FLEXIBILITY UNDER DELAWARE LAW IN DRAFTING ADVANCEMENT PROVISIONS ON A "CLEAR DAY," AND POTENTIAL SURPRISES FOR THOSE WHO DO NOT TAKE ADVANTAGE OF THAT FLEXIBILITY

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I. INTRODUCTION

Probably well-known is that Delaware law — both statutory and decisional — provides flexibility in drafting various contract provisions that are intended to control the governance relationships between Delaware-formed business entities, their owners, and their managers. Indeed, Delaware business entity law has been described as "contractarian."[1]

What may be less well-known is the *extent* of that drafting flexibility. What also may be less well-known is the critical importance of exercising that drafting on a "clear day," that is, before a dispute arises. Or, to borrow from Latin, "*ex ante*."

In a day and age of potential statutory, regulatory, and/or common law liability for corporate directors and officers — or for managers of unincorporated business entities — timely and effective drafting of advancement and indemnification provisions has assumed special significance. Appropriate attention to such drafting flexibility can result in advancement and indemnification as narrow or as broad as may be intended. Conversely, disregard of that flexibility can result in a rude awakening for claimants or for the responding business entity, surprised by what may be the unintended scope of advancement and indemnification protection. And, at that juncture, the parties likely will be unable to compel judicially a different outcome.

This article seeks to help the reader avoid traps for the unwary, whether the trap is for the current or former business manager or for the business itself. It does so by highlighting the expansive drafting flexibility that Delaware law affords and then discussing when that drafting must occur in order for it to be effective.

II. DRAFTING FLEXIBILITY — FROM STATUTORY AND DECISIONAL LAW

A. Statutory Scheme

Title 8 of the Delaware Code, the Delaware General Corporation Law or the "DGCL," is largely enabling in nature. Thus, time and again, the DGCL permits contracting shareholders, directors, or officers to shape their corporate relationships.[2] Delaware statutes addressing unincorporated business entities — such as partnerships, limited partnerships, and limited liability companies — are to the same effect, embracing freedom of contract.[3]

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1. *E.g.*, David Rosenberg, *Making Sense of Good Faith in Delaware Corporate Fiduciary Law: A Contractarian Approach*, 29 Del. J. Corp. L. 491, 491 (2004) ("Delaware is the most contractarian jurisdiction [.]").

2. Jones Apparel Grp. v. Maxwell Shoe Co., 883 A.2d 837, 845 (Del. Ch. 2004) (noting that "Delaware's corporate statute is widely regarded as the most flexible in the nation because it leaves the parties to the corporate contract (managers and stockholders) with great leeway to structure their relations, subject to relatively loose statutory constraints and to the policing of director misconduct

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This theme permeates provisions that address advancement (or advance indemnification) of defense expenses as well as end-of-the-matter indemnification of such expenses. Thus, Section 145(e) of the DGCL permits — but does not require — advancement of defense expenses, and Section 145(a) and (b) of the statute permit — but do not require — indemnification.[4] (Indemnification only is required when, pursuant to Section 145(c) of the DGCL, the claimant has been successful on the merits or otherwise in defending all or a portion of a civil or criminal proceeding.)[5] Other Delaware statutes, addressing unincorporated entities, likewise permit, but do not require advancement or indemnification.[6]

Which brings us to Section 145(f) of the DGCL, the so-called "non exclusivity" provision. That statutory subsection provides in part:

> The indemnification and advancement of expenses provided by, or granted pursuant to, the other subsections of this section shall not be deemed exclusive of any other rights to which those seeking indemnification or advancement of expenses may be entitled under any bylaw, agreement, vote of stockholders, or disinterested directors or otherwise, both as to action in such person's official capacity and as to action in another capacity while holding such office.[7]

Delaware case law, addressed below, has confirmed that, with very few exceptions, parties are free to expand *or narrow* the corporate advancement and indemnification protections otherwise potentially afforded by Section 145 of the DGCL. Case law addressing "alternative entities" has been to the same effect.

B. Decisional Law

Delaware courts have made clear that parties may exercise drafting flexibility in expanding or narrowing the scope of advancement and indemnification protection.

Historically, most typical have been provisions in governing documents that have made advancement and/or indemnification "mandatory."[8] Thus, advancement has been conditioned only upon a claimant tendering an unsecured

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through equitable review"); *see also* Edward P. Welch & Robert S. Saunders, *Freedom and its Limits in the Delaware General Corporation Law*, 33 Del. J. Corp. L. 845, 848-55 (2008) (summarizing DGCL enabling provisions found in Sections 102(b)(1), 141(a), 141(d), 151(a), 212, 102(b)(7), and 122(17)).

3. Delaware Revised Uniform Partnership Act, Del. Code Ann. tit. 6, § 15-103(d) ("It is the policy of this chapter to give maximum effect to the principle of freedom of contract …"); Delaware Revised Uniform Limited Partnership Act, Del. Code Ann. tit. 6, § 17-1101(c) (same); Delaware Limited Liability Company Act, Del. Code Ann. tit. 6, § 18-1101(b) (same).

4. Del. Code Ann. tit. 8, § 145(e); Del. Code Ann. tit. 8, § 145(a), (b).

5. Del. Code Ann. tit. 8, § 145(c).

6. Del. Code Ann. tit. 6, §§ 15-110, 17-108, 18-108.

7. Del. Code Ann. tit. 8, § 145(f).

8. Homestore, Inc. v. Tafeen, 888 A.2d 204, 212 (Del. 2005) ("The advancement authority conferred by section 145(e) is permissive. Nevertheless, mandatory advancement provisions are set forth in a great many corporate charters, bylaws and indemnification agreements.").

"undertaking" (a promise to repay amounts advanced if it later is determined that the claimant is not entitled to indemnification).[9] And indemnification often has been assured "to the fullest extent permitted by law."[10]

At the other end of the spectrum, Delaware decisions have suggested the possibility of a corporation doing away with advancement altogether or in any event cutting off advancement after a criminal conviction or a finding of civil liability and before appeal.[11] In addition, numerous decisions have embraced conditions on advancement such as (i) providing security or (ii) providing an affirmation that the claimant's underlying conduct would satisfy the requirements for indemnification under Section 145(a) or (b) of the DGCL.[12]

Likewise, Delaware courts have suggested that a corporation may require a claimant to make a pre-suit "demand" on the corporation's board as a condition of indemnification.[13]

But *all* decisions underscore the importance of the *timing* of the drafting of such provisions.

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9. *E.g.*, Xu Hong Bin v. Heckman Corp., C.A. No. 4802-CC, 2010 Del. Ch. LEXIS 3, at *5 & n.7 (Del. Ch. Jan. 8, 2010) (noting that the following language provided mandatory advancement rights: "The expenses of officers and directors incurred in defending the civil suit or proceeding must be paid by the corporation as incurred and in advance of the final disposition of the actions, suit or proceeding, under receipt of an undertaking by or on behalf of the director or officer to pay the amount if it is ultimately determined by a court of competent jurisdiction that he or she is not entitled to be indemnified by the corporation").

10. *E.g.*, Underbrink v. Warrior Energy Servs. Corp., C.A. No. 2982-VCP, 2008 Del. Ch. LEXIS 65, at *25-26 (Del. Ch. May 30, 2008) ("The Corporation shall, to the fullest extent permitted by applicable law in effect on the date of effectiveness of these Bylaws, and to such greater extent as applicable law may thereafter permit, indemnify and hold the Indemnitee harmless from and against any and all losses, liabilities, claims, damages and … [e]xpenses … arising out of any event or occurrence related to the fact that the Indemnitee is or was a director or Officer of the Corporation ….). Governing documents also may require that a trust be established to ensure the funding of the advancement payments in the change-of-control setting or otherwise. *See, e.g.*, Joseph Warren Bishop, Jr., Law of Corporate Officers and Directors/Indemnification and Insurance 7-190 (Appendix 7C) (West 2010). And those documents may provide that the corporation bears the burden of establishing *non*-entitlement to advancement. *See* Schoon v. Troy Corp., 948 A.2d 1157, 1169 (Del. Ch. 2008) (quoting a bylaw section providing that the "corporation shall have the burden of proving that the indemnitee was not entitled to the requested … advancement of expenses").

11. Brooks-McCollom v. Emerald Ridge Serv. Corp., C.A. No. 147-N, 2004 Del. Ch. LEXIS 105, at *7 (Del. Ch. July 29, 2004) ("The Delaware General Corporation Law permits a corporation to advance the costs of litigation to a director. This allowance is permissive, not mandatory. Thus, a corporation is free to limit the terms of advancement and even preclude advancement entirely."); Sun-Times Media Grp., Inc. v. Black, 954 A.2d 380, 406 n.104 (Del. Ch. 2008) ("A corporation could grant mandatory advancement but circumscribe that obligation so that it explicitly excludes advancement for costs incurred in connection with any appellate stages of a proceeding.").

12. *Homestore*, 888 A.2d at 212 ("In addition to an express undertaking requirement, corporations may specify by bylaw or contract the terms and conditions upon which present and former corporate officials may receive advancement, e.g., proof of an ability to repay or the posting of a secured bond."); Gentile v. SinglePoint Fin., Inc., 787 A.2d 102, 106 (Del. Ch. 2001) (finding plaintiff entitled to advancement under a bylaw provision conditioning advancement upon "receipt by the corporation of [] a written affirmation by such Indemnitee of his good faith belief that he has met the standard of conduct necessary for indemnification by the Corporation"); *see also* Thompson v. Williams Cos., C.A. No. 2716-VCS, 2007 Del. Ch. LEXIS 112, at *6-8 (Del. Ch. July 31, 2007) (approving bylaw requirement of dollar-for-dollar security); Paolino v. Mace Security Int'l, Inc., 985 A.2d 392, 398 (Del. Ch. 2009) (describing bylaw "variant of a common carve-out eliminating indemnification [and, in turn, advancement] for any proceeding (or part thereof) initiated by an indemnitee without prior Board approval."); Connecticut General Life Insurance Co. v. Pinkas, C.A. No. 5724-VCN, 2010 Del. Ch. LEXIS 228, at *3 (Del. Ch. Nov. 18, 2010) ("[Limited partnership agreement] tempers the broad right of advancement it provides by requiring that potential indemnitees first seek advancement from other available sources.").

13. Stifel Fin. Corp. v. Cochran, 809 A.2d 555, 560 (Del. 2002) (refusing to read a pre-suit demand requirement into Section 145 but noting that the defendant corporation "was free to write a demand requirement into its bylaws, but did not").

III. DRAFTING ON A "CLEAR DAY"

Delaware decisions have emphasized time and again that, while parties are given a wide berth in drafting advancement and indemnification provisions, that drafting must occur on a "clear day," or *ex ante*, rather than *post hoc*, after a dispute has arisen.

Perhaps most jarring for business entities in recent years has been the phenomenon of being faced with an advancement demand by a current or (more likely) former director or officer or LLC manager, only to find that the documents governing the business entity contain "mandatory" advancement provisions. Under those circumstances, Delaware courts have emphasized, it is too late to attempt to impose limitations on such advancement apart from the unsecured, contingent obligation to repay amounts advanced.[14] Thus, a corporation or other business entity can be left to resist the requested advancement on certain grounds in connection with *entitlement* to advancement (such as lack of a covered proceeding, or lack of requisite capacity on the part of the claimant) and/or *reasonableness* of the attorneys' fees and other expenses incurred (who did what work, in connection with which matter, at what rates, etc.).[15] But such resistance, if later found by the courts to be unwarranted, can indeed be costly for the defending business entity: with the entity not only paying the advancement amount, but also prejudgment interest (typically at 5% above the Federal Reserve Discount Rate), the claimant's enforcement attorneys' fees and other expenses (so-called "fees-on-fees"), *and* the entity's own costs.[16] In addition, it has been suggested that business managers could have exposure to a "waste" claim in resisting an advancement demand in the face of mandatory advancement provisions.[17]

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14. *See, e.g.*, DeLucca v. KKAT Mgmt., C.A. No. 1384-N, 2006 Del. Ch. LEXIS 19, at *6-7 (Del. Ch. Jan. 23, 2006) ("[T]his is yet another case in which defendants in an advancement case seek to escape the consequences of their own contractual freedom. Regretting the broad grant of mandatory advancement they forged on a clear day, they seek to have the judiciary ignore the plain language of their contracts and generate an after-the-fact judicial contract that reflects their current preference. But it is not the job of a court to relieve sophisticated parties of the burdens of contracts they wish they had drafted differently but in fact did not. Rather, it is the court's job to enforce the clear terms of contracts."); Reddy v. Elec. Data Sys. Corp., C.A. No. 19467, 2002 Del. Ch. LEXIS 69, at *13 (Del. Ch. June 18, 2002) ("Having been accorded the freedom to craft its bylaws as it wished, EDS cannot point to its own drafting failures as a defense to Reddy's advancement claim, however. If it chose, EDS could have conditioned former employees' advancement rights on an undertaking, proof of an ability to repay, or even the posting of a secured bond. But it did not do so.").

15. *See, e.g.*, Sassano v. CIBC World Mkts. Corp., 948 A.2d 453, 463 (Del. Ch. 2008) ("Having found that the Bylaws extend mandatory advancement to nominal officers, the question becomes whether Sassano was a nominal officer of CIBC from 1998 to 2003, the time frame of the allegations for which he seeks advancement."); Radiancy, Inc. v. Azar, C.A. No. 1547-N, 2006 Del. Ch. LEXIS 13, at *9 (Del. Ch. Jan. 23, 2006) ("Under Section 6.1 of the bylaws, therefore, there is no basis on which to challenge Perry's right to advancement for those allegations. The only remaining question as to Perry is when and if he became a director or officer … and whether his status as such (if any) entitles him to mandatory advancement."); O'Brien v. IAC/InterActive Corp., C.A. No. 3892-VCP, 2010 Del. Ch. LEXIS 189, at *16 (Del. Ch. Aug. 27, 2010) ("When dealing with a mandatory indemnification provision such as the one here …. The party seeking indemnification … must prove that the amount of indemnification sought is reasonable.").

16. *Homestore*, 888 A.2d at 209 (affirming the Court of Chancery's entry of a "Final Order and Judgment" ordering a corporation to pay to its former corporate officer "96% of the fees and expenses incurred in the liability phase of this advancement action," "96% of the fees and expenses incurred in the 'reasonableness' phase of this action," and pre-judgment and post-judgment interest); *see also Paolino*, 985 A.2d at 401 ("The broad and mandatory advancement rights that corporations continue to grant or leave in place, despite repeated suggestions by this Court that the rights be more narrowly tailored, already create a disincentive for corporations to pursue remedies when they know that they must also fund the defense.") (footnote omitted); *Stifel Fin. Corp.*, 809 A.2d at 561-62 ("[Corporations] remain free to tailor their indemnification bylaws to exclude 'fees on fees,' if that is a desirable goal.").

17. Barrett v. Am. Country Holdings, Inc., 951 A.2d 735, 747 (Del. Ch. 2008) ("The accumulation of cases like this, where the stockholders get it coming and going because of the corporation's refusal to honor mandatory advancement contracts, is regrettable, and at some point, a case of sufficient dollar value will arise such that a board is sued for wasting the corporation's resources by putting up a clearly frivolous defense.").

Two Delaware decisions bear special mention.

A. Schoon v. Troy

The first decision is *Schoon v. Troy*.[18] In *Schoon*, plaintiffs included Richard W. Schoon, a current director of Troy Corp., a Delaware corporation, and Linda J. Bohnen, executrix of the estate of former Troy director William J. Bohnen.[19] They sued Troy for advancement of defense expenses in connection with fiduciary duty claims first threatened and then filed by the company.[20] On cross-motions for summary judgment, the Court of Chancery concluded that, under the governing bylaws, William Bohnen was not entitled to advancement but Schoon was.[21]

The Court recounted that Troy had adopted several amendments to its bylaws and that those amendments "establish different advancement rights for Bohnen, as a former director, and Schoon as a current director."[22] Quoting from the plaintiffs' brief, the Court observed, for purposes of the cross-motions, that the plaintiffs assumed "that the amendments were validly adopted."[23]

Troy's pre-amendment bylaws had provided that "the Corporation shall pay the expenses incurred by any present or former director…."[24] The amended provision read, "[l]osses reasonably incurred by a director or officer in defending any threatened or pending Proceeding … shall be paid by the Corporation in advance of the final disposition of such Proceeding …."[25] Troy told the Court that the purpose of the amendment was to "delete former directors from entitlement to advancement."[26]

Bohnen contended that his advancement rights in the pre-amendment bylaws vested before the adoption of the amendments — at the time he took office as a director.[27] In support of his argument, he relied upon the decision of the Delaware Superior Court in *Salaman v. National Media Corp*.[28] The *Salaman* court had stated that "the right to advancement and indemnification is a vested contract right which cannot be unilaterally terminated."[29] But the *Schoon* court noted

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18. *Schoon v. Troy Corp*., 948 A.2d 1157 (Del. Ch. 2008).

19. *Id.* at 1159-60.

20. *Id.* at 1159.

21. *Id.*

22. *Id.* at 1165.

23. *Id.* at 1161 n.7.

24. *Id.* at 1165.

25. *Id.* at 1169.

26. *Id.* at 1165.

27. *Id.* at 1166.

28. *Id.* at 1165-66 (citing Salaman v. Nat'l Media Corp., C.A. No. 92C-01-161, 1992 Del. Super. LEXIS 564 (Del. Super. Oct. 8, 1992)).

29. *Id.* at 1166 (quoting *Salaman*, 1992 Del. Super. LEXIS 564, at *17-18).

that the plaintiff in *Salaman* had been named as a defendant before the bylaw at issue was amended.[30] In contrast, the court found, Bohnen's rights under the pre-amendment bylaws had not been triggered prior to the amendments because he had not been named in certain affirmative defenses and was not a party to the lawsuit at issue.[31]

The Court of Chancery likewise rejected Bohnen's argument that, even if the amendments to the bylaws were effective, they failed to terminate his right to advancement because of other language in the bylaws.[32] In particular, Bohnen relied on language that read, "The rights conferred by this Article shall continue as to a person who has ceased to be a director or officer and shall inure to the benefit of such person and the heirs, executors, administrators and other comparable legal representatives of such person."[33] The court found that the quoted language did not aid Bohnen's cause because he had resigned before Troy initiated its fiduciary duty claims against him: "Rather, it is better understood as providing that a director, whose right to advancement is triggered while in office, does not lose that right by ceasing to serve as a director."[34] In addition, the court found that the bylaws as amended would still provide for *indemnification* of former directors.[35] The court concluded, "In short, the language of the bylaws deliberately and unambiguously provides for unequal treatment of current and former directors in receiving advancement."[36]

The *Schoon* decision was criticized by some commentators as sanctioning a corporation's unilateral and retroactive extinguishment of advancement and indemnification rights.[37] But it would seem that that conclusion is overbroad.

Undeniably, the *Schoon* court, on the facts presented, did find that the claimant former director was not entitled to further advancement. But, doctrinally, what the court concluded was that the right to advancement never "vested" in the first place because it had not been triggered during the time Bohnen was in office as a director. In addition, the distinction that the court endorsed between former and current officers or directors is supported by the language of Section 145(e) of the Delaware General Corporation Law: "Such expenses (including attorneys' fees) incurred by former directors and officers or other employees and agents may be so paid upon such terms and conditions, if any, as the corporation deems appropriate."[38] The *Schoon* court accordingly referred to "the flexibility inherent in section 145."[39]

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30. *Id.* at 1166.

31. *Id.*

32. *Id.* at 1166-67.

33. *Id.* at 1166.

34. *Id.* at 1167.

35. *Id.*

36. *Id.* at 1168.

37. *See, e.g.*, Sheppard Mullin Richter & Hampton LLP, *Delaware Chancery Court Denies Advancement Claim Brought by Former Director Where Subsequent By-Law Amendment Retroactively Limited Advancement Rights of Former Directors*, Corp. & Sec. L. Blog, (Sept. 2, 2008), http://www.corporatesecuritieslawblog.com/148291-print.html ("Before *Schoon*, it was commonly understood that rights to advancement and indemnification could not be unilaterally terminated by a director's corporation. Now, however, directors can be held liable for all expenses relating to their official actions if litigation arises after they resign from the board."); Steven H. Goldberg & Michael B. Jacobson, Keeping Current: Director Indemnification, 18 Bus. L. Today, no. 2, Nov.-Dec. 2008, *available at* http://www.abanet.org/buslaw/blt/2008-11-12/keepingcurrent-1.shtml ("A recent Delaware Chancery Court decision has arguably significantly eroded the protection of fee advancement and indemnification rights provided to directors in company bylaws. The decision in *Schoon v. Troy Corp.*, 948 A.2d 1157 (2008), opens the door for companies to terminate unilaterally such rights afforded to corporate directors.").

38. Del. Code Ann. tit. 8, § 145(e).

39. *Schoon*, 948 A.2d at 1165.

Subsequently, the Delaware General Assembly amended Section 145(f) to provide:

> A right to indemnification or to advancement of expenses arising under a provision of the certificate of incorporation or a bylaw shall not be eliminated or impaired by an amendment to such provision after the occurrence of the act or omission that is the subject of the civil, criminal, administrative or investigative action, suit or proceeding for which indemnification or advancement of expenses is sought, unless the provision in effect at the time of such act or omission explicitly authorizes such elimination or impairment after such action or omission has occurred.[40]

Thus, the statute, as amended, preserves drafting flexibility that can accomplish "elimination or impairment" of advancement and indemnification rights after the occurrence of the challenged act or omission. But, in the absence of such a contractual provision, such an attempt to abrogate or narrow advancement and indemnification rights will be a legal nullity. In addition, presumably the "vesting" of those rights need not await the assertion of a claim in the underlying proceeding but instead will occur when the position is assumed.

B. Xu Hong Bin v. Heckmann Corp.

The second decision of note is *Xu Hong Bin v. Heckmann Corp.*[41] There, in a "letter" decision, the form of which may understate the significance of the ruling, the Court of Chancery held that the defendant corporation may place reasonable terms and conditions on the plaintiff former director of the corporation.[42] The court concluded that the corporation was entitled to impose the terms and conditions on advancement where, notwithstanding an unqualified right in the corporate charter to receive advancement, simultaneously-executed bylaws provided, "Such expenses (including attorneys' fees) incurred by former directors and officers or other employees and agents may be so paid upon such terms and conditions, if any, as the Corporation deems appropriate."[43]

The court found that there was "nothing inherently contradictory" between the charter provisions and the bylaw provisions, at least where the provisions had been drafted at the same time and the drafters could be assumed not to "intend for these two documents to conflict."[44] Accordingly, the court concluded that the bylaw provision was not invalid under Section 109(b) of the DGCL (which provides that a bylaw provision "may contain any provision, not inconsistent with law or with the certificate of incorporation.").[45] Relatedly, the court rejected the plaintiff's argument that "the preservation of a right to place conditions on advancement must be made in the same instrument that creates the advancement rights."[46] By footnote, the court added:

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40. An Act to Amend Title 8 of the Delaware Code Relating to the General Corporation Law, 77 Del. Laws, c. 14 § 3 (2009) (amending Del. Code Ann. tit. 8, § 145(f) by adding the above-quoted sentence to the end of the subsection).

41. *Xu Hong Bin v. Heckmann Corp.*, C.A. No. 4802-CC, 2010 Del. Ch. LEXIS 3 (Del. Ch. Jan. 8, 2010).

42. *Id.* at *1.

43. *Id*. at *11.

44. *Id.* at *14.

45. *Id.* at *11-12 & n.15 (quoting Del. Code Ann. tit. 8, § 109(b)).

46. *Id.* at *11-12.

> Had Section 6 of the bylaws been enacted at some point subsequent to the execution of the articles my opinion on this matter might have been different. I decline a foray into that question today because it involves a different circumstance than the one at issue. Today I focus only on circumstances such as this where the articles and bylaws were executed simultaneously.[47]

While the court acknowledged "the articles would have been better drafted if they included some language in Article Ninth [of the charter] that pointed the reader to the bylaws for further information that advancement and indemnification rights," it declined to adopt a cross-referencing rule.[48] The court also seemed to suggest that the plaintiff had the opportunity either to have declined the directorship or to have negotiated for greater advancement protection before he agreed to become a director:

> Second, both the articles and the bylaws were in effect when Xu began his directorship. Thus, Xu had every opportunity to read the articles and bylaws and become fully informed regarding the scope of his indemnification and advancement rights before agreeing to serve as a director. I must proceed on the assumption that directors of Delaware corporations read the articles and bylaws before joining the board, particularly those provisions that relate to indemnification and advancement rights.[49]

The court left for another day "the reasonableness of the terms and conditions that have already been demanded by Heckmann."[50]

IV. TWO IMPORTANT COROLLARIES

There are two important corollaries to keep in mind as drafting considerations in the advancement context. The first is that ambiguities in advancement provisions generally will be construed against the business entity that drafted the provisions.[51] The practical impact is that parol evidence may not be considered; instead, the court may well look only to the words of the governing document to determine the reasonable expectations of the advancement claimant.[52] The second corollary is that the advancement *claimant* also should be clear in making a demand for advancement, ensuring that the demand refers to advancement rather than indemnification, refers to a specific amount, provides support for the amount

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47. *Id.* at *14 n.21.

48. *Id.* at *14-15.

49. *Id*. at *15-16.

50. *Id.* at *1.

51. *Paolino*, 985 A.2d at 402 (citing Thompson v. Williams Cos., C.A. No. 2716-VCS, 2007 WL 2215953, at *3 (Del. Ch. July 31, 2007); Greco v. Columbia HCA Healthcare Corp., C.A. No. 16801, 1999 WL 1261446, at *13 (Del. Ch. Feb. 12, 1999)); *see also* Stockman v. Heartland Indus. Partners, L.P., C.A. No. 4427-VCS, 2009 Del. Ch. LEXIS 131, at *3 (Del. Ch. July 14, 2009) ("Moreover, to the extent there is any ambiguity in the Partnership Agreement regarding advancement, that ambiguity must be resolved against [the limited partnership].").

52. *Stockman*, 2009 Del. Ch. LEXIS, at *18-19.

requested, and includes an undertaking if required.[53] Such attention to careful drafting not only will demonstrate the adequacy and ripeness of the advancement claim, it also will lay the groundwork for a later award of prejudgment interest.[54]

V. CONCLUSION

Business entities and their managers have an opportunity under Delaware law to exercise drafting flexibility in connection with advancement and indemnification so long as they do so before a dispute arises. Failure to avail themselves of this opportunity can result in costly remorse.

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53. *Paolino*, 985 A.2d at 395.

54. Citadel Holding Corp. v. Roven, 603 A.2d 818, 826 n.9 (Del. 1992) (awarding "interest computed from the date of demand," meaning "the date when Roven specified the amount of reimbursement demanded and produced his written promise to pay"); Katzman v. Comprehensive Care Corp., C.A. No. 5892-VCL (Del. Ch. Dec. 28, 2010) (Transcript) at 22, 29 (prejudgment interest on advancement amounts to run from date of submission of invoices certified to include "expenses reasonably incurred for purposes of advancements").