

14A: 2-7 et al

LEGISLATIVE HISTORY CHECKLIST

**NJSA:** 14A:2-7 et al (Corporate officers-- limited liability-- authority to limit)

**LAWS OF:** 1989 **CHAPTER:** 17

**BILL NO:** S2673

**SPONSOR(S):** Lesniak

**Date Introduced:** June 16, 1988

**Committee:** **Assembly:** Insurance  
**Senate:** Labor, Industry and Professions

**Amended during passage:** Yes Amendments during passage denoted by asterisks.

**Date of Passage:** **Assembly:** January 26, 1989  
**Senate:** December 19, 1988

**Date of Approval:** February 2, 1989

**Following statements are attached if available:**

**Sponsor statement:** Yes

**Committee statement:** **Assembly** Yes  
**Senate** Yes

**Fiscal Note:** No

**Veto Message:** No

**Message on Signing:** No

**Following were printed:**

**Reports:** Yes

**Hearings:** No

974.90 New Jersey. Corporation Law Revision Commission  
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[FIRST REPRINT]  
SENATE, No. 2673

STATE OF NEW JERSEY

INTRODUCED JUNE 16, 1988

By Senator LESNIAK

1 AN ACT concerning the civil liability of certain corporate  
directors and officers and revising parts of the statutory law.

3

BE IT ENACTED *by the Senate and General Assembly of the*  
5 *State of New Jersey:*

1. N.J.S.14A:2-7 is amended to read as follows:

7 14A:2-7. Certificate of incorporation.

(1) The certificate of incorporation shall set forth:

9 (a) The name of the corporation;

(b) The purpose or purposes for which the corporation is  
11 organized. It shall be a sufficient compliance with this paragraph  
to state, alone or with specifically enumerated purposes, that the  
13 corporation may engage in any activity within the purposes for  
which corporations may be organized under this act, and all such  
15 activities shall by such statement be deemed within the purposes  
of the corporation, subject to expressed limitations, if any;

17 (c) The aggregate number of shares which the corporation  
shall have authority to issue; <sup>1</sup>[if such shares are to consist of one  
19 class only, the par value of each of such shares, or a statement  
that all of such shares are without par value;]<sup>1</sup>

21 (d) If the shares are, or are to be, divided into classes, or  
into classes and series, the designation of each class and series,  
23 the number of shares in each class and series, and a statement of  
the relative rights, preferences and limitations of the shares of  
25 each class and series, to the extent that such designations,  
numbers, relative rights, preferences and limitations have been  
27 determined;

(e) If the shares are, or are to be, divided into classes, or  
29 into classes and series, a statement of any authority vested in the  
board to divide the shares into classes or series or both, and to  
31 determine or change for any class or series its designation,  
number of shares, relative rights, preferences and limitations;

EXPLANATION--Matter enclosed in bold-faced brackets [thus] in the  
above bill is not enacted and is intended to be omitted in the law.

Matter underlined thus is new matter.

Matter enclosed in superscript numerals has been adopted as follows:

<sup>1</sup> Senate LIP committee amendments adopted September 19, 1988.

1 (f) Any provision not inconsistent with this act or any other  
statute of this State, which the incorporators elect to set forth  
3 for the management of the business and the conduct of the  
affairs of the corporation, or creating, defining, limiting or  
5 regulating the powers of the corporation, its directors and  
shareholders or any class of shareholders, including any provision  
7 which under this act is required or permitted to be set forth in  
the bylaws;

9 (g) The address of the corporation's initial registered office,  
and the name of the corporation's initial registered agent at such  
11 address;

(h) The number of directors constituting the first board and  
13 the names and addresses of the persons who are to serve as such  
directors;

15 (i) The names and addresses of the incorporators;

(j) The duration of the corporation if other than perpetual;

17 and

(k) If, pursuant to subsection 14A:2-7(2), the certificate of  
19 incorporation is to be effective on a date subsequent to the date  
of filing, the effective date of the certificate.

21 (2) The certificate of incorporation shall be filed in the office  
of the Secretary of State. The corporate existence shall begin  
23 upon the effective date of the certificate, which shall be the date  
of the filing or such later time, not to exceed <sup>1</sup>[30] 90<sup>1</sup> days from  
25 the date of filing, as may be set forth in the certificate. Such  
filing shall be conclusive evidence that all conditions precedent  
27 required to be performed by the incorporators have been  
complied with and, after the corporate existence has begun, that  
29 the corporation has been incorporated under this act, except as  
against this State in a proceeding to cancel or revoke the  
31 certificate of incorporation or for involuntary dissolution of the  
corporation.

33 (3) The certificate of incorporation may provide that a  
director or officer shall not be personally liable, or shall be liable  
35 only to the extent therein provided, to the corporation or its  
shareholders for damages for breach of any duty owed to the  
37 corporation or its shareholders, except that such provision shall  
not relieve a director or officer from liability for any breach of  
39 duty based upon an act or omission (a) in breach of such person's

1 duty of loyalty to the corporation or its shareholders, (b) not in  
2 good faith or involving a knowing violation of law or (c) resulting  
3 in receipt by such person of an improper personal benefit. As  
4 used in this subsection, an act or omission in breach of a person's  
5 duty of loyalty means an act or omission which that person knows  
6 or believes to be contrary to the best interests of the corporation  
7 or its shareholders in connection with a matter in which he has a  
8 material conflict of interest.

9 (cf: P.L.1988, c.94, s.10)

10 2. N.J.S.14A:3-5 is amended to read as follows:

11 14A:3-5. Indemnification of directors, officers and employees.

12 (1) As used in this section,

13 (a) "Corporate agent" means any person who is or was a  
14 director, officer, employee or agent of the indemnifying  
15 corporation or of any constituent corporation absorbed by the  
16 indemnifying corporation in a consolidation or merger and any  
17 person who is or was a director, officer, trustee, employee or  
18 agent of any other enterprise, serving as such at the request of  
19 the indemnifying corporation, or of any such constituent  
20 corporation, or the legal representative of any such director,  
21 officer, trustee, employee or agent;

22 (b) "Other enterprise" means any domestic or foreign  
23 corporation, other than the indemnifying corporation, and any  
24 partnership, joint venture, sole proprietorship, trust <sup>1</sup>[, employee  
25 benefit plan]<sup>1</sup> or other enterprise, whether or not for profit,  
26 served by a corporate agent;

27 (c) "Expenses" means reasonable costs, disbursements and  
28 counsel fees;

29 (d) "Liabilities" means amounts paid or incurred in  
30 satisfaction of settlements, judgments, fines and penalties;  
31 <sup>1</sup>[and]<sup>1</sup>

32 (e) "Proceeding" means any pending, threatened or  
33 completed civil, criminal, administrative or arbitrate action,  
34 suit or proceeding, and any appeal therein and any inquiry or  
35 investigation which could lead to such action, suit or proceeding  
36 <sup>1</sup>; and

37 (f) References to "other enterprises" include employee  
38 benefit plans; references to "fines" include any excise taxes  
39 assessed on a person with respect to an employee benefit plan;

1 and references to "serving at the request of the indemnifying  
2 corporation" include any service as a corporate agent which  
3 imposes duties on, or involves services by, the corporate agent  
4 with respect to an employee benefit plan, its participants, or  
5 beneficiaries; and a person who acted in good faith and in a  
6 manner the person reasonably believed to be in the interest of the  
7 participants and beneficiaries of an employee benefit plan shall  
8 be deemed to have acted in a manner "not opposed to the best  
9 interests of the corporation" as referred to in this section.<sup>1</sup>

10 (2) Any corporation organized for any purpose under any  
11 general or special law of this State shall have the power to  
12 indemnify a corporate agent against his expenses and liabilities in  
13 connection with any proceeding involving the corporate agent by  
14 reason of his being or having been such a corporate agent, other  
15 than a proceeding by or in the right of the corporation, if

16 (a) such corporate agent acted in good faith and in a manner  
17 he reasonably believed to be in or not opposed to the best  
18 interests of the corporation; and

19 (b) with respect to any criminal proceeding, such corporate  
20 agent had no reasonable cause to believe his conduct was  
21 unlawful. The termination of any proceeding by judgment, order,  
22 settlement, conviction or upon a plea of nolo contendere or its  
23 equivalent, shall not of itself create a presumption that such  
24 corporate agent did not meet the applicable standards of conduct  
25 set forth in paragraphs 14A:3-5(2)(a) and 14A:3-5(2)(b).

26 (3) Any corporation organized for any purpose under any  
27 general or special law of this State shall have the power to  
28 indemnify a corporate agent against his expenses in connection  
29 with any proceeding by or in the right of the corporation to  
30 procure a judgment in its favor which involves the corporate  
31 agent by reason of his being or having been such corporate agent,  
32 if he acted in good faith and in a manner he reasonably believed  
33 to be in or not opposed to the best interests of the corporation.  
34 However, in such proceeding no indemnification shall be provided  
35 in respect of any claim, issue or matter as to which such  
36 corporate agent shall have been adjudged to be liable to the  
37 corporation, unless and only to the extent that the Superior Court  
38 or the court in which such proceeding was brought shall  
39 determine upon application that despite the adjudication of

1 liability, but in view of all circumstances of the case, such  
2 corporate agent is fairly and reasonably entitled to indemnity for  
3 such expenses as the Superior Court or such other court shall  
4 deem proper.

5 (4) Any corporation organized for any purpose under any  
6 general or special law of this State shall indemnify a corporate  
7 agent against expenses to the extent that such corporate agent  
8 has been successful on the merits or otherwise in any proceeding  
9 referred to in subsections 14A:3-5(2) and 14A:3-5(3) or in defense  
10 of any claim, issue or matter therein.

11 (5) Any indemnification under subsection 14A:3-5(2) and,  
12 unless ordered by a court, under subsection 14A:3-5(3) may be  
13 made by the corporation only as authorized in a specific case  
14 upon a determination that indemnification is proper in the  
15 circumstances because the corporate agent met the applicable  
16 standard of conduct set forth in subsection 14A:3-5(2) or  
17 subsection 14A:3-5(3). Unless otherwise provided in the  
18 certificate of incorporation or bylaws, such determination shall  
19 be made

20 (a) by the board of directors or a committee thereof, acting  
21 by a majority vote of a quorum consisting of directors who were  
22 not parties to or otherwise involved in the proceeding; or

23 (b) if such a quorum is not obtainable, or, even if obtainable  
24 and such quorum of the board of directors or committee by a  
25 majority vote of the disinterested directors so directs, by  
26 independent legal counsel, in a written opinion, such counsel to be  
27 designated by the board of directors; or

28 (c) by the shareholders if the certificate of incorporation or  
29 bylaws or a resolution of the board of directors or of the  
30 shareholders so directs.

31 (6) Expenses incurred by a corporate agent in connection with  
32 a proceeding may be paid by the corporation in advance of the  
33 final disposition of the proceeding as authorized by the board of  
34 directors upon receipt of an undertaking by or on behalf of the  
35 corporate agent to repay such amount [unless] if it shall  
36 ultimately be determined that he is not entitled to be indemnified  
37 as provided in this section.

38 (7)-(a) If a corporation upon application of a corporate agent  
39 has failed or refused to provide indemnification as required under

1 subsection 14A:3-5(4) or permitted under subsections 14A:3-5(2),  
2 14A:3-5(3) and 14A:3-5(6), a corporate agent may apply to a  
3 court for an award of indemnification by the corporation, and  
such court

5 (i) may award indemnification to the extent authorized  
under subsections 14A:3-5(2) and 14A:3-5(3) and shall award  
7 indemnification to the extent required under subsection  
14A:3-5(4), notwithstanding any contrary determination which  
9 may have been made under subsection 14A:3-5(5); and

11 (ii) may allow reasonable expenses to the extent authorized  
by, and subject to the provisions of, subsection 14A:3-5(6), if the  
13 court shall find that the corporate agent has by his pleadings or  
during the course of the proceeding raised genuine issues of fact  
or law.

15 (b) Application for such indemnification may be made

17 (i) in the civil action in which the expenses were or are to be  
incurred or other amounts were or are to be paid; or

19 (ii) to the Superior Court in a separate proceeding. If the  
application is for indemnification arising out of a civil action, it  
shall set forth reasonable cause for the failure to make  
21 application for such relief in the action or proceeding in which  
the expenses were or are to be incurred or other amounts were or  
23 are to be paid.

25 The application shall set forth the disposition of any previous  
application for indemnification and shall be made in such manner  
and form as may be required by the applicable rules of court or,  
27 in the absence thereof, by direction of the court to which it is  
made. Such application shall be upon notice to the corporation.  
29 The court may also direct that notice shall be given at the  
expense of the corporation to the shareholders and such other  
31 persons as it may designate in such manner as it may require.

33 (8) The indemnification and advancement of expenses provided  
by or granted pursuant to the other subsections of this section  
shall not exclude any other rights, including the right to be  
35 indemnified against liabilities and expenses incurred in  
proceedings by or in the right of the corporation, to which a  
37 corporate agent may be entitled under a certificate of  
incorporation, bylaw, agreement, vote of shareholders, or  
39 otherwise; provided that no indemnification shall be made to or

1 on behalf of a corporate agent if a judgment or other final  
adjudication adverse to the corporate agent establishes that his  
3 acts or omissions (a) were in breach of his duty of loyalty to the  
corporation or its shareholders, as defined in subsection (3) of  
5 N.J.S.14A:2-7, (b) were not in good faith or involved a knowing  
violation of law or (c) resulted in receipt by the corporate agent  
7 of an improper personal benefit.

(9) Any corporation organized for any purpose under any  
9 general or special law of this State shall have the power to  
purchase and maintain insurance on behalf of any corporate agent  
11 against any expenses incurred in any proceeding and any  
liabilities asserted against him by reason of his being or having  
13 been a corporate agent, whether or not the corporation would  
have the power to indemnify him against such expenses and  
15 liabilities under the provisions of this section. The corporation  
may purchase such insurance from, or such insurance may be  
17 reinsured in whole or in part by, an insurer owned by or otherwise  
affiliated with the corporation, whether or not such insurer does  
19 business with other insureds.

(10) The powers granted by this section may be exercised by  
21 the corporation, notwithstanding the absence of any provision in  
its certificate of incorporation or bylaws authorizing the exercise  
23 of such powers.

(11) Except as required by subsection 14A:3-5(4), no  
25 indemnification shall be made or expenses advanced by a  
corporation under this section, and none shall be ordered by a  
27 court, if such action would be inconsistent with a provision of the  
certificate of incorporation, a bylaw, a resolution of the board of  
29 directors or of the shareholders, an agreement or other proper  
corporate action, in effect at the time of the accrual of the  
31 alleged cause of action asserted in the proceeding, which  
prohibits, limits or otherwise conditions the exercise of  
33 indemnification powers by the corporation or the rights of  
indemnification to which a corporate agent may be entitled.

(12) This section does not limit a corporation's power to pay  
35 or reimburse expenses incurred by a corporate agent in  
connection with the corporate agent's appearance as a witness in  
37 a proceeding at a time when the corporate agent has not been  
made a party to the proceeding.

(cf: P.L.1988, c.94, s.13)



1 3. N.J.S.14A:6-14 is amended to read as follows:

14A:6-14. Liability of directors; reliance on <sup>1</sup>[corporate]<sup>1</sup>  
3 records <sup>1</sup>and reports<sup>1</sup>.

(1) Directors and members of any committee designated by the  
5 board shall discharge their duties in good faith and with that  
degree of diligence, care and skill which ordinarily prudent  
7 <sup>1</sup>[men] people<sup>1</sup> would exercise under similar circumstances in like  
positions.

9 <sup>1</sup>(2)<sup>1</sup> In discharging their duties, directors and members of any  
committee designated by the board shall not be liable if, acting in  
11 good faith, they rely

<sup>1</sup>[upon] (a) Upon<sup>1</sup> the opinion of counsel for the corporation  
13 <sup>1</sup>[or upon] ;

(b) Upon<sup>1</sup> written reports setting forth financial data  
15 concerning the corporation and prepared by an independent public  
accountant or certified public accountant or firm of such  
17 accountants <sup>1</sup>[or upon] ;

(c) Upon<sup>1</sup> financial statements, books of account or reports of  
19 the corporation represented to them to be correct by the  
president, the officer of the corporation having charge of its  
21 books of account, or the person presiding at a meeting of the  
board <sup>1</sup>; or

23 (d) Upon written reports of committees of the board<sup>1</sup>.

<sup>1</sup>(3)<sup>1</sup> A director shall not be personally liable to the  
25 corporation or its shareholders for damages for breach of duty as  
a director if and to the extent that such liability has been  
27 eliminated or limited by a provision in the certificate of  
incorporation authorized by subsection (3) of N.J.S.14A:2-7.

29 <sup>1</sup>[(2)] (4)<sup>1</sup> In taking action, including, without limitation,  
31 action which may involve or relate to a change or potential  
change in the control of the corporation, a director shall be  
33 entitled to consider, without limitation, both the long-term and  
the short-term interests of the corporation and its shareholders.  
For the purpose of this subsection, "control" means the  
35 possession, directly or indirectly, of the power to direct or cause  
the direction of the management and policies of the corporation,  
37 whether through the ownership of voting shares, by contract or  
otherwise.

39 (cf: P.L.1988, c.94, s.33)

1       4. N.J.S.17B:18-57 is amended to read as follows:

2       17B:18-57. Mutual insurers; change of name, extension of  
3 corporate existence or amendment of charter or certificate of  
incorporation.

5       a. Any mutual insurer heretofore or hereafter incorporated  
under any general or special law of this State may change its  
7 name and extend its corporate existence or amend its charter or  
certificate of incorporation for any lawful purpose by a 3/4 vote  
9 of its directors present at any regular or special meeting, held in  
accordance with its charter and bylaws, held not less than 30 nor  
11 more than 90 days after notice of the proposed amendment has  
been given to the directors and to the commissioner.

13       b. Upon adoption, a certificate of such adoption setting forth  
such change of name, extension or amendment shall be made and  
15 filed by the president or a vice-president of the insurer and by  
the secretary or an assistant secretary under the corporate seal  
17 and shall be acknowledged or proved as in the case of deeds of  
real estate and shall be submitted to the commissioner for his  
19 approval. If the commissioner finds that such change of name,  
extension or amendment is in conformity with law and does not  
21 unreasonably affect the interests of the policyholders, he may  
endorse his approval on the certificate. When so approved, it  
23 shall be filed in the Department of Insurance whereupon the  
charter or certificate of incorporation shall be deemed to be  
25 amended accordingly.

c. The refusal of the commissioner to give any approval shall  
27 be subject to judicial review.

d. To the extent that an amendment of the charter or  
29 certificate of incorporation of a mutual insurer is adopted in  
accordance with subsection (3) of N.J.S.14A:2-7, [or section 4 of  
31 this 1987 amendatory and supplementary act.] the commissioner  
shall approve such amendment unless he finds that it  
33 unreasonably affects the interest of the policyholders.

(cf: P.L.1987, c.35, s.5)

35       5. Section 3 of P.L.1948, c.67 (C.17:9A-3) is amended to read  
as follows:

37       3. Incorporation; certificate of incorporation; officers,  
directors and employees as incorporators.

39       A. Seven or more persons, of full age, may incorporate a bank

1 on the terms and conditions prescribed by this act. Such persons  
shall execute and acknowledge a certificate of incorporation  
3 stating:

(1) The name by which the bank shall be known;

5 (2) The street, street number, if any, and municipality in  
which the principal office of the bank is to be located;

7 (3) The powers authorized by this act which the bank will  
have power to exercise;

9 (4) The amount of the capital stock, the number of shares  
into which it is divided, and the par value of each share;

11 (5) The amount of surplus with which the bank will  
commence business;

13 (6) The amount of the fund reserved for organization  
expense pursuant to section 5;

15 (7) The names and residences of the incorporators, and the  
number of shares subscribed for by each;

17 (8) The number of directors, or that the number of directors  
shall be not less than a stated minimum, or more than a stated  
19 maximum;

(9) The names of the persons who will serve as directors  
21 until the first annual meeting of stockholders; and

(10) Such other provisions, not inconsistent with this act, as  
23 the incorporators may choose to insert for the regulation of the  
business and affairs of the bank.

25 The certificate of incorporation may provide that a director or  
officer shall not be personally liable, or shall be liable only to the  
27 extent therein provided, to the bank or its stockholders for  
damages for breach of any duty owed to the bank or its  
29 stockholders, except that such provision shall not relieve a  
director or officer from liability for any breach of duty based  
31 upon an act or omission (a) in breach of such person's duty of  
loyalty to the bank or its stockholders, (b) not in good faith or  
33 involving a knowing violation of law or (c) resulting in receipt by  
such person of an improper personal benefit. If such a provision  
35 is not included in the original certificate of incorporation, it may  
be added by an amendment effected in accordance with section  
37 117 of P.L.1948, c.67 (C.17:9A-117). As used in this section, an  
act or omission in breach of a person's duty of loyalty means an  
39 act or omission which that person knows or believes to be

1 contrary to the best interests of the bank or its stockholders in  
2 connection with a matter in which he has a material conflict of  
3 interest.

4 B. An officer, director or employee of any bank may be an  
5 incorporator of another bank when not inconsistent with such  
6 person's fiduciary duty or other applicable law.

7 (cf: P.L.1987, c.35, s.6)

8 6. Section 2 of P.L.1982, c.9 (C.17:9A-8.2) is amended to read  
9 as follows:

10 2. Nine or more persons, over the age of 18 years, may  
11 incorporate a capital stock savings bank in this State on the  
12 terms and provisions prescribed by this act. They shall execute  
13 and acknowledge a certificate of incorporation stating:

14 a. The name by which the capital stock savings bank shall be  
15 known;

16 b. The street, street number, if any, and municipality in which  
17 the principal office of the capital stock savings bank is to be  
18 located;

19 c. The amount of the capital stock, the number of shares into  
20 which it is divided, and the par value of each share;

21 d. The amount of surplus with which the capital stock savings  
22 bank will commence business;

23 e. The names and addresses of the incorporators;

24 f. The number of directors, or that the number of directors  
25 shall be not less than a stated minimum or more than a stated  
26 maximum;

27 g. The names of the persons who will serve as directors until  
28 their successors are elected and qualify;

29 h. Any fiduciary powers that the capital stock savings bank  
30 shall be authorized to exercise; and

31 i. Any other provisions, not inconsistent with this act, which  
32 the incorporators choose to insert for the regulation of the  
33 business and affairs of the capital stock savings bank.

34 The certificate of incorporation may provide that a director or  
35 officer shall not be personally liable, or shall be liable only to the  
36 extent therein provided, to the capital stock savings bank or its  
37 stockholders for damages for breach of any duty owed to the  
38 capital stock savings bank or its stockholders, except that such  
39 provision shall not relieve a director or officer from liability for

1 an act or omission (a) in breach of such person's duty of loyalty  
2 to the capital stock savings bank or its stockholders, (b) not in  
3 good faith or involving a knowing violation of law or (c) resulting  
4 in receipt by such person of an improper personal benefit. If such  
5 a provision is not included in the original certificate of  
6 incorporation, it may be added by an amendment effected in  
7 accordance with section 117 of P.L.1948, c.67 (C.17:9A-117). As  
8 used in this section, an act or omission in breach of a person's  
9 duty of loyalty means an act or omission which that person knows  
10 or believes to be contrary to the best interests of the capital  
11 stock savings bank or its stockholders in connection with a matter  
12 in which he has a material conflict of interest.

13 (cf: P.L.1987, c.35, s.8)

14 7. Section 250 of P.L.1948, c.67 (C.17:9A-250) is amended to  
15 read as follows:

16 250. Action against directors, managers, officers or  
17 employees; indemnification.

18 A. As used in this section

19 (1) "Corporate agent" means any person who is or was a  
20 director, officer, employee or agent of the indemnifying bank or  
21 of any constituent banking institution or corporation absorbed by  
22 the indemnifying bank in a consolidation or merger or created by  
23 or owned by the indemnifying bank and any person who is or was a  
24 director, officer, trustee, employee or agent of any other  
25 enterprise, serving as such at the request of the indemnifying  
26 bank, or of any constituent banking institution or corporation or  
27 the legal representative of any such director, officer, trustee,  
28 employee or agent;

29 (2) "Other enterprise" means any domestic or foreign  
30 corporation, other than the indemnifying bank, and any  
31 partnership, joint venture, sole proprietorship, trust, employee  
32 benefit plan or other enterprise, whether or not for profit, served  
33 by a corporate agent;

34 (3) "Expenses" means reasonable costs, disbursements and  
35 counsel fees;

36 (4) "Liabilities" means amounts paid or incurred in  
37 satisfaction of settlements, judgments, fines and penalties;

38 (5) "Proceeding" means any pending, threatened or  
39 completed civil, criminal, administrative or arbitral action,

1 suit or proceeding, and any appeal therein and any inquiry or  
investigation which could lead to such action, suit or proceeding;

3 (6) "Bank" includes savings bank and capital stock savings  
bank;

5 (7) "Directors" includes directors of a bank and capital  
stock savings bank and managers of a savings bank.

7 B. Any bank of this State shall have the power to indemnify a  
corporate agent against his expenses and liabilities in connection  
9 with any proceeding involving the corporate agent by reason of  
his being or having been such a corporate agent, other than a  
11 proceeding by or in the right of the bank, if

(1) Such corporate agent acted in good faith and in a manner  
13 he reasonably believed to be in or not opposed to the best interest  
of the bank;

15 (2) With respect to any criminal proceeding, such corporate  
agent had no reasonable cause to believe his conduct was  
17 unlawful.

The termination of any proceeding by judgment, order,  
19 settlement, conviction or upon a plea of nolo contendere or its  
equivalent, shall not of itself create a presumption that such  
21 corporate agent did not meet the applicable standards of conduct  
set forth in subdivisions (1) and (2) of this subsection.

23 C. Any bank of this State shall have the power to indemnify a  
corporate agent against his expenses in connection with any  
25 proceeding by or in the right of the bank to procure a judgment in  
its favor which involves the corporate agent by reason of his  
27 being or having been such corporate agent, if he acted in good  
faith and in a manner he reasonably believed to be in or not  
29 opposed to the best interests of the bank. However, in such  
proceeding no indemnification shall be provided in respect of any  
31 claim, issue or matter as to which such corporate agent shall  
have been adjudged to be liable to the bank, unless and only to  
33 the extent that the Superior Court or other court in which such  
proceeding was brought shall determine upon application that  
35 despite the adjudication of liability, but in view of all  
circumstances of the case, such corporate agent is fairly and  
37 reasonably entitled to indemnity for such expenses as the  
Superior Court or other court shall deem proper.

39 D. Any bank of this State shall indemnify a corporate agent

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1 against expenses to the extent that such corporate agent has been  
successful on the merits or otherwise in any proceeding referred  
3 to in subsections B and C of this section or in defense of any  
claim, issue or matter therein.

5 E. Any indemnification under subsection B of this section, and,  
unless ordered by a court, under subsection C of this section, may  
7 be made by the bank only as authorized in a specific case upon a  
determination that indemnification is proper in the circumstances  
9 because the corporate agent met the applicable standard of  
conduct set forth in subsection B of this section or subsection C  
11 of this section. Unless otherwise provided in the certificate of  
incorporation or bylaws, the determination shall be made

13 (a) By the board of directors or a committee thereof acting  
by a quorum consisting of directors who were not parties to or  
15 otherwise involved in, the proceeding; or

(b) If such a quorum is not obtainable, or, even if obtainable  
17 and that quorum of the board of directors or committee by a  
majority vote of the disinterested directors so directs, by  
19 independent legal counsel in a written opinion, that independent  
legal counsel to be designated by the board of directors; or

21 (c) By the stockholders, if the certificate of incorporation or  
bylaws or a resolution of the board of directors or of the  
23 stockholders so directs, in the case of a bank which is not a  
savings bank, and by the commission, in the case of a savings  
25 bank.

F. Expenses incurred by a corporate agent in connection with a  
27 proceeding may be paid by the bank in advance of the final  
disposition of the proceeding, if authorized by the board of  
29 directors, upon receipt of an undertaking by or on behalf of the  
corporate agent to repay such amount [unless] if it shall  
31 ultimately be determined that he is not entitled to be indemnified  
as provided in this section.

33 G. (1) If a bank upon application of a corporate agent has  
failed or refused to provide indemnification as required under  
35 subsection D of this section or permitted under subsections B, C  
and F of this section, a corporate agent may apply to a court for  
37 an award of indemnification by the bank, and such court

(2) May award indemnification to the extent authorized under  
39 subsections B and C of this section and shall award

1 indemnification to the extent required under subsection D of this  
section, notwithstanding any contrary determination which may  
3 have been made under subsection E of this section; and

(3) May allow reasonable expenses to the extent authorized by,  
5 and subject to the provisions of, subsection F of this section, if  
the court shall find that the corporate agent has by his pleadings  
7 or during the course of the proceeding raised genuine issues of  
fact or law.

9 (4) Application for such indemnification may be made

(a) In the civil action in which the expenses were or are to  
11 be incurred or other amounts were or are to be paid; or

(b) To the Superior Court in a separate proceeding. If the  
13 application is for indemnification arising out of a civil action, it  
shall set forth reasonable cause for the failure to make  
15 application for such relief in the action or proceeding in which  
the expenses were or are to be incurred or other amounts were or  
17 are to be paid.

(5) The application shall set forth the disposition of any  
19 previous application for indemnification and shall be made in such  
manner and form as may be required by the applicable rules of  
21 court or, in the absence thereof, by direction of the court to  
which it is made. Such application shall be upon notice to the  
23 bank. The court may also direct that notice shall be given at the  
expense of the bank to the stockholders of a bank other than a  
25 savings bank and such other persons as it may designate in such  
manner as it may require.

27 H. The indemnification and advancement of expenses provided  
by or granted pursuant to the other subsections of this section  
29 shall not exclude any other rights, including the right to be  
indemnified against liabilities and expenses incurred in  
31 proceedings by or in the right of the bank, to which a corporate  
agent may be entitled under a certificate of incorporation, bylaw,  
33 agreement, vote of stockholders of a bank other than a savings  
bank, or otherwise; provided that no indemnification shall be  
35 made to or on behalf of a corporate agent if a judgment or other  
final adjudication adverse to the corporate agent establishes that  
37 his acts or omissions (a) were in breach of his duty of loyalty to  
the bank or its stockholders, (b) were not in good faith or involved  
39 a knowing violation of law or (c) resulted in receipt by the



1 corporate agent of an improper personal benefit. As used in this  
2 subsection, an act or omission in breach of a person's duty of  
3 loyalty means an act or omission which that person knows or  
4 believes to be contrary to the best interests of the bank, other  
5 than a savings bank, or its stockholders or the savings bank or its  
6 depositors in connection with a matter in which he has a material  
7 conflict of interest.

8 I. Any bank of this State shall have the power to purchase and  
9 maintain insurance on behalf of any corporate agent against any  
10 expenses incurred in any proceeding and any liabilities asserted  
11 against him by reason of his being or having been a corporate  
12 agent, whether or not the bank would have the power to  
13 indemnify him against those expenses and liabilities under the  
14 provisions of this section. The bank may purchase such insurance  
15 from, or such insurance may be reinsured in whole or in part by,  
16 an insurer owned by or otherwise affiliated with the bank,  
17 whether or not such insurer does business with other insureds.

18 J. The powers granted by this section may be exercised by a  
19 bank notwithstanding the absence of any provision in its  
20 certificate of incorporation or bylaws authorizing the exercise of  
21 such powers.

22 K. Except as required by subsection D of this section, no  
23 indemnification shall be made or expenses advanced by a  
24 corporation under this section, and none shall be ordered by the  
25 Superior Court or other court, if that action would be  
26 inconsistent with a provision of the certificate of incorporation, a  
27 bylaw, a resolution of the board of directors or of the  
28 stockholders, or an agreement or other proper corporate action,  
29 in effect at the time of the accrual of the alleged cause of action  
30 asserted in the proceeding, which prohibits, limits or otherwise  
31 conditions the exercise of indemnification powers by the  
32 corporation or the rights of indemnification to which a corporate  
33 agent may be entitled.

34 L. This section does not limit a bank's power to pay or  
35 reimburse expenses incurred by a corporate agent in connection  
36 with the corporate agent's appearance as a witness in a  
37 proceeding at a time when the corporate agent has not been made  
38 a party to the proceeding.

39 (cf: P.L.1987, c.35, s.10)

1       8. Section 11 of P.L.1987, c.35 (C.17:9A-197.1) is amended to  
read as follows:

3       11. Notwithstanding the provisions of section 197 of P.L.1948,  
c.67 (C.17:9A-197), a savings bank may, by amending its  
5       certificate of incorporation in the manner provided in section 198  
of P.L.1948, c.67 (C.17:9A-198), provide that a manager or  
7       officer shall not be personally liable, or shall be liable only to the  
extent therein provided, to the savings bank or its depositors for  
9       damages for breach of any duty owed to the savings bank or its  
depositors, except that such provision shall not relieve a manager  
11       or officer from liability for an act or omission (a) in breach of  
such person's duty of loyalty to the savings bank or its  
13       depositors, (b) not in good faith or involving a knowing violation  
of law or (c) resulting in receipt by such person of an improper  
15       personal benefit. As used in this section, an act or omission in  
breach of a person's duty of loyalty means an act or omission  
17       which that person knows or believes to be contrary to the best  
interests of the savings bank or its depositors in connection with  
19       a matter in which he has a material conflict of interest.

The Commissioner of Banking shall approve such amendment  
21       unless he finds that it unreasonably affects the interests of the  
depositors.

23       (cf: P.L.1987, c.35, s.11)

9. Section 13 of P.L.1987, c.35 (C.17:12B-38.1) is amended to  
25       read as follows:

13. An association may with the approval of the commissioner,  
27       amend its certificate of incorporation or bylaws, by a 2/3 vote of  
its board present and voting at a duly convened regular or special  
29       meeting, to provide that a director or officer shall not be  
personally liable, or shall be liable only to the extent therein  
31       provided, to the association or its members for damages for  
breach of any duty owed to the association or its members,  
33       except that the provision shall not relieve a director or officer  
from liability for an act or omission: a. in breach of that  
35       person's duty of loyalty to the association or its members; b. not  
in good faith or involving a knowing violation of law; or c.  
37       resulting in receipt by that person of an improper personal  
benefit. As used in this section, an act or omission in breach of a

1 person's duty of loyalty means an act or omission which that  
2 person knows or believes to be contrary to the best interests of  
3 the association or its members in connection with a matter in  
4 which he has a material conflict of interest.

5 The commissioner shall approve the amendment unless he finds  
6 that it unreasonably affects the interest of the members.

7 This section shall be applicable to federal associations, in  
8 addition to State associations, to the extent permitted by federal  
9 law.

(cf: P.L.1987, c.35, s.13)

11 10. Section 15 of P.L.1987, c.35 (C.17:12B-250.1) is amended  
12 to read as follows:

13 15. A capital stock association may with the approval of the  
14 commissioner, amend its certificate of incorporation or bylaws,  
15 by a 2/3 vote of its board present and voting at a duly convened  
16 regular or special meeting, to provide that a director or officer  
17 shall not be personally liable, or shall be liable only to the extent  
18 therein provided, to the association or its stockholders for  
19 damages for breach of any duty owed to the association or its  
20 stockholders, except that the provision shall not relieve a  
21 director or officer from liability for an act or omission: a. in  
22 breach of that person's duty of loyalty to the association or its  
23 stockholders; b. not in good faith or involving a knowing violation  
24 of law; or c. resulting in receipt by that person of an improper  
25 personal benefit. As used in this section, an act or omission in  
26 breach of a person's duty of loyalty means an act or omission  
27 which that person knows or believes to be contrary to the best  
28 interests of the association or its stockholders in connection with  
29 a matter in which he has a material conflict of interest.

30 The commissioner shall approve the amendment unless he finds  
31 that it unreasonably affects the interest of the stockholders.

32 This section shall be applicable to federal associations, in  
33 addition to State associations, to the extent permitted by federal  
34 law.

35 (cf: P.L.1987, c.35, s.15)

36 11. Sections 4, 7, 9, 12, 14 and 16 of P.L.1987, c.35 are  
37 repealed.

12. This act shall take effect immediately.

1 breach of that person's duty of loyalty to the association or its  
2 stockholders; b. not in good faith or involving a knowing violation  
3 of law; or c. resulting in receipt by that person of an improper  
4 personal benefit. As used in this section, an act or omission in  
5 breach of a person's duty of loyalty means an act or omission  
6 which that person knows or believes to be contrary to the best  
7 interests of the association or its stockholders in connection with  
8 a matter in which he has a material conflict of interest.

9 The commissioner shall approve the amendment unless he finds  
10 that it unreasonably affects the interest of the stockholders.

11 This section shall be applicable to federal associations, in  
12 addition to State associations, to the extent permitted by federal  
13 law.

(cf: P.L. 1987, c. 35, s. 15)

15 11. Sections 4, 7, 9, 12, 14 and 16 of P.L. 1987, c. 35 are  
16 repealed.

17 12. This act shall take effect immediately.

19 *SPONSOR'S* STATEMENT

21 On February 4, 1987 New Jersey enacted P.L. 1987, c. 35,  
22 which permits the shareholders of New Jersey corporations to  
23 protect corporate directors and officers against certain lawsuits  
24 by shareholders or others on behalf of the corporation. Because  
25 the New Jersey bill was the first in the nation to permit  
26 corporations to protect officers as well as directors, the  
27 Legislature thought it wise to insert a two-year "sunset" of the  
28 officers' provisions in the law. This bill makes the officers'  
29 provisions permanent.

30 The bill further provides that officers and directors can  
31 consider the long term as well as the short term interests of the  
32 company in making their decisions. It also makes several other  
33 changes to clarify the provisions of the 1987 law.

35 INSURANCE  
36 Corporations

37  
38 Makes permanent the authority to limit liability of certain  
39 corporate officers under certain circumstances.

1 INSURANCE  
Corporations

3

5 Makes permanent the authority to limit liability of certain  
corporate officers under certain circumstances.

SENATE LABOR, INDUSTRY AND PROFESSIONS COMMITTEE

STATEMENT TO

SENATE, No. 2673

with Senate committee amendments

STATE OF NEW JERSEY

DATED: SEPTEMBER 19, 1988

The Senate Labor, Industry and Professions Committee reports favorably and with committee amendments Senate Bill No. 2673.

P.L.1987, c.35, which was signed into law on February 4, 1987, permits New Jersey corporations to include in their certificates of incorporation a provision eliminating or limiting the liability of directors or officers, or both, for damages to the corporation or its shareholders for certain breaches of duty. However, pursuant to that law, the authority to eliminate or limit the liability of officers expires in February of 1989 (on the 730th day after February 4, 1987, the effective date of P.L.1987, c.35). This bill eliminates that "sunset" provision for officers and would thereby allow this protection to be continued to be provided for officers.

One of the breaches of duty for which a director or officer cannot be protected against under P.L.1987, c.35 is an act or omission "in breach of such person's duty of loyalty to the corporation or its shareholders." This bill defines such act or omission as one which that person knows or believes to be contrary to the best interests of the corporation or its shareholders in connection with a matter in which he has a material conflict of interest. This definition will prevent plaintiffs in shareholder suits from getting around the statute by characterizing actions or omissions which are normally considered negligence as breaches of the duty of loyalty.

The bill clarifies that any additional indemnification rights to which a corporate agent may be entitled may include "the right to be indemnified against liabilities and expenses incurred in proceedings by or in the right of the corporation."

The bill entitles corporate directors to consider both the long-term and short-term interests of the corporation and its shareholders in taking any action, including an action which involves a change in the control of the corporation.

Lastly, the bill makes two minor changes. It makes it clear that, in the case of commercial banks and capital stock savings banks, provisions limiting liability of directors and officers need not be included in the original certificate of incorporation but may be added by amendment. It also makes a minor change to the indemnification statutes by requiring an indemnitee to repay expense advances if it is ultimately determined that he is not entitled to be indemnified, rather than unless it is ultimately determined that he is entitled to be indemnified.

The committee made technical amendments to the bill to reflect those changes recently made to the corporate law by P.L.1988, c.94.

ASSEMBLY INSURANCE COMMITTEE

STATEMENT TO

SENATE, No. 2673

STATE OF NEW JERSEY

DATED: JANUARY 23, 1989

The Assembly Insurance Committee reports this bill with a favorable recommendation.

This bill eliminates a "sunset" provision in P.L.1987, c.35, which would have taken away the authority of corporations organized under Title 14A to amend their certificates of incorporation to limit the liability of officers. Under that law, certificates of incorporation may be amended to extend immunity from shareholders' derivative suits to both officers and directors of corporations; only the provision governing officers was subject to a sunset.

The bill also defines a "breach of ... duty of loyalty to the corporation or its shareholders" as one in which the person knows or believes to be contrary to the best interests of the corporation or its shareholders in connection with a matter in which he has a material conflict of interest. The intent of this provision is to prevent shareholders from getting around the statute by characterizing actions of omissions which are normally considered negligence as breaches of the duty of loyalty.

The bill clarifies the fact that any additional indemnification rights to which a corporate agent may be entitled may include "the right to be indemnified against liabilities and expenses incurred in proceedings by or in the right of the corporation." The bill further amends the corporation law to permit officers and directors to consider both the long-term and short-term interests of the corporation and its shareholders in taking any action, including an action which involves a change in the control of the corporation.

The bill's primary purpose is to eliminate the sunset provision applicable to officers which was established by the Legislature in 1987. In addition, it adds language to the law which would further clarify areas in which derivative actions are permitted by more carefully defining the duties of officers and directors and their obligations to the corporation and its shareholders. The need for this is partly occasioned by the present climate in which corporate officers and directors are often faced with decisions



regarding corporate takeovers which may require them to choose between the interests of the corporation as a business and shareholders' more immediate interests. They are therefore more vulnerable to derivative types of actions.