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CURRENT STATUS OF CORPORATE DIRECTORS' RIGHT TO INDEMNIFICATION

Joseph W. Bishop, Jr.*

In these days when profits are hypertrophied and business leaders have, at least for a time, ceased to be objects of suspicion and aversion, a director of a large corporation is a person of considerable magnificence. But corporate eminence, like other types, has its perils. The director's sword of Damocles is the individual liability to which he almost inevitably exposes himself when he assumes the responsibility of managing a large aggregation of other people's capital, thereby affecting in a variety of ways the interests of other business organizations, government, and the public.

The most discussed type of such liability is that resulting from a creditor's or minority stockholder's derivative suit against directors ¹ for asserted mismanagement or waste of the corporate assets. Recent business history suggests that such liability may assume alarming proportions. To take an outstanding example, the cost of resisting a vigorous effort by outsiders to seize control, carried on with modern high-pressure techniques of proxy fighting, may easily run into six, and even seven, figures.² If, at the suit of a minority stockholder, it should ultimately be held improper to pay such expenses out of the corporate till — and, in the present state of the law, no director or his counsel can predict

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¹ The position of corporate officers and employees is, in the situations considered in this article, substantially similar to that of directors. For the sake of simplicity, most references will be to directors, but what is said about them is generally applicable to the others.

² The total costs of one recent proxy fight for control of a fairly large corporation (2,310,207 shares held by 10,245 shareholders; capital stock and surplus of $14,991,510) came to $261,522, about equally divided between the two factions. See Rosenfeld v. Fairchild Engine & Airplane Corp., 116 N.Y.S.2d 840, 842-43 (Sup. Ct. 1952), aff'd, 284 App. Div. 201, 132 N.Y.S.2d 273 (2d Dep't 1954), aff'd, 309 N.Y. 168, 128 N.E.2d 201 (1955). Doubtless sums considerably greater were spent in such widely publicized proxy fights as those for control of the New York Central, Montgomery Ward, and the New York, New Haven & Hartford. It is reported that in the New York Central proxy contest management spent $340,000, and the insurgents $305,000, on newspaper advertisements alone. The New Yorker, July 3, 1954, p. 37.
with certainty how far the courts will sanction such disbursements—the director will have to reach into his own pocket to replenish that till. And, although courts are certainly slow to find negligence or misconduct where directors appear to be exercising their best business judgment and do not profit personally from the challenged transaction, it is not hard to call to mind other situations—for example, the voting of enormous salaries and fringe benefits to executives whose value may be more apparent to the directors than to minority stockholders or judges—in which the director must have an uneasy awareness that his actions may be successfully challenged as waste of corporate assets.\(^3\)

Moreover, a director serving what he conceives to be the best interests of his corporation may, like any other agent, incur substantial personal liability to third persons, including the government. Instances are not wanting in which directors, furthering with perhaps excessive zeal the purposes of their corporation, have found themselves the subject of criminal proceedings under the revenue or antitrust laws.\(^4\)

The director cannot safeguard himself by the simple process of refraining from conscious wrongdoing. In the first place, there are sizeable areas of corporation law in which it is not easy to tell in advance what a court will regard as permissible. In the second place, no matter how innocent the director, he will probably incur substantial counsel fees, payable win, lose, or draw, in the course of defending himself if charges are brought.

In some jurisdictions, in recent years, legislative action has limited the open season on directors by handicapping the more irresponsible type of stockholder’s derivative action—“strike suits” brought by professional plaintiffs in the hope of being

\(^3\) There have been many laborers in this legal vineyard, and the literature on stockholders’ derivative actions is correspondingly voluminous. See, e.g., FLETCHER, Cyclopedia of Private Corporations §§ 5939–6045 (rev. ed. 1932); Wood, Survey and Report Regarding Stockholders’ Derivative Suits (1944); Hornstein, Legal Controls for Intracorporate Abuse—Present and Future, 41 COLUM. L. REV. 405 (1941); Hornstein, The Counsel Fee in Stockholder’s Derivative Suits, 39 COLUM. L. REV. 784, 797–98 (1939).

\(^4\) A New York judge not long ago went so far as to describe antitrust prosecutions as “an occupational hazard to the officers and directors of large corporations, as truly as falling from a ladder is an occupational hazard to a painter or carpenter.” Van Voorhis, J., dissenting in Schwarz v. General Aniline & Film Corp., 279 App. Div. 996, 998, 322 N.Y.S.2d 146, 150 (1st Dep’t 1952), aff’d, 305 N.Y. 395, 113 N.E.2d 533 (1953).
bought off. Thus statutes may require that the plaintiff have been a stockholder at the time of the transaction of which he complains or that his stock have thereafter devolved upon him by operation of law. They may also require that a plaintiff whose stock holdings aggregate less than a stated percentage of the corporation's outstanding shares, or less than a stated market value, post security for the expenses, including counsel fees, which the corporation may incur in the action — either directly or through an obligation to indemnify another party, such as a director who is named as a defendant.

While such measures undoubtedly afford the director a degree of protection against the worst of his natural enemies, they by no means serve to set his mind completely at rest. In many states they do not exist; even where they do, it might in hard times be easy to find enough discontented stockholders to make up the necessary minimum. Troublesome questions as to what stockholders' suits are "in the right of" the corporation, and therefore within the scope of the statutes, add to the uncertainty. And, of course, the statutes furnish no protection at all against criminal sanctions or civil liabilities sought to be imposed by third persons.


The statute [N.Y. GEN. CORP. LAW § 61-b] was aimed at a particular and well-perceived abuse — the so-called "strike suit," brought on behalf of a corporation against its directors or officers by persons who, since their holdings are "too small to indicate legitimate personal interest in the outcome and accordingly in the bringing of the action," realize the nuisance value of their suits and hope to be bought off by secret settlements. . . . Actions for waste or mismanagement were peculiarly vulnerable to that abuse.

6 E.g., FED. R. CIV. P. 23(b); DEL. CODE ANN. tit. 8, § 327 (1953); N.J. STAT. ANN. §§ 14:3-15 (Supp. 1955); N.Y. GEN. CORP. LAW § 61; PA. STAT. ANN. tit. 12, § 1321 (Purdon 1953).


8 Thus the New York Court of Appeals recently split four to three on whether an action against a corporation and its directors to compel the declaration of dividends is brought "in the right of" the corporation, the majority holding that it is. Gordon v. Elliman, 306 N.Y. 456, 119 N.E.2d 331 (1954); cf. Lehrman v. Godchaux Sugars, Inc., 207 Misc. 314, 138 N.Y.S.2d 163 (Sup. Ct. 1955) (action to enjoin proposed recapitalization as unfair to one class of stock is not brought "in the right of" the corporation, so plaintiff cannot be required to post security). See Scott, Developments in Corporate Law, The Business Lawyer, July 1955, pp. 25, 30-31.
In these circumstances, an individual who is asked to serve on the board of a corporation, who has no significant personal financial interest in the corporation, may well pause and ponder the relative values of the game and the candle. The question he must ask himself and his lawyer is: "If I get into legal trouble, can the corporation bail me out, and must it?" The purpose of this article is to examine some of the more recent cases and statutes which, particularly in New York, make it so hard to give a concise and rational answer to that question.

I. COMMON LAW

The simplest situation is that in which a director, at the suit of a stockholder, is found derelict in the performance of his duties to the corporation. The courts which have considered such cases have uniformly held that such rascals cannot compound their rascality by charging the corporation with the cost of their defense. A fortiori, they could hardly expect the corporation to return to them the amounts which they have been compelled to repay it, even though their misconduct may have consisted not of diverting corporate assets into their own pockets, but of permitting others to profit. There seems to be no case in which it has been asserted that indemnification under such circumstances was authorized or required by charter, by-law, or contract. Even in the absence of statute, it seems somewhat doubtful that a court would find consonant with public policy a provision or agreement which permitted or required indemnification in such circumstances — although a distinction might validly be drawn for such purposes between deliberate fleecing of the corporation and acts which, although found to be improper, were done in good faith and not for the personal profit of the defendant director.

A greater variety of common-law opinion has manifested itself with respect to the director who successfully defends himself against charges of misfeasance. Courts in two important jurisdictic-

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10 See p. 1067 infra.
tions — Ohio and New York — have held that not even such an innocent can recover his legal expenses. In 1907, in what appears to be the earliest decision dealing with the problem, *Figge v. Bergenthal*, the Supreme Court of Wisconsin said: "[I]f no case is made against defendants it is not improper or unjust that the corporation should pay for the defense of the action." In fact, however, the corporation, by a resolution of the stockholders, had elected to pay the costs of the director's defense. Thus, although the director himself controlled the corporation, the case is not necessarily to be regarded as a decision on his *right* to such indemnification. Twenty-four years later the Ohio Court of Appeals, in *Griesse v. Lang*, was faced with a situation in which directors, victorious in a stockholder's suit against them, caused the corporation to pay their legal expenses, omitting, however, to secure the authorization of the stockholders. The court held the payment illegal, adducing as grounds both the fact that there was no stockholder vote and its conclusion that the corporation had received no benefit from the legal services to the defendant directors. The opinion betrays little understanding of the real problems involved. A successful defense against charges of having wronged the corporation could rarely, if ever, amount to an affirmative benefit to the corporation; and if the first ground itself rendered the payment illegal, it is hard to see how it could have been authorized by any vote of the stockholders short of unanimity. Several years later, a retired judge of the New York Court of Appeals, sitting as a referee in litigation in the supreme court, found no authority other than the *Figge* and *Griesse* cases, elected to follow the latter, and held in *New York Dock Co. v. McCollum* that successful directors, absent any showing that the corporation had benefited from their defense, were not entitled to reimbursement of their counsel fees. More recent decisions in

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11 130 Wis. 594, 625, 109 N.W. 581, 592 (1907).
12 37 Ohio App. 553, 175 N.E. 222 (1931).
13 Besides distinguishing the *Figge* case on the ground of ratification, the Ohio court concluded — erroneously — that the case had been overruled by *Jesse v. Four Wheel Drive Auto Co.*, 177 Wis. 627, 189 N.W. 276 (1922), a case in which directors were denied indemnification for litigation expenses for the good reason that the acts for which they had been sued (alleged fraud in inducing the sale of stock to themselves) had been performed in their individual capacities and had nothing to do with the corporation.
15 In fact, there is nothing in the report of the *McCollum* case to indicate that the corporation or its stockholders were willing to indemnify the directors, so the
other jurisdictions have, however, reached the opposite conclusion, upholding the common-law right of a vindicated director to recover from the corporation the expenses of his defense. Not long ago a federal court of appeals, making obiter a survey of the common-law cases, concluded that the trend (if so portentous a term may be applied to two cases) was in favor of the innocent director's right to indemnification.16

Even if we assume that the corporation has no legal obligation to reimburse the directors, either because the particular jurisdiction refuses to recognize such liability in any circumstances or because the director's defense has not prevailed, we are left with the troublesome question of the extent to which a corporation, in the exercise of its business judgment, can elect to indemnify the director, and the still more troublesome question of the manner in which such corporate willingness may be manifested: by provision of charter or by-laws or other form of contract, by action of a majority of the stockholders, or simply by resolution of the directors. The cases have not clearly illuminated the first question and have left the second in almost total darkness.

We may start from the proposition that there should be and is an area within which a corporation is free to indemnify a director against expenses incurred in connection with litigation based on alleged failure in the director's duty to the corporation, regardless of the existence of a legal obligation to do so, just as it is normally free, in the interest of good relations with employees, other businesses, or the public, to recognize obligations which are moral at best, or even to make donations to charity.17 The problem, of

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17 Cf. Breay v. Royal British Nurses’ Ass’n, [1897] 2 Ch. 272 (C.A.), which, in the expansive and leisurely judicial fashion of the period, considered the right of a corporation to indemnify a member who, in consequence of carrying out its instructions, was personally sued for libel. Lord Justice Lindley said: Now, supposing this was not the case of a corporation, is there anything illegal or immoral or improper in a master defending his servant, or a principal defending his agent, in such a case? Absolutely nothing. Can it be said, then,
course, is to delimit that area. Clearly outside such an area of discretion should be any degree of indemnification of directors who have willfully betrayed their fiduciary obligation to the corporation — unless, perhaps, they can show, as to counsel fees, that "some interest of the corporation was in fact threatened and that, for that reason, the expenditure was justified ..." 18

Assuming that a particular claim for indemnity may be, although not legally enforceable, within the permissible area of discretion, there remains the problem of the significance which should be given to particular methods of exercising that discretion. Ordinarily, a corporation exercises its business judgment through its directors and officers. But, by the very nature of the case, a decision of interested directors themselves to have the corporation retain or pay their counsel is not entitled to the indulgence ordinarily shown a bona fide exercise of corporate business judgment, and the courts appear to give it little or no weight. 19

If, as is often the case, the interested directors own or control a

that this is such an unbusinesslike proceeding that we ought to draw a sharp distinction, and say that although an ordinary individual can do it, a corporation cannot do it, even though they stand in the same position towards the person whom they defend as an ordinary individual? That would be equivalent to saying that a corporation cannot do it in any ordinary matter of business what everybody else conducting the same kind of business can do. That appears to me to be a proposition which cannot be sustained.

Id. at 277.

18 Godley v. Crandall & Godley Co., 181 App. Div. 75, 78, 168 N.Y. Supp. 251, 254 (1st Dep't 1917), aff'd mem., 227 N.Y. 556, 126 N.E. 908 (1920) (directors, although held personally liable for improper disbursements, had succeeded in reducing the scope of a receivership sought by plaintiff minority shareholders); cf. Esposito v. Riverside Sand & Gravel Co., 287 Mass. 185, 187, 191 N.E. 363, 364 (1934); Kirby v. Schenck, 25 N.Y.S.2d 431 (Sup. Ct. 1941). Where, as is often the case, the same counsel act for both the corporation and the individual defendants, Solomon himself might have difficulty in arriving at a fair allocation of their total fees between the corporation and the directors. Cf. Heller v. Boylan, 29 N.Y.S.2d 653, 694-96 (Sup. Ct.), aff'd mem., 263 App. Div. 815, 32 N.Y.S.2d 131 (1st Dep't 1941). The learned referee in the McCollum case indicated that, in his opinion, situations in which directors could show such benefit to the corporation as to justify its payment of their counsel fees would be exceedingly rare. 173 Misc. at 111, 16 N.Y.S.2d at 849.

19 For example, in the Griess case, in Hollander v. Breeze Corps., 131 N.J. Eq. 585, 26 A.2d 507 (Ch. 1947); aff'd per curiam, 131 N.J. Eq. 613, 26 A.2d 522 (Ct. Err. & App. 1942), and in Apfel v. Auditor, 223 App. Div. 457, 228 N.Y. Supp. 489 (1st Dep't 1928), aff'd mem., 250 N.Y. 600, 166 N.E. 339 (1929), the defendant directors, who controlled the management of the corporations, had authorized the expenditures. In all these cases the courts refused to allow the payment from corporate funds. In each, however, the court seems to have assumed that the payment was simply illegal, although in the Griess case (the only one in which the directors' defense had been successful) there is a suggestion that the result might have been different if a majority of the stockholders had given their approval.
majority of the stock, a vote by that majority should add nothing. In such cases, the courts may have to abandon their traditional reluctance to pass upon questions of business judgment and themselves decide whether indemnification is a reasonably prudent use of corporate funds. On the other hand, a court might well fall back on its familiar policy of nonintervention where payment of expenses which come within the discretionary area has been approved by a majority of disinterested directors or stockholders.

There is obviously a much stronger case for indemnification if it is provided for by some form of previous agreement between the corporation and the director. In practice, after the disturbing decision in the McCollum case, and before the enactment of the legislation hereinafter discussed, many corporations amended their charters or by-laws to authorize the reimbursement of directors for expenses incurred in successfully defending suits.20 There appears to be no case passing squarely upon the validity of such a provision in the absence of statute — although, if reimbursement of even innocent directors for litigation expenses which cannot be shown to have benefited the corporation is illegal at common law, as the Griesse case said and the McCollum case seemed to say,21 it is not easy to see how it could be made any

20 See Hornstein, Directors' Expenses in Stockholders' Suits, 43 COLUM. L. REV. 301, 300-02 (1943); Jervis, Corporate Agreements To Pay Directors' Expenses in Stockholders' Suits, 40 COLUM. L. REV. 1192 (1940). A typical amendment reads substantially as follows:

Any person made a party to any action, suit, or proceeding by reason of the fact that he, his testator, or intestate, is or was a director, officer, or employee of the Corporation or of any corporation which he served as such at the request of the Corporation shall be indemnified by the Corporation against the reasonable expenses, including attorneys' fees, actually and necessarily incurred by him in connection with the defense of such action, suit, or proceeding, or in connection with any appeal therein, except in relation to matters as to which it shall be adjudged in such action, suit, or proceeding that such officer, director, or employee is liable for negligence of misconduct in the performance of his duties.

The foregoing right of indemnification shall not be deemed exclusive of any other rights to which such officer, director, or employee may be entitled apart from the provisions of this section.

The amount of indemnity to which any officer or director may be entitled shall be fixed by the board of directors, except that in any case where there is no disinterested majority of the board available the amount shall be fixed by arbitration pursuant to the then existing rules of the American Arbitration Association.

21 A later New York common-law decision, however, added the significant qualification "in the absence of contract" to the statement that a director who successfully defends against a derivative action cannot require the corporation to reimburse him. Bailey v. Bush Terminal Co., 46 N.Y.S.2d 877, 880 (Sup. Ct. 1943), aff'd mem., 267 App. Div. 899, 48 N.Y.S.2d 324 (1st Dep't), aff'd mem., 293 N.Y. 735, 56 N.E.2d 739 (1944). Presumably the word "contract" was intended
INDEMNIFICATION OF DIRECTORS

less so by a charter or by-laws provision passed by a vote of a mere majority of the stockholders.

The foregoing should sufficiently demonstrate that at common law the extent of a director's right to indemnity for expenses incurred in the defense of actions by or on behalf of the corporation is highly uncertain. Is he any better off when he is sued by third persons for an alleged tort or breach of contract committed in the course of his duties? Rules which are clearer in principle apply to his right to indemnity in such circumstances, but a reading of the cases, even when statutory complications are put to one side, leaves one in some doubt as to the practical value of his remedies, should the corporation refuse to reimburse him.\(^2\)

When a director acts for his corporation in dealing with outsiders, the relationship between him and the corporation is that of principal and agent. It is well established that there is an implied promise on the part of a principal to indemnify his agent for losses which are the "direct and natural consequence of the execution of the agency" — including not only counsel fees expended in litigation based on such acts, but damages which an agent acting in good faith may be compelled to pay third persons upon a determination that his conduct was wrongful.\(^3\) The rule should be no less applicable because the principal happens to be a corporation and the agent one of its directors or officers; and in fact it has frequently been stated, though not so frequently applied, where the principal and the agent bore these characters.\(^4\)

to include a charter or by-law provision. Cf. Schwarz v. General Aniline & Film Corp., 305 N.Y. 395, 404–05, 113 N.E.2d 533, 537 (1953) (concurring opinion).

\(^2\) It is probable that in most cases in which the allegedly wrongful acts were done by the individual in the ordinary course of business, so that the interests of the corporation are directly involved, the corporation will be willing to reimburse the individual for expenses which he has borne, and no litigation will result. See New York Law Revision Commission, Report, LEGIS. Doc. No. 65 (E), at 20 (1945). There is no doubt as to the propriety of reimbursement in such circumstances. See p. 1067 infra.

\(^3\) See, e.g., Standard Galvanizing Co. v. Commissioner, 202 F.2d 736 (7th Cir. 1953).

\(^4\) See, e.g., Standard Galvanizing Co. v. Commissioner, 202 F.2d 736 (7th Cir. 1953).
The difficulty, of course, is to apply the rule to particular situations — specifically, to find a causal connection between the authorized execution of the agency and whatever legal difficulty the agent gets into. It is probably merely coincidence that in the two principal cases in which directors have sought to invoke the rule against reluctant corporate principals, the courts have refused to find such a connection. In Du Puy v. Crucible Steel Co.,\(^2\) the plaintiff, who was chairman of the defendant's board of directors, was indicted for conspiracy to defraud the Government in the filing of the corporation's income tax returns. Having been tried and acquitted, he sued the corporation to recover the fees he had paid to the eminent and expensive counsel who defended him. Although he alleged his innocence and his acquittal, the court seized on his failure to allege specifically that the returns were correct (or at least honest) as ground for a holding that the complaint did not show the plaintiff's prosecution to be a direct and natural consequence of the execution of his agency which was to file proper returns. In Hoch v. Duluth Brewing & Malting Co.,\(^2\) the plaintiff, who was the president and a director of the defendant corporation, took title to certain land as security for a debt owed the corporation. Many years later, after the debt had been paid and the land reconveyed, the United States, asserting that the original patent to the land had been secured by fraud, brought a civil action for damages against everyone in the chain of title, including the plaintiff. The Government was nonsuited, and the plaintiff attempted to recover his counsel fees from the corporation. Again, the court refused to find a causal relation between the execution of the agency and the agent's loss — this time on the ground that the loss was caused by "the independent and unexpected wrongful act of the United States, for which the defendant was in no wise responsible."\(^2\) The correctness of both of these decisions is open to serious question;\(^2\) but there they are, and the


\(^{2}\) 288 Fed. 583 (W.D. Pa. 1923).

\(^{26}\) 173 Minn. 374, 217 N.W. 503 (1928).

\(^{27}\) Id. at 378, 217 N.W. at 504.

\(^{28}\) The cases seem to go on a theory that the third party's suit must be a probable and foreseeable consequence of the execution of the agency, rather than merely a direct consequence. Carried to its logical extreme, this reasoning would lead to the result that a completely innocent agent can never be entitled to indemnification. In D'Arcy v. Lyle, 5 Binn. 441 (Pa. 1813), a favorite of the Emperor Christophe of Haiti asserted an unjust claim against the principal, which the agent was compelled
raised eyebrows of legal commentators are not likely to offer much reassurance to a corporate director who finds himself in a similar situation.

On the other hand, in the absence of fraud, there would seem to be little reason for a court to upset a corporation’s voluntary decision to indemnify a director against the cost of defending and, if need be, settling or satisfying a judgment in a suit by a third party based on acts performed by the director within the scope of his authority and on the corporation’s behalf; and the few cases which have considered the matter have taken this view. One New York case, in fact, upheld, against the complaint of a minority stockholder, the corporation’s decision to finance the unsuccessful defense of some of its officers and directors in a criminal antitrust proceeding and even its decision to pay the fines of two who had pleaded nolo contendere.29 The court did so, however, not by applying the indemnification rule of the law of agency, but by reasoning that the interests of the individual defendants and the corporation (which was also a defendant) were so closely bound up that the corporation defended itself in defending them. In a recent tax case, a federal court of appeals concluded that payment of a corporate officer’s expenses in pending litigation arising out of his activity as the corporation’s agent in floating a loan was a proper business expense, on the theory that otherwise the director might very well sue the corporation on the agency theory and at least force the corporation to pay expensive fees in the defense even if it were successful.30

It should be noted that the ordinary charter or by-laws provisions for indemnification may complicate rather than simplify the director’s problem, so far as third-party litigation is concerned. Although aimed at suits based on asserted wrongs to the corpora-

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30 Standard Galvanizing Co. v. Commissioner, 202 F.2d 736 (7th Cir. 1953).
The first part of this article should make it clear that the common law governing a director's right to indemnification for costs is or was a director, officer, or employee of the Corporation . . . .” 31) may be broad enough to cover also suits based on allegedly wrongful acts committed in the corporation's behalf and in the course of the director's duties; and practically all such provisions either in substance except from their scope expenses in connection with an action in which the director is adjudged guilty of negligence or misconduct, or affirmatively prohibit indemnification in such a case. This is fair enough where the director is found to have been delinquent in his duties to the corporation; but it may be most unfair in the third-party situation. Suppose, for example, that an officer who has diligently and in good faith implemented a corporate policy which turns out to be a violation of the anti-trust laws, finds himself, as a result, liable for a substantial fine and an even more substantial lawyer's bill. He has been adjudged guilty of misconduct vis-à-vis the Government, but not as to his corporation. If there were no indemnity provision in its charter, the corporation would probably be free to pay his counsel fees and even his fine, certainly if its interests were so closely related to his that it could be said itself to derive benefit from his defense.32 It could persuasively be argued that, since he acted as the corporation's agent for the performance of acts which he did not know to be illegal and which were not manifestly so, the corporation is under an obligation to make him whole. But if the charter explicitly prohibits indemnification for expenses in connection with an action in which the officer is held liable, indemnification might be ultra vires. Most such provisions also state in substance that the right of indemnification which they confer is not exclusive of any other right which the director may have in a court of law. Such a proviso may save whatever rights the director may have under the law of agency; but if those rights are based on a theory of implied contract the implication of such a contract is assuredly not facilitated by an express provision to the contrary in the corporate articles or by-laws.

II. STATUTORY REGULATION

The first part of this article should make it clear that the common law governing a director's right to indemnification for costs

31 See note 20 supra.
of litigation is a welter of confusion. After the McCollum case had, as it were, focused the confusion, there was a not unnatural cry for legislation. So far, about a third of the states have heeded that cry. 33 The trouble is that the director's lawyer who turns to an examination of these statutes, and the cases construing them, may find two new uncertainties for every old one that has been laid to rest.

Basically, the statutes are of two types, although they present a somewhat bewildering variety of detail. The commoner type simply provides that the corporation shall have power to indemnify in certain cases, or that it may, by action of its stockholders, make such provision in its charter or by-laws; 34 the others grant to directors, officers, or employees a right to indemnification in certain cases. 35 New York is one of a small number of states which have both types. Because the New York statutes, 36 constituting article 6-A of the General Corporation Law, are fairly typical and because recent decisions of the courts have raised some difficult questions under them, this article is concentrated on the law of that state.

The operative provisions of the statutes are set forth in two sections. Section 63 authorizes the indemnification by the corporation of directors, officers, and employees for expenses incurred in defending against actions brought by reason of their corporate office, unless they are adjudged liable for negligence or misconduct in the performance of their duties; the indemnification may be provided for by the certificate of incorporation, an amendment to that certificate, another certificate filed pursuant to law, the by-laws, or a resolution in a specific case. The right is not exclusive of other rights apart from the statute. 37

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33 The statutes are comprehensively and competently surveyed in Coniment, 52 Mich. L. Rev. 1023 (1954).
37 Section 63 provides in part:

The certificate of incorporation of a corporation or, when adopted by a vote of the holders of record of a majority of the outstanding shares at the time entitled to vote for the election of directors . . . a certificate of amendment to the certificate of incorporation, or other certificate filed pursuant to law, or the by-laws, or a resolution in a specific case, may provide that any person made a party to any action, suit or proceeding by reason of the fact that he, his testator or intestate, is or was a director, officer or employee of the corporation or of any corporation which he served as such at the request of
supplements the previous section by providing a right to have the expenses assessed against the corporation. Section 67 then defines the extent of the court’s jurisdiction to award expenses.

The extent to which the provisions of section 63 limit the freedom of a corporation to provide for indemnification is very far from clear. A majority of the New York Court of Appeals recently said that the section is a “regulation of the exercise of a common-law right of freedom of contract and is merely declaratory thereof”; but the Attorney General of New York has ruled that a charter provision which provides a broader right of indemnification than that spelled out in section 63 cannot be filed. This ruling appears questionable in the light of the decision in Schwarz v. General Aniline & Film Corp. The court of appeals held in that case that the words “any action, suit or proceeding” in section 64 do not include a criminal action. But a majority of the court also stated very explicitly that the corporation was free

the corporation, shall be indemnified by the corporation against the reasonable expenses, including attorney’s fees, actually and necessarily incurred by him in connection with the defense of such action, suit or proceeding, or in connection with any appeal therein, except in relation to matters as to which it shall be adjudged in such action, suit or proceeding that such officer, director or employee is liable for negligence or misconduct in the performance of his duties. Such right of indemnification shall not be deemed exclusive of any other rights to which such director, officer or employee may be entitled apart from this statute.

Section 64 provides:

Any person made a party to any action, suit or proceeding by reason of the fact that he, his testator or intestate, is or was a director, officer or employee of a corporation shall be entitled to have his reasonable expenses, including attorneys’ fees, actually and necessarily incurred by him in connection with the defense of such action, suit or proceeding, and in connection with any appeal therein, assessed against the corporation or against another corporation at the request of which he served as such director, officer or employee, upon court order . . . except in relation to matters as to which it shall be adjudged in such action, suit or proceeding that such officer, director or employee is liable for negligence or misconduct in the performance of his duties.

In essence, the court must find that the applicant has been successful in whole or in part, or that the action has been settled with the approval of the court; and it can make no award if indemnification is inconsistent with the law of the state of incorporation, or any action of stockholders antedating and effective at the time of the accrual of the alleged cause of action, or any condition imposed by the court in connection with a court-approved settlement.

The court of appeals in that case held in Schwarz v. General Aniline & Film Corp., 305 N.Y. 395, 405, 113 N.E.2d 533, 537 (1953) (concurring opinion). The charter in question would have authorized indemnification for expenses incurred in a settlement not blessed with court approval and would have excepted only cases in which the director or officer was adjudged guilty of “wilful misfeasance or malfeasance in the performance of his duties,” rather than the statutory formula of “negligence or misconduct.”
to authorize reimbursement in its charter or by-laws "and to include specifically not only civil but criminal actions." 48 Unless we are to suppose that the court interpreted the words "any action, suit or proceeding" to include criminal actions in one section, but to exclude such actions in the very next section, enacted at the same time, we can only conclude that the court of appeals, unlike the Attorney General, thinks a corporation can contract for a broader right of indemnity than that specified in section 63. Moreover, such a contract would seem to be sanctioned by that section's provision that "such right of indemnification shall not be deemed exclusive of any other rights to which such director . . . may be entitled apart from this statute." Former section 27-a of the General Corporation Law, 44 which section 63 was supposed to refine and improve, saved "any other rights to which he [a director] may be entitled, under any by-law, agreement, vote of stockholders or otherwise." However anomalous may be a statutory recognition of the possibility of indemnity provisions broader than those which the statute was thought necessary affirmatively to sanction, that seems to be the plain intent of the clause. And the substitution of the very broad phrase "apart from this statute" could hardly have been intended to narrow the scope of the saving clause.

If it were thought that a corporation's freedom to contract for the indemnification of directors is comprised within the four corners of section 63, serious problems might be posed. Not, to be sure, with respect to expenses in connection with actions by or on behalf of the corporation, for a wrong to it. In such cases, the statutory limitation — no reimbursement "in relation to matters as to which it shall be adjudged in such action, suit or proceeding that such officer, director or employee is liable for negligence or misconduct in the performance of his duties" — is essentially consistent with the policy adopted by most corporations prior to the statute and with sound public policy. A caveat may perhaps be entered as to the situation in which the director's defense, although unsuccessful, has incidentally benefited the corporation,

48 In the concurring opinion of Carswell, J., in which the other members of the majority concurred. Id. at 405, 113 N.E.2d at 537. However, it is reported that the New York Secretary of State, acting on the advice of the Attorney General, will not accept for filing a charter provision which authorizes indemnification for expenses in connection with criminal actions. See Scott, Developments in Corporate Law, The Business Lawyer, July 1955, p. 33 n.5.
as by avoiding or limiting the scope of receivership; it is doubtful whether section 63 would sanction any reimbursement in such a situation, unless it could be argued that such aspects of the litigation, i.e., those which may adversely affect the corporation unless successfully defended against by the director, are distinct from matters as to which the director may be adjudged liable. The language of the exception, when read in conjunction with section 65, which permits application to the courts for reimbursement under a charter or by-law provision, and section 67, which permits the court to make an award if the applicant was successful “in whole or in part,” seems clearly to permit differentiation between charges as to which a director is held liable and other charges in the same litigation as to which he is exonerated.

Potential complications under section 63 arise from the possibility of its application to suits, not by or on behalf of the corporation, for wrongs to third parties committed by the director or officer in the authorized execution of his duties to the corporation. Although the juxtaposition of article 6-A to article 6, which deals entirely with breach of the director’s duties to the corporation, shows clearly enough that the legislature was concerned primarily with the latter type of proceeding, the language of the


46 Cf. Cohn v. Columbia Pictures Corp., 117 N.Y.S.2d 809, 814 (Sup. Ct. 1952). However, a decision of the New York Supreme Court under former § 61-a of the General Corporation Law, N.Y. Sess. Laws 1941, c. 350, § 1 (the forerunner of present § 64), refused to assess against the corporation any part of the counsel fees of directors who had been largely, but not entirely, successful in their defense, even though that statute explicitly provided that if such parties should be successful only in part their expenses should be assessed against the corporation in whatever amount the court thought reasonable. Drivas v. Lekas, 182 Misc. 567, 48 N.Y.S.2d 785 (Sup. Ct. 1944). The court apparently proceeded on the theory that the statute did not entitle even wholly successful defendant directors to reimbursement unless they could show benefit to the corporation. The present statute at least make clear that such benefit is not a condition precedent to an innocent director’s right to indemnity.


Directors, officers or employees of corporations may, by virtue of their office or employment, be named as defendants in various sorts of actions or proceedings. Broadly speaking, these are of two types: (1) where it is sought to hold an official liable personally or with the corporation for something done or omitted to be done in the course of his duty; (2) where the gravamen of the action or proceeding is something done or omitted to be done which, it is claimed, was not in the ordinary course of business and therefore constitutes a breach of duty to the corporation, to stockholders, or perhaps to governmental authority.
statute draws no distinction between the two types of litigation and, indeed, specifically applies to one sort of third-party action: that which results from service, at the request of the corporation, as a director, officer, or employee of another corporation. A standard which is appropriate where the corporation itself is the aggrieved party, i.e., no indemnification if the director is adjudged liable for misconduct in the performance of his duties, is not well adapted to a situation in which the action complained of not only was not directed against the corporation, but was taken for its benefit and under its authority. There are as yet no cases involving the application of section 63 to situations in which a director, although found liable to third persons, is yet guilty of no dereliction in his duties to his corporation. It may reasonably be doubted that it was the intention of the legislature to preclude reimbursement in circumstances like those of Simon v. Socony-Vacuum Oil Co. 48 or Du Puy v. Crucible Steel Co.; 49 but it is to be feared that the legislature’s failure clearly to limit section 63 to the type of litigation covered by article 6 — that which is based on derelictions of duty to the corporation — has considerably muddied the waters.

Similar questions, in possibly more acute form, present themselves under section 64. 50 Unlike section 63, it contains no provi-

\[\text{In actions of the first type, it would seem that if individual defendants are required in the first instance to assume the expenses of their own defense, the corporation may properly reimburse them. We are here concerned with actions or proceedings of the second type.}\

The commentator’s mention of a breach of duty to governmental authority probably had reference to failure to comply with the corporation laws. A violation of the antitrust or revenue laws would appear to belong in his first category, for the director can hardly be said to have any fiduciary obligation to the government and certainly is not seeking indemnification from it.


50 This provision appears in terms to be mandatory; i.e., if a defendant director meets its requirements, a court has no discretion to refuse to assess against the corporation his reasonable expenses, even where his moral right to indemnification is far from clear. See Austrian v. Williams, 120 F. Supp. 900, 904-05 (S.D.N.Y. 1953), rev’d in part on other grounds, 216 F.2d 278 (2d Cir. 1954), cert. denied, 348 U.S. 953 (1955) (expenses awarded where there was “more than probable cause” for bringing suit against directors, who escaped liability “only because of the Statute of Limitations”). On the other hand, the New York Court of Appeals has since held tantamount to an adjudication of a defendant director’s misconduct under § 64 a dismissal of a stockholder’s complaint on the sole ground that the plaintiff was estopped by her own participation with the defendant in a conspiracy to mulct the corporation. Diamond v. Diamond, 307 N.Y. 263, 120 N.E.2d 819 (1954). Three judges dissented.
sion saving whatever rights the director might have independently of the statute; like section 63, its language draws no distinction between suits in the right of the corporation and suits by third parties.\textsuperscript{51} Moreover, the fact that the impact of its predecessor, former section 61-a,\textsuperscript{52} was limited in terms to suits "brought by the corporation, or brought in its behalf by a receiver or trustee or by one or more stockholders or creditors or officers or directors of such corporation" might ground an argument that the broadening of the language was intended to comprehend third-party suits. More probably, however, the change is attributable to the fact that, whereas section 64 relates only to a defendant's right to indemnification, section 61-a also governed the right of a successful plaintiff to have his expenses paid out of the corporate fisc and so had to be particular in its description of eligible parties plaintiff.\textsuperscript{53}

While the ambiguity of the language of section 64 may be explained away, as yet no one seems to have suggested that the section is inapplicable to the third-party situation. A case in point is \textit{Schwarz v. General Aniline & Film Corp.},\textsuperscript{54} the facts of which closely paralleled those of the \textit{Simon} case. The Government had secured an indictment, under section 1 of the Sherman Act,\textsuperscript{55} of the corporation and a number of its officers and directors, including Schwarz. Schwarz, maintaining his innocence, retained personal counsel. After substantial legal expenses had been incurred, he accepted his counsel's advice to curtail further expenses by pleading \textit{nolo contendere} and was fined $500. Upon application to the corporation for reimbursement of his expenses, he was told that the corporation did not "feel authorized to do so without an order of the court."\textsuperscript{56} Subsequently he applied to the supreme court for an order assessing expenses under article 6-A; it does not seem to have occurred to either party that the corporation might

\textsuperscript{51} The application of the equivalent Pennsylvania statute is limited to suits brought in the right of the corporation. \textit{Pa. Stat. Ann. tit. 12, §§ 1321-23 (Purdon 1952).} But the California statute seems to be explicitly applicable to third-party actions — and it is, also explicitly, exclusive. \textit{Cal. Corp. Code Ann. § 830 (Deering 1953).}

\textsuperscript{52} \textit{N.Y. Sess. Laws 1941, c. 350, § 1.}

\textsuperscript{53} See New York Law Revision Commission, \textit{Report, Legis. Doc. No. 65 (E), at 31 (1945).}

\textsuperscript{54} \textit{305 N.Y. 395, 113 N.E.2d 533 (1953).}

\textsuperscript{55} \textit{26 Stat. 209 (1890), as amended, 15 U.S.C. § 1 (1952).}

\textsuperscript{56} \textit{305 N.Y. at 398-99, 113 N.E.2d at 534.}
be empowered, not to say obligated, to reimburse him on the common-law doctrine that a principal is bound to reimburse his agent for losses resulting from the execution of the agency. Both lower courts refused the order on the ground that Schwarz had been adjudged liable for "misconduct in the performance of his duties." 57

The court of appeals found it unnecessary to decide whether a plea of nolo contendere is equivalent to an adjudication of misconduct; it threw the case out on the ground — probably correct, as far as it went — that the legislature had not intended article 6-A to apply to criminal proceedings. But it seems to have held such proceedings outside the scope of article 6-A not because they were third-party proceedings, but because they were criminal, whereas "the Legislature was thinking of, and legislating about, civil causes only." 68 The inference is that the result might have been quite different if Schwarz had run up his legal bills in a civil antitrust proceeding. 59 Nowhere either in the opinions of the lower courts or in those of the majority or dissent in the court of appeals is there any suggestion that the plaintiff might have had a common-law remedy which was neither dependent upon nor limited by article 6-A. It is true that the courts were under no obligation to pass upon a contention which the pleadings failed to raise, and the actual holding of the court of appeals is limited to the statement that "court-mandated reimbursement, under article 6-A, can never be had as to expenses of one defending himself against criminal charges . . . ." 60 Nevertheless, the case is all too likely to be cited for the broad proposition that a director has no right to recover from the corporation the expenses of defending himself against criminal charges, and it is likely to distract the attention of directors and counsel from the theory upon which recovery in such cases ought to be predicated: that the director, as the corporation's agent for the carrying out of policies, not manifestly illegal, nor known to the director to be so,

58 305 N.Y. at 402, 113 N.E.2d at 536.
59 Or so the three dissenting judges thought when they said that "the basic flaw in the majority's reasoning . . . stems from a faulty assumption of an essential difference between the criminal and the civil in the area of antitrust regulation." Id. at 410, 113 N.E.2d at 540.
60 Id. at 403, 113 N.E.2d at 536.
which got it and him into trouble with the Government, is entitled to be made whole by his principal.

The *Schwarz* case raised, and ultimately left unanswered, another serious question: the meaning of the statutory words "negligence or misconduct in the performance of his duties." To revert to the example given at the beginning of this article, the authorization of campaign expenses incurred in the course of a proxy fight, a careful reading of the majority, concurring, and dissenting opinions in *Rosenfeld v. Fairchild Engine and Airplane Corp.* should convince any observer that a thoroughly upright director, consulting learned counsel at every step, may yet find himself liable for failure to comply with the exasperatingly vague standards laid down in that case:

In a contest over policy, as compared to a purely personal power contest, corporate directors have the right to make reasonable and proper expenditures, subject to the scrutiny of the courts when duly challenged, from the corporate treasury for the purpose of persuading the stockholders of the correctness of their position and soliciting their support for policies which the directors believe, in all good faith, are in the best interests of the corporation.  

Let us put ourselves in the position of A and B, incumbent directors of a corporation with a seductive surplus, faced with a challenge by C, who wants to control the corporation. C, via direct mail solicitation, newspaper ads, and any other techniques he can afford, promises higher dividends to the stockholding electorate and denounces A and B as mossbacks. A and B sincerely believe that C is a pirate whose only objective is to drain the surplus into his own pockets. In alarm, they reply by hiring costly public relations counsel and bombarding the stockholders with counter-propaganda. Is this a "contest over policy" or a "purely personal power contest"? The "policies" as against "personalities" test seems nearly meaningless; no one seeking to overturn existing management would identify himself with its policies. Is a full-page, or a quarter-page, newspaper ad a "reasonable and proper" expenditure? A television broadcast? The answers lie in the womb of future "judicial scrutiny." The point is that, although it is quite possible that a court will ultimately find some of A's and B's expenditures improper, A and B, acting in the sincere

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62 Id. at 173, 128 N.E.2d at 293.
belief that the expenditures are necessary to avert corporate catastrophe, are certainly not guilty of negligence or misconduct, in any ordinary sense of those terms. They cannot, surely, be termed negligent for inability to peer far enough into the Fairchild decision's crystal ball. By hypothesis, they acted in what they conceived to be the corporation's best interest. Even if they cannot be altogether relieved from liability, they ought at least to recover the counsel fees which they have expended in litigating the question of propriety.

In this welter of uncertainty, corporations and their directors may deem it prudent to consider express contracts of indemnification, covering expenses in connection with criminal proceedings and actions by third parties which are based on the individual's authorized performance of an act, not known to be illegal nor manifestly so, in the course of his duties, and excluding only matters as to which he is adjudged liable for negligence or willful misconduct in the performance of his duties to the corporation. Such a contract, as to third-party actions, would do no more than put into writing the implied contract which the common law considers to exist between principal and agent. There appears to be no case striking down such a contract and, despite the anomaly inherent in permitting a corporation to do by simple contract what, according to the Attorney General of New York, it could not do by an amendment to its charter, approved by its stockholders, the saving clause in section 63 and the above-quoted dicta in the Schwarz case are strong indications that such a contract would be upheld.

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63 See Van Voorhis, J., dissenting from the appellate division's decision in the Schwarz case, 279 App. Div. at 998, 112 N.Y.S.2d at 149-50: "The term 'misconduct' as employed in section 64 of the General Corporation Law . . . refers to something done with wrongful intent in derogation of the interests of the corporation."

64 Cf. Companies Act, 1948, 11 & 12 Geo. 6, c. 38, § 448(1), which provides that:

(1) If in any proceeding for negligence, default, breach of duty or breach of trust against an officer of a company . . . it appears to the court hearing the case that that officer . . . is or may be liable in respect of the negligence, default, breach of duty or breach of trust, but that he has acted honestly and reasonably, and that, having regard to all the circumstances of the case, including those connected with his appointment, he ought fairly to be excused for the negligence, default, breach of duty or breach of trust, that court may relieve him, either wholly or partly, from his liability on such terms as the court may think fit.

Companies Act, 1948, 11 & 12 Geo. 6, c. 38, § 455(1) defines "officer" to include a "director, manager or secretary."

65 N.Y. ATT'Y GEN. ANN. REP. 182 (1953). See note 41 supra.
Reinforcement for this view is found in the opinion of the United States Court of Appeals for the Third Circuit in *Mooney v. Willys-Overland Motors, Inc.*,66 applying the law of Delaware. The Delaware statute67 is one of those which specifically confer upon corporations power to indemnify directors and officers against the expense of successfully defending litigation, without specifying any particular method of exercising the power. It also provides that "such indemnification shall not be deemed exclusive of any other rights to which those indemnified may be entitled, under any by-law, agreement, vote of stockholders, or otherwise." Willys had a by-law, cast in somewhat broader terms than the statute. Mooney, the corporation's president, entered into a contract with it, terminating his employment and settling various claims against it, which provided, *inter alia*, that the company would indemnify him for his expenses in connection with a then-pending minority stockholders' suit in which he was named as a defendant. When Mooney, having secured the dismissal of the complaint against him, passed on to the corporation his lawyer's bill, the corporation rejected his claim, arguing that Mooney had not been sued by reason of having been an officer of Willys but for wrongful acts as a controlling stockholder; that he was therefore not within the class of persons to whom indemnity might be given under the Delaware statute and Willys' by-law; that the statute and by-law controlled claims for indemnity to the exclusion of all other arrangements; and that the contract, if it gave a broader right of indemnification than the by-law, was ultra vires. But the court said:

Broadly speaking, the matter of indemnification of corporate officers and directors for litigation expenses is one with which the numerous share-holding member [*sic*] of the public and the state and federal regulatory-agencies are properly concerned. But that concern is with the types of corporate employees and advisors who are made indemnifiable, and with the extent to which indemnification is carried, e.g., should it extend to settlements, or to any cases in which the persons seeking indemnification are found liable? We think that Delaware Corporation Law § 2(10) and Willys' By-Law XXIII have met the requirements of public policy by the realistic limits they set upon the right of indemnification. We do not think that public policy requires that the Delaware statute be construed

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66 204 F.2d 888 (3d Cir. 1953).
67 DEL. CODE ANN. tit. 8, § 122(10) (1953).
as controlling every conceivable situation which in one aspect may be called indemnification for litigation expenses, any more than the policy of ultra vires should be applied to invalidate those other payments under the contract which, except for the contract, would be gifts. Where there exists, as there does here, an independent ground for the payment of litigation expenses, we see no reason to make an overriding reference to the statute.

We see no danger here of encouraging non-meritorious claims for indemnification outside the by-law and the statute. An independent legal ground... must be shown in every case.

The last-quoted paragraph leaves one in some doubt as to what the court would have done had the litigation involved, and the contract provided for, reimbursement for the costs of an unsuccessful defense. The reference to meeting the requirements of public policy by setting realistic limits on the right to indemnification seems to imply that the court might have voided, as against public policy, an agreement to reimburse a director who had been adjudged liable for negligence or misconduct. But the reference to the possibility of showing an "independent legal ground" for a claim outside the scope of the statute reopens the question. The practical importance of the ambiguity is probably not great. The case did not involve, and the court clearly did not have in mind, litigation by third parties based on allegedly wrongful acts in the corporation's behalf; and it is primarily in that situation that a corporation might be morally or legally obligated to reimburse a director whose defense was unsuccessful.

In general, it may be said that, at least in New York, corporate directors who have reason to anticipate involvement in the factual situations discussed in this article will do well not to place too much reliance upon the statutory panacea. At least until such time as a coherent pattern of judicial decision begins to manifest itself, or the legislature tinkers further with article 6-A, the director's best protection will probably continue to lie in carefully drawn charter or by-law provisions, perhaps supplemented in special cases by ad hoc contracts.

68 204 F.2d at 896.
69 Cf. Companies Act, 1948, 11 & 12 Geo. 6, c. 38, § 205, which in substance makes void any charter or contract provision purporting to indemnify an officer or director against liability based on "negligence, default, breach of duty or breach of trust of which he may be guilty in relation to the company." On the problem of indemnification against liability under the various federal statutes regulating securities, see Loss, SECURITIES REGULATION 1089 (1951).