

## 2009 Updates to Delaware General Corporation Law - Part 1: Enhanced Protection for Directors

April 28, 2009

Effective August 1, 2009, Delaware has amended section 145(f) of the Delaware General Corporation Law to address the problem created by the Delaware Chancery Court's recent decision in *Schoon v. Troy Corp.*, 948 A.2d 1157 (Del. Ch. 2008).

In *Schoon*, a former director sought advancement expenses under the corporate by-law provision in place during his tenure on the board and existing at the time of the act in question. However, prior to the commencement of the action against the former director, the company's board amended that by-law provision such that former directors were no longer entitled to advancement of expenses. The Chancery Court found that the advancement rights claimed by the former director vested only upon the commencement of the suit against him, and therefore any rights would be determined by the corporate documents in effect at the time of the suit. Deciding that the by-law amendment was valid, the Court concluded that the former director was not entitled to advancement of his litigation expenses.

(It may be worth noting that the holding in *Schoon* would almost certainly not have affected an indemnification contract between a director and the corporation, which helps explain the rise in such contracts in recent years.)

The change to section 145(f) is intended to overturn this holding of *Schoon*, thereby creating a new default rule regarding indemnification and advancement rights. The statute now explicitly prohibits the elimination or impairment of any indemnification and advancement rights provided in the corporation's charter and by-laws once the act or omission in question has occurred. Indemnification and advancement rights could only be eliminated or impaired retroactively where the by-law or charter provision, existing at the time of the act or omission in question, expressly authorized such elimination or impairment.

As a result, unless corporate documents provide for the elimination of this "vested" right, directors, officers and other persons entitled to indemnification or advancement of expenses can more comfortably rely on the protections existing at the time of their act or omission without concern that such protections will later be eliminated or impaired.

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