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M E M O R A N D U M

To: R. Franklin Balotti Edward B. Maxwell, II  
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Michael D. Goldman A. Gilchrist Sparks, III

From: Stephen P. Lamb 

Date: April 10, 1986

Re: Corporate Law Section Council Meeting  
Friday, April 11, 1986 -- 3:30 p.m.

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Attached is a proposal to create a "cap" on a director's liability. Ed Welch, Tom Allingham and I put this together in response to Gil Spark's suggestion at the March 10 meeting that anyone interested should try drafting language. I am circulating it for purposes of discussion.

SPL:lks

Attachment

Section 146. Liability of Directors for Breach of Duty

(a) The aggregate liability of the members of a board of directors for breach of fiduciary duty as directors in connection with any transaction or occurrence (including all acts and omissions related to any transaction or occurrence) shall not exceed \$1 million.

(b) The limitation set forth in subparagraph (a) of this section shall not apply to any judgment for breach of fiduciary duty against a director in connection with any transaction or occurrence approved by that director (i) between the corporation and that director, or between the corporation and any other corporation, partnership, association, or other organization in which that director is also a director or officer, or has a material financial interest, (ii) from which that director is found to have derived a material financial benefit distinct from that which devolves upon the corporation or the stockholders generally, or (iii) which the director believed to have been contrary to the best interests of the corporation.

(c) Punitive damages shall not be recoverable against directors on any claim for breach of fiduciary duty.

(d) This section shall become effective immediately and shall apply to all judgments entered after \_\_\_\_\_, 1986.

Commentary On Section 146

As is well known, it is becoming increasingly difficult to obtain adequate directors' and officers' liability insurance. To the extent that it remains available, the scope and amount of coverage is decreasing and the cost is rising.

The growing unavailability of directors' and officers' insurance is a disincentive to service by qualified persons as directors of Delaware corporations. The purpose of Section 146 is to encourage qualified persons to serve as directors of Delaware corporations by making clear that, with certain exceptions, the aggregate liability of all of the members of the board of directors for breach of fiduciary duty shall not exceed \$1 million dollars.

This limitation would not be available to directors in three circumstances. First, the limitation would not apply where a director is on both sides of a transaction on which he or she is voting. Thus, for example, the limitation would not be applicable to a vote by a director with respect to an acquisition proposal where the director served on the board of both the acquiror and the acquired company.

Second, it would not apply to any judgment for breach of fiduciary duty against any director in connection with a transaction or occurrence from which the director derives a material financial benefit distinct from that which devolves upon the corporation or the stockholders generally. Payment to directors of fees for their services as directors would not trigger this exception.

Third, a director would not be protected where he or she approved a transaction which he or she believed to have been contrary to the best interests of the corporation. Thus, conduct undertaken in bad faith would not be protected.

Section 146 is also intended to provide that only one recovery of the maximum amount available under the statute for breach of fiduciary duty will be permitted in connection with each transaction or occurrence. For example, litigation challenging approval of a merger could result in a maximum liability of \$1 million for breach of fiduciary duty, even though approval of the merger may have involved many resolutions and acts by the board of directors.

Section 146 is not intended to create any restriction on the rights of any person to seek any form of relief other than money damages.