

Article 7.

Civil Liabilities and Criminal Penalties.

§ 78A-56. Civil liabilities.

(a) Any person who:

- (1) Offers or sells a security in violation of G.S. 78A-8(1), 78A-8(3), 78A-10(b), 78A-13, 78A-14, 78A-24, or 78A-36(a), or of any rule or order under G.S. 78A-49(d) which requires the affirmative approval of sales literature before it is used, or of any condition imposed under G.S. 78A-27(d) or 78A-28(g), or
- (2) Offers or sells a security by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading (the purchaser not knowing of the untruth or omission), and who does not sustain the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of the untruth or omission,

is liable to the person purchasing the security from him, who may sue either at law or in equity to recover the consideration paid for the security, together with interest at the legal rate from the date of payment, costs, and reasonable attorneys' fees, less the amount of any income received on the security, upon the tender of the security, or for damages if the purchaser no longer owns the security. Damages are the amount that would be recoverable upon a tender less the value of the security when the purchaser disposed of it and interest at the legal rate as provided by G.S. 24-1 from the date of disposition.

(b) Any person who purchases a security by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading (the seller not knowing of the untruth or omission), and who does not sustain the burden of proof that the person did not know, and in the exercise of reasonable care could not have known, of the untruth or omission, shall be liable to the person selling the security to him, who may sue either at law or in equity to recover the security, plus any income received by the purchaser thereon, upon tender of the consideration received, or for damages if the purchaser no longer owns the security. Damages are the excess of the value of the security when the purchaser disposed of it, plus interest at the legal rate as provided by G.S. 24-1 from the date of disposition, over the consideration paid for the security.

(b1) A person who willfully violates G.S. 78A-12 is liable to a person who purchases or sells a security, other than a security traded on a national securities exchange or quoted on a national automated quotation system administered by a self-regulatory organization, at a price that was affected by the act or transaction for the damages sustained as a result of the act or transaction. Damages are the difference between the price at which the securities were purchased or sold and the value the securities would have had at the time of the person's purchase or sale in the absence of the act or transaction, plus interest at the legal rate as provided by G.S. 24-1 from the date of the purchase or sale, costs, and reasonable attorneys' fees determined by the court.

- (c) (1) Every person who directly or indirectly controls a person liable under subsection (a), (b), or (b1) of this section, every partner, officer, or director of the person, every person occupying a similar status or performing similar functions, and every dealer or salesman who materially aids in the sale is also liable jointly and severally with and to the same extent as the person, unless able to sustain the burden of proof that the person did not know, and in the exercise of

reasonable care could not have known, of the existence of the facts by reason of which the liability is alleged to exist.

- (2) Unless liable under subdivision (1) of this subsection, every employee of a person liable under subsection (a), (b), or (b1) of this section who materially aids in the transaction giving rise to the liability and every other person who materially aids in the transaction giving rise to the liability is also liable jointly and severally with and to the same extent as the person if the employee or other person actually knew of the existence of the facts by reason of which the liability is alleged to exist.
- (3) There is contribution among the several persons liable under subdivisions (1) and (2) of this subsection as provided among tort-feasors pursuant to Chapter 1B of the General Statutes.

(d) Any tender specified in this section may be made at any time before entry of judgment. Tender shall require only notice of willingness to exchange the security for the amount specified. Any notice may be given by service as in civil actions or by certified mail addressed to the last known address of the person liable.

(e) Every cause of action under this statute survives the death of any person who might have been a plaintiff or defendant.

(f) No person may sue under this section for a violation of G.S. 78A-24 or G.S. 78A-36 more than two years after the sale or contract of sale.

No person may sue under this section for any other violation of this Chapter more than three years after the person discovers facts constituting the violation, but in any case no later than five years after the sale or contract of sale, except that if a person who may be liable under this section engages in any fraudulent or deceitful act that conceals the violation or induces the person to forgo or postpone commencing an action based upon the violation, the suit may be commenced not later than three years after the person discovers or should have discovered that the act was fraudulent or deceitful.

(g) (1) No purchaser may sue under this section if, before suit is commenced, the purchaser has received a written offer stating the respect in which liability under this section may have arisen and fairly advising the purchaser of his rights; offering to repurchase the security for cash payable on delivery of the security equal to the consideration paid, together with interest at the legal rate as provided by G.S. 24-1 from the date of payment, less the amount of any income received on the security or, if the purchaser no longer owns the security, offering to pay the purchaser upon acceptance of the offer an amount in cash equal to the damages computed in accordance with subsection (a); and stating that the offer may be accepted by the purchaser at any time within 30 days of its receipt; and the purchaser has failed to accept such offer in writing within the specified period.

(2) No seller may sue under this section if, before suit is commenced, the seller has received a written offer stating the respect in which liability under this section may have arisen and fairly advising the seller of his rights; offering to return the security plus the amount of any income received thereon upon payment of the consideration received, or, if the purchaser no longer owns the security, offering to pay the seller upon acceptance of the offer an amount in cash equal to the damages computed in accordance with subsection (b); and providing that the

offer may be accepted by the seller at any time within 30 days of its receipt; and the seller has failed to accept such offer in writing within the specified period.

- (3) Offers shall be in the form and contain the information the Administrator by rule prescribes. Every offer under subsection (g) of this section shall be delivered to the offeree or sent by certified mail addressed to the offeree at the offeree's last known address. The person making the offer shall file a copy of the rescission offer with the Administrator at least 10 days before delivering the offer to the offeree. If an offer is not performed in accordance with its terms, suit by the offeree under this section shall be permitted without regard to this subsection.

(h) No person who has made or engaged in the performance of any contract in violation of any provision of this Chapter or any rule or order hereunder, or who has acquired any purported right under any such contract with knowledge of the facts by reason of which its making or performance was in violation, may base any suit on the contract.

(i) Any condition, stipulation, or provision binding any person acquiring any security to waive compliance with any provision of this Chapter or any rule or order hereunder is void.

(j) The rights and remedies provided by this Chapter are in addition to any other rights or remedies that may exist at law or in equity, but this Chapter does not create any cause of action not specified in this section or G.S. 78A-37(d). If the requirements of Chapter 1D of the General Statutes are met, punitive damages are available to the extent provided in that Chapter.

(k) The purchaser of a viatical settlement contract may rescind or cancel the purchase agreement for any reason by providing written notice of rescission or cancellation to the issuer or the issuer's agent, by certified mail, return receipt requested, within 10 business days after each of the following: (i) the date on which the purchase agreement for the viatical settlement contract is signed by the purchaser, and (ii) the date of actual notice to the purchaser of the assignment, transfer, or sale of all or a portion of an insurance policy on which the viatical settlement contract is based. Notice of rescission is effective upon deposit in the United States mail. The notice of rescission need not take a particular form and is sufficient if it expresses the intention of the purchaser to rescind the transaction. For purposes of this subsection and subsection (k1) of this section only, the rescission period of 10 business days following the purchaser's signing of the purchase agreement shall also be known as the "initial 10-day rescission period."

(k1) Immediately upon receipt of any consideration by an issuer or its agent pursuant to a viatical settlement purchase agreement, the issuer or its agent shall deliver the consideration to a domestic independent escrow agent. For purposes of this section, "domestic independent escrow agent" means an escrow agent, located in this State, and not affiliated with the issuer, its affiliate, its officers or directors, or its promoter, or any agents thereof. The domestic independent escrow agent shall maintain the funds received, in their entirety, in an escrow account or trust account located in this State, for the initial 10-day rescission period following the signing of the purchase agreement, as provided in subsection (k) of this section, unless the domestic independent escrow agent, prior to the completion of the initial 10-day rescission period, receives notice of the purchaser's cancellation or rescission of the purchase agreement in accordance with this section. If the purchase agreement is rescinded or cancelled within the initial 10-day rescission period, the domestic independent escrow agent shall immediately deliver the funds, in their entirety along with any interest earned on the funds during the time in which the funds were held in escrow, to the purchaser upon receiving notice, by certified mail, from the issuer or its agent that the purchase agreement has been rescinded or cancelled by the purchaser. If the purchase agreement has not

been rescinded or cancelled within the initial 10-day rescission period, the domestic independent escrow agent shall release the funds to the issuer or its agent in a manner to be determined by agreement between the issuer and the domestic independent escrow agent. Until the funds become available for release by the domestic independent escrow agent to the issuer upon the expiration of the initial 10-day rescission period without rescission or cancellation by the purchaser, the funds are not subject to claims by creditors of the issuer, its affiliates, or associates.

(l) Within 90 days after the sale or execution of a contract of sale for an investment of funds intended to be used to purchase a viatical settlement contract or contracts, the seller shall provide the purchaser with a rescission offer in accordance with rules prescribed by the Administrator, if, within that period, there has not been the identification of each and every viatical settlement contract acceptable to the purchaser which has been or shall be purchased for the investment. The purchaser may accept the rescission offer within 10 business days after receiving it. Acceptance of the rescission offer is effective upon compliance by the purchaser with the procedural requirements for notice of rescission or cancellation by a viatical settlement purchaser set forth in subsection (k) of this section. The seller shall keep a record of the rescission offer and its acceptance or rejection for at least three years after providing that offer and shall provide that record to the Administrator at the Administrator's request. For purposes of this subsection only, "purchaser" means a person who executes a contract of sale, with a seller, for an investment of funds to be used to purchase a viatical settlement contract or viatical settlement contracts when, at the time of execution of the contract, each and every viatical settlement contract to be purchased pursuant to the investment has not been identified. (1925, c. 190, s. 23; 1927, c. 149, s. 23; 1955, c. 436, s. 10; 1971, c. 572, s. 2; 1973, c. 1380; 1975, c. 19, s. 22; c. 144, s. 3; 1977, c. 781, s. 2; 1983, c. 817, ss. 20, 21; 1987, c. 282, s. 9; 1991, c. 456, s. 5; 2001-183, s. 1; 2001-436, s. 11; 2003-413, ss. 5-10.)

§ 78A-57. Criminal penalties.

(a) Any person who willfully violates any provision of this Chapter except G.S. 78A-8, 78A-9, 78A-11, 78A-12, 78A-13, or 78A-14 is guilty of a Class I felony.

(a1) Any person who willfully violates any rule or order under this Chapter is guilty of a Class I felony. No person may be imprisoned for the violation of any rule if the person proves that the person had no knowledge of the rule. It is an affirmative defense to a charge of violating an order under this Chapter that the person had no knowledge of the order.

(a2) Any person who willfully violates G.S. 78A-8, 78A-11, 78A-13, or 78A-14 is guilty of a felony. If the losses caused by a single act or a series of related acts in a common scheme or plan are one hundred thousand dollars (\$100,000) or more, the person is guilty of a Class C felony. If the losses caused by a single act or a series of related acts in a common scheme or plan are less than one hundred thousand dollars (\$100,000), the person is guilty of a Class H felony.

(a3) Any person who willfully violates G.S. 78A-9 knowing the statement made to be false or misleading in any material respect is guilty of a Class H felony. Any other willful violation of G.S. 78A-9 constitutes a Class 2 misdemeanor.

(a4) Any person who willfully violates G.S. 78A-12 is guilty of a Class H felony.

(b) The Administrator may refer such evidence as is available concerning violations of this Chapter or of any rule or order hereunder to the proper district attorney, who may, with or without such a reference, institute the appropriate criminal proceedings under this Chapter. Upon receipt of a reference, the district attorney may request that a duly employed attorney of the Administrator prosecute or assist in the prosecution of the violation or violations on behalf of the State. Upon

approval of the Administrator, the employee may be appointed a special prosecutor for the district attorney to prosecute or assist in the prosecution of the violations without receiving compensation from the district attorney. Such a special prosecutor shall have all the powers and duties prescribed by law for district attorneys and such other powers and duties as are lawfully delegated to the special prosecutor by the district attorney for violations of this Chapter.

(c) Nothing in this Chapter limits the power of the State to punish any person for any conduct which constitutes a crime by statute or at common law. (1925, c. 190, s. 23; 1927, c. 149, s. 23; 1955, c. 436, s. 10; 1971, c. 572, s. 2; 1973, c. 47, s. 2; c. 1380; 1987, c. 849, s. 7; 1991, c. 456, s. 6; 2001-436, s. 12; 2003-413, s. 11.)

§ 78A-58. Obstruction of investigation.

A person is guilty of a Class H felony if the person willfully does any of the following for the purpose of interfering with the performance of any audit, examination, or investigation by the Administrator under this Chapter:

- (1) Makes or causes to be made to the Administrator or the Administrator's designated representative any false or misleading oral or written statement.
- (2) Creates, causes to be made, or delivers any record, report, or document knowing that it is false or misleading in any material respect.
- (3) Destroys or alters any record, report, or document.
- (4) Conceals or secretes any record, report, or document. (2003-413, s. 12.)

§§ 78A-59 through 78A-62. Reserved for future codification purposes.