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Advancement of Legal Fees May Be More Than Corporations Bargained For: Miller v. Miller, 973 N.E.2d 228 (Ohio 2012)

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ADVANCEMENT OF LEGAL FEES MAY BE MORE THAN CORPORATIONS BARGAINED FOR: *MILLER V. MILLER*, 973 N.E.2D 228 (OHIO 2012)

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I. INTRODUCTION

Smart, driven, and financially savvy directors are the touchstones of well-run corporations. Therefore, it is no surprise that seeking and attracting qualified individuals to serve in those roles is a priority for corporations. However, serving as a director comes with many responsibilities and risks. An environment that makes it safe for directors to take risks encourages risk taking. A business environment that encourages risk taking—prudent risk taking but still risk taking—is an environment that is good for business. The "business judgment rule" protects officers and directors, acting in their official capacity, from liability for exercising the judgment demanded by their roles.[1] The expansion of the business judgment rule and the statutory protections limiting directors' personal liability for actions taken as director have created a framework that encourages qualified candidates to seek these positions, giving corporations the best opportunity to be competitive. To promote that capitalistic culture, a key consideration for any potential director is the right to advancement.

Advancement prevents directors from having to pay out of pocket for legal fees incurred defending actions related to their position as director.[2] The right of advancement creates an obligation for the corporation to pay the legal fees of directors as they are incurred. Advancement is triggered when a claim related to the conduct of a director in carrying out his duties as director is filed.[3] Therefore, it allows for front-end payment. A closely related right, but distinct from advancement, is indemnification, which occurs at the close of litigation and refers to the right of the director to be reimbursed for legal fees.[4] If

1. MELVIN ARON EISENBERG & JAMES D. COX, CORPORATIONS AND OTHER BUSINESS ORGANIZATIONS 770-771 (10th ed. 2011) ("[The business judgment rule] 'is a presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith, and in the honest belief that the action taken was in the best interest of the company.' Nevertheless, a showing that the board breached either its fiduciary duty of care of its fiduciary duty of loyalty in connection with a challenged transaction may rebut this presumption.") (footnote omitted) (citing Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984)).

2. Richard A. Rossman, et al., Symposium, *Primer on Advancement of Defense Costs: The Rights and Duties of Officers and Corporations*, 85 U. DET. MERCY L. REV. 29, 31 (2007).

3. *Id*. This was an issue raised by the plaintiff in *Miller* and the Court failed to adequately address whether or not advancement applies only in these situations.

4. *Id*.

the director succeeds in his defense, the corporation will reimburse the fees. Otherwise, the director is responsible for the fees.[5]

In 1986, the Ohio General Assembly amended its corporate statutes, marking a change in many corporate laws, including the addition of default advancement for directors. The Ohio Supreme Court recently examined the advancement statute for the first time in *Miller v. Miller*.[6] This Article analyzes the business climate when the amendments were adopted, the court's decision in *Miller*, and the potential issues this statute creates going forward, especially for close corporations. Part II takes a retrospective look at the climate of corporate litigation when the 1986 amendments were enacted, the provisions of the advancement amendments in Ohio and Delaware, and the Ohio Supreme Court's decision in *Miller*. Part III examines Ohio's adoption of opt-out advancement, the *Mille*r decision, and the effects of both on the future of advancement rights in Ohio. Part IV concludes that *Miller*, rather than clarifying the issue of advancement, only succeeded in creating more questions for Ohio companies and the attorneys advising them.

II. BACKGROUND

A. 1980s: A Growing Concern Regarding Personal Liability of Corporate Officers and Directors.

When Ohio amended its corporate statutes in 1986, immense uncertainty and anxiety existed in the corporate world. Recent court decisions and increasing directors' and officers' (D&O) insurance premiums created an environment that caused legislatures to prepare for the worst.[7]

In *Smith v. Van Gorkom,* the Delaware Supreme Court held that directors were not protected by the business judgment rule in situations in which they failed to "inform themselves of all information reasonably available to them and relevant to their decision" and failed to "disclose all material information" to shareholders.[8] The transaction in *Van Gorkom* was a merger in which the CEO and the board of directors acted quickly to sell the company at a share price that was above market value but had not been independently confirmed as the intrinsic value of the stock.[9] Rather than review any reports, the board relied on the oral

5. *Id.*

6. Miller v. Miller, 973 N.E.2d 228, 233 (Ohio 2012).

7. *See* Deborah Cahalane, *1986 Ohio Corporation Amendments: Expanding the Scope of Director Immunity*, 56 U. CIN. L. REV. 663, 664 (1987).

8. Smith v. Van Gorkom, 488 A.2d 858, 893 (Del. 1985).

9. *Id.* at 865–67.

presentations of the CEO and the company's attorney.[10] Although the board voted for a bid period to test the value of the stock, it did not review the merger contract before approving it.[11] The court held that the board of directors acted with gross negligence for conduct that seemed to be mere negligence,[12] thus limiting the believed broad protection of the business judgment rule.

One year earlier, in *Jones v. VIP Development Co.*, the Ohio Supreme Court had lowered the threshold for traditional negligence.[13] *Van Gorkom* and *Jones* demonstrated the courts' widespread willingness to hold negligent parties to a higher standard of care and resulted in great uncertainty for corporate directors.

To make matters worse, at that time claims against corporate directors and officers had almost tripled nationally.[14] In 1985, one in five directors was involved in litigation.[15] Due to the growing number of claims and uncertainty about the protection of the business judgment rule, D&O premiums skyrocketed, increasing tenfold between 1984 and 1986.[16] At the same time, insurers refused to underwrite claims in excess of $10 million, despite a median policy limit of $25 million.[17] Corporations' inability to insure directors and the expanded potential liability for directors resulted in an exodus of independent directors from corporations and a shrinking field of directors willing to undertake the risks associated with the position.

For good reason, corporations were nervous. Indiana's legislature was the first to react, followed by Delaware, and then forty other states.[18] The new amendments were designed to reduce the risk of directors' personal liability for money damages in hopes of attracting qualified individuals to the position.[19] Several states expanded nonexclusivity provisions, allowing for more than just indemnification.[20] Many of these expansions seemed to allow for

10. *Id.* at 869.

11. *Id.* at 869.

12. Cahalane, *supra* note 7, at 669–70.

13. Jones v. VIP Dev. Co., 472 N.E.2d 1046, 1059 (Ohio 1984).

14. Cahalane, *supra* note 7, at 670–71.

15. *Id.* at 671 n.44.

16. *Id.* at 671.

17. *Id.* at 671 n.46.

18. James J. Hanks, Jr., *Evaluating Recent Changes in State Legislation on Director and Officer Liability Limitation and Indemnification*, 43 BUS. LAW. 1207, 1209 (1988).

19. *Id.* at 1209.

20. *Id.* at 1226–27 ("Nonexclusivity provisions offer an important opportunity for corporate counsel to craft broad protection for directors and officers. . . . These contracts should be drafted as 'freestanding' obligations containing all of the substantive rights (including advancement of expenses) and necessary procedures to furnish the desired protection without relying upon changeable statutes or charter or by-law provisions.").

advancement in cases of willful misconduct or even recklessness, neither of which had been allowed previously.[21]

B. Ohio's Response

In 1986, Ohio joined the movement to quell the worry and uncertainty and amended its corporate statutes.[22] Ohio broadened its already-codified business judgment rule and expanded the instances in which a director could be indemnified for legal fees.[23] But most notably, Ohio added the right to advancement for corporate directors.[24] Combined, these expansions greatly decreased the circumstances in which a director would be personally responsible for the costs of litigation.[25]

The Ohio State Bar Association (OSBA) was a key player in the quick adoption of the 1986 amendments.[26] According to the OSBA, the amendment was necessary because corporations were leaving Ohio, citing more favorable statutes in other states as the reason.[27] The General Assembly, in an "emergency," adopted the expansion of director rights.[28]

Currently, the advancement of legal fees to directors is the default rule for Ohio corporations; the corporation must specifically opt out in its articles of incorporations or bylaws by citing the statute.[29] The advancement statute provides that the duty to advance fees in a specific case arises when the director agrees to repay the fees if the director

21. *Id.* at 1226.

22. Cahalane, *supra* note 7, at 672.

23. *Id.* at 665; *see also* OHIO REV. CODE ANN. § 1701.59(a) (West 2012).

24. Cahalane, supra note 7, at 672.

25. *Id.*

26. Merit Brief of Amicus Curiae the Ohio State Bar Association in Support of Appellant Sam M. Miller at 1, Miller v. Miller, 973 N.E.2d 228 (Ohio 2012) (No. 2011-0024) [hereinafter *OSBA Brief*].

27. *Id.*

28. *Id.*

29. OHIO REV. CODE ANN. § 1701.13(E)(5)(a) (West 2012).

> Unless at the time of a director's act or omission that is the subject of an action, suit, or proceeding referred to in division (E)(1) or (2) of this section, the articles or the regulations of a corporation state, by specific reference to this division, that the provisions of this division do not apply to the corporation and unless the only liability asserted against a director in an action, suit, or proceeding referred to in division (E)(1) or (2) of this section is pursuant to section 1701.95 of the Revised Code, expenses, including attorney's fees, incurred by a director in defending the action, suit, or proceeding shall be paid by the corporation as they are incurred, in advance of the final disposition of the action, suit, or proceeding, upon receipt of an undertaking by or on behalf of the director in which the director agrees to do both of the following:
>
> (i) Repay that amount if it is proved by clear and convincing evidence in a court of competent jurisdiction that the director's action or failure to act involved an act or omission undertaken with deliberate intent to cause injury to the corporation or undertaken with reckless disregard for the best interests of the corporation;
>
> (ii) Reasonably cooperate with the corporation concerning the action, suit, or proceeding.

loses, and the director agrees to reasonably cooperate with the corporation in the pending suit.[30]

Unlike Ohio, the majority of states and the Model Business Corporation Act (The Model Act) have a permissive advancement statute that allows corporations to grant advancement but does not automatically create an obligation to advance fees.[31] In permissive jurisdictions, a corporation will typically adopt language similar to the statute in its articles of incorporation or bylaws granting the right to and scope of advancement.[32] In all jurisdictions, including Ohio, precision and specificity in drafting corporate governing documents is dispositive of the rights and obligations of directors.[33]

C. Delaware Advancement

Delaware, like Ohio, reacted to the panic by enacting statutes that provide expanded protection of directors under the business judgment rule and limit the instances in which directors are personally responsible for legal fees. However, the Delaware advancement law is permissive, whereas the Ohio law is the default. A Delaware corporation *may* include advancement in its articles of incorporation or its bylaws, but in the absence of an advancement clause, a director cannot force the corporation to advance legal fees.[34]

The Delaware Supreme Court has addressed the issue of advancement several times, mostly notably in *Homestore, Inc. v. Tafeen*.[35] Homestore had adopted advancement rights for its officers but then refused to pay fees for civil and criminal proceedings for its director, Tafeen.[36] The court held that when a company has adopted mandatory advancement, the company cannot avoid advancement, even under the most egregious circumstances.[37]

Once a Delaware corporation adopts the right to advancement, the court will enforce the director's rights.[38] Although challenges to advancement are allowed in summary proceedings, the advancement right granted in a corporation's articles of incorporation or bylaws is

30. *Id.*

31. Rossman, et al., *supra* note 2, at 34.

32. *Id.* at 34.

33. *Id.* at 36.

34. DEL. CODE ANN. tit. 8, § 145 (West 2011).

35. Homestore, Inc. v. Tafeen, 886 A.2d 502 (Del. 2005).

36. *Id.* at 503.

37. *Id.* at 505.

38. Stephen A. Radin, *"Sinners Who Find Religion": Advancement of Litigation Expenses to Corporate Officials Accused of Wrongdoing*, 25 REV. LITIG. 251, 256–57 (2006).

treated as a contractual provision.[39] The purpose of advancement, the Delaware Supreme Court has stated, is to "promote the desirable end that corporate officials will resist what they consider unjustified suits and claims, secure in the knowledge that their reasonable expenses will be borne by the corporation they have served if they are vindicated."[40] That purpose prevails across the country and summarizes why the right to advancement is important to a corporation's ability to recruit quality directors.

D. Miller v. Miller

The Ohio Supreme Court addressed the 1986 advancement statute for the first time in *Miller v. Miller*.[41] Relying on Delaware law, the Court held that the defendant, Sam M. Miller (Director Miller), was entitled to advancement of legal fees for his defense in a derivative suit brought by shareholders of Trumbell Industries (Shareholders-Miller), a close corporation.[42] Trumbell Industries (Trumbell), an Ohio close corporation that sold plumbing supplies, was owned by four cousins, each of whom also served as a director of Trumbell.[43]

1. The Parties: A Civil War

The plaintiffs were one set of Miller cousins (Shareholders-Miller) who together owned 50% of Trumbell stock and made up two of the four members of the Board of Directors.[44] A majority of the Board did not approve the suit because the four family members had been divided, two to two, for years.[45] Trumbell was later added as a plaintiff without the Board's approval.[46]

The defendant, Director Miller, was another cousin who owned 25% of Trumbell.[47] His brother was the final 25% owner. Director Miller and his brother were the other two members of the Board of Directors.[48]

Shareholders-Millers brought a derivative action against the

39. *Id.* at 256–57.

40. *Homestore*, 886 A.2d at 505.

41. Miller v. Miller, 973 N.E.2d 228 (Ohio 2012).

42. *Id.* at 230.

43. *Id*.

44. Merit Brief of Appellees at 3, Miller v. Miller, 973 N.E.2d 228 (Ohio 2012) (No. 2011-0024) [hereinafter *Shareholders Brief*].

45. Merit Brief of Appellant Sam M. Miller at *26–27, Miller v. Miller, 973 N.E.2d 228 (Ohio 2012) (No. 11-0024), 2011 WL 2249529 [hereinafter *Miller Brief*].

46. *Id.*

47. *Shareholders Brief*, supra note 44, at 4.

48. *Id.*

defendant alleging Director Miller's involvement with a third-party company that also sold plumbing supplies was a violation of his fiduciary duty.[49] In addition to being a shareholder, Director Miller was Vice President of Sales and Marketing, Plumbing-Products Manager, and a member of the Trumbell Board of Directors.[50]

2. The Eleventh District Court of Appeals Ruling: A Valiant Effort

The claim alleged that Director Miller entered into an agreement with another company in violation of his fiduciary duties to Trumbell.[51] After the suit commenced, Director Miller reimbursed himself for his current legal fees and submitted an "undertaking" to Trumbell, calling on his right to advancement pursuant to ORC 1701.13(E)(5).[52] Following the provision's requirements, Director Miller's undertaking stated that he agreed to repay the fees should he not be successful in his defense and to reasonably cooperate with the corporation during the suit.[53] Both sides moved for declaratory judgment on the issue of advancement.[54] The trial court ordered Trumbell to advance the legal fees to Director Miller because, according to the undertaking, he had complied with the requirements in the Ohio statute.[55]

The Eleventh District Court of Appeals reversed, holding that Director Miller was not entitled to advancement because the relevant provisions of the code are limited to a lawsuit where the director is seeking to secure a benefit for the corporation.[56] The Eleventh District focused on two aspects of the statute: (1) "an act or omission" and (2) "an action, suit, or proceeding referred to in division (E)(1) or (E)(2)."[57] The court found that this case did not meet either requirement. First, the allegations centered on Director Miller's involvement with an outside company, which meant that Director Miller was not acting within the scope of his directorial duties, and therefore, the claim did not concern an act or omission on behalf of the corporation.[58] Second, the court found that the case fell within the exclusionary language contained in the statute because (E)(1) and (E)(2) are only applicable if the director

49. Miller v. Miller, 973 N.E.2d 228, 230 (Ohio 2012).

50. *Id.*

51. *Id.*

52. Ohio law requires directors submit an undertaking, which is a written statement in which the director agrees to abide by O.R.C. § 1701.13(E)(5)(a).

53. *Miller*, 973 N.E.2d at 230.

54. *Id.*

55. *Id.*

56. Miller v. Miller, 942 N.E.2d. 438, 445 (Ohio Ct. App. 11th Dist. 2010).

57. *Id.*

58. *Id.*

"acted in good faith and in a manner he reasonably believed to be in or not opposed to the best interests of the corporation."[59] According to the court, Director Miller was not acting in the best interest of the corporation when he entered into the agreement with the other company. Section (E)(2) further excluded this action because that section relates to a director seeking to procure a judgment in favor of the corporation.[60] The court also explained that division (E)(1) only applies to cases "other than an action by or in the right of the corporation."[61] The court held that "any other interpretation has the potential to result in significant injustice to the corporation and any of the remaining shareholders."[62]

In a concurrence, Judge Grendall emphasized the finding that section 1701.13(E)(5)(a) only allows for advancement in actions where the director acted in good faith and not in opposition to the best interests of the corporation.[63] Furthermore, Judge Grendall stated that the defendant could not meet the requirement of reasonable cooperation because the defendant's interests were opposed to the corporation's.[64] Director Miller appealed to the Ohio Supreme Court.[65]

3. The Ohio Supreme Court: A Simplified Version of the Case

The Ohio Supreme Court's decision first distinguished between the right to advancement and the right to indemnification.[66] It found that advancement is a separate and distinct right while the underlying action is pending and is essential to the defendant's ability to mount a defense.[67] Therefore, advancement is not dependent on indemnification.[68] Nor is advancement limited when the corporation alleges conduct that, if proven, would bar indemnification.[69] The court found that allowing a corporation to avoid advancement by alleging misconduct would render the advancement law moot.[70] In this way, Shareholders-Miller's allegation that Director Miller violated his fiduciary duty did not absolve Trumbell from the obligation to advance

59. *Id.*
60. *Id.*
61. *Id.*
62. *Id.*
63. *Id.* at 446 (Grendall, J., concurring).
64. *Id.* at 447.
65. Miller v. Miller, 973 N.E.2d 228, 233 (Ohio 2012).
66. *Id.* at 234.
67. *Id.*
68. *Id.* at 237.
69. *Id*.
70. *Id.* at 238.

Director Miller's legal fees.[71]

The corporation argued that advancement is only available in an "action, suit, or proceeding" referred to in (E)(1) or (2), namely where "the person acted in good faith, and in a manner the person reasonably believed to be in or not opposed to the best interests of the corporation."[72] The majority dismissed this argument because, as stated above, advancement is not dependent on whether the director would be entitled to indemnification.[73] The court relied heavily on *United States v. Stein*,[74] a Southern District of New York case applying Delaware law, despite the fact that the Ohio and Delaware statutes are fundamentally different.[75] In *Stein*, the main issues were whether the court had jurisdiction over the advancement claim and what law applied.[76] The decision, although it contained a short discussion of the advancement rights in Delaware,[77] provided a civil procedure analysis of advancement, rather than a substantive one.[78] Furthermore, the case involved several contractual obligations regarding advancement between the corporation and the defendants, which were absent in *Miller*.[79]

Although the court of appeals found the plaintiff's argument persuasive, the Ohio Supreme Court stated that the court of appeals wrongly decided the issue of advancement because it focused on indemnification, but the Ohio Supreme Court did not address the significance or role of the language in section 1701.13(E)(5) referring to (E)(1) and (2) that the court of appeals had found so interesting.

The court then addressed circumstances when a corporation does not have a duty to advance fees. According to ORC 1701.13(E)(5)(a), a company opting out of advancement must specifically state that the law regarding advancement does not apply to it.[80] Under the statute, the court held that advancement is mandatory unless the company specifically opts out.[81] The Court found that Trumbell did not specifically opt out of the provision.[82] Trumbell's articles of incorporation did allow for indemnification but made no reference to

71. *Id.* at 238–39.

72. *Id.* at 237.

73. *Id.*

74. United States v. Stein, 452 F.Supp.2d 230 (S.D.N.Y. 2006), *vacated sub nom.* Stein v. KPMG, LLP, 486 F.3d 753 (2d Cir. 2007).

75. Miller v. Miller, 973 N.E.2d 228, 237 (Ohio 2012).

76. *Stein*, 452 F.Supp.2d at 269–71.

77. *Id.* at 271–72.

78. *Id.* at 273 (conducting an Erie Doctrine analysis of advancement law).

79. *Id.* at 239.

80. *Id.*

81. *Id.* at 240.

82. *Id.* at 239.

advancement.[83] Because advancement is the default in Ohio, Trumbell had to affirmatively opt out in order to avoid it.[84]

However, the court also found that, under the statute, advancement, although mandatory, is not automatic.[85] A defendant seeking advancement must execute an undertaking, agreeing to repay the fees if his defense is unsuccessful and reasonably cooperate with the corporation concerning the action, suit, or proceeding.[86] The court found that Director Miller fulfilled the requirements that triggered the advancement.[87] Once Trumbell received Director Miller's undertaking, its duty to advance legal fees became mandatory.[88]

The court dismissed Shareholders-Miller's argument that Director Miller was acting as an officer in his capacity as Vice President and therefore, was not entitled to advancement.[89] The court stated that because the plaintiff had not raised the issue in the lower court, it could not do so now.[90]

The majority also dismissed Shareholders-Miller's argument that Director Miller did not reasonably cooperate and found that Shareholders-Miller's evidence purporting to show Director Miller's lack of cooperation was inadequate.[91] Shareholders-Miller's evidence included the trial court's finding that Director Miller had wrongfully withheld documents and had been ordered to reimburse the plaintiff's legal fees for expenses incurred as a result of his delay.[92] Director Miller produced the documents, including a letter that became the crux of the plaintiff's case, only after the corporation filed a request for sanctions.[93] Shareholders-Miller also presented deposition testimony in which, in response to a question regarding Director Miller's cooperation with the plaintiffs, Director Miller stated he would only respond to requests from a majority of the Board.[94] Because the Trumbell Board had been deadlocked in a family feud for over a decade and split the parties in the suit, getting a majority of the Board to agree on anything was an impossible task.[95] The court found that Shareholders-Miller did

83. *Id.*
84. *Id.* at 240.
85. *Id.*
86. *Id.*
87. *Id.* at 240–41.
88. *Id.* at 241.
89. *Id.* at 238.
90. *Id.*
91. *Id.*
92. *Shareholder's Brief*, *supra* note 44, at 15.
93. *Id.*
94. *Id.* at 18; *see also* Miller v. Miller, 973 N.E.2d 228, 240 (Ohio 2012).
95. A majority decision was impossible because the Board was divided in the suit. *Shareholders*

not point to anything specific showing Director Miller actually failed to cooperate, and furthermore, the court found that the duty to reasonably cooperate should not require the director to surrender his right to defend himself.[96] The court again cited *Stein* in support of its argument that companies still have a duty to advance legal fees when they sue directors for wrongdoing.[97] In rejecting the plaintiff's argument, the court stated the evidence was inadequate to show the defendant was uncooperative, suggesting that evidence of an uncooperative director may be the way out of advancement.[98]

The court held that Director Miller was entitled to advancement of his legal fees, despite being sued by directors/shareholders of the close corporation for breach of his fiduciary duties.[99]

4. The Dissent: A Plea to the General Assembly

Justice O'Donnell, in a short dissent, found that mandatory advancement does not apply to companies suing their own directors for breach of directors' duties because such a director would have acted in his individual capacity and could not reasonably cooperate with the company.[100] Therefore, the requirements for advancement cannot be met in those situations.[101]

Advancement is only required, Justice O'Donnell argued, in claims arising out of service as a director.[102] Therefore, Trumbell had no statutory duty to advance expenses if the director acted in an individual capacity, as he found Director Miller did.[103]

The dissent argued that it was not the General Assembly's intent to force a company to advance legal fees for a defense against itself.[104] This argument was evident by the wording of the statute requiring the director to "reasonably cooperate" with the corporation.[105] As Justice O'Donnell explained, "when the director and the corporation are adverse parties in litigation, the director simply cannot reasonably cooperate in

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Brief, *supra* note 44, at 18.

96. *Miller*, 973 N.E.2d at 240–41.

97. *Id.* at 241 ("[T]he duty to advance expenses often requires companies to advance the cost of defending claims that allege wrongs to the companies, even lawsuits brought by companies themselves against former officers and directors.") (quoting United States v. Stein, 452 F. Supp. 2d 230, 272 (S.D.N.Y. 2006)) (internal quotation marks omitted).

98. *Id.* at 240–41.

99. *Id.* at 241.

100. *Id.* at 241–42 (O'Donnell, J., dissenting).

101. *Id.* at 242.

102. *Id.* at 241.

103. *Id.*

104. *Id.* at 242.

105. *Id.*

the manner required by the statute, and the circumstances of this case demonstrate the futility of expecting a director to fully and honestly assist the corporation's suit against him."[106] The dissent pointed out that the majority failed to recognize the director's duty to reasonably cooperate with the corporation.[107] In this case, because Director Miller was being sued by the corporation, Director Miller could not reasonably cooperate and should not be expected to, even if he says he will.[108] The dissent went on to say that the company should not have to wait until final adjudication of the underlying action before receiving a judgment on advancement.[109] Here, the allegations had enough substance to suggest that Director Miller was acting ultra vires, and therefore, would not be entitled to indemnification protection after the case and therefore not entitled to advancement during the case.[110]

Justice O'Donnell ended his dissent by encouraging the General Assembly to clarify the law in this area to exclude advancement when a corporation sues its own directors.[111]

III. ANALYSIS

The *Miller* case presented a complex situation in which to apply the advancement statute. The complexity of the issues and the uniqueness of the parties made it a challenging case to create a valuable interpretation of the law for the future. Consequently, *Miller* created an inappropriately simplistic precedent that created more uncertainty than existed before the case was decided. That inappropriate simplicity is most poignant in the application of the statute to a closely held, family company.

A. Unique Circumstances Lead to Unintended Consequences

The 1986 Comment to the corporate amendments stated that a corporation, unless its articles of incorporation specifically state that section 1701.13(E)(5)(a) does not apply to it, is required to advance legal fees to a director when it receives an undertaking by the director (1) to repay the fees if his conduct is deemed to have been recoverable under section 1701.59, and (2) to cooperate with the corporation.[112] The

106. *Id.*
107. *Id.* at 243.
108. *Id.* at 242–43.
109. *Id.* at 243.
110. *Id.*
111. *Id.*
112. OHIO REV. CODE ANN. § 1701.13 (West 2012).

1986 amendment greatly increased the allowable scope of directors' actions and greatly decreased the financial risk for directors.[113]

The Ohio General Assembly has a history of adopting default, rather than permissive, corporate laws.[114] Such laws are contrary to the Model Act and many Delaware statutes. One may argue that the laws make Ohio more "business friendly," which is precisely what the OSBA argued when its Corporation Law Committee proposed the emergency adoption of default advancement.[115] As stated above, Ohio wanted to stop directors and corporations from fleeing the state.[116] In its amicus brief, the OSBA stated that the amendment was quickly adopted with overwhelming support.[117] That many politicians are not familiar with the complexities of corporate law or that the OSBA had an interest (certainly a justified one though) in paid attorney's fees are undisputed. Therefore, it is not surprising that an emergency adoption of the default 1986 amendment has had unintended consequences. The fact that the OSBA was the main contributor and that the amendment was passed in a frantic attempt to prevent a migration of corporations away from the state, begs the question whether the language adopted really does further the best interest of corporations, specifically close corporations like Trumbell.[118]

The problem in 1986 was the inability of corporations to attract quality directors because of the threat of liability.[119] As previously stated, good directors are often behind good corporations. In the interest of promoting corporate welfare in this manner, Ohio created a default advancement regime.[120] The concern at the time was attracting directors, not the actual effect of paying directors' legal fees.[121]

The consequence is the court's ruling that advancement is mandatory unless a corporation opts out. The implications of the default rule are apparent in *Miller*, which illustrates how a blanket default advancement rule causes problems for close corporations.[122] Without proper limits, forcing this type of advancement regime on all corporations is contrary

113. Cahalane, *supra* note 7, at 672.

114. Examples of default provisions include the quorum default, OHIO REV. CODE ANN. § 1701.51(A), the cumulative-voting default, § 1701.55, the length-of-term default, § 1701.57, and the liability-shield default, § 1701.59(D).

115. *OSBA Brief*, *supra* note 26, at 2.

116. *Id.* at 1.

117. *Id.*

118. "Close corporations have only a small number of shareholders, and are typically characterized by owner-management. . . . [M]odern courts have come to understand that close corporations often need special treatment." EISENBERG & COX, *supra* note 1, at 452.

119. *OSBA Brief*, *supra* note 26, at 26.

120. *Id.* at 2.

121. *Id.*

122. *Shareholders Brief*, *supra* note 44, at 3.

to the purpose of the 1986 amendments.

B. The Need for Legislative Clarification

The Ohio Supreme Court correctly construed ORC 1701.13(E)(5)(a) but incorrectly distilled the case down to a corporation suing its director for violation of a fiduciary duty.[123] This distillation oversimplified the facts of the claim and therefore, prevented the court from thoroughly analyzing the statute.

According to the statute, advancement is a guaranteed right for directors in all but two circumstances: when the corporation disclaims its applicability in its articles of incorporation or bylaws or when the director fails to meet the requirements of the statute.[124] The Ohio Supreme Court's holding was warranted in three ways. Fundamentally, indemnification and advancement are two distinct rights, not dependent on each other, and advancement was the only issue in the case.[125] Statutorily, Ohio law makes advancement the default rule, and therefore, the corporation is responsible for understanding its advancement duties.[126] Specifically, because the Supreme Court found Director Miller met the requirements of the statute, it had to find in his favor.[127]

First, the Court rejected any argument that advancement is dependent on indemnification because under longstanding corporate law, the two rights are distinct, and under Ohio law, the legislature treated them separately.[128] The Ohio Revised Code (ORC) provides that indemnification "may" be allowed, but the ORC provides that advancement "shall" be awarded as long as the statutory requirements are met.[129] The court was correct in holding that fundamentally the two rights are distinct and advancement is not dependent on the ultimate ability to be indemnified.[130]

The court was also correct in pointing out that regardless of the indemnification rights provided in the articles of incorporation, Trumbell failed to disclaim its duty to advance fees in the same articles or regulations.[131] The Ohio statute shifts the burden to the corporation

123. Miller v. Miller, 973 N.E.2d 228, 230 (Ohio 2012).

124. OHIO REV. CODE ANN. § 1701.13(E)(5)(a) (West 2012).

125. *Miller*, 973 N.E.2d at 429–30.

126. *Id.* at 240.

127. *Id.* at 241.

128. *Id.* at 233–34.

129. OHIO REV. CODE ANN. § 1701.13(E)(1) ("A corporation *may* indemnify . . . .") (emphasis added); § 1701.13(E)(5)(a) ("[E]xpenses . . . *shall* be paid by the corporation as they are incurred . . . .") (emphasis added).

130. *Miller*, 973 N.E.2d at 234.

131. *Id.* at 240.

to understand what duties it undertakes when it incorporates in Ohio. The law specifically allows a corporation to opt out completely from the requirement.[132] Advancement, by its definition, implies an unsavory position in which the director of a company is being sued for her actions or omissions as a director. That is precisely why the advancement right is important to attract directors. The court's holding shows that a corporation cannot use a statutory provision to attract a director, then turn around and disclaim that duty in order to avoid paying for that same director's fees if and when the case arises. If Trumbell had wanted to avoid advancement, it could have done so at any time by amending the articles or bylaws.[133] Trumbell did not, and therefore, it cannot try to avoid its statutory obligations when an unpleasant case emerges.[134]

Finally, because the court found that Director Miller met the statutory requirements, it correctly held his legal fees had to be advanced. The court, after analyzing the "reasonable cooperation" requirement, found that Director Miller did comply. Therefore, the moment Trumbell received the undertaking its duty was triggered.[135]

On its face, the opinion applied a straightforward and correct statutory interpretation based on the plain language of the rule. However, the case presented more complex issues that remain unsettled by the opinion.

1. Are There Any Limits in Section 1701.13(E)(5)?

The court failed to address whether advancement applies to a company's suit against its own director in two regards: first, by omitting the provision of the statute that referred to ORC 1701.13(E)(1) or (2); and second, by not adequately vetting the circumstances under which Director Miller was sued.

First, the court rendered the (E)(1) and (E)(2) language in section 1701.13 superfluous and wrongly relied on a Delaware decision in making this determination. ORC 1701.13 provides:

> (5)(a) Unless at the time of a director's act or omission *that is the subject of an action, suit, or proceeding referred to in division (E)(1) or (2) of this section*, the articles . . . state, . . . that the provisions of this division do not apply to the corporation and unless the only liability asserted against a director *in an action, suit, or proceeding referred to in division (E)(1) or (2) of this section is pursuant to section 1701.95* of the Revised Code, expenses, including attorney's fees, incurred by a director in

132. OHIO REV. CODE ANN. § 1701.13(E)(5)(a) (West 2012).

133. *Miller*, 973 N.E.2d at 239.

134. *Id.* at 240.

135. *Id.* at 241.

> defending the action, suit, or proceeding shall be paid by the corporation . . . [136]

The court did not address the "action, suit, or proceeding referred to in division (E)(1) or (2)" that is referenced twice in the provision. Sections (E)(1) and (2) govern indemnification rights.[137] The court of appeals addressed this issue extensively. In doing so, it came to the conclusion that cases under (E)(1) and (2) are cases in which the director is seeking to secure a benefit for the corporation.[138] The concurring appellate opinion found that the cases referred to in those provisions are those in which the "the person acted in good faith and in a manner the person reasonably believed to be in or not opposed to the best interests of the corporation," in other words, when the director is protected by the business judgment rule.[139] The Ohio Supreme Court rejected those arguments, finding the court of appeals wrongly made advancement reliant on indemnification.[140]

The Ohio Supreme Court then relied on *Stein* which stated

> a company *that undertakes to advance defense costs* may not avoid that obligation by claiming that the litigation against its former employee for which the employee seeks advancement of defense costs accuses the employee of conduct that, if proven, would foreclose indemnification or establish a breach . . . of duty.[141]

The *Stein* court was not analyzing the right to advancement but rather was looking at advancement in an Erie Doctrine analysis.[142]

Furthermore, the *Miller* Court failed to recognize distinctions in the Ohio and Delaware statutes. The Delaware code states that "expenses . . . *may* be paid by the corporation," as provided for in the corporation's articles or bylaws.[143] Unlike the Ohio provisions, the Delaware statute contains no reference to the types of actions or proceedings for which advance fees are allowed. In fact, the Delaware statute only states that fees may be paid in advance when a corporation receives an undertaking stating that the director or officer will repay the amount if it is determined he is not entitled to indemnification.[144] Therefore, when the *Stein* Court held that alleging misconduct does not eliminate the obligation of advancement, it was interpreting a different

136. OHIO REV. CODE ANN. § 1701.13(E)(5)(a) (West 2012) (emphasis added).
137. *Id.* § 1701.13(E)(1)–(2).
138. Miller v. Miller, 942 N.E.2d 438, 445 (Ohio Ct. App. 11th Dist. 2010).
139. *Id.* at 446 (Grendell, J., concurring).
140. *Miller*, 973 N.E.2d at 237.
141. *Id.* (emphasis added).
142. United States v. Stein, 452 F. Supp. 2d 230, 271–73 (S.D.N.Y. 2006).
143. DEL. CODE ANN. tit. 8, § 145(e) (West 2011) (emphasis added).
144. *Id.*

statute as well as the rights provided in the specific company's articles of incorporation and contracts with the defendants in that case.[145] The Ohio Supreme Court, therefore, was incorrect in relying on *Stein* to do a substantive analysis on whether the defendant in *Miller* had a statutory right to advancement under Ohio law. This holding renders the additional language in the code superfluous, violating one of the key canons of statutory interpretation, namely that the legislature means what it says and does not use superfluous words.[146]

Based on the language of the statute, the court should have limited advancement to cases in (E)(1) or (2).[147] It should have also specified to what cases (E)(1) and (2) referred. Although the court points out that relying on indemnification for advancement is inconsistent with the general understanding that does not allow the court to disregard the language in favor of a reading that is based on distinct law, the court did not declare the language in the statute inconsistent. Instead, it *ignored* explicit statutory language.

The Shareholders-Miller argued that (E)(5) was limited to actions challenging a director's conduct as a director.[148] According to Shareholders-Miller, (E)(1) and (2) should be read in conjunction with the undertaking requirement of (E)(5)(a)(i)–(ii).[149] The standard in the undertaking is the same as the standard for the business judgment rule protection in section 1701.59.[150] Therefore, the statute should not require advancement in cases in which "the director's action or failure to act involved an act or omission undertaken with deliberate intent to cause injury to the corporation or undertaken with reckless disregard for the best interests of the corporation."[151]

The defendant argued that (E)(5) was meant to cover any lawsuit filed against a director that is "based on his or her position as director, regardless of whether that lawsuit was filed by the corporation itself, by shareholders of the corporation, or by a person or company outside of the corporation."[152] Sections (E)(1) and (2) refer to actions brought by a person or party outside of the corporation and those brought "by or in the right of the corporation," respectively.[153] This suggests that the statute anticipated directors being sued by their corporations and being

145. *Id.*; *see also Stein*, 452 F. Supp. 2d at 239.

146. *See, e.g.*, Doe v. Montgomery Cnty. Bd. of Elections, 962 A.2d 342, 351 (Md. 2008). The Court in *Miller* also cites statutory canons, but then ignores them. *Miller*, 973 N.E.2d at 240.

147. OHIO REV. CODE ANN. § 1701.13(E)(5) (West 2012).

148. *Shareholders Brief*, *supra* note 44, at 29–30.

149. *Id.* at 30.

150. *Id.* at 31.

151. *Id.* (citing OHIO REV. CODE ANN. § 1701.59(D) (West 2012)).

152. *Miller Brief*, supra note 45, at 11.

153. *Id.*

advanced legal fees.[154]

The statutory language is ambiguous. The statute specifically references (E)(1) and (2) twice, but the court merely states that advancement is not reliant on indemnification without providing an explanation for that clause.

The reference to the indemnification provision does place a limit on the mandatory advancement.[155] The court did not see any limits in the Ohio statute because advancement, according to Delaware law, would not have any limits.[156] In this instance, comparison with the scope of Delaware law was misplaced because Delaware does not have default statutory advancement.[157] Any inquiry into the scope and circumstances in which advancement is allowed under Delaware law would be an inquiry into the specific grant in the corporation's articles of incorporation, not the wording of the statute. Therefore, the company chooses the extent of the advancement. Contrarily, a limitation on the extent of the default advancement is appropriate where the legislature, not a specific company, places a uniform advancement requirement on all corporations. The limitation should strike a balance between preserving the director's right to advancement and safeguarding against the unusual circumstances present in *Miller*.

Bearing in mind that the beneficiary of this statute was intended to be the corporation is important.[158] Neither interpretation of the language by the parties ("seeking a benefit for the corporation" or "by or in the right of the corporation") helped Trumbell in this case. The corporation was at war with itself. Although Trumbell was named as a plaintiff and was paying the plaintiff's legal fees, the Board never voted to be a part of the suit. The Board had no real independent voice, yet was the only party being forced to pay. The case was a derivative suit, implying that the corporation was to be the beneficiary of the ruling, but the unique circumstances called that presumption into question.[159] The court failed to address who represented Trumbell and what were Trumbell's interests. That failure, combined with rendering the limitation language moot, made the court's espousal of advancement doctrine contrary to the purpose and the plain language of the statute.

154. *OSBA Brief*, *supra* note 26, at 6.

155. OHIO REV. CODE ANN. § 1701.13(E)(5)(a) (West 2012) ("Unless at the time of a director's act or omission that is the subject of an action, suit, or proceeding referred to in division (E)(1) or (2) of this section . . . .").

156. Miller v. Miller, 973 N.E.2d 228, 237 (Ohio 2012).

157. *See* United States v. Stein, 452 F. Supp. 2d 230, 271 (S.D.N.Y. 2006).

158. *OSBA Brief*, *supra* note 26, at 2.

159. EISENBERG & COX, *supra* note 1, at 1047 ("[A]ny relief recovered in a derivative action . . . is returned to the corporation.").

2. The Need for a Meaningful "Cooperation" Standard

In the absence of any language addressing statutory limitations on advancement, the court could have created a strict standard for reasonable cooperation by the director.

As the court points out, advancement is not automatic; it arises when a director has completed an undertaking.[160] In the undertaking, the director agrees to repay the fees if his conduct is deemed to have been recoverable under section 1701.59 and to reasonably cooperate with the corporation.[161] The court did not set any standard for cooperation. In fact, the court found the director cooperated, despite evidence that the director was more than just elusive.[162] Given the unintended consequences of the statute, the court should have balanced the inequities by strictly construing the terms "reasonably cooperate," to place a higher, but appropriate, burden on a director who receives the benefit of payment.

Trumbell's status as a close corporation and the family feud within the board created unique circumstances in *Miller* that are pertinent here. The statute required the director to cooperate with the corporation.[163] But, as shown above, the corporation had no independent voice in the litigation.

The majority in *Miller* dismissed the idea that a director could not "reasonably cooperate" with its opponent in litigation.[164] The dissent stressed this point and encouraged the General Assembly to take up the issue.[165] Neither examined what level of cooperation would be needed to meet the statute's requirement, nor did they use the facts to support their argument for or against a meaningful standard of cooperation.

The majority stated that no evidence showed that the defendant "actually failed to cooperate," suggesting that a mere promise to reasonably cooperate is enough for advancement.[166] Here, the trial court sanctioned Director Miller after finding that he wrongfully withheld documents during discovery.[167] In a deposition, Director Miller refused to answer a question, explaining that he would comply only with requests from a majority of the Trumbell Board, whom Director Miller felt represented the corporation.[168] Furthermore, Director Miller knew

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160. OHIO REV. CODE ANN. § 1701.13(E)(5) (West 2012).

161. *Id.*

162. *See* Miller v. Miller, 973 N.E.2d 228, 240 (Ohio 2012).

163. OHIO REV. CODE ANN. § 1701.13(E)(5)(a)(ii) (West 2012).

164. *Miller*, 973 N.E.2d at 241.

165. *Id.* at 243.

166. *Id.* at 240–41.

167. *See Shareholders Brief*, *supra* note 44, at 15.

168. *Id.* at 18.

that it would be impossible for a majority, and therefore the plaintiff, to make a request of him because he and his fellow defendant were the other two directors.[169] Therefore, when he agreed to cooperate, he knew he would not have to comply with any request from the plaintiff.[170] In that way, Justice O'Donnell was correct to point out in his dissenting opinion that it was impossible for the defendant and plaintiff to reasonably cooperate. The dissent solves the problem of what level of cooperation is necessary by eliminating advancement duties when the director is a party-opponent to the corporation.[171] That seems too far-reaching when applied to all circumstances where the corporation is suing a director. As the dissent states, he agrees with the majority that a corporation cannot avoid advancement "by making the mere allegation that the director committed fraud or breached a fiduciary duty."[172] The statute also clearly anticipated advancing fees when directors are defendants.[173] But the dissent's argument should apply in special circumstances, like *Miller*, in which the parties are too intertwined in a close corporation for the director to be able to cooperate.

The fact that Director Miller's promise to cooperate was clearly illusory should have resulted in a finding that he did not meet the requirements of the undertaking. According to the majority, however, Director Miller fulfilled the requirements of the undertaking, and his statement during discovery was not enough to demonstrate Director Miller failed to cooperate.

The Court ignored the fact that no majority of the board existed in this case, and no independent corporation was available to make a request of Director Miller.[174] Instead, the majority read the "reasonably cooperate" language to mean that the defendant "need not surrender his right to defend himself" but did not elaborate on how far he may go to defend himself while cooperating with the party suing him.[175]

The majority opinion went too far in finding that a director who withholds documents and states he will only comply with requests he knows are impossible has met the statutory requirement of cooperation. The trial court went so far as to award attorneys' fees to the plaintiff for the additional expenses incurred due to the defendant's withholdings.[176] By this standard, even if sanctions are imposed for obstruction, a

169. *Id.*

170. *See id.* at 4–5.

171. *Miller*, 973 N.E.2d at 243 (O'Donnell, J., dissenting).

172. *Id.*

173. *OSBA Brief*, *supra* note 26, at 3.

174. *Shareholders Brief*, *supra* note 44, at 18.

175. *Miller*, 973 N.E.2d at 240–41.

176. *Shareholders Brief*, *supra* note 44, at 15.

defendant would still be cooperating. Delaying disclosure of materials harmful to the defendant, but required by law to be disclosed, would fail under the majority's idea of preserving the right to defend oneself. But wrongfully withholding documents cannot be considered legally defending oneself.

Because *Miller* was the first time the Ohio Supreme Court looked at the amended statute, no other case law exists addressing the level of cooperation a director must abide by in order to receive advanced legal in Ohio.[177] However, problems exist with both the majority's and the dissent's views on how to address this issue. Merriam-Webster defines "cooperate" as: "to act or work with another or others; act together or in compliance."[178] What did the General Assembly intend when it required a director to cooperate with the corporation?

Cooperation clauses are common in insurance policies, including D&O insurance.[179] An insurer may require that in order for the insurer to defend a suit, the insured must cooperate in good faith.[180] Actions that constitute a violation of a cooperation clause include failure to give notice of [a possible claim], failure to forward paperwork timely, and failure to give honest and complete answers.[181] These actions hinder the insurer from preparing an adequate defense.[182]

The insurance setting is distinct from this one because, in the context of insurance, it is always in the best interest of both the insured and insurer to cooperate in order to mount a successful defense. Nonetheless, it provides an informative standard for cooperation. Director Miller would have failed under the insurance test by failing to produce documents and refusing to answer questions.

Director Miller also failed to cooperate because his agreement to cooperate was made in bad faith.[183] Director Miller knew he would

177. *Miller*, 973 N.E.2d at 233.

178. *Cooperate*, MERRIAM-WEBSTER.COM, http://www.merriam-webster.com/dictionary/cooperate (last visited Aug. 27, 2013).

179. RICHARD A. LORD, WILLISTON ON CONTRACTS § 49:106 (4th ed. 2012), *available at* Westlaw 16 WILLISTON ON CONTRACTS § 49:106. *See also* JOSEPH WARREN BISHOP II ET AL., LAW OF CORPORATE OFFICERS & DIRECTORS § 8:34 (2012), *available at* Westlaw LAW OF CORP. OFFICERS & DIR. § 8:34 ("D&O policies may contain a cooperation clause providing that the insurer's consent to settlements shall not be unreasonably withheld. Rather, the insurer shall be entitled to full information and all particulars it may request in order to reach a decision as to the reasonableness of the settlement. These clauses often provide that the corporation may not take any action that increases the exposure of the insurer. The purpose of these clauses is to prevent collusion between the insured and allegedly injured party during a settlement.") (citations omitted).

180. LORD, *supra* note 179, § 49:107.

181. *Id.*

182. *Id.* § 49:106.

183. MARY THERESE K. FITZGERALD ET AL., OHIO JURISPRUDENCE § 473 (3d ed. 2012), *available at* Westlaw 12 Ohio Jur. 3d § 473.

never have to cooperate because a majority of the Board, and therefore the corporation, would never be able to make a request. Although the standard for cooperation is unclear from the statute, the General Assembly made it a requirement and would not have done so if it could be complied with as easily as the court found.

D. What Happens Next

After the *Miller* decision, many questions exist about how to deal with advancement, most of which are beyond the scope of this article. This section will briefly address three areas of concern after *Miller*: (1) corporations opting out of advancement entirely; (2) corporations being forced to pay legal fees in a suit where their interests are not adequately protected; and (3) directors taking advantage of a lenient cooperation standard.

1. Corporations Opting Out

The easiest solution to the issues raised in *Miller* is that corporations should opt out of advancement, making it a non-issue. However, because the right to advancement is a key consideration for potential directors, the lack of this right could dissuade quality candidates from choosing to become directors.[184] Furthermore, the ability to purchase D&O insurance makes having to pay out attorneys' fees less of a financial issue for corporations.[185] Opting out completely would also be harmful to the corporation. If a director was the subject of an action where he was trying to get judgment on behalf of the corporation, advancing legal fees would be in the corporation's best interest. The corporation could advance fees, even if it opted-out entirely, but a director who had to seek permission of the board may be dissuaded from the claim altogether. Furthermore, if everyone opted out of the advancement provision, the statute would be rendered moot and the protections afforded by it meaningless. The General Assembly adopted the statute to make Ohio friendlier to corporations, and default advancement is an important tool to accomplish that goal.[186]

2. Inadequate Protection of the Corporation's Interest

Second, in cases like *Miller* in which the corporation's interests are illusory and the Board is at war, the advancement statute will no longer

184. *OSBA Brief*, *supra* note 26, at 2.
185. EISENBERG & COX, *supra* note 1, at 690.
186. *OSBA Brief*, *supra* note 26, at 2.

serve to protect quality directors and corporations. Instead, both sides will loot the corporate treasury because no one can adequately protect the corporation's interest. Under Ohio law, corporations are distinct from both their shareholders and their directors.[187] Both groups, however, are expected to represent and preserve the interests of the corporation. A majority of the board is deemed to represent the corporation, and shareholders can bring a complaint on behalf of an injured corporation through derivative suits.[188] As the court held, advancement contemplates four situations in which a director has a right to advancement: (1) when the corporation, by a vote of the majority of the board, sues a director; (2) when the corporation, in a derivative action brought by shareholders, sues a director; (3) when the corporation or director is sued by a third party; and (4) when the director sues a third party on behalf of the corporation. In *Miller*, whose facts did not fall neatly into any of these categories, the court made a generally applicable legal pronouncement, thereby ignoring the corporation's interest. After *Miller*, courts no longer need to look at the corporation's role in the suit. Instead, regardless of form and procedure, directors can use the corporation's treasury to fund their offensive and defensive actions under the guise of benefit to the corporation. This will have a larger effect on closely held corporations, like Trumbell, which have few board members, are family run, and whose sole shareholders are also directors. Because advancement becomes mandatory with a simple execution of meaningless promises, corporate funds can be pilfered to fund family feuds and Board arguments without any regard to fiduciary obligations or safeguards for the corporate interest.

3. Worthless Cooperation

The third problem presented by *Miller* is that no standard for cooperation was set and directors could easily take advantage of this and in fact are encouraged to because they are not paying the legal fees. Defendant-corporations have an incentive to draw out a case in hopes of the plaintiff abandoning the case due to lack of money or effort. A plaintiff-director who has unlimited advanced fees would have the same incentive as the defendant-corporation to draw out litigation. After *Miller*, a corporation must always advance legal fees to a director when it receives an undertaking, including a promise to cooperate given in bad faith. A director should not be able to withhold documents for months and refuse to answer requests from members of the board and still

187. EISENBERG & COX, *supra* note 1, at 191 ("A corporation is a legal person or legal entity."); *see also* OHIO REV. CODE ANN. § 1701.13 (West 2012).

188. *OSBA Brief*, *supra* note 26, at 2.

receive his legal fees. If that were the case, why would a director not be "difficult"? The corporation is essentially battling itself, but the defendant has no incentive to bring a quick close to the case. In fact, the longer the director can withhold documents and weasel out of questions, the more the corporation will have to pay for the director's legal fees. The court established no standard for cooperation and allowed a director acting in bad faith, much less a merely "difficult" director, to receive advancement, creating an incentive for the director to be disagreeable. Furthermore, in cases like *Miller* where the director knows a majority vote is impossible, the director has no duty to cooperate at all. That runs contrary to the purpose of advancement and the general interest of corporations, as well as the statutory requirement of ORC 1701.13(E)(5)(a).

IV. CONCLUSION

In *Miller,* the Ohio Supreme Court reviewed the 1986 Ohio amended advancement statute. It held that advancement of legal fees to directors is mandatory unless a corporation specifically opts out of the provision, or the corporation can show the director has not met the requirements of the undertaking. The court generally interpreted the advancement statute correctly, but it left many questions unanswered, rendering the future of the advancement right unclear.

The General Assembly should reexamine this statute in light of the issues in *Miller* to determine how best to accomplish its goal of attracting and retaining corporations. It should amend the statute to include specific situations when advancement applies, instead of referring to another part of the statute, to make the advancement right clear.

After *Miller*, corporations and transactional attorneys should pay close attention to the duties the corporations are undertaking when incorporating in Ohio and protect the corporation against situations like *Miller*, where the only losing party was the corporation.