## TABLE OF CONTENTS

Dedicati Acknow Introduc	ledgments	iii v vii
	CHAPTER 1	
	Overview of	
	Shareholder Derivative Litigation	
§ 1.01 § 1.02	The Shareholder of the Modern Corporation The Shareholder Derivative Action:	1-2
	Definition	1-8
	Litigation	1-8
	Direct Action	1-9
§ 1.03	History	1-17
	[1] Early History	1-17
	[2] Derivative Suits Today	1-25
§ 1.04	Statutes Affecting Derivative Lawsuits [1] The Private Securities Litigation	1-30
	Reform Act (PSLRA)	1-30
	<ul><li>[a] Purposes of the Reform Act</li><li>[b] Provisions of the Reform Act</li><li>[i] Reduction of Abusive</li></ul>	1-31 1-32
	Litigation [ii] Reduction of Coercive	1-32
	Settlements	1-42
	Corporate Fraud [c] Evaluating the Impact of	1-43
	the PSLRA	1-45

xii	SHAREHOLDER DERIVATIVE LITIGATION	1
	[2] Securities Litigation Uniform Standard Act (SLUSA) of 1998	. 1-47
	[3] The Sarbanes-Oxley Act of 2002 [4] The Dodd-Frank Wall Street Reform	
	and Consumer Protection Act	
§ 1.05	[5] Corporate Bylaws	
	CHAPTER 2	
	The Role of the Delaware Court of Chancery i Shareholder Derivative Litigation	n
§ 2.01	Introduction	. 2-1
§ 2.02	The Birth of Delaware's General Corporations  Law	. 2-3
§ 2.03	The Role of the Delaware Court of Chancery	
Ü	[1] Influence of English Courts of Equity	
	[2] Establishment and Growth of Equity	2.0
§ 2.04	Jurisprudence in Delaware Conclusion	
	CHAPTER 3	
	The Role of the Business Judgment Rule	
	in Derivative Suits	
§ 3.01	In General	. 3-2
	[1] The Business Judgment Rule Defined	
	[2] The Entire Fairness Standard	
	[3] Escaping Entire Fairness Review [a] Shareholder Ratification Under the	. 3-11
	Corwin Doctrine	. 3-11
	[b] Use of an Independent Committee	
	[4] The Contemporary Reexamination of	
\$ 2.02	the Business Judgment Rule	
§ 3.02 § 3.03	Rationale for the Business Judgment Rule Elements of the Business Judgment Rule	
g 5.05	[1] Exercise of Business Judgment	
	[2] The Duty of Loyalty	
	[a] Disinterestedness	
	[b] Independence	. 3-24
	[3] The Duty of Due Care	
	[3A] The Duty of Oversight	. 3-30
	[a] Caremark Claims	. 3-30

		7	TABLE OF CONTENTS	xiii
		[b]	Fairness Opinions and the Engagement of Financial	
		[c]	Advisors	3-34 3-35
	Γ <i>Ι</i> 11	[d]	Regulating Conflicts of Interest od Faith" or "In the Best Interests	3-44
	[4]	of	'the Corporation'	3-47
0.204	г. 1	[a]	Waste	3-49
§ 3.04			Outies in Context of Change of	2 52 1
			te Control	3-52.1
	[1]		cal and the Creation of the Change	2 52 1
	[2]		Control Doctrine	3-52.1
	[2]		Revlon Duties	3-52.3
	[3]	-	"R" Us	3-62.1
		[a]	•	3-62.1
		[b]		3-62.2
		[c]	Reasonable Basis for Protective	2.64
	F 4 7	0	Measures	3-64
	[4]		fidentiality Agreements—Martin	
			arietta Materials, Inc. v. Vulcan	2.65
			aterials Co	3-65
		[a]	Background of the Case	3-65
		[b]	The Parties' Legal Arguments	3-69
		[c]	The Chancery Court's Legal	
			Analysis	3-71
		[d]	The Chancery Court Grants	
			Injunctive Relief	3-76
	[5]	Shar	reholder Protective Measures in	
			esponse to Activist Investors	3-78
§ 3.05			Outies and Controlling Stockholder	
	Fr	eeze-C	Outs	3-81
	[1]	Wha	at Qualifies as "Controlling"?	3-82
	[2]		trolling Shareholder Freeze-Outs:	
		W	That Standard of Review Applies?	3-82.2
		[a]	Mergers with Controlling	
			Shareholders: The <i>Lynch</i> Test	3-82.3
		[b]	Departing from Lynch via Tender	
			Offers	3-87
		[c]	Questioning the Dual Approach:	
		=	Pure Resources	3-91
		[d]	Toward a Unified Standard:	
			In re Cox Communications	3-94

xiv	SE	AREHOLDER DERIVATIVE LITIGATIO	N
		[e] Adopting the Unified Standard:  In re MFW Shareholders'	2.00
	[3] [4]	Litigation and Its Progeny  Derivative or Direct Claims	
§ 3.06	The 1	Shareholders	3-109
3 2.00		Derivative Litigation	3-111
		CHAPTER 4	
		nand Requirement and Other Prerequie to Shareholder Derivative Litigation	sites
§ 4.01	In Go	eneral	4-2
§ 4.02	Purp	ose of the Demand Requirement	4-6
§ 4.03	Adeq	uacy of the Demand	
	[1]	Alerting the Board of Directors	
	[2]	Content of the Demand	
	[3]	Assistance of the Shareholder	
	[4]	Time to Respond to the Demand	
§ 4.04		and on Shareholders	
§ 4.05	Choic	ee of Law Considerations	
	[1]	Federal Court Actions	
	[2]	State Court Actions	4-23
	[3]	Choice of Law Issues Surrounding	
		Demand on Shareholders	4-26
	[4]	Effect of Forum Selection Bylaws on	
		Derivative Plaintiffs	4-26
	[5]	Choice of Law Issues for Hedge Funds.	
§ 4.06		ey of State Demand Requirements	
§ 4.07	The 1	Universal Demand Requirement	
§ 4.08	The S	Standing Requirement	4-38
	[1]	Stock Ownership at the Time Suit	
		Is Commenced	4-42
	[2]	Stock Ownership at the Time of the	
		Conduct Being Challenged	4-45
		[a] Generally	4-45
		[b] Choice of Law Issues Regarding	
		Stock Ownership	4-49
	[3]	Exceptions to the Contemporaneous	
		Ownership Rule	4-51
		[a] Statutory	
		[b] Continuing Wrong Doctrine	4-53

		Т	TABLE OF CONTENTS	XV
	[4]		table Standing	4-56
		[a]	Standing for Corporate Directors in Derivative Actions?	4-56
		[b]	Derivative Actions Filed on Behalf of Limited Liability Companies	4-57
	[5]		ct of Merger on Standing to Sue	4-60
	[6]	Effec	erivatively  et of Bankruptcy on Shareholder	4-60
	[7]	Shar	eholder Standing Following Initial	
	F01		blic Offering	4-72.1 4-72.2
	[8] [9]		mum-Stake-to-Sue Bylawsble (and Multi-Tier) Derivative	4-12.2
	[2]		etions	4-72.3
		[a]	Rationale for Double Derivative	
		F1 7	Actions	4-72.4
		[b]	The Requirement of Injury to the	1 72 5
		[c]	Parent Corporation	4-72.5 4-72.6
		[d]	Demand in Double Derivative	<del>1</del> -72.0
		[]	Lawsuits	4-72.7
§ 4.09	Fair	and A	dequate Representation	4-73
	[1]		eneral	4-73
	[2]		ors Considered.	4-76
		[a]	The "Professional Plaintiff"	4-79
		[b]	Simultaneous Prosecution of Class and Derivative Actions	4-83
		[c]	The "Fast-Filer" Presumption	4-85
§ 4.10	Secu		r-Expense Statutes	4-91
§ 4.11			a's Ability to Recover Expenses	4-95
			CHAPTER 5	
			Demand Futility	
§ 5.01	In G	eneral		5-2
§ 5.02			emand Futility	5-4
§ 5.03		icable	Legal Standards	5-9
	[1]	The [a]	Delaware Test	5-10
		F	Board of Directors	5-11
		[b] [c]	Reasonable Doubt The First Prong of the <i>Aronson</i>	5-12
			Test	5-13
			[i] Interestedness	5-13

[iii] Independence         5-14           [d] The Second Prong of the Aronson Test: Valid Business Judgment         5-16           [e] Rales v. Blasband: Non-Action by Board of Directors         5-17           [f] Moving Towards a New Test:
[e] Rales v. Blasband: Non-Action by Board of Directors
[f] Moving Towards a New Test:       Comparing Aronson and Rales       5-18         [g] A Sea Change: Delaware's Single,       Three-Prong Test       5-23         [h] Determining Which Board to       Evaluate       5-27         [2] The New York Test       5-29         [3] The Maryland Test       5-30         [4] The Indiana Test       5-31         § 5.04 Common Grounds for Allegations of       Demand Futility       5-32         [1] Naming Directors as Defendants       5-32         [2] Approval or Acquiescence of the       Challenged Transaction       5-33         [3] Financial Interest and Director       Compensation       5-34         [4] Entrenchment       5-39         [5] Domination and Control       5-43         [6] Personal Friendships       and Other Relationships       5-46         [7] Philanthropic Ties       5-51         [8] Threat of Personal Liability       5-53         [9] Failure of Oversight (Caremark Claims)       5-61         [a] Caremark's First Prong:       Board-Level Oversight         and Controls       5-62         [b] Caremark's Second Prong:       Ignoring Red Flags       5-69
Comparing Aronson and Rales   5-18
Three-Prong Test
Evaluate.   5-27     [2] The New York Test   5-29     [3] The Maryland Test.   5-30     [4] The Indiana Test   5-31     § 5.04 Common Grounds for Allegations of Demand Futility   5-32     [1] Naming Directors as Defendants   5-32     [2] Approval or Acquiescence of the Challenged Transaction   5-33     [3] Financial Interest and Director Compensation   5-34     [4] Entrenchment   5-39     [5] Domination and Control   5-43     [6] Personal Friendships and Other Relationships   5-46     [7] Philanthropic Ties   5-51     [8] Threat of Personal Liability   5-53     [9] Failure of Oversight (Caremark Claims)   5-61     [a] Caremark's First Prong: Board-Level Oversight and Controls   5-62     [b] Caremark's Second Prong: Ignoring Red Flags   5-69
[2] The New York Test
[3] The Maryland Test. 5-30 [4] The Indiana Test 5-31  § 5.04 Common Grounds for Allegations of Demand Futility. 5-32 [1] Naming Directors as Defendants 5-32 [2] Approval or Acquiescence of the Challenged Transaction 5-33 [3] Financial Interest and Director Compensation. 5-34 [4] Entrenchment 5-39 [5] Domination and Control 5-43 [6] Personal Friendships and Other Relationships 5-46 [7] Philanthropic Ties 5-51 [8] Threat of Personal Liability 5-53 [9] Failure of Oversight (Caremark Claims) 5-61 [a] Caremark's First Prong: Board-Level Oversight and Controls 5-62 [b] Caremark's Second Prong: Ignoring Red Flags 5-69
[4] The Indiana Test
§ 5.04 Common Grounds for Allegations of Demand Futility
Demand Futility 5-32  [1] Naming Directors as Defendants 5-32  [2] Approval or Acquiescence of the Challenged Transaction 5-33  [3] Financial Interest and Director Compensation 5-34  [4] Entrenchment 5-39  [5] Domination and Control 5-43  [6] Personal Friendships and Other Relationships 5-46  [7] Philanthropic Ties 5-51  [8] Threat of Personal Liability 5-53  [9] Failure of Oversight (Caremark Claims) 5-61  [a] Caremark's First Prong:  Board-Level Oversight  and Controls 5-62  [b] Caremark's Second Prong:  Ignoring Red Flags 5-69
[1] Naming Directors as Defendants 5-32 [2] Approval or Acquiescence of the Challenged Transaction 5-33 [3] Financial Interest and Director Compensation 5-34 [4] Entrenchment 5-39 [5] Domination and Control 5-43 [6] Personal Friendships and Other Relationships 5-46 [7] Philanthropic Ties 5-51 [8] Threat of Personal Liability 5-53 [9] Failure of Oversight (Caremark Claims) 5-61 [a] Caremark's First Prong: Board-Level Oversight and Controls 5-62 [b] Caremark's Second Prong: Ignoring Red Flags 5-69
[2] Approval or Acquiescence of the Challenged Transaction 5-33 [3] Financial Interest and Director Compensation 5-34 [4] Entrenchment 5-39 [5] Domination and Control 5-43 [6] Personal Friendships and Other Relationships 5-46 [7] Philanthropic Ties 5-51 [8] Threat of Personal Liability 5-53 [9] Failure of Oversight (Caremark Claims) 5-61 [a] Caremark's First Prong: Board-Level Oversight and Controls 5-62 [b] Caremark's Second Prong: Ignoring Red Flags 5-69
Challenged Transaction 5-33  [3] Financial Interest and Director
[3] Financial Interest and Director Compensation
Compensation 5-34  [4] Entrenchment 5-39  [5] Domination and Control 5-43  [6] Personal Friendships and Other Relationships 5-46  [7] Philanthropic Ties 5-51  [8] Threat of Personal Liability 5-53  [9] Failure of Oversight (Caremark Claims) 5-61  [a] Caremark's First Prong:  Board-Level Oversight  and Controls 5-62  [b] Caremark's Second Prong:  Ignoring Red Flags 5-69
[4] Entrenchment
[5] Domination and Control
[6] Personal Friendships and Other Relationships 5-46 [7] Philanthropic Ties 5-51 [8] Threat of Personal Liability 5-53 [9] Failure of Oversight (Caremark Claims) 5-61 [a] Caremark's First Prong: Board-Level Oversight and Controls 5-62 [b] Caremark's Second Prong: Ignoring Red Flags 5-69
and Other Relationships
[7] Philanthropic Ties
[8] Threat of Personal Liability
[9] Failure of Oversight (Caremark Claims) 5-61 [a] Caremark's First Prong: Board-Level Oversight and Controls 5-62 [b] Caremark's Second Prong: Ignoring Red Flags 5-69
[a] Caremark's First Prong:  Board-Level Oversight  and Controls
Board-Level Oversight and Controls
and Controls
[b] Caremark's Second Prong:  Ignoring Red Flags
Ignoring Red Flags 5-69
[10] Engaging in Illegal Conduct 5-81
[11] Insured Versus Insured Exclusion 5-86
[12] Claims of Waste
[13] Activity After Suit Is Filed 5-90.3
§ 5.05 Effects of a Demand Futility Dismissal 5-90.5
[1] Demand Futility Allegations and Issue
Preclusion
[2] Privity Between Multiple Shareholders 5-90.8
[3] Adequacy of Representation 5-90.15
§ 5.06 Appellate Review of Demand Futility
Determinations

	TABLE OF CONTENTS	xvii
§ 5.07	Demand Futility and the 2008 Financial Crisis [1] <i>Citigroup</i> and the Failure to Monitor Risks	5-92 5-92
	[2] Dow, Goldman Sachs, and the Reaffirmation of the Business	3-92
	Judgment Rule	5-97
	Compensation	5-101
	CHAPTER 6	
	<b>Board Responses in Demand-Required Cases</b>	
§ 6.01	In General	6-2
§ 6.02 § 6.03	The Wrongful Refusal Rule	6-3
	Section 220	6-8
	[1] Proper Purpose	6-10
	[2] Scope of Inspection	6-14.2 6-23
	[4] Judicial Limitations on Books and	0-23
	Records Actions	6-25
	[5] Effect of Section 220 Demand	0 20
	Requestor's Identity	6-26.1
	[a] Section 220 Demand by Requestor Not Involved in Pending	
	Derivative Litigation	6-26.1
	[b] Section 220 Demand by Plaintiff in Pending Derivative	( 2( 2
	Litigation	6-26.3
	Cases	6-26.4
	[d] Section 220 Demand by Corporate	0 20
	Director	6-26.8
	[6] Books and Records Demands in	
	Other Jurisdictions	6-26.9
§ 6.04	The Modified Business Judgment Rule in	6.26.11
e ( 05	Wrongful Refusal Cases	6-26.11
§ 6.05 § 6.06	Demand as Concession of Independence Lack of Due Care or Good Faith as a Basis	6-26.13
y 0.00	for Wrongful Refusal	6-31
	[1] Reasonableness of Investigation	6-31
	L-1	0 51

xviii	SHAREHOLDER DERIVATIVE LITIGATION	
	[2] Good Faith	6-39
	[3] Independence of Counsel	6-40
§ 6.07 § 6.08	Use of a Committee to Review Demand Consideration of Factors Other Than the	6-44
	Merits in Reviewing a Demand	6-50
	CHAPTER 7	
	<b>Board Responses in Demand-Excused Cases: The Special Litigation Committee</b>	
§ 7.01	In General	7-2
§ 7.02	Judicial Treatment of Special Litigation	
	Committees	7-5
	[1] The New York Rule	7-5
	[2] The Delaware Rule	7-10
	[3] The Massachusetts Approach	7-19
	[4] The Second Circuit Approach	7-22 7-25
	[5] The Iowa Rule	7-25 7-26
	[7] The New Jersey Rule	7-20
§ 7.03	The Theory of Structural Bias	7-30
§ 7.03 § 7.04	Statutory Responses to Special Litigation	7-30
3 7.0 .	Committees	7-34
§ 7.05	Independence, Good Faith, and Due Care: Characteristics of an Adequate Special	, 5 .
	Litigation Procedure	7-37
	[1] Independent Committee	7-37
	[2] Adequate Procedures	7-41
	[3] Thorough Consideration of Potential	
	Claims	7-50
	[4] Stays and Timing of the Special	
	Litigation Committee's Review	7-52.1
§ 7.06	The ALI Approach and the Future of	
	the Delaware Two-Step	7-59
	CHAPTER 8	
	Special Issues with Outside Director Liability	
§ 8.01 § 8.02	Introduction	8-2
U	Litigation	8-4
	[1] Breach of Fiduciary Duty	8-4

	TABLE OF CONTENTS	xix
	[2] Allegations of Egregious Director	0.4
	Misconduct	8-4
	[3] Exception to the Business Judgment Rule	8-5
§ 8.03	In re Emerging Communications, Inc.	0-3
3 0.02	Shareholders Litigation	8-9
	[1] Theory of the Case: Fairness Standard	
	of Review	8-9
	[2] Unfair Dealing: Specialized Financial	8-9
	Expertise	0-3
	and Loyalty	8-10
§ 8.04	Integrated Health Services, Inc. v. Elkins	8-13
Ü	[1] Outside Director Misconduct and	
	Personal Liability	8-13
	[2] Duty of Loyalty	8-13
§ 8.05	In re Oracle Corporation Derivative	0.16
	Litigation	8-16
	<ul><li>[1] Misappropriation of Inside Information</li><li>[2] Heightened Scrutiny</li></ul>	8-16 8-16
§ 8.06	Disney's Impact on Settlements of Shareholder	0-10
3 0.00	Derivative Litigation	8-18
	[1] Enron	8-19
	[2] Worldcom	8-20
§ 8.07	The Road Forward: Recent Conceptions of	
	Outside Directors' Liability	8-22
	CHAPTER 9	
	Procedural Issues in Derivative Litigation	
§ 9.01	In General	9-1
§ 9.02	Federal Subject Matter Jurisdiction	9-2
	[1] Diversity Jurisdiction	9-2
	[2] Amount in Controversy for Purposes	
	of Diversity Jurisdiction	9-4
0.002	[3] Ripeness	9-5
§ 9.03	Personal Jurisdiction	9-7 9-8.2
§ 9.04 § 9.05	Verification of the Complaint	9-8.2 9-9
§ 9.05 § 9.06	Right to a Jury Trial	9-11
§ 9.07	Discovery	9-13
§ 9.08	Statutes of Limitations	9-20

## **CHAPTER 10**

## An Overview of the Attorney-Client Privilege and Work Product Doctrine

§	10.01	Setting the Stage	 10-2
§	10.02	The Attorney-Client Privilege: Background	
		and Definition	 10-4
§	10.03	The Attorney-Client Privilege in the	
		Corporate Context	 10-8
		[1] Application of the Attorney-Client	
		Privilege to Corporations	 10-8
		[2] Scope of the Attorney-Client Privilege	
		in the Corporate Context	 10-10
		[a] The Control Group Test	10-13
		[b] The Subject Matter Test	10-15
		[c] Hybrid Approaches	10-16
		[3] Directors' Access to Privileged	
		Information	 10-18
		[4] Attorney-Client Privilege for	
		Communications That Include	
		an Investment Banker	 10-20.1
§	10.04	Exceptions to the Attorney-Client Privilege	10-20.3
		[1] The Fiduciary Exception	10-20.3
		[2] The Crime-Fraud Exception	10-20.3
		[3] Other Exceptions	 10-23
§	10.05	Waiver of the Attorney-Client Privilege	10-25
		[1] The Corporate Client	 10-25
		[2] Implied Waiver in General	10-28
		[3] Disclosure to Government Agencies	10-29
		[4] Disclosure to Insurance Carriers	 10-39
		[5] Disclosure to Outside Auditors	 10-41
		[6] Inadvertent Disclosure	 10-42
		[7] Reliance on Advice of Counsel	 10-47
		[8] Effect of Waiver by Corporation on	
		Corporate Officers or Employees	 10-50
§	10.06	The Work Product Doctrine	 10-52
	10.07	Exceptions to and Waiver of the Work	
		Product Doctrine	 10-56
		[1] Exceptions to the Work Product	
		Doctrine	 10-56
		[2] Waiver of Work Product Protection	 10-58
§	10.08	The Self-Evaluative or Self-Critical Analysis	
		Privilege	 10-63

## **CHAPTER 11**

Special Issues Regarding the Attorney-Client
Privilege and Work Product Doctrine in
Shareholder Derivative Litigation

§ 11.01 § 11.02	In General	11-4
§ 11.03	Application of the Fiduciary Exception	
	Exception Beyond Derivative Actions [3] Criticism of the <i>Garner</i> Fiduciary	11-11
	Exception	11-16
§ 11.04	Application of the Fiduciary Exception in the Derivative Context	11-20
§ 11.05	Application of the Fiduciary Exception in	
Ü	the Class Action Context	11-24
	[1] Distinguishing Derivative Actions	
	from Class Actions	11-24
	[2] Invocation of the Exception by	
	"Purchasers" as Opposed to	
	Shareholders	11-25
§ 11.06	Invoking the Protections of Either the Attorney-Client Privilege or the Work	
	Product Doctrine in the Derivative Context	
	[1] Mandated Disclosure	11-27
	[2] Privilege Considerations Following	
	a Special Litigation Committee's	
	Investigation	11-30
	CHAPTER 12	
	Indemnification	
§ 12.01	In General	12-2
§ 12.02	Statutory Indemnification	
3	[1] Indemnification Statutes Generally	
	[2] Prerequisites to Statutory	120
	Indemnification	12-7
	[a] Who May Be Indemnified	
	[b] Proceedings Covered	
	[3] Mandatory Indemnification by Statute	
	[a] Degree of Success Required	
	[b] Nature of the Success Required	

§ 12.03       Mandatory Indemnification by Charter, By-law, or Agreement       12-15         § 12.04       Permissive Indemnification       12-17         [1]       Conditions Precedent to Permissive Indemnification       12-17         [2]       Limitations on Permissive Indemnification       12-18         [3]       Corporate Authorization of Indemnification       12-20         § 12.05       Non-Exclusivity Provisions and the Public Policy Limitation       12-23         § 12.06       Court-Ordered Indemnification       12-29         § 12.07       Disclosure of Indemnification       12-32         § 12.08       Indemnification and the Federal Securities Laws       12-33         § 12.09       Advancement of Expenses       12-33         [1]       Timing of Advancement       12-39         [2]       Non-Exclusivity of Advancement       12-39         [2]       Non-Exclusivity of Advancement       12-39         [3]       Non-Exclusivity of Advancement       12-44         § 12.10       Advancement of Expenses to Former Officers and Directors       12-46         CHAPTER 13         D&O Liability Insurance         § 13.01       In General       13-2         § 13.03       Basic Features of a D&O Liability Policy
\$ 12.04 Permissive Indemnification. 12-17  [1] Conditions Precedent to Permissive Indemnification. 12-17  [2] Limitations on Permissive Indemnification. 12-18  [3] Corporate Authorization of Indemnification. 12-20  § 12.05 Non-Exclusivity Provisions and the Public Policy Limitation 12-23  § 12.06 Court-Ordered Indemnification 12-29  § 12.07 Disclosure of Indemnification 12-32  § 12.08 Indemnification and the Federal Securities Laws 12-33  § 12.09 Advancement of Expenses 12-36  [1] Timing of Advancement 12-39  [2] Non-Exclusivity of Advancement Rights 12-44  § 12.10 Advancement of Expenses to Former Officers and Directors 12-46  CHAPTER 13  D&O Liability Insurance  § 13.01 In General 13-2  § 13.02 Enabling Statutes 13-5  § 13.03 Basic Features of a D&O Liability Policy 13-7  [1] The Insuring Clauses 13-7  [2] "Claims-Made" Policy 13-8  § 13.04 Defined Terms 13-12  [1] "Wrongful Act" 13-12  [1] "Wrongful Act" 13-12
[1] Conditions Precedent to Permissive
[2] Limitations on Permissive
[3] Corporate Authorization of
Indemnification   12-20
Policy Limitation   12-23
\$ 12.06
\$ 12.07 Disclosure of Indemnification 12-32 \$ 12.08 Indemnification and the Federal Securities
\$ 12.08
\$ 12.09 Advancement of Expenses 12-36 [1] Timing of Advancement 12-39 [2] Non-Exclusivity of Advancement Rights 12-44  \$ 12.10 Advancement of Expenses to Former Officers and Directors 12-46  CHAPTER 13  D&O Liability Insurance  \$ 13.01 In General 13-2  \$ 13.02 Enabling Statutes 13-5  \$ 13.03 Basic Features of a D&O Liability Policy 13-7 [1] The Insuring Clauses 13-7 [2] "Claims-Made" Policy 13-8  \$ 13.04 Defined Terms 13-12 [1] "Wrongful Act" 13-12 [2] "Loss" 13-14.1
\$ 12.09 Advancement of Expenses 12-36 [1] Timing of Advancement 12-39 [2] Non-Exclusivity of Advancement Rights 12-44  \$ 12.10 Advancement of Expenses to Former Officers and Directors 12-46  CHAPTER 13  D&O Liability Insurance  \$ 13.01 In General 13-2  \$ 13.02 Enabling Statutes 13-5  \$ 13.03 Basic Features of a D&O Liability Policy 13-7 [1] The Insuring Clauses 13-7 [2] "Claims-Made" Policy 13-8  \$ 13.04 Defined Terms 13-12 [1] "Wrongful Act" 13-12 [2] "Loss" 13-14.1
[1] Timing of Advancement 12-39 [2] Non-Exclusivity of Advancement Rights 12-44  § 12.10 Advancement of Expenses to Former Officers and Directors 12-46  CHAPTER 13  D&O Liability Insurance  § 13.01 In General 13-2  § 13.02 Enabling Statutes 13-5  § 13.03 Basic Features of a D&O Liability Policy 13-7  [1] The Insuring Clauses 13-7  [2] "Claims-Made" Policy 13-8  § 13.04 Defined Terms 13-12  [1] "Wrongful Act" 13-12  [2] "Loss" 13-14.1
[2] Non-Exclusivity of Advancement Rights
Rights
\$ 12.10 Advancement of Expenses to Former Officers and Directors
CHAPTER 13  D&O Liability Insurance  § 13.01 In General 13-2 § 13.02 Enabling Statutes 13-5 § 13.03 Basic Features of a D&O Liability Policy 13-7 [1] The Insuring Clauses 13-7 [2] "Claims-Made" Policy 13-8 § 13.04 Defined Terms 13-12 [1] "Wrongful Act" 13-12 [2] "Loss" 13-14.1
D&O Liability Insurance         § 13.01       In General       13-2         § 13.02       Enabling Statutes       13-5         § 13.03       Basic Features of a D&O Liability Policy       13-7         [1]       The Insuring Clauses       13-7         [2]       "Claims-Made" Policy       13-8         § 13.04       Defined Terms       13-12         [1]       "Wrongful Act"       13-12         [2]       "Loss"       13-14.1
§ 13.01       In General       13-2         § 13.02       Enabling Statutes       13-5         § 13.03       Basic Features of a D&O Liability Policy       13-7         [1]       The Insuring Clauses       13-7         [2]       "Claims-Made" Policy       13-8         § 13.04       Defined Terms       13-12         [1]       "Wrongful Act"       13-12         [2]       "Loss"       13-14.1
§ 13.02       Enabling Statutes       13-5         § 13.03       Basic Features of a D&O Liability Policy       13-7         [1]       The Insuring Clauses       13-7         [2]       "Claims-Made" Policy       13-8         § 13.04       Defined Terms       13-12         [1]       "Wrongful Act"       13-12         [2]       "Loss"       13-14.1
§ 13.02       Enabling Statutes       13-5         § 13.03       Basic Features of a D&O Liability Policy       13-7         [1]       The Insuring Clauses       13-7         [2]       "Claims-Made" Policy       13-8         § 13.04       Defined Terms       13-12         [1]       "Wrongful Act"       13-12         [2]       "Loss"       13-14.1
§ 13.03       Basic Features of a D&O Liability Policy.       13-7         [1]       The Insuring Clauses.       13-7         [2]       "Claims-Made" Policy.       13-8         § 13.04       Defined Terms.       13-12         [1]       "Wrongful Act"       13-12         [2]       "Loss".       13-14.1
[1] The Insuring Clauses. 13-7 [2] "Claims-Made" Policy. 13-8 § 13.04 Defined Terms. 13-12 [1] "Wrongful Act" 13-12 [2] "Loss". 13-14.1
[2] "Claims-Made" Policy 13-8 § 13.04 Defined Terms 13-12 [1] "Wrongful Act" 13-12 [2] "Loss" 13-14.1
§ 13.04       Defined Terms       13-12         [1]       "Wrongful Act"       13-12         [2]       "Loss"       13-14.1
[1] "Wrongful Act"
[2] "Loss"
§ 13.05 Exclusions
v .
[1] Insured Versus Insured
[2] Antitakeover Exclusion
[3] Prior or Pending Litigation 13-25
[4] Fraud
§ 13.06 Reporting and Notice
[1] Claim Reporting Requirement 13-27
[2] I ne Occurrence Exception to the
[2] The Occurrence Exception to the Claims-Made Rule

		TABLE OF CONTENTS	xxiii
§	13.07	Defense of Actions	13-31 13-31
		Defense Expenses	13-35
		[a] The Relative Exposure Analysis	13-37
		[b] The Larger Settlement Rule	13-38
		[c] The Reasonably Related Test	13-40
		[3] Settlement	13-40
		[4] Recoupment of Defense Costs	13-40.1
§	13.08	Excess Coverage	13-41
§	13.09	Cancellation and Rescission	13-43
		[1] Cancellation	13-43
		[2] Rescission	13-43
§	13.10	Liability Limiting Statutes	13-45
		CHAPTER 14	
		Settlement	
§	14.01	In General	14-2
§	14.02	Notification of Shareholders	14-5
		[1] Notification Requirement	14-5
		[2] Adequacy of Notice	14-6
§	14.03	Preclusive Effect of Settlement	14-9
§	14.04	Objectors	14-10.1
_		[1] Standing of Shareholders to Object	
		and Appeal	14-10.1
		[2] Discovery by Objector	14-11
§	14.05	Legal Standards for Reviewing Proposed	
		Settlements	14-13
		[1] Establishing a Presumption of Fairness	14-14
		[a] Absence of Collusion	14-15
		[b] Experienced Counsel	14-16
		[c] Sufficient Discovery	14-16.1
			14-16.1
		[2] Factors to Be Considered When	
		Settlement Is Accorded Initial	
		Presumption of Fairness	14-17
		[a] Benefit to the Corporation	14-20
		[b] Likelihood of Success on	
		the Merits	14-23
		[c] Complexity, Expense, and State	
		of Litigation	14-24
		[d] Reaction of Shareholders	14-25
		L 3	

xxiv		SHAREHOLDER DERIVATIVE LITIGATION			
§	14.06	Attorneys' Fees and Incentive Awards	14-26 14-26		
		[2] Making Plaintiff's Counsel Earn Their Fees	14-32		
		[3] Attorneys' Fees When Defendants' Action Renders the Litigation			
		Moot			
		Plaintiffs' Counsel	14-42		
		[6] In re Riverbed Technology: A Sea Change in Shareholder Litigation			
8	14.07	Settlements?	14-46.1		
o		Decisions to Settle	14-47		
§	14.08	Considerations Regarding Representation in	1.4.40		
		Settlement Negotiations	14-49		
		Actions	14-49		
		[2] The Need for Separate Corporate and			
		Individual Counsel in Successive	14-54		
		Representations	14-34		
		CHAPTER 15			
		<b>Practical Considerations</b>			
§	15.01	Introduction	15-2		
	15.02	Identifying a Derivative Demand	15-4		
§	15.03	Initial Response to a Demand Letter [1] Notification of the Company's	15-6		
		Insurance Carrier	15-6		
		Shareholder	15-8		
§	15.04	An Overview of the Formation of a Committee of the Board to Consider			
		Derivative Claims	15-9		
§	15.05	Formation of a Committee of the Board to	15 10		
8	15.06	Consider a Demand	15-10		
8	15.00	a Lawsuit Is Filed with No Pre-Suit			
		Demand Having Been Made	15-12		
§	15.07	The Investigation of the Committee of the Board	15-14		
		WIND DUMING	10 17		

		TABLE OF CONTENTS	XXV
	[1]	Retention of Counsel	15-14
	[2] [3]	Scope of the Committee's Review Role of the Committee in the	15-16
	F 43	Investigative Process	15-17
	[4]	Document Collection and Review [a] Identifying the Essential	15-18 15-18
		Documents	
	[5]	Relevant Documents The Witness Interview	15-19 15-20
	[5]		15-20
		[a] Opening Remarks	
		Interview	15-21
§ 15.08		ting with Shareholder's Counsel	15-23
§ 15.09		orting the Results of the Committee's	15.04
		vestigation	15-24
	[1]	Reporting in the Demand-Required	15.04
		Context	15-24
		[a] Report of Counsel to the	15.26
		Evaluation Committee	15-26
		[b] Report of the Evaluation	15.07
		Committee to the Board	15-27
		[c] The Board Meeting	15-28
	[2]	[d] The Board Resolution	15-28
	[2]	Reporting in the Demand-Excused	15.20
c 15 10	Conc	Context	15-29
§ 15.10	[1]	Conclusions of the Board After the	15-30
		Recommendation Is Made by an	
	507	Evaluation Committee	15-30
	[2]	Conclusions of an Empowered	1.7.01
0.4744	G1	Committee	15-31
§ 15.11		ement of a Derivative Proceeding	15-33
	[1]	Structuring a Settlement	15-34
	[2]	The Memorandum of Understanding	15-35
	[3]	Involvement of the Insurance Carrier	15-37
	[4]	Conducting Confirmatory Discovery	15-38
	[5]	The Final Settlement Agreement [a] The Basic Terms of the Settlement	15-39
		Agreement	15-39
		[b] Contingencies and Other	
		Miscellaneous Provisions to	
		Be Included in the Settlement	
		Agreement	15-41

xxvi	SH	AREHOI	LDER DERIVATIVE LITIGATION					
	[6]		o Shareholders'hen to Provide Individual	15-43				
			Noticeispatching Notice to	15-43				
			Shareholders	15-44				
		[c] Fo	orm of Individual Notice	15-45				
		[d] No	otice by Publication	15-46				
	[7]		ng Final Approval of					
	_		ettlement	15-47				
§ 15.12	Insura	ance Con	siderations	15-49				
			Appendices					
APPENDIX A: Derivative Action Flow Chart								
APPEND	IX B:		Rule of Civil Procedure 23.1	D 1				
A DDENID	IV C.		ve Action by Shareholders erivative Action Statutes	B-1				
AFFEND	IA C:		es	C-1				
APPENDIX D: Selected Provisions from the Model								
1111 21 (2			s Corporation Act	D-1				
APPEND	IX E:		Provisions from the American	2 1				
		Law Ins	stitute's Principles of Corporate					
			ance: Analysis and					
		Recomn	nendations	E-1				
APPEND	IX F:		Provisions from the					
			s-Oxley Act of 2002	F-1				
APPEND	IX G:	Memora	andum of Understanding	G-1				
APPEND			ent Documents	H-1				
			Stipulation of Settlement	H-3				
			Notice of Proposed Settlement Summary Notice	H-18 H-29				
			Order Certifying a Settlement	11-29				
	Apper	IIUIX II- <del>T</del>	Class	H-31				
	Annei	ndix H-5	Order of Notice Hearing and	11 51				
Administration								
	Apper	ndix H-6	Order and Final Judgment	H-33 H-39				
			Order Awarding Attorneys'					
			Fees	H-43				
TABLE (	OF CA	SES		TC-1				
TABLE (	OF AB	BREVIA	ATIONS	TA-1				
INDEX.				I-1				