investigative and whether formal or informal;

(e) The term "agent" includes a volunteer;

(2) in connection with any proceeding with respect to conduct for which the director was adjudged liable on the basis of receiving a financial benefit to which he or she was not entitled, whether or not involving action in the director's official capacity.

CROSS-REFERENCES

Advance for expenses, see § 8.53.

Articles of incorporation, see § 2.02(b)(5).

"Corporation" defined, see § 8.50(1).

Court-ordered indemnification, see § 8.54.

Derivative proceedings, see §§ 7.40–7.47.

Determination of indemnification, see § 8.55.

"Director" defined, see § 8.50(2).

Director's conflicting interest transaction, see §§ 8.60–8.63.

Exclusivity of subchapter, see § 8.59.

"Expenses" defined, see § 1.40.

"Liability" defined, see § 8.50(3).

Liability-limitation provisions, see § 2.02(b)(4).

Limits on indemnification, see § 8.58(c).

Mandatory indemnification, see § 8.52.

Obligatory indemnification, see §§ 2.02(b)(5), 8.58(a).

Officer indemnification, see § 8.56.

"Official capacity" defined, see § 8.50(4).

"Party" defined, see § 8.50(5).

"Proceeding" defined, see § 8.50(6).

Standards of conduct for directors, see § 8.30.

Standards of liability for directors, see § 8.31.

OFFICIAL COMMENT

1. Section 8.51(a)

Subsection 8.51(a) permits, but does not require, a corporation to indemnify directors if the standards of subsection (a) (1) or of a provision of the articles referred to in subsection (a) (2) are met. This authorization is subject to any limitations set forth in the articles of incorporation pursuant to section 8.58(c).

(f) The term "serving at the request of the corporation" includes any service as a director, officer, employee, or agent of the corporation that imposes duties on such persons, including duties relating to an employee benefit plan and its participants or beneficiaries; and

(g) The term "not opposed to the best interest of the corporation" describes the actions of a person who acts in good faith and in a manner he or she reasonably believes to be in the best interests of the participants and beneficiaries of an employee benefit plan.

(12) A corporation shall have power to purchase and maintain insurance on behalf of any person who is or was a director, officer, employee, or agent of the corporation or is or was serving at the request of the corporation as a director, officer, employee, or agent of another corporation, partnership, joint venture, trust, or other enterprise against any liability asserted against the person and incurred by him or her in any such capacity or arising out of his or her status as such, whether or not the corporation would have the power to indemnify the person against such liability under the provisions of this section. *Laws 1989, c. 89-154, § 93. Amended by Laws 1997, c. 97-102, § 30, eff. July 1, 1997.*

Historical and Statutory Notes

Amendment Notes:

Laws 1997, c. 97-102, eff. July 1, 1997, removed gender-specific references without substantive changes in legal effect.

Author Commentary

The indemnification provisions attempt to reconcile a policy of protecting officers, directors, employees and agents (herein referred to as "persons") from the expense and risks of litigation brought against them with a policy of deterring unacceptable behavior on the part of such persons. This is accomplished by either requiring or permitting the corporation to indemnify such persons in certain circumstances and prohibiting the corporation from doing so or limiting the amount or type of indemnification in other circumstances. Subsection (7) provides that the section is not the exclusive source of authority for indemnification and sets forth a nonexclusive description of other sources, such as bylaws, agreements, vote of shareholders or disinterested directors, or otherwise. It appears, although the drafting is not clear, that the limitations contained in subs. (7) apply only to such additional sources of indemnification and do not apply to all indemnification authorized or required under s. 607.0850. As a result of the prohibition against personal loans contained in the Sarbanes-Oxley Act of 2002 (see discussion in Author Commentary under s. 607.0833), there is some doubt as to whether the provisions for advance payment of litigation expenses in subs. (6) and (7) continue to be available for the public-reporting companies to which the Act applies. It does not appear that the Act was intended to apply to litigation expenses, but this is a matter that will require clarification. There is relatively little litigation to date on this subject. In *Envirokare Tech, Inc. v. Pappas*, 420 F. Supp. 2d 291 (S.D.N.Y. 2006), a federal court considered this issue with respect to a Nevada corporation and held that the Sarbanes-Oxley Act's prohibition was not intended to preclude advance litigation expenses authorized by indemnification provisions.

Types of Indemnification

Indemnification is authorized in two distinct types of proceedings, non-derivative and derivative proceedings. The former are covered in subs. (1) and the latter in subs. (2). The latter is logically the more limited since indemnification of a person found liable to the corporation in a derivative proceeding would produce an absurd and circular result, i.e. the person would have to pay a judgment to the corporation and would then be indemnified by the corporation for the judgment (plus his or her legal fees and other costs of litigation).

If a derivative action is settled, subs. (2) provides that indemnification "shall be authorized" if the settling defendant acted in good faith and in a manner reasonably believed to be in the best interests of the corporation. Thus, the common practice of settling minor or even doubtfully valid derivative actions does not deprive the defendant directors or other persons of their indemnification rights. Even if the derivative proceeding results in a judgment of liability, such person may nevertheless be indemnified where the person, upon application to the court, is found by the court to be fairly and reasonably entitled to indemnification. This judicially-ordered indemnification may rarely occur for directors, given the limited and egregious circumstances set forth in s. 607.0831 in which directors may be held personally liable.

Mandatory Indemnification

The statute requires that a person be indemnified in any case where the person is successful on the merits or otherwise in the proceeding brought against him or her, thereby creating an enforceable statutory right to indemnification in such person which cannot be abrogated by contrary provisions in the articles of incorporation or bylaws. It should be noted that the provision does not require the party to be indemnified to be "wholly successful" on the merits or otherwise, the term used in the MBCA. Florida's provision is consistent with Delaware's. A party who has been partially successful in an action may bring a claim for indemnification based on that partial success. The indemnified amount may need to be carefully determined based upon the proportionality of the successful to the unsuccessful elements.

Absent any such limitation, the standards for indemnification of directors contained in this subsection define the outer limits

for which discretionary indemnification is permitted under the Model Act. Conduct which does not meet one of these standards is not eligible for permissible indemnification under the Model Act, although court-ordered indemnification may be available under section 8.54(a)(3). Conduct that falls within these outer limits does not automatically entitle directors to indemnification, although a corporation may obligate itself to indemnify directors to the maximum extent permitted by applicable law. See section 8.58(a). No such obligation, however, may exceed these outer limits. Absent such an obligatory provision, section 8.52 defines much narrower circumstances in which directors are entitled as a matter of right to indemnification.

Some state statutes provide separate, but usually similarly worded, standards for indemnification in third-party suits and indemnification in suits brought by or in the right of the corporation. Section 8.51 makes clear that the outer limits of conduct for which indemnification is permitted should not be dependent on the type of proceeding in which the claim arises. To prevent circularity in recovery, however, section 8.51(d)(1) limits indemnification in connection with suits brought by or in the right of the corporation to expenses incurred and excludes amounts paid to settle such suits or to satisfy judgments. In addition, to discourage wrongdoing, section 8.51(d)(2) bars indemnification where the director has been adjudged to have received a financial benefit to which the director is not entitled. Nevertheless, a court may order certain relief from these limitations under section 8.54(a)(3).

The standards of conduct described in subsections (a)(1)(i) and (a)(1)(ii)(A) that must be met in order to permit the corporation to indemnify a director are closely related, but not identical, to the standards of conduct imposed by section 8.30 on members of the board of directors when discharging the duties of a director: good faith, reasonable belief that the best interests of the corporation are being served, and appropriate care (i.e., that which a person in a like position would reasonably believe appropriate under similar circumstances). Unless authorized by a charter provision adopted pursuant to subsection (a)(2), it would be difficult to justify indemnifying a director who has not met any

If the action is dismissed as a result of settlement, a party's claim to indemnification under this provision may depend on the terms of the settlement. In *Waltuch v. ContiCommodity Services*, 88 F.3d 87 (2d Cir. 1996), applying Delaware's similar provision, the settlement dismissed the action against both the officer defendant and the corporate defendant, with the corporate defendant agreeing to pay the entire settlement amount. Because the settlement did not impose any monetary or other obligation upon the defendant officer, the defendant was entitled to mandatory indemnification. There is no analogous case in Florida.

In *Banco Industrial de Venezuela C.A., Miami Agency v. De Saad*, 68 So.3d 895 (Fla. 2011), the Florida Supreme Court addressed a claim for mandatory indemnification brought by an officer of a foreign-based bank. The Court correctly, in our opinion, determined that under the "internal affairs doctrine" the issue of indemnification was to be determined by the law of the bank's state of incorporation, which was not Florida. However, the Court did not end its opinion at that point. Instead, it went on to state that if Florida law were applicable, the mandatory indemnification provision did not apply because the officer seeking indemnification failed to meet the conditions of subsection (1) of 607.0850, including the requirement of having acted in good faith. This aspect of the Court's opinion was, in our judgment, an unfortunate misreading of the statute. The Court's conflating of subsections (1) and (3) has no statutory or policy basis. The only requirement for mandatory indemnification is, as stated in the statute, success on the merits or otherwise. The Court's interpretation that imports into subsection (3) additional standards contained in subsection (1) could be regarded as obiter dictum because of the Court's initial decision that the Florida statute was inapplicable under the internal affairs doctrine. However, the second prong of the Court's opinion has at minimum clouded the issue of mandatory indemnification. Additional case law will perhaps rectify what we believe to be an error in judicial interpretation.

Covered Persons

Permitted indemnitees include not only officers, directors, employees and agents of the corporation, but also persons who, at the request of the corporation, serve as a director, officer, employee or agent of another corporation or of a partnership, joint venture, trust or other enterprise whether or not such person also holds any of such positions with the corporation itself. This would include, for example, persons who serve subsidiaries, employee benefit plans and trusts, and other entities which are affiliated or unaffiliated with the corporation (e.g. trade associations, cooperative buying organizations, charities, etc.), whether or not such other entities also provide indemnification in some form. Curiously, however, the required indemnification contained in subs. (3) of the statute appears to apply only to directors, officers, employees and agents of the corporation itself, a result which was probably not intended by the drafters of the statute. The *Investors Insurance Group* case (cited below) did not follow this narrow reading of subs. (3) and upheld an award of indemnification to the former president of the indemnifying corporation's subsidiary.

As noted above, agents as well as directors, officers and employees are covered by subs. (1) and (2) of the section. It is not uncommon for a corporation to limit the class of indemnified persons by including a provision in its articles of incorporation or bylaws which excludes agents from those persons entitled to indemnification with respect to proceedings in which the agent has not been successful on the merits.

The Florida Supreme Court has held that the statutory indemnification provisions apply only to Florida corporations, not to corporations incorporated elsewhere even if doing business in Florida as a foreign corporation. *Banco Industrial de Venezuela C.A., Miami Agency v. De Saad*, 68 So.3d 895 (Fla. 2011). The decision was based on the "internal affairs doctrine" under which rights and obligations within a corporation, including indemnification, are controlled by the laws of the state of incorporation.

Fees on Fees

Litigation has occurred in some states regarding whether an indemnified party is entitled to attorneys' fees and other costs incurred in pursuing an indemnification claim. Such a claim was denied under New York law in *Baker v. Health Management Systems, Inc.*, 298 F.3d 146 (2d Cir. 2002). Section 607.0850(9) appears to give a court the authority to award such expenses, as it specifically includes "expenses incurred in seeking court-ordered indemnification." The only doubt that might be thrown on this question comes from the fact that an award under subs. (9)(a) specifically includes "expenses incurred in obtaining court-ordered indemnification," and subs. 9(b) and 9(d) are silent in that regard. Are so-called "fees on fees" only allowed in subs. 9(a) circumstances? It appears that the most reasonable interpretation is to allow a court discretion in determining whether the indemnified party is entitled to such reimbursement, and that a determination under subs. 9(a) will result in such reimbursement without question.

Advance Expenses

Subsection 607.0850(6) provides that the corporation may advance litigation expenses subject to repayment undertakings in the event the director, officer, or agent is ultimately found to be not entitled to indemnification. Advancement of expenses is optional unless mandated by the company's articles or by-laws. It is common for the by-laws to adopt on a mandatory basis all or most of the statutory indemnification options. In *U.S. v. Steir*, 452 F. Supp. 2d 230 (S.D.N.Y. 2006), decided under Delaware law, the court held that a mandatory advance payment requirement could not be avoided or used as an advance set-off where the corporation is suing a former employee for conduct which allegedly damaged the corporation and which, if proved, would foreclose indemnification.

Leading Cases

Banco Industrial de Venezuela C.A., Miami Agency v. De Saad, 68 So.3d 895 (Fla. 2011): statutory indemnification provisions apply only to corporations incorporated in Florida (N.B.: the alternative Court holding regarding

of these standards. It would not, however, make sense to require a director to meet all these standards in order to be indemnified because a director who does so would normally have no liability, at least to the corporation or its shareholders, under the terms of section 8.31.

Section 8.51(a) adopts a middle ground by authorizing discretionary indemnification in the case of a failure to meet the appropriate care standard of section 8.30(b) because public policy would not be well served by an absolute bar. A director's potential liability for conduct which does not on each and every occasion satisfy the appropriate care requirement of section 8.30(b), or which with the benefit of hindsight could be so viewed, would in all likelihood deter qualified individuals from serving as directors and inhibit some who serve from taking risks. Permitting indemnification against such liability tends to counter these undesirable consequences. Accordingly, section 8.51(a) authorizes indemnification at the corporation's option even though section 8.30's appropriate care requirement is not met, but only if the director satisfies the "good faith" and "corporation's best interests" standards. This reflects a judgment that, balancing public policy considerations, the corporation may indemnify a director who does not satisfy the appropriate care test but not one who fails either of the other two standards.

As in the case of section 8.30, where the concept of good faith is also used, no attempt is made in section 8.51 to provide a definition. The concept involves a subjective test, which would permit indemnification for "a mistake of judgment," in the words of the Official Comment to section 8.31, even though made unwisely or negligently by objective standards. Section 8.51 also requires, as does section 8.30, a "reasonable" belief that conduct when acting in the director's official capacity was in the corporation's best interests. It then adds a provision, not found in section 8.30, relating to criminal proceedings that requires the director to have had no "reasonable cause" to believe that the conduct was unlawful. These both involve objective standards applicable to the director's belief concerning the effect of the conduct in question. Conduct includes both acts and omissions.

conditions applicable to mandatory indemnification is discussed in the **Author Commentary** and is, in the Authors' judgment, an incorrect reading of the statute).

Sargent v. Genesco, Inc., 337 F. Supp. 1244 (S.D. Fla. 1972), later proceeding 458 F. 2d 9: claim for damages by stockholders of corporation whose bylaws provided for indemnification by corporation of directors and officers for expenses incurred in connection with litigation resulting from activities of board member or officer in corporate capacity would be considered a derivative action at least for purposes of applying Florida's security-for-expense statute.

James Talcott, Inc. v. Crown Industries, Inc., 323 So. 2d 311 (Fla. 2d DCA 1975): corporate officers must be held accountable for the consequence of their acts.

Myakka Valley Ranches Improvement Association, Inc. v. Bieschke, 610 So. 2d 3 (Fla. 2d DCA 1992): former directors of nonprofit corporation were entitled to attorney fees and costs from corporation in suit brought by them seeking review of corporate books, but recovery would be solely from corporation and not individual defendants.

State ex rel. Blatt v. Panellfab International Corp., 314 So. 2d 196 (Fla. 3d DCA 1975): writ of mandamus to compel corporation to pay director the expenses he incurred in successfully defending criminal action for violation of Securities Exchange Act of 1934 was inappropriate, where petition failed to allege or show on its face that director was without adequate remedies at law or in equity and where director's right to recover such expenses depended on determination of controverted question whether criminal charges against him resulted from conduct outside scope of his duties.

Investors Insurance Group, Inc. v. Roger E. Kling, 712 So. 2d 1258 (Fla. 1st DCA 1998): former president of subsidiary of corporation entitled to indemnification from the corporation under s. 607.0850(3) since he met the requirement of subs. (1) of the section. [Authors' Note: See reference to this case in the Commentary Section.]

Turkey Creek Masters Owners Ass'n, Inc. v. Hope, 766 So. 2d 1245 (Fla. 1st DCA 2000): trial court may order corporate plaintiff to indemnify defendant for fees and expenses in an action by the corporation against one or more of its directors or employees, but must consider "all the relevant circumstances" to determine if defendants are fairly and reasonably entitled to indemnification by the corporation.

Colonial Guild Ltd. v. Pruitt, 2004 WL 627921 (Ct.App., 9th App Dist. 2004): Ohio court applying s. 607.0850(7)(d) held that plaintiff was not entitled to indemnification for attorneys' fees under his indemnification agreement with the corporation because he engaged in willful misconduct which gave rise to the litigation in which those fees were incurred.

O'Brien v. Precision Response Corp., 942 So.2d 1030 (Fla. 4th DCA 2007): respondent, a former officer of plaintiff corporation in an arbitration brought against him, successfully defended the corporation's claims and was therefore entitled to indemnification from corporation notwithstanding his failure to prevail on his claims against the corporation.

Wendt v. La Costa Beach Resort Condominium Association, Inc., 64 So.3d 1228 (Fla. 2011): statute authorizes indemnification of directors in direct actions brought by the corporation against the directors if statutory conditions for indemnification are met.

Leading Articles

Jay P. Lechner, *Corporate Misdeeds and Their Impact Upon Enforceability of Executive Employment Agreement Indemnification Provisions*, The Fla. B. J. (May, 2003) 20.

Robert L. Jennings and Kenneth A. Horkey, *Indemnification of Corporate Officers and Directors*, 15 Nova L. J. 1357 (1991).

Diane H. Mazur, *Indemnification of Directors in Actions Brought Directly by the Corporation: Must the Corporation Finance Its Opponent's Defense?* 19 J. of Corp. Law 201 (1994).

Riah Ramlogon Sueradge, *Personal Liability of Directors in Florida: Whose Corporation Is It Anyway?* 15 Nova L. J. 1389 (1991).

Stephen A. Radin, *Indemnification for Service to Wholly-Owned Subsidiary*, 72 Aspen Law & Business, Corporation Report Bulletin, No. 9, Sec. 9.1 (2001).

Cross References

FBCA s. 607.1621: obligation to report to shareholders certain indemnification payments made pursuant to s. 607.0850.

Section 8.51(a)(1)(ii)(B) requires, if not acting in the director's official capacity, that the action be "at least not opposed to" the corporation's best interests. This standard is applicable to the director when serving another entity at the request of the corporation or when sued simply because of the director's status. The words "at least" qualify "not opposed to" in order to make it clear that this standard is an outer limit for conduct other than in an official capacity. While this subsection is directed at the interests of the indemnifying (*i.e.*, the requesting) corporation, a director serving another entity by request remains subject to the provisions of the law governing service to that entity, including provisions dealing with conflicts of interest. Compare sections 8.60–8.63. Should indemnification from the requesting corporation be sought by a director for acts done while serving another entity, which acts involved breach of the duty of loyalty owed to that entity, nothing in section 8.51(a)(1)(ii)(B) would preclude the requesting corporation from considering, in assessing its own best interests, whether the fact that its director had engaged in a violation of the duty owed to the other entity was in fact "opposed to" the interests of the indemnifying corporation. Receipt of an improper financial benefit from a subsidiary would normally be opposed to the best interests of the parent.

Section 8.51 also permits indemnification in connection with a proceeding involving an alleged failure to satisfy legal standards other than the standards of conduct in section 8.30, *e.g.*, violations of federal securities laws and environmental laws. It should be noted, however, that the Securities and Exchange Commission takes the position that indemnification against liabilities under the Securities Act of 1933 is against public policy and requires that, as a condition for accelerating the effectiveness of a registration statement under the Act, the issuer must undertake that, unless in the opinion of its counsel the matter has been settled by controlling precedent, it will submit to a court the question whether such indemnification is against public policy as expressed in the Act. 17 C.F.R. § 229.512(h) (1993).

In addition to indemnification under section 8.51(a)(1), section 8.51(a)(2) permits indemnification under the standard

of conduct set forth in a charter provision adopted pursuant to section 2.02(b)(5). Based on such a charter provision, section 8.51(a)(2) permits indemnification in connection with claims by third parties and, through section 8.56, applies to officers as well as directors. (This goes beyond the scope of a charter provision adopted pursuant to section 2.02(b)(4), which can only limit liability of directors against claims by the corporation or its shareholders.) Section 8.51(a)(2) is subject to the prohibition of subsection (d)(1) against indemnification of settlements and judgments in derivative suits. It is also subject to the prohibition of subsection (d)(2) against indemnification for receipt of an improper financial benefit; however, this prohibition is already subsumed in the exception contained in section 2.02(b)(5)(A).

2. Section 8.51(b)

As discussed in the Official Comment to Section 8.50(2), ERISA requires that a “fiduciary” (as defined in ERISA) discharge the fiduciary’s duties “solely in the interest” of the participants in and beneficiaries of an employee benefit plan. Section 8.51(b) makes clear that a director who is serving as a trustee or fiduciary for an employee benefit plan under ERISA meets the standard for indemnification under section 8.51(a) if the director reasonably believes the conduct while serving in that capacity was in the best interests of the participants in and beneficiaries of the plan.

This standard is arguably an exception to the more general standard that conduct not in an official corporate capacity is indemnifiable if it is “at least not opposed to” the best interests of the corporation. However, a corporation that causes a director to undertake fiduciary duties in connection with an employee benefit plan should expect the director to act in the best interests of the plan’s beneficiaries or participants. Thus, subsection (b) establishes and provides a standard for indemnification that is consistent with the statutory policies embodied in ERISA. See Official Comment to section 8.50(2).

3. Section 8.51(c)

The purpose of section 8.51(c) is to reject the argument that indemnification is automatically improper whenever a proceeding has been concluded on a basis that does not exonerate the director claiming indemnification. Even though a final judgment or conviction is not automatically determinative of the issue of whether the minimum standard of conduct was met, any judicial determination of substantive liability would in most instances be entitled to considerable weight. By the same token, it is clear that the termination of a proceeding by settlement or plea of *nolo contendere* should not of itself create a presumption either that conduct met or did not meet the relevant standard of subsection (a) since a settlement or *nolo* plea may be agreed to for many reasons unrelated to the merits of the claim. On the other hand, a final determination of non-liability (including one based on a liability-limitation provision adopted under section 2.02(b)(4)) or an acquittal in a criminal case automatically entitles the director to indemnification of expenses under section 8.52.

Section 8.51(c) applies to the indemnification of expenses in derivative proceedings (as well as to indemnification in third party suits). The most likely application of this subsection in connection with a derivative proceeding will be to a settlement since a judgment or order would normally result in liability to the corporation and thereby preclude indemnification for expenses under section 8.51(d)(1), unless ordered by a court under section 8.54(a)(3). In the rare event that a judgment or order entered against the director did not include a determination of liability to the corporation, the entry of the judgment or order would not be determinative that the director failed to meet the relevant standard of conduct.

4. Section 8.51(d)

This subsection makes clear that indemnification is not permissible under section 8.51 in two situations: (i) a proceeding brought by or in the right of a corporation that results in a settlement or a judgment against the director and (ii) a proceeding

that results in a judgment that an improper financial benefit was received as a result of the director's conduct.

Permitting indemnification of settlements and judgments in derivative proceedings would give rise to a circularity in which the corporation receiving payment of damages by the director in the settlement or judgment (less attorneys' fees) would then immediately return the same amount to the director (including attorneys' fees) as indemnification. Thus, the corporation would be in a poorer economic position than if there had been no proceeding. This situation is most egregious in the case of a judgment against the director. Even in the case of a settlement, however, prohibiting indemnification is not unfair. Under the revised procedures of section 7.44, upon motion by the corporation, the court must dismiss any derivative proceeding which independent directors (or a court-appointed panel) determine in good faith, after a reasonable inquiry, is not in the best interests of the corporation. Furthermore, under section 2.02(b)(4), the directors have the opportunity to propose to shareholders adoption of a provision limiting the liability of directors in derivative proceedings. In view of these considerations, it is unlikely that directors will be unnecessarily exposed to meritless actions. In addition, if directors were to be indemnified for amounts paid in settlement, the dismissal procedures in section 7.44 might not be fully employed since it could be less expensive for the corporation to indemnify the directors immediately for the amount of the claimed damages rather than bear the expense of the inquiry required by section 7.44. The result could increase the filing of meritless derivative proceedings in order to generate small but immediately paid attorneys' fees. Despite the prohibition on indemnification of a settlement or a judgment in a derivative proceeding, subsection (d)(1) permits indemnification of the related reasonable expenses incurred in the proceeding so long as the director meets the relevant standard of conduct set forth in section 8.51(a). In addition, indemnification of derivative proceeding expenses and amounts paid in settlement where the relevant standard was not met may be ordered by a court under section 8.54(a)(3).

Indemnification under section 8.51 is also prohibited if there has been an adjudication that a director received an improper financial benefit (*i.e.*, a benefit to which the director is not entitled), even if, for example, the director acted in a manner not opposed to the best interests of the corporation. For example, improper use of inside information for financial benefit should not be an action for which the corporation may elect to provide indemnification, even if the corporation was not thereby harmed. Given the express language of section 2.02(b)(5) establishing the outer limit of an indemnification provision contained in the articles of incorporation, a director found to have received an improper financial benefit would not be permitted indemnification under subsection (a)(2). Although it is unlikely that a director found to have received an improper financial benefit could meet the standard in subsection (a)(1)(ii)(B), this limitation is made explicit in section 8.51(d)(2). Section 8.54(a)(3) permits a director found liable in a proceeding referred to in subsection (d)(2) to petition a court for a judicial determination of entitlement to indemnification for reasonable expenses. The language of section 8.51(d)(2) is based on section 2.02(b)(4)(A) and, thus, the same standards should be used in interpreting the application of both provisions. Although a settlement may create an obligation to pay money, it should not be construed for purposes of this subchapter as an adjudication of liability.

ANNOTATION**HISTORY**

See the Annotation to section 8.50.

See FBCA Section 607.0850 above

§ 8.52. MANDATORY INDEMNIFICATION

A corporation shall indemnify a director who was wholly successful, on the merits or otherwise, in the defense of any proceeding to which the director was a party because he or she was a director of the corporation against expenses incurred by the director in connection with the proceeding.

CROSS-REFERENCES

- “Corporation” defined, see § 8.50(1).
- Court-ordered indemnification, see § 8.54.
- “Director” defined, see § 8.50(2).
- “Expenses” defined, see § 1.40(9AA).
- Limits on indemnification, see § 8.58(c).
- “Party” defined, see § 8.50(5).
- Permissible indemnification, see § 8.51.
- “Proceeding” defined, see § 8.50(6).

OFFICIAL COMMENT

Section 8.51 determines whether indemnification may be made voluntarily by a corporation if it elects to do so. Section 8.52 determines whether a corporation must indemnify a director for his or her expenses; in other words, section 8.52 creates a statutory right of indemnification in favor of the director who meets the requirements of that section. Enforcement of this right by judicial proceeding is specifically contemplated by section 8.54(a)(1). Section 8.54(b) gives the director a statutory right to recover expenses incurred in enforcing the director's statutory right to indemnification under section 8.52.

The basic standard for mandatory indemnification is that the director has been "wholly successful, on the merits or otherwise," in the defense of the proceeding. The word "wholly" is added to avoid the argument accepted in *Merritt-Chapman & Scott Corp. v. Wolfson*, 321 A.2d 138 (Del. 1974), that a defendant may be entitled to partial mandatory indemnification if, by plea bargaining or otherwise, the director was able to obtain the dismissal of some but not all counts of an indictment. A defendant is "wholly successful" only if the entire proceeding is disposed of on a basis which does not involve a finding of liability. A director who is precluded from mandatory indemnification by this requirement may still be entitled to permissible indemnification under section 8.51(a) or court-ordered indemnification under section 8.54(a)(3).

The language in earlier versions of the Model Act and in many other state statutes that the basis of success may be "on the merits or otherwise" is retained. While this standard may result in an occasional defendant becoming entitled to indemnification because of procedural defenses not related to the merits, e.g., the statute of limitations or disqualification of the plaintiff, it is unreasonable to require a defendant with a valid procedural defense to undergo a possibly prolonged and expensive trial on the merits in order to establish eligibility for mandatory indemnification.

ANNOTATION**HISTORY**

See the Annotation to section 8.50.

See FBCA Section 607.0850 above

§ 8.53. ADVANCE FOR EXPENSES

(a) A corporation may, before final disposition of a proceeding, advance funds to pay for or reimburse expenses incurred in

connection with the proceeding by an individual who is a party to the proceeding because that individual is a member of the board of directors if the director delivers to the corporation:

- (1) a signed written affirmation of the director's good faith belief that the relevant standard of conduct described in section 8.51 has been met by the director or that the proceeding involves conduct for which liability has been eliminated under a provision of the articles of incorporation as authorized by section 2.02(b)(4); and
- (2) a signed written undertaking of the director to repay any funds advanced if the director is not entitled to mandatory indemnification under section 8.52 and it is ultimately determined under section 8.54 or section 8.55 that the director has not met the relevant standard of conduct described in section 8.51.

(b) The undertaking required by subsection (a)(2) must be an unlimited general obligation of the director but need not be secured and may be accepted without reference to the financial ability of the director to make repayment.

(c) Authorizations under this section shall be made:

(1) by the board of directors:

- (i) if there are two or more qualified directors, by a majority vote of all the qualified directors (a majority of whom shall for such purpose constitute a quorum) or by a majority of the members of a committee of two or more qualified directors appointed by such a vote; or
- (ii) if there are fewer than two qualified directors, by the vote necessary for action by the board in accordance with section 8.24(c), in which authorization directors who are not qualified directors may participate; or

(2) by the shareholders, but shares owned by or voted under the control of a director who at the time is not a qualified director may not be voted on the authorization.

CROSS-REFERENCES

- Committees of the board, see § 8.25.
- “Corporation” defined, see § 8.50(1).
- Court-ordered indemnification, see § 8.54.
- Determination of indemnification, see § 8.55.
- “Director” defined, see § 8.50(2).
- “Expenses” defined, see § 1.40.
- Limits on indemnification and advance for expenses, see § 8.58(c).
- “Party” defined, see § 8.50(5).
- “Proceeding” defined, see § 8.50(6).
- “Qualified director” defined, see § 1.43.
- Quorum of directors, see § 8.24(a).
- Standard for indemnification, see § 8.51.

OFFICIAL COMMENT

Section 8.53 authorizes, but does not require, a corporation to pay for or reimburse, in advance, a director’s reasonable expenses if two conditions are met. This authorization is subject to any limitations set forth in the articles of incorporation pursuant to section 8.58(c).

Section 8.53 recognizes an important difference between indemnification and an advance for expenses: indemnification is retrospective and, therefore, enables the persons determining whether to indemnify to do so on the basis of known facts, including the outcome of the proceeding. Advance for expenses is necessarily prospective and the individuals making the decision whether to advance expenses generally have fewer known facts on which to base their decision. Indemnification may include reimbursement for non-advanced expenses.

Section 8.53 reflects a determination that it is sound public policy to permit the corporation to advance (by direct payment or by reimbursement) the defense expenses of a director so long as the director (i) believes in good faith that the director was acting

in accordance with the relevant standard for indemnification set forth in section 8.51 or that the proceeding involves conduct for which liability has been eliminated pursuant to section 2.02(b)(4) and (ii) agrees to repay any amounts advanced if it is ultimately determined that the director is not entitled to indemnification. This policy is based upon the view that a person who serves an entity in a representative capacity should not be required to finance his or her own defense. Moreover, adequate legal representation often involves substantial expenses during the course of the proceeding and many individuals are willing to serve as directors only if they have the assurance that the corporation has the power to advance these expenses. In fact, many corporations enter into contractual obligations (*e.g.*, by a provision in the articles or bylaws or by individual agreements) to advance expenses for directors. See section 8.58(a).

Section 8.53(a) requires the director's signed written affirmation as to the good faith belief that the director has met the relevant standard of conduct necessary for indemnification by the corporation and a signed written undertaking by the director to repay any funds advanced if it is ultimately determined that such standard of conduct has not been met. A single undertaking may cover all funds advanced from time to time in connection with the proceeding. Under subsection (b), the undertaking need not be secured and financial ability to repay is not a prerequisite. The theory underlying this subsection is that wealthy directors should not be favored over directors whose financial resources are modest. The undertaking must be made by the director and not by a third party. If the director or the corporation wishes some third party to be responsible for the director's obligation in this regard, either is free to make those arrangements separately with the third party.

In the absence of an obligatory provision established pursuant to section 8.58(a), the decision to advance expenses must be made in accordance with subsection (c). Section 8.53 does not address the question of the standard by which the decision to advance expenses is to be made. Accordingly, the standards of section 8.30 should, in general, govern. The conditions for

advance for expenses are different from the conditions for indemnification. Directors normally meet the standards of section 8.30 in approving an advance for expenses if they limit their consideration to the financial ability of the corporation to pay the amount in question and do not have actual knowledge of facts sufficient to cause them to believe that the subsection (a)(1) affirmation was not made in good faith. The directors are not required by section 8.30 to make any inquiry into the merits of the proceeding or the good faith of the belief stated in that affirmation. Thus, in the great majority of cases, no special inquiry will be required. The directors acting on a decision to advance expenses may, but are not required to, consider any additional matters they deem appropriate and may condition the advance of expenses upon compliance with any additional requirements they desire to impose.

A corporation may obligate itself pursuant to section 8.58(a) to advance for expenses under section 8.53 by means of a provision set forth in its articles of incorporation or bylaws, by a resolution of its shareholders or board of directors, by a contract or otherwise. However, any such obligatory arrangement must comply with the requirements of subsection (a) regarding furnishing of an affirmation and undertaking. No other procedures are contemplated, although obligatory arrangements may include notice and other procedures in connection with advancement of expenses and indemnification requests.

At least one court has held that a general obligatory provision requiring indemnification to the extent permitted by law does not include advance for expenses if not specifically mentioned. See, e.g., *Advanced Mining Systems, Inc. v. Fricke*, 623 A.2d 82 (Del. 1992). Unless provided otherwise, section 8.58(a) requires the opposite result, unless provided otherwise.

The decision to advance expenses is required to be made only one time with respect to each proceeding rather than each time a request for payment of expenses is received by the corporation. However, the directors are free to reconsider the decision at any time (e.g., upon a change in the financial ability of the corporation to pay the amounts in question). The decision as to the reason-

ableness of any expenses may be made by any officer or agent of the corporation duly authorized to do so.

The procedures set forth in subsection (c) for authorizing an advance for expenses parallel the procedures set forth in section 8.55(b) for selecting the person or persons to make the determination that indemnification is permissible. If the advance for expenses is not authorized by the shareholders under subsection (c)(2), the procedure specified in subsection (c)(1)(i) must be used. If it is unavailable, then the procedure under subsection (c)(1)(ii) may be used.

Under subsection (c)(1)(i), the vote required when the qualified directors act as a group is an absolute majority of their number. A majority of the qualified directors constitutes a quorum for board action for this purpose.

The committee of two or more qualified directors referred to in subsection (c)(1)(i) may be a committee of the board of directors to which the power to authorize advances for expenses from time to time has been delegated, so long as (1) the committee was appointed by a majority vote of directors who were, at the time of appointment of the committee, qualified directors and (2) each advance is authorized by a majority vote of members of the committee who, at the time of the vote, are qualified directors.

Under subsection (c)(1)(ii), which is available only if subsection (c)(1)(i) is not available, the board's action must be taken in accordance with section 8.20 or section 8.21, as the case may be, and directors who are not qualified directors may participate in the vote. Allowing directors who at the time are not qualified directors to participate in the authorization decision, if there is no or only one qualified director, is a principle of prudence that is based on the concept that, if there are not at least two qualified directors, then it is preferable to return the power to make the decision to the full board (even though it includes non-qualified directors) than to leave it with one qualified director.

Illustration 1: The board consists of 15 directors, four of whom are non-qualified directors. Of the 11 qualified directors, nine are present at the meeting at which the authorization is to

be made (or the committee is to be appointed). Under subsection (c)(1)(i), a quorum is present and at least six of the nine qualified directors present at the board meeting must authorize any advance for expenses because six is an absolute majority of the 11 qualified directors. Alternatively, six of the nine qualified directors present at the board meeting may appoint a committee of two or more of the qualified directors (up to all 11) to decide whether to authorize the advance. Action by the committee would require an absolute majority of the qualified directors appointed as members.

Illustration 2: The board consists of 15 directors, only one of whom is a qualified director. Subsection (c)(1)(i) is not available because the number of qualified directors is less than two. Accordingly, the decision must be made by the board under subsection (c)(1)(ii) (or, as is always permitted, by the shareholders under subsection (c)(2)).

Authorizations by shareholders rather than by directors are permitted by subsection (c)(2), but shares owned by or voted under the control of directors who at the time are not qualified directors may not be voted on the authorizations. This does not affect general rules, as to the required presence of a quorum at the meeting, otherwise governing the authorization.

The fact that there has been an advance for expenses does not determine whether a director is entitled to indemnification. Repayment of any advance is required only if it is ultimately determined that the director did not meet the relevant standard of conduct in section 8.51. A proceeding will often terminate without a judicial or other determination as to whether the director's conduct met that standard. Nevertheless, the board of directors should make, or cause to be made, an affirmative determination of entitlement to indemnification at the conclusion of the proceeding. This decision should be made in accordance with the procedures set forth in section 8.55.

Judicial enforcement of rights granted by or pursuant to section 8.53 is specifically contemplated by section 8.54.

ANNOTATION

HISTORY

See the Annotation to section 8.50.

Model Act Derivation

1984 Act § 8.53(c) amended, proposed, 60 BUS. LAW.
341 (2004), adopted, 60 BUS. LAW. 943
(2005)

See FBCA Section 607.0850 above

**§ 8.54. COURT-ORDERED INDEMNIFICATION
AND ADVANCE FOR EXPENSES**

- (a) A director who is a party to a proceeding because he or she is a director may apply for indemnification or an advance for expenses to the court conducting the proceeding or to another court of competent jurisdiction. After receipt of an application and after giving any notice it considers necessary, the court shall:
- (1) order indemnification if the court determines that the director is entitled to mandatory indemnification under section 8.52;
 - (2) order indemnification or advance for expenses if the court determines that the director is entitled to indemnification or advance for expenses pursuant to a provision authorized by section 8.58(a); or
 - (3) order indemnification or advance for expenses if the court determines, in view of all the relevant circumstances, that it is fair and reasonable
 - (i) to indemnify the director, or
 - (ii) to advance expenses to the director, even if he or she has not met the relevant standard of conduct set forth in section 8.51(a), failed to comply with section 8.53 or was adjudged liable in a proceeding referred to in subsection 8.51(d)(1) or (d)(2), but if the director was adjudged so liable indemnification shall be limited to expenses incurred in connection with the proceeding.
- (b) If the court determines that the director is entitled to indemnification under subsection (a)(1) or to indemnification or advance for expenses under subsection (a)(2), it shall also order the corporation to pay the director's expenses incurred in connection with obtaining court-ordered indemnification or advance for expenses. If the court determines that the director is entitled to indemnification or advance for expenses under subsection (a)(3), it may also order the corporation to pay the director's expenses to obtain court-ordered indemnification or advance for expenses.

CROSS-REFERENCES

Advance for expenses, see § 8.53.

“Corporation” defined, see § 8.50(1).

“Director” defined, see § 8.50(2).

“Expenses” defined, see § 1.40.

Limits on indemnification and advance for expenses,
see § 8.58(c).

Mandatory indemnification, see § 8.52.

Obligatory indemnification, see § 8.58(a).

“Party” defined, see § 8.50(5).

Permissible indemnification, see § 8.51.

“Proceeding” defined, see § 8.50(6).

OFFICIAL COMMENT

Section 8.54(a) provides for court-ordered indemnification in three situations:

- (1) A director is entitled to mandatory indemnification under section 8.52. If so, the director may enforce that right by judicial proceeding.
- (2) A director is entitled to indemnification or advance for expenses pursuant to a provision in the articles or bylaws, board or shareholder resolution, or contract. If so, the director may enforce that right by judicial proceeding. To the extent that these rights are contractual, the corporation may have contractual defenses. If the corporation has contracted to indemnify a director to the fullest extent permitted by law, a court may, nevertheless, deny an advance for expenses if it determines that the director did not have, at the time of delivering the affirmation required by section 8.53(a)(1), a good faith belief that he or she met the relevant standard of conduct.
- (3) A court in its discretion determines that it is fair and reasonable under all the relevant circumstances to order an advance for expenses or indemnification for the amount of a settlement or judgment (in addition to expenses), whether or not the director met the relevant standard of conduct in section 8.51 or is otherwise ineligible for indemnification. However, there are two exceptions: an adverse judgment in a derivative proceeding (section 8.51(d)(1)) and an adverse judgment in a proceeding charging receipt of an improper financial benefit (section 8.51(d)(2)), although in either case the court may order payment of expenses. Thus, with these exceptions, sec-

tion 8.54(a)(3) permits a court to order indemnification for amounts paid in settlement of and expenses incurred in connection with a derivative proceeding or a proceeding charging receipt of an improper financial benefit. Section 8.54(a)(3) applies to (a) a situation in which a provision in the articles of incorporation, bylaws, resolution, or contract obligates the corporation to indemnify or to advance expenses but the relevant standard of conduct has not been met and (b) a situation involving a permissive provision pursuant to which the board declines to exercise its authority to indemnify or to advance expenses. However, in determining whether indemnification or expense advance would be "fair and reasonable," a court should give appropriate deference to an informed decision of a board or committee made in good faith and based upon full information. Ordinarily, a court should not determine that it is "fair and reasonable" to order indemnification or expense advance where the director has not met conditions and procedures to which he or she agreed.

The discretionary authority of the court to order indemnification of a derivative proceeding settlement under section 8.54(a)(3) contrasts with the denial of similar authority under section 145(b) of the Delaware General Corporation Law. A director seeking court-ordered indemnification or expense advance under section 8.54(a)(3) must show that there are facts peculiar to his or her situation that make it fair and reasonable to both the corporation and to the director to override an intracorporate declination or any otherwise applicable statutory prohibition against indemnification, *e.g.*, sections 8.51(a) or (d).

Aside from the two exceptions noted above and other than the fairness and reasonableness requirement, there are no statutory outer limits on the court's power to order indemnification under section 8.54(a)(3). In an appropriate case, a court may wish to refer to the provisions of section 2.02(b)(4) establishing the outer limits of a liability-limiting charter provision. It would be an extraordinary situation in which a court would want to provide indemnification going beyond the limits of section 2.02(b)(4),

but if the court, as the independent decision-maker, finds that it is "fair and reasonable," then the court is permitted to do so. It should be emphasized again, however, that the director seeking indemnification must make a showing of fairness and reasonableness and that exercise of the power granted by section 8.54(a)(3) is committed to the court's discretion.

Among the factors a court may want to consider are the gravity of the offense, the financial impact upon the corporation, the occurrence of a change in control or, in the case of an advance for expenses, the inability of the director to finance a defense. A court may want to give special attention to certain other issues. First, has the corporation joined in the application to the court for indemnification or an advance for expenses? This factor may be particularly important where under section 8.51(d) indemnification is not permitted for an amount paid in settlement of a proceeding brought by or in the right of the corporation. Second, in a case where indemnification would have been available under section 8.51(a)(2) if the corporation had adopted a provision authorized by section 2.02(b)(5), was the decision to adopt such a provision presented to and rejected by the shareholders and, if not, would exculpation of the director's conduct have resulted under a section 2.02(b)(4) provision? Third, in connection with considering indemnification for expenses under section 8.51(d)(2) in a proceeding in which a director was adjudged liable for receiving a financial benefit to which he or she was not entitled, was such financial benefit insubstantial—particularly in relation to the other aspects of the transaction involved—and what was the degree of the director's involvement in the transaction and the decision to participate?

Under section 8.54(b), if a director successfully sues to enforce the right to indemnification of expenses under subsection (a)(1) or to indemnification or advance for expenses under subsection (a)(2), then the court must order the corporation to pay the director's expenses in the enforcement proceeding. However, if a director successfully sues for indemnification or advance for expenses under subsection (a)(3), then the court may (but is not required to) order the corporation to pay the director's expenses

in the proceeding under subsection (a)(3). The basis for the distinction is that the corporation breached its obligation in the first two cases but not in the third.

Application for indemnification under section 8.54 may be made either to the court in which the proceeding was heard or to another court of appropriate jurisdiction. For example, a defendant in a criminal proceeding who has been convicted but believes that indemnification would be proper could apply either to the court which heard the criminal proceeding or bring an action against the corporation in another forum.

A decision by the board of directors not to oppose the request for indemnification is governed by the general standards of conduct of section 8.30. Even if the corporation decided not to oppose the request, the court must satisfy itself that the person seeking indemnification is deserving of receiving it under section 8.54.

As provided in section 8.58(c), a corporation may limit the rights of a director under section 8.54 by a provision in its articles of incorporation. In the absence of such a provision, the court has general power to exercise the authority granted under this section.

ANNOTATION

HISTORY

See the Annotation to section 8.50.

§ 8.55. DETERMINATION AND AUTHORIZATION OF INDEMNIFICATION

- (a) A corporation may not indemnify a director under section 8.51 unless authorized for a specific proceeding after a determination has been made that indemnification is permissible because the director has met the relevant standard of conduct set forth in section 8.51.
- (b) The determination shall be made:
- (1) if there are two or more qualified directors, by the board of directors by a majority vote of all the qualified directors (a majority of whom shall for such purpose constitute a quorum), or by a majority of the members of a committee of two or more qualified directors appointed by such a vote;
 - (2) by special legal counsel:
 - (i) selected in the manner prescribed in subdivision (1); or
 - (ii) if there are fewer than two qualified directors, selected by the board of directors (in which selection directors who are not qualified directors may participate); or
 - (3) by the shareholders, but shares owned by or voted under the control of a director who at the time is not a qualified director may not be voted on the determination.
- (c) Authorization of indemnification shall be made in the same manner as the determination that indemnification is permissible except that if there are fewer than two qualified directors, or if the determination is made by special legal counsel, authorization of indemnification shall be made by those entitled to select special legal counsel under subsection (b)(2)(ii).

CROSS-REFERENCES

Advance for expenses, see § 8.53.

Committees of the board, see § 8.25.

“Corporation” defined, see § 8.50(1).

“Director” defined, see § 8.50(2).

“Party” defined, see § 8.50(5).

“Proceeding” defined, see § 8.50(6).

“Qualified director” defined, see § 1.43.

Quorum of directors, see § 8.24(a).

Standard for indemnification, see § 8.51.

OFFICIAL COMMENT

Section 8.55 provides the method for determining whether a corporation should indemnify a director under section 8.51. In this section a distinction is made between a “determination” and an “authorization.” A “determination” involves a decision whether under the circumstances the person seeking indemnification has met the relevant standard of conduct under section 8.51 and is therefore eligible for indemnification. This decision may be made by the individuals or groups described in section 8.55(b). In addition, after a favorable “determination” has been made, the corporation must decide whether to “authorize” indemnification except to the extent that an obligatory provision under section 8.58(a) is applicable. This decision includes a review of the reasonableness of the expenses, the financial ability of the corporation to make the payment, and the judgment whether the limited financial resources of the corporation should be devoted to this or some other use. While special legal counsel may make the “determination” of eligibility for indemnification, counsel may not “authorize” the indemnification. A pre-existing obligation under section 8.58(a) to indemnify if the director is eligible for indemnification dispenses with the second-step decision to “authorize” indemnification.

Section 8.55(b) establishes procedures for selecting the person or persons who will make the determination of permissibility

of indemnification. As indicated in the Official Comment to section 8.53(c), the committee of qualified directors referred to in subsection (b)(1) may include a committee of the board to which has been delegated the power to determine whether to indemnify a director so long as the appointment and composition of the committee members comply with subsection (b)(1). In selecting special legal counsel under subsection (b)(2), directors who are parties to the proceeding may participate in the decision if there are insufficient qualified directors to satisfy subsection (b)(1). Directors who are not eligible to act as qualified directors may also participate in the decision to “authorize” indemnification on the basis of a favorable “determination” if necessary to permit action by the board of directors. The authorization of indemnification is the decision that results in payment of any amounts to be indemnified. This limited participation of interested directors in the authorization decision is justified by the principle of necessity.

Under subsection (b)(1), the vote required when the qualified directors act as a group is an absolute majority of their number. A majority of the qualified directors constitutes a quorum for board action for this purpose. If there are not at least two qualified directors, then the determination of entitlement to indemnification must be made by special legal counsel or by the shareholders.

Legal counsel authorized to make the required determination is referred to as “special legal counsel.” In earlier versions of the Model Act, and in the statutes of many states, reference is made to “independent” legal counsel. The word “special” is felt to be more descriptive of the role to be performed; it is intended that the counsel selected should be independent in accordance with governing legal precepts. “Special legal counsel” normally should be counsel having no prior professional relationship with those seeking indemnification, should be retained for the specific purpose, and should not be or have been either inside counsel or regular outside counsel to the corporation. Special legal counsel also should not have any familial, financial or other relationship with any of those seeking indemnification that would, in the circumstances, reasonably be expected to exert an influence on

counsel in making the determination. It is important that the process be sufficiently flexible to permit selection of counsel in light of the particular circumstances and so that unnecessary expense may be avoided. Hence the phrase "special legal counsel" is not defined in the statute.

Determinations by shareholders, rather than by directors or special legal counsel, are permitted by subsection (b)(3), but shares owned by or voted under the control of directors who at the time are not qualified directors may not be voted on the determination of eligibility for indemnification. This does not affect general rules as to the required presence of a quorum at the meeting in order for the determination to be made.

Section 8.55 is subject to section 8.58(a), which authorizes an arrangement obligating the corporation in advance to provide indemnification or to advance expenses.

ANNOTATION

HISTORY

See the Annotation to section 8.50.

Model Act Derivation

1984 Act	§ 8.55(b) amended, proposed, 60 BUS. LAW. 341 (2004), adopted, 60 BUS. LAW. 943 (2005)
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See FBCA Section 607.0850 above

§ 8.56. INDEMNIFICATION OF OFFICERS

- (a) A corporation may indemnify and advance expenses under this subchapter to an officer of the corporation who is a party to a proceeding because he or she is an officer of the corporation
- (1) to the same extent as a director; and
 - (2) if he or she is an officer but not a director, to such further extent as may be provided by the articles of incorporation, the bylaws, a resolution of the board of directors, or contract except for
 - (A) liability in connection with a proceeding by or in the right of the corporation other than for expenses incurred in connection with the proceeding or
 - (B) liability arising out of conduct that constitutes
 - (i) receipt by the officer of a financial benefit to which he or she is not entitled,
 - (ii) an intentional infliction of harm on the corporation or the shareholders, or
 - (iii) an intentional violation of criminal law.
- (b) The provisions of subsection (a)(2) shall apply to an officer who is also a director if the basis on which he or she is made a party to the proceeding is an act or omission solely as an officer.
- (c) An officer of a corporation who is not a director is entitled to mandatory indemnification under section 8.52, and may apply to a court under section 8.54 for indemnification or an advance for expenses, in each case to the same extent to which a director may be entitled to indemnification or advance for expenses under those provisions.

CROSS-REFERENCES

Advance for expenses, see § 8.53.

Agents, indemnification of and advance for expenses for, see § 8.58(e).

Articles of incorporation, see § 2.02, ch. 10A.

Bylaws, see § 2.06, ch. 10B.

“Corporation” defined, see § 8.50(1).

“Director” defined, see § 8.50(2).

Employees, indemnification of and advance for expenses for, see § 8.58(e).

“Expenses” defined, see § 1.40.

“Liability” defined, see § 8.50(5).

Limits on rights to indemnification and advance for expenses, see § 8.58(c).

Obligatory indemnification, see §§ 2.02(b)(5), 8.58(a).

“Officer” defined, see § 8.50(2).

Officer standards of conduct, see § 8.42.

“Party” defined, see § 8.50(5).

“Proceeding” defined, see § 8.50(6).

OFFICIAL COMMENT

Section 8.56 correlates the general legal principles relating to the indemnification of officers of the corporation with the limitations on indemnification in subchapter E. This correlation may be summarized in general terms as follows.

- (1) An officer of a corporation who is *not* a director may be indemnified by the corporation on a discretionary basis to the same extent as though he or she were a director, and, in addition, may have additional indemnification rights apart from subchapter E, but the outer limits of such rights are specified. See sections 8.56(a)(2) and (c).
- (2) An officer who is *also* a director of the corporation is entitled to the indemnification rights of a director and of an officer who is not a director (see preceding paragraph) if the conduct that is the subject of the proceeding was solely in his or her capacity as an officer. See section 8.56(b).
- (3) An *officer* of a corporation who is not a director has the right of mandatory indemnification granted to directors under section 8.52 and the right to apply for court-ordered indemnification under section 8.54. See section 8.56(c).

Section 8.56 does not deal with indemnification of employees and agents because the concerns of self-dealing that arise when directors provide for their own indemnification and expense advance (and sometimes for senior executive officers) are not present when directors (or officers) provide for indemnification and expense advance for employees and agents who are not directors or officers. Moreover, the rights of employees and agents to indemnification and advance for expenses derive from principles of agency, the doctrine of respondeat superior, collective bargaining or other contractual arrangements rather than from a corporation statute. It would be presumptuous for a corporation statute to seek to limit the indemnification bargain that a corporation may wish to make with those it hires or retains. The same standard applicable to directors and officers may not be appropriate for office workers and hazardous waste workers, brokers and custodians, engineers and farm workers. None of their roles or responsibilities are prescribed by the Model Act.

Section 3.02 grants broad powers to corporations, including powers to make contracts, appoint and fix the compensation of employees and agents and to make payments furthering the business and affairs of the corporation. Many corporations provide for the exercise of these powers in the same provisions in the articles, bylaws or otherwise in which they provide for expense advance and indemnification for directors and officers.

Indemnification may also be provided to protect employees or agents from liabilities incurred while serving at a corporation's request as a director, officer, partner, trustee, or agent of another commercial, charitable, or nonprofit venture.

Although employees and agents are not covered by subchapter E, the principles and procedures set forth in the subchapter for indemnification and advance for expenses for directors and officers may be helpful to counsel and courts in dealing with indemnification and expense advance for employees and agents.

Careful consideration should be given to extending mandatory maximum indemnification and expense advance to employees and agents. The same considerations that may favor mandatory maximum indemnification for directors and officers—e.g., encouraging qualified individuals to serve—may not be present in the cases of employees and agents. Many corporations may prefer to retain the discretion to decide, on a case-by-case basis, whether to indemnify and advance expenses to employees and agents (and perhaps even officers, especially nonexecutive officers) rather than binding themselves in advance to do so.

1. Officers Who Are Not Directors

While section 8.56 does not prescribe the standards governing the rights of officers to indemnification, subsection (a) does set outer limits beyond which the corporation may not indemnify. These outer limits for officers (see subsection (a)(2)) are substantially the same as the outer limits on the corporation's power to indemnify directors: (i) in a proceeding by or in the right of the corporation, indemnification is not allowed other than for reasonable expenses incurred in connection therewith and (ii) in any proceeding, indemnification is not allowed in

those situations in which directors' liability to the corporation or its shareholders could not be eliminated by a provision included in the articles pursuant to section 2.02(b)(4), i.e., where there has been receipt of a financial benefit to which the officer is not entitled, intentional infliction of harm on the corporation or shareholders or intentional violation of criminal law. Since officers are held to substantially the same standards of conduct as directors (see section 8.42), there does not appear to be any reasoned basis for granting officers greater indemnification rights as a substantive matter. Procedurally, however, there is an important difference. To permit greater flexibility, officers may be indemnified (within the above-mentioned outer limits) with respect to conduct that does not meet the standards set by section 8.51(a)(1) simply by authorization of the board of directors, whereas directors' indemnification can reach beyond those standards, as contemplated by section 8.51(a)(2), only with a shareholder-approved provision included in the articles pursuant to section 2.02(b)(5). This procedural difference reflects the reduced risk of self-dealing as to officers.

Section 8.56(c) grants nondirector officers the same rights to mandatory indemnification under section 8.52 and to apply to a court for indemnification under section 8.54 as are granted to directors. Since their substantive rights to indemnification are essentially the same as those of directors, it is appropriate to grant officers the same affirmative procedural rights to judicial relief as are provided to directors.

The broad authority in section 8.56(a)(2) to grant indemnification may be limited by appropriate provisions in the articles of incorporation. See section 8.58(c).

2. Officers Who Are Also Directors

Subsection (b) provides, in effect, that an officer of the corporation who is also a director is subject to the same standards of indemnification as other directors and cannot avail himself or herself of the provisions of subsection (a) unless the person can establish that the act or omission that is the subject of the proceeding was committed solely in his or her capacity as officer.

Thus, a vice president for sales who is also a director and whose actions failed to meet section 8.51(a) standards could be indemnified provided that the conduct was within the outer limits of subsection (a)(2) and involved only his or her officer capacity.

This more flexible approach for situations where the individual is not acting as a director seems appropriate as a matter of fairness. There are many instances where officers who also serve as directors assume responsibilities and take actions in their nondirector capacities. It is hard to justify a denial of indemnification to an officer who failed to meet a standard applicable only to directors when the officer can establish that he or she did not act as a director. Nor are there likely to be complications or difficulties because some directors are treated differently than others where the high burden of proof—solely as officer—is met. Obviously, the burden will be especially difficult to meet where the roles of officer and director are closely intertwined, as is often the case with a chief executive officer.

For a director-officer to be indemnified under section 8.51 for conduct in the capacity as a director when he or she has not satisfied the standards of section 8.51(a), a provision in the articles under section 2.02(b)(5) is required. If such a provision is included in the articles, the standards for indemnification are those specified in section 2.02(b)(5). For a director-officer to be indemnified for conduct solely in the capacity as an officer, even though the director-officer has not satisfied the standards of section 8.56(a), only a resolution of the board authorizing such indemnification is required, rather than a provision in the articles. If such a resolution is adopted, the standards for indemnification are those specified in subsection (a)(2). However, when a director-officer seeks indemnification or expense advance under subsections (b) and (a)(2) on the basis of having acted solely in the capacity as an officer, indemnification or expense advance must be approved through the same procedures as set forth in sections 8.55 or 8.53(c), as the case may be, for approval of indemnification or expense advance for a director when acting in the capacity of a director.

ANNOTATION**HISTORY**

See the Annotation to section 8.50.

See FBCA Section 607.0850 above

§ 8.57. INSURANCE

A corporation may purchase and maintain insurance on behalf of an individual who is a director or officer of the corporation,

or who, while a director or officer of the corporation, serves at the corporation's request as a director, officer, partner, trustee, employee, or agent of another domestic or foreign corporation, partnership, joint venture, trust, employee benefit plan, or other entity, against liability asserted against or incurred by the individual in that capacity or arising from his or her status as a director or officer, whether or not the corporation would have power to indemnify or advance expenses to the individual against the same liability under this subchapter.

CROSS-REFERENCES

"Corporation" defined, see § 8.50(1).

"Director" defined, see § 8.50(2).

Employees and agents, see § 8.58(e).

"Expenses" defined, see § 1.40(9AA).

"Liability" defined, see § 8.50(3).

"Officer" defined, see § 8.50(2).

"Official capacity" defined, see § 8.50(4).

Standard for indemnification, see § 8.51.

OFFICIAL COMMENT

Section 8.57 authorizes a corporation to purchase and maintain insurance on behalf of directors and officers against liabilities imposed on them by reason of actions in their official capacity, or their status as such, or arising from their service to the corporation or another entity at the corporation's request. Insurance is not limited to claims against which a corporation is entitled to indemnify under this subchapter. This insurance, usually referred to as "D&O liability insurance," provides protection to directors and officers in addition to the rights of indemnification created by or pursuant to this subchapter (as well as typically protecting the individual insureds against the corporation's failure to pay indemnification required or permitted by this subchapter) and provides a source of reimbursement for corporations which indemnify directors and others for conduct covered by the

insurance. On the other hand, policies typically do not cover uninsurable matters, such as actions involving dishonesty, self-dealing, bad faith, knowing violations of the securities acts, or other willful misconduct. Johnston, "Corporate Indemnification and Liability Insurance for Directors and Officers," 33 BUS. LAW. 1993, 2024-29 (1978). See also Knepper & Bailey, *Liability of Corporate Officers and Directors*, section 21.07 (4th ed. 1988).

Although this section does not include employees and agents for the reasons stated in the Official Comment to section 8.56, the corporation has the power under section 3.02 to purchase and maintain insurance on their behalf. This power is confirmed in section 8.58(d).

This section is not intended to set the outer limits on the type of insurance which a corporation may maintain or the persons to be covered. Rather, it is included to remove "any doubt as to the power to carry insurance and to maintain it on behalf of directors, officers, employees and agents." Sebring, "Recent Legislative Changes in the Law of Indemnification of Directors, Officers and Others," 23 BUS. LAW. 95, 106 (1967).

ANNOTATION

See the Annotation to section 8.50.

**§ 8.58. VARIATION BY CORPORATE ACTION;
APPLICATION OF SUBCHAPTER**

- (a) A corporation may, by a provision in its articles of incorporation or bylaws or in a resolution adopted or a contract approved by its board of directors or shareholders, obligate itself in advance of the act or omission giving rise to a proceeding to provide indemnification in accordance with section 8.51 or advance funds to pay for or reimburse expenses in accordance with section 8.53. Any such obligatory provision shall be deemed to satisfy the requirements for authorization referred to in section 8.53(c) and in section 8.55(c). Any such provision that obligates the corporation to provide indemnification to the fullest extent permitted by law shall be deemed to obligate the corporation to advance funds to pay for or reimburse expenses in accordance with section 8.53 to the fullest extent permitted by law, unless the provision specifically provides otherwise.
- (b) A right of indemnification or to advances for expenses created by this subchapter or under subsection (a) and in effect at the time of an act or omission shall not be eliminated or impaired with respect to such act or omission by an amendment of the articles of incorporation or bylaws or a resolution of the directors or shareholders, adopted after the occurrence of such act or omission, unless, in the case of a right created under subsection (a), the provision creating such right and in effect at the time of such act or omission explicitly authorizes such elimination or impairment after such act or omission has occurred.
- (c) Any provision pursuant to subsection (a) shall not obligate the corporation to indemnify or advance expenses to a direc-

tor of a predecessor of the corporation, pertaining to conduct with respect to the predecessor, unless otherwise specifically provided. Any provision for indemnification or advance for expenses in the articles of incorporation, bylaws, or a resolution of the board of directors or shareholders of a predecessor of the corporation in a merger or in a contract to which the predecessor is a party, existing at the time the merger takes effect, shall be governed by section 11.07(a)(4).

- (d) Subject to subsection (b), a corporation may, by a provision in its articles of incorporation, limit any of the rights to indemnification or advance for expenses created by or pursuant to this subchapter.
- (e) This subchapter does not limit a corporation's power to pay or reimburse expenses incurred by a director or an officer in connection with appearing as a witness in a proceeding at a time when he or she is not a party.
- (f) This subchapter does not limit a corporation's power to indemnify, advance expenses to or provide or maintain insurance on behalf of an employee or agent.

CROSS-REFERENCES

Advance for expenses, see § 8.53.

Articles of incorporation, see § 2.02, ch. 10A.

Amendments to articles of incorporation, see § 10.09.

Bylaws, see § 2.06, ch. 10B.

"Corporation" defined, see § 8.50(1).

"Director" defined, see § 8.50(2).

"Expenses" defined, see § 1.40.

Indemnification generally, see §§ 8.51–8.56.

Insurance, power to provide, see § 8.57.

"Officer" defined, see § 8.50(2).

"Party" defined, see § 8.50(5).

Predecessor, see § 8.50(1).

"Proceeding" defined, see § 8.50(6).

OFFICIAL COMMENT

Section 8.58(a) authorizes a corporation to make obligatory the permissive provisions of subchapter E in advance of the conduct giving rise to the request for assistance. Many corporations have adopted such provisions, often with shareholder approval. An obligatory provision satisfies the requirements for authorization in subsection (c) of sections 8.53 and 8.55, but compliance would still be required with subsections (a) and (b) of these sections.

Section 8.58(a) further provides that a provision requiring indemnification to the fullest extent permitted by law shall be deemed, absent an express statement to the contrary, to include an obligation to advance expenses under section 8.53. This provision of the statute is intended to avoid a decision such as that of the Delaware Supreme Court in *Advanced Mining Systems, Inc. v. Fricke*, 623 A.2d 82 (Del. 1992). If a corporation provides for obligatory indemnification and not for obligatory advance for expenses, the provision should be reviewed to ensure that it properly reflects the intent in light of the third sentence of section 8.58(a). Also, a corporation should consider whether obligatory expense advance is intended for direct suits by the corporation as well as for derivative suits by shareholders in the right of the corporation. In the former case, assuming compliance with subsections (a) and (b) of section 8.53, the corporation could be required to fund the defense of a defendant director even where the board of directors has already concluded that the director has engaged in significant wrongdoing. See Official Comment to section 8.53.

Section 8.58(b) clarifies that a right of indemnification or to advances for expenses with respect to an act or omission cannot be eliminated or impaired after such act or omission by an amendment to the articles of incorporation or bylaws or by director or shareholder resolution. This limitation, however, may itself be qualified by the express terms of the provision in effect at the time of such act or omission.

Section 8.58(c) provides that an obligatory indemnification provision as authorized by subsection (a) does not, unless spe-

cific provision is made to the contrary, bind the corporation with respect to a predecessor. An obligatory indemnification provision of a predecessor is treated as a liability (to the extent it is one) under section 11.07(a)(4), which governs the effect of a merger.

Section 8.58(d) permits a corporation to limit the right of the corporation to indemnify or advance expenses by a provision in its articles of incorporation. As provided in section 10.09, no such limitation will affect rights in existence when the provision becomes effective pursuant to section 1.23.

Section 8.58(e) makes clear that subchapter E deals only with actual or threatened defendants or respondents in a proceeding, and that expenses incurred by a director in connection with appearance as a witness may be indemnified without regard to the limitations of subchapter E. Indeed, most of the standards described in sections 8.51 and 8.54(a) by their own terms can have no meaningful application to a director whose only connection with a proceeding is that he or she has been called as a witness.

Subchapter E does not regulate the power of the corporation to indemnify or advance expenses to employees and agents. That subject is governed by the law of agency and related principles and frequently by contractual arrangements between the corporation and the employee or agent. Section 8.58(f) makes clear that, while indemnification, advance for expenses, and insurance for employees and agents are beyond the scope of this subchapter, the elaboration in subchapter E of standards and procedures for indemnification, expense advance, and insurance for directors and officers is not in any way intended to cast doubt on the power of the corporation to indemnify or advance expenses to or purchase and maintain insurance for employees and agents under section 3.02 or otherwise.

ANNOTATION

HISTORY

See the Annotation to section 8.50.

§ 8.59. EXCLUSIVITY OF SUBCHAPTER

A corporation may provide indemnification or advance expenses to a director or an officer only as permitted by this subchapter.

CROSS-REFERENCES

Advance for expenses, see § 8.53.

“Corporation” defined, see § 8.50(1).

“Director” defined, see § 8.50(2).

“Expenses” defined, see § 1.40.

“Officer” defined, see § 8.50(2).

Standards for indemnification, see §§ 8.51–8.56.

OFFICIAL COMMENT

This subchapter is the exclusive source for the power of a corporation to indemnify or advance expenses to a director or an officer.

Section 8.59 does not preclude provisions in articles of incorporation, bylaws, resolutions, or contracts designed to provide procedural machinery in addition to (but not inconsistent with) that provided by this subchapter. For example, a corporation may properly obligate the board of directors to consider and act expeditiously on an application for indemnification or advance for expenses or to cooperate in the procedural steps required to obtain a judicial determination under section 8.54.

ANNOTATION**HISTORY**

See the Annotation to section 8.50.