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Short Title: Directors Liability.

(Public)

Sponsors:

Referred to:

April 5, 1989

A BILL TO BE ENTITLED

AN ACT TO LIMIT THE LIABILITY OF DIRECTORS, OFFICERS, AND
EMPLOYEES OF MEDICAL SERVICES CORPORATIONS.

The General Assembly of North Carolina enacts:

Section 1. Chapter 58 of the General Statutes is amended by adding new
sections to read:

“INDEMNIFICATION.

”§ 58-65-166. Policy statement and definitions.

(a) It is the public policy of this State to enable corporations organized under this Chapter to attract and maintain responsible, qualified directors, officers, employees, and agents, and, to that end, to permit corporations organized under this Chapter to allocate the risk of personal liability of directors, officers, employees, and agents through indemnification and insurance as authorized in this Part.

(b) Definitions in this Part:

(1) ‘Corporation’ includes any not for profit domestic hospital, medical, or dental service corporation, or successor of a corporation in a merger or other transaction in which the predecessor's existence ceased upon consummation of the transaction.

(2) ‘Director’ or ‘Trustee’ means an individual who is or was a director of a corporation or an individual who, while a director of a corporation, is or was serving at the corporation's request as a director, officer,

1 partner, trustee, employee, or agent of another foreign or domestic
2 corporation, partnership, joint venture, trust, employee benefit plan, or
3 other enterprise. A director is considered to be serving an employee
4 benefit plan at the corporation's request if his duties to the corporation
5 also impose duties on, or otherwise involve services by, him to the
6 plan or to participants in or beneficiaries of the plan. 'Director' or
7 'Trustee' includes, unless the context requires otherwise, the estate or
8 personal representative of a director or trustee.

9 (3) 'Expenses' means expenses of every kind incurred in defending a
10 proceeding, including counsel fees.

11 (4) 'Liability' means the obligation to pay a judgment, settlement, penalty,
12 fine (including an excise tax assessed with respect to an employee
13 benefit plan), or reasonable expenses incurred with respect to a
14 proceeding.

15 (5) 'Official capacity' means: (i) when used with respect to a director or
16 trustee, the office of director or trustee in a corporation; and (ii) when
17 used with respect to an individual other than a director or trustee, as
18 contemplated in G.S. 58-65-172, the office in a corporation held by the
19 officer or the employment or agency relationship undertaken by the
20 employee or agent on behalf of the corporation. 'Official capacity'
21 does not include service for any other foreign or domestic corporation
22 or any partnership, joint venture, trust, employee benefit plan, or other
23 enterprise.

24 (6) 'Party' includes an individual who was, is, or is threatened to be made
25 a named defendant or respondent in a proceeding.

26 (7) 'Proceeding' means any threatened, pending, or completed action, suit,
27 or proceeding, whether civil, criminal, administrative, or investigative
28 and whether formal or informal.

29 (8) 'Trustee'. Whenever the term 'director' or 'directors' is used herein it
30 shall include the term 'trustee', or a person who is designated as a
31 'trustee' under a corporation governed by this Article.

32 **"§ 58-65-167. Authority to indemnify.**

33 (a) Except as provided in subsection (d), a corporation may indemnify an
34 individual made a party to a proceeding because he is or was a director against liability
35 incurred in the proceeding if:

36 (1) He conducted himself in good faith; and

37 (2) He reasonably believed (i) in the case of conduct in his official
38 capacity with the corporation, that his conduct was in its best interests;
39 and (ii) in all other cases, that his conduct was at least not opposed to
40 its best interests; and

41 (3) In the case of any criminal proceeding, he had no reasonable cause to
42 believe his conduct was unlawful.

1 (b) A director's conduct with respect to an employee benefit plan for a
2 purpose he reasonably believed to be in the interests of the participants in and
3 beneficiaries of the plan is conduct that satisfies the requirement of subsection (a)(2)(ii).

4 (c) The termination of a proceeding by judgment, order, settlement,
5 conviction, or upon a plea of no contest or its equivalent is not, of itself, determinative
6 that the director did not meet the standard of conduct described in this section.

7 (d) A corporation may not indemnify a director under this section:

8 (1) In connection with a proceeding by or in the right of the corporation in
9 which the director was adjudged liable to the corporation; or

10 (2) In connection with any other proceeding charging improper personal
11 benefit to him, whether or not involving action in his official capacity,
12 in which he was adjudged liable on the basis that personal benefit was
13 improperly received by him.

14 (e) Indemnification permitted under this section in connection with a proceeding
15 by or in the right of the corporation that is concluded without a final adjudication on the
16 issue of liability is limited to reasonable expenses incurred in connection with the
17 proceeding.

18 (f) The authorization, approval or favorable recommendation by the board of
19 directors of a corporation of indemnification, as permitted by this section, shall not be
20 deemed an act or corporate transaction in which a director has a conflict of interest, and
21 no such indemnification shall be void or voidable on such ground.

22 **"§ 58-65-168. Mandatory indemnification.**

23 Unless limited by its articles of incorporation, a corporation shall indemnify a
24 director who was wholly successful, on the merits or otherwise, in the defense of any
25 proceeding to which he was a party because he is or was a director of the corporation
26 against reasonable expenses incurred by him in connection with the proceeding.

27 **"§ 58-65-169. Advance for expenses.**

28 Expenses incurred by a director in defending a proceeding may be paid by the
29 corporation in advance of the final disposition of such proceeding as authorized by the
30 board of directors in the specific case or as authorized or required under any provision
31 in the articles of incorporation or bylaws or by any applicable resolution or contract
32 upon receipt of an undertaking by or on behalf of the director to repay such amount
33 unless it shall ultimately be determined that he is entitled to be indemnified by the
34 corporation against such expenses.

35 **"§ 58-65-170. Court-ordered indemnification.**

36 Unless a corporation's articles of incorporation provide otherwise, a director of
37 the corporation who is a party to a proceeding may apply for indemnification to the
38 court conducting the proceeding or to another court of competent jurisdiction. On
39 receipt of an application, the court after giving any notice the court considers necessary
40 may order indemnification if it determines:

41 (1) The director is entitled to mandatory indemnification under G.S. 58-
42 65-168, in which case the court shall also order the corporation to pay
43 the director's reasonable expenses incurred to obtain court-ordered
44 indemnification; or

- 1 (2) The director is fairly and reasonably entitled to indemnification in
2 view of all the relevant circumstances, whether or not he met the
3 standard of conduct set forth in G.S. 58-65-167 or was adjudged liable
4 as described in G.S. 58-65-167(d), but if he was adjudged so liable his
5 indemnification is limited to reasonable expenses incurred.

6 **"§ 58-65-171. Determination and authorization of indemnification.**

7 (a) A corporation may not indemnify a director under G.S. 58-65-167 unless
8 authorized in the specific case after a determination has been made that indemnification
9 of the director is permissible in the circumstances because he has met the standard of
10 conduct set forth in G.S. 58-65-167.

11 (b) The determination shall be made:

12 (1) By the board of directors by majority vote of a quorum consisting of
13 directors not at the time parties to the proceeding;

14 (2) If a quorum cannot be obtained under subdivision (1), by majority vote
15 of a committee duly designated by the board of directors (in which
16 designation directors who are parties may participate), consisting
17 solely of two or more directors not at the time parties to the
18 proceeding;

19 (3) By special legal counsel (i) selected by the board of directors or its
20 committee in the manner prescribed in subdivision (1) or (2); or (ii) if
21 a quorum of the board of directors cannot be obtained under
22 subdivision (1) and a committee cannot be designated under
23 subdivision (2), selected by majority vote of the full board of directors
24 (in which selection directors who are parties may participate); or

25 (4) By the shareholders, but shares owned by or voted under the control of
26 directors who are at the time parties to the proceeding may not be
27 voted on the determination.

28 (c) Authorization of indemnification and evaluation as to reasonableness of
29 expenses shall be made in the same manner as the determination that indemnification is
30 permissible, except that if the determination is made by special legal counsel,
31 authorization of indemnification and evaluation as to reasonableness of expenses shall
32 be made by those entitled under subsection (b)(3) to select counsel.

33 **"§ 58-65-172. Indemnification of officers, employees, and agents.**

34 Unless a corporation's articles of incorporation provide otherwise:

35 (1) An officer of the corporation is entitled to mandatory indemnification
36 under G.S. 58-56-168 and is entitled to apply for court-ordered
37 indemnification under G.S. 58-65-170, in each case to the same extent
38 as a director;

39 (2) The corporation may indemnify and advance expenses under this Part
40 to an officer, employee, or agent of the corporation to the same extent
41 as to a director; and

42 (3) A corporation may also indemnify and advance expenses to an officer,
43 employee, or agent who is not a director to the extent, consistent with

1 public policy, that may be provided by its articles of incorporation,
2 bylaws, general or specific action of its board of directors, or contract.

3 **"§ 58-65-173. Additional indemnification and insurance.**

4 (a) In addition to and separate and apart from the indemnification provided
5 for in G.S. 58-65-167, 58-65-168, 58-65-170, 58-65-171, and 58-65-172, a corporation
6 may in its articles of incorporation or bylaws or by contract or resolution indemnify or
7 agree to indemnify any one or more of its directors, officers, employees, or agents
8 against liability and expenses in any proceeding (including without limitation a
9 proceeding brought by or on behalf of the corporation itself) arising out of their status as
10 such or their activities in any of the foregoing capacities; provided, however, that a
11 corporation may not indemnify or agree to indemnify a person against liability or
12 expenses he may incur on account of his activities which were at the time taken known
13 or believed by him to be clearly in conflict with the best interests of the corporation. A
14 corporation may likewise and to the same extent indemnify or agree to indemnify any
15 person who, at the request of the corporation, is or was serving as a director, officer,
16 partner, trustee, employee, or agent of another foreign or domestic corporation,
17 partnership, joint venture, trust or other enterprise or as a trustee or administrator under
18 an employee benefit plan. Any provision in any articles of incorporation, bylaw,
19 contract, or resolution permitted under this section may include provisions for recovery
20 from the corporation of reasonable costs, expenses, and attorneys' fees in connection
21 with the enforcement of rights to indemnification granted therein and may further
22 include provisions establishing reasonable procedures for determining and enforcing the
23 rights granted therein.

24 (b) The authorization, adoption, approval, or favorable recommendation by
25 the board of directors of a public corporation of any provision in any articles of
26 incorporation, bylaw, contract or resolution, as permitted in this section, shall not be
27 deemed an act or corporate transaction in which a director has a conflict of interest, and
28 no such articles of incorporation or bylaw provision or contract or resolution shall be
29 void or voidable on such grounds. The authorization, adoption, approval, or favorable
30 recommendation by the board of directors of a nonpublic corporation of any provision
31 in any articles of incorporation, bylaw, contract or resolution, as permitted in this
32 section, which occurred on or prior to the effective date of this act, shall not be deemed
33 an act or corporate transaction in which a director has a conflict of interest, and no such
34 articles of incorporation, bylaw provision, contract or resolution shall be void or
35 voidable on such grounds. Except as permitted in G.S. 55-8-31, no such bylaw,
36 contract, or resolution not adopted, authorized, approved or ratified by shareholders
37 shall be effective as to claims made or liabilities asserted against any director prior to its
38 adoption, authorization, or approval by the board of directors.

39 (c) A corporation may purchase and maintain insurance on behalf of an
40 individual who is or was a director, officer, employee, or agent of the corporation, or
41 who, while a director, officer, employee, or agent of the corporation, is or was serving at
42 the request of the corporation as a director, officer, partner, trustee, employee, or agent
43 of another foreign or domestic corporation, partnership, joint venture, trust, employee
44 benefit plan, or other enterprise, against liability asserted against or incurred by him in

1 that capacity or arising from his status as a director, officer, employee, or agent, whether
2 or not the corporation would have power to indemnify him against the same liability
3 under any provision of this Chapter.

4 **"§ 58-65-174. Application of Part.**

5 (a) If articles of incorporation limit indemnification or advance for expenses,
6 indemnification and advance for expenses are valid only to the extent consistent with
7 the articles.

8 (b) This Part does not limit a corporation's power to pay or reimburse
9 expenses incurred by a director in connection with his appearance as a witness in a
10 proceeding at a time when he has not been made a named defendant or respondent to the
11 proceeding.

12 (c) This Part shall not affect rights or liabilities arising out of acts or
13 omissions occurring before the effective date of this act."

14 Sec. 2. This act shall become effective October 1, 1990.