

NORTH CAROLINA GENERAL ASSEMBLY
1977 SESSION

CHAPTER 236
SENATE BILL 202

AN ACT TO AMEND G.S. 55A-15(a)(8) OF THE GENERAL STATUTES AND TO ADD NEW G.S. 55A-17.1, G.S. 55A-17.2, AND G.S. 55A-17.3 CONCERNING INDEMNIFICATION OF OFFICERS AND DIRECTORS OF NONPROFIT CORPORATIONS.

The General Assembly of North Carolina enacts:

Section 1. G.S. 55A-15(a)(8) as the same appears in Volume 2B of the General Statutes is hereby amended to read as follows:

"(8) Subject to any restrictions in the Charter, to provide by bylaw, agreement, vote of board of directors or members, or otherwise, for indemnification of any director or officer or former director or officer of the corporation or any person who may have served at its request as a director or officer of another corporation, whether for profit or not for profit, against expenses actually and necessarily incurred by him in connection with the defense of any action, suit or proceeding in which he is made a party by reason of being or having been such director or officer, except in relation to matters as to which he shall be adjudged in such action, suit or proceeding to be liable for negligence or misconduct in the performance of duty."

Sec. 2. Chapter 55A of the General Statutes is hereby amended by adding new G.S. 55A-17.1, G.S. 55A-17.2 and G.S. 55A-17.3 to read as follows:

"§ 55A-17.1. Indemnification of directors, officers, employees or agents; general provisions. — (a) The indemnification of a director or officer of a corporation permitted by this section or by G.S. 55A-17.2 and G.S. 55A-17.3 shall not be deemed exclusive of any other rights to which such director or officer may be entitled, under any bylaw, agreement, vote of board of directors or members, or otherwise with respect to any liability or litigation expenses arising out of his activities as director or officer.

(b) As used in this section and in G.S. 55A-17.2 and G.S. 55A-17.3, the term 'person' includes the legal representative of such person.

(c) Anything in this section or in G.S. 55A-17.2 or G.S. 55A-17.3 to the contrary notwithstanding, a corporation shall have the power to purchase and maintain insurance on behalf of any person who is or was a director, officer, employee or agent of the corporation, or is or was serving at the request of the corporation as a director, officer, employee or agent of another corporation, partnership, joint venture, trust or other enterprise against any liability asserted against him and incurred by him in such capacity, or arising out of his status as such, whether or not the corporation would have the power to indemnify him against such liability.

(d) Expenses incurred by a director, officer, employee or agent in defending a civil or criminal action, suit or proceeding may be paid by the corporation in advance of the final disposition of such action, suit or proceeding as authorized by the board of directors in the specific case upon receipt of an undertaking by or on behalf of the director, officer, employee or agent to repay such amount unless it shall be ultimately determined that he is entitled to be indemnified by the corporation as authorized in this section, or in G.S. 55A-17.2 or

G.S. 55A-17.3, or by any bylaw, agreement, vote of board of directors or members, or otherwise.

"§ 55A-17.2. Indemnification in actions by outsiders. — (a) When by reason of the fact that he is or was serving as director, officer, employee or agent of a corporation, or in any such capacity at the request of the corporation in any other corporation, partnership, joint venture, trust or other enterprise, any person is or was a party or is threatened to be made a party to any threatened, pending or completed action, suit or proceedings, whether civil, criminal, administrative or investigative, not brought by the corporation nor brought by any party seeking derivatively to enforce a liability of such a person to the corporation, such person shall be entitled to indemnification, or reimbursement by the corporation for any expenses, including attorneys' fees, or any liabilities which he may have incurred in consequence of such action, suit or proceeding, under the following conditions:

- (1) If such person is wholly successful in his defense on the merits, or if the proceeding is an administrative or investigative proceeding which does not result in the indictment, fine or penalty of such person, he shall be entitled to reimbursement from the corporation of all his reasonable expenses of defense or participation, including attorneys' fees.
- (2) If such person is wholly successful in his defense otherwise than solely on the merits, the corporation may pay or agree to pay to him such expenses of defense or participation, including attorneys' fees, as the board of directors in good faith shall deem reasonable, regardless of any adverse interest of any or all of the directors.
- (3) If such person is not wholly successful or is unsuccessful in his defense, or with the proceeding to which he is a party results in his indictment, fine or penalty, the corporation may pay or agree to pay, in whole or in part, such expenses of defense or participation, including attorneys' fees, and the amount of any judgment, money decree, fine, penalty or settlement for which he may have become liable, if
 - a. a plan for such payment, in the case of corporations which have members, is approved by a consent in writing signed by the members entitled to vote or such plan is sent to the members entitled to vote, with notice of a members' meeting, whether annual or special, to be held to take action thereon and if at such meeting a plan is approved by a majority of such members, exclusive of those members to be benefited by the plan if approved, or
 - b. a majority of a quorum consisting of directors who are not parties to such action, suit or proceeding shall determine that such person acted in good faith and in a manner he reasonably believed to be in or not opposed to the best interests of the corporation, and with respect to any criminal action or proceeding, had no reasonable cause to believe his conduct was unlawful; and, if the corporation has members, after such determination by the directors, the corporation shall, not later than 60 days before any such payment or agreement to pay is made, send to all members of record on a record date not more than 10 days prior to the date of mailing, at their registered addresses, a statement specifying the persons to be paid, the amounts to be paid, and the nature and status of the suit or proceedings at the time of mailing.
 - c. in a proceeding brought by such person for such determination in the superior court of the district where the corporation has its registered office it shall be determined that such person acted in good faith and in a manner he reasonably believed to be in or not opposed to the

best interests of the corporation, and, with respect to any criminal action or proceeding, had no reasonable cause to believe his conduct was unlawful. In such a proceeding, if the corporation has members, the court in its discretion may order notice thereof to be sent to such members in such manner and in such form as it may deem appropriate, at the expense of the corporation; and it may allow all members so notified to be heard in opposition to the determination requested.

(b) The termination of any action, suit or proceeding by judgment, order, settlement, conviction, or upon plea of nolo contendere or its equivalent, shall not, of itself, create a presumption that the person did not act in good faith and in a manner which he reasonably believed to be in the best interests of the corporation, and, with respect to any criminal action or proceeding, had reasonable cause to believe that his conduct was unlawful.

"§ 55A-17.3. Indemnity for litigation expenses in corporate action. — (a) When a present or former director, officer, employee or agent of a corporation or any person who has served or is serving in such capacity at the request of the corporation in any other corporation, partnership, joint venture, trust or other enterprise, is sued, alone or with others, in the courts of this State, in any action seeking to establish his liability to the corporation arising out of his alleged dereliction of duty to the corporation, he shall in turn be entitled to indemnification or reimbursement from the corporation for so much of his expenses of defense, including attorneys' fees, as the court in its discretion, upon motion for indemnification or reimbursement, duly made in such action, finds to be reasonable, if:

- (1) such person is successful in whole or in part in the action against him or in any settlement thereof and the court finds that his conduct fairly and equitably merits such relief; or
- (2) the court finds, despite his adjudication of liability, that such person has acted honestly and reasonably and that, in view of all the circumstances of the case, his conduct fairly and equitably merits such relief.

(b) When such action is brought in another state and the result thereof is as would have entitled the defendant officer or director to make a motion in the cause for indemnification or reimbursement of his expenses of defense under subsection (a) of this section if the action had been brought in this State, but no such relief is available in the state in which the action is actually brought, the defendant officer or director may bring a separate action against the corporation in this State for such indemnification or reimbursement as he might have recovered had the suit against him been brought in this State. Notice of said action for indemnification or reimbursement shall be sent, in such form as the court may approve and at the corporation's expense, to the party or parties plaintiff in the prior action who shall be entitled to be heard.

(c) Whenever indemnification or reimbursement as permitted in this section is sought from a corporation which has members, the court may in its discretion order notice of the claim thereof to be sent to the members in such manner and in such form as it may approve, at the expense of the corporation. All members so notified may be heard in opposition to the relief requested."

Sec. 3. This act shall become effective upon ratification.

In the General Assembly read three times and ratified, this the 19th day of April, 1977.