

LEGISLATIVE HISTORY CHECKLIST

NJSA: 14A:2-7 et al (Corporations-- Directors-- limit liability)

CHAPTER 35

Laws Of: 1987

Bill No: S2510

Sponsor(s): Lesniak

Date Introduced: September 15, 1986

Committee: Assembly: Insurance

Senate: Labor, Industry and Professions

Amended during passage: No Senate substitute for Senate committee substitute enacted

Date of Passage: Assembly: January 22, 1987

Senate: December 15, 1986

Date of Approval: February 4, 1987

Following statements are attached if available:

Sponsor statement: Yes

Committee statement: Assembly Yes

Senate Yes

Fiscal Note: No

Veto Message: No

Message on Signing: Yes

Following were printed:

Reports: No

Hearings: Yes

other states with similar statutes:

N.Y. Bus. & Corp. 721 et seq (1986)

Del: Code Ann. Title 8, §145 (1986)

Pa. Stat. Ann. Title 15, §1410 (Purdon 1987)

(over)

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974.90 New Jersey. Legislature. Senate. Labor, Industry and Professions Committee
159 - Public hearing on proposed insurance
1986e legislation and recommendations, 8-22-86
Trenton, 1986.

See also:

Cheever, Joan M, "Liability fears scaring off potential board directors," 119 NJLJ 681.

J345.02 Partnership for New Jersey Liability Task Force.
P273 Summary report. . . January 19, 1987.

See newspaper clipping -- "Insurance: Executives offer plan," 1-25-87 NYT-- (attached).

2-4-87

SENATE SUBSTITUTE FOR
SENATE COMMITTEE SUBSTITUTE FOR
SENATE, No. 2510

STATE OF NEW JERSEY

ADOPTED DECEMBER 4, 1986

By Senator LESNIAK

AN ACT concerning liabilities of certain corporate directors and
officers and insurance with respect to certain corporate agents,
and revising parts of statutory law.

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

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

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

3 (1) The certificate of incorporation shall set forth:

4 (a) The name of the corporation;

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

13 (c) The aggregate number of shares which the corporation
14 shall have authority to issue; if such shares are to consist of
15 one class only, the par value of each of such shares, or a state-
16 ment that all of such shares are without par value;

17 (d) If the shares are, or are to be, divided into classes, or
18 into classes and series, the designation of each class and
19 series, the number of shares in each class and series, and a
20 statement of the relative rights, preferences and limitations
21 of the shares of each class and series, to the extent that such

**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 printed in italics thus is new matter.

22 designations, numbers, relative rights, preferences and limita-
23 tions have been determined;

24 (e) If the shares are, or are to be, divided into classes, or
25 into classes and series, a statement of any authority vested
26 in the board to divide the shares into classes or series or both,
27 and to determine or change for any class or series its desig-
28 nation, number of shares, relative rights, preferences and
29 limitations;

30 (f) Any provision not inconsistent with this act or any other
31 statute of this State, which the incorporators elect to set
32 forth for the management of the business and the conduct
33 of the affairs of the corporation, or creating, defining, limiting
34 or regulating the powers of the corporation, its directors and
35 shareholders or any class of shareholders, including any pro-
36 vision which under this act is required or permitted to be
37 set forth in the bylaws;

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

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

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

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

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

50 (2) The certificate of incorporation shall be filed in the office
51 of the Secretary of State. The corporate existence shall begin
52 upon the effective date of the certificate, which shall be the date
53 of the filing or such later time, not to exceed 30 days from the
54 date of filing, as may be set forth in the certificate. Such filing
55 shall be conclusive evidence that all conditions precedent required
56 to be performed by the incorporators have been complied with and,
57 after the corporate existence has begun, that the corporation has
58 been incorporated under this act, except as against this State in
59 a proceeding to cancel or revoke the certificate of incorporation
60 or for involuntary dissolution of the corporation.

61 (3) *The certificate of incorporation may provide that a director*
62 *shall not be personally liable, or shall be liable only to the extent*
63 *therein provided, to the corporation or its shareholders for dam-*
64 *ages for breach of any duty owed to the corporation or its share-*
65 *holders, except that such provision shall not relieve a director*

66 *from liability for any breach of duty based upon an act or omission*
 67 *(a) in breach of such person's duty of loyalty to the corporation*
 68 *or its shareholders, (b) not in good faith or involving a knowing*
 69 *violation of law or (c) resulting in receipt by such person of an*
 70 *improper personal benefit.*

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

2 14A:3-5. Indemnification of directors, officers and employees.

3 (1) As used in this section,

4 (a) "corporate agent" means any person who is or was a
 5 director, officer, employee or agent of the indemnifying cor-
 6 poration or of any constituent corporation absorbed by the in-
 7 demnifying corporation in a consolidation or merger and any
 8 person who is or was a director, officer, trustee, employee or
 9 agent of any other enterprise, serving as such at the request
 10 of the indemnifying corporation, or of any such constituent
 11 corporation, or the legal representative of any such director,
 12 officer, trustee, employee or agent;

13 (b) "other enterprise" means any domestic or foreign cor-
 14 poration, other than the indemnifying corporation, and any
 15 partnership, joint venture, sole proprietorship, trust, *employee*
 16 *benefit plan* or other enterprise, whether or not for profit,
 17 seved by a corporate agent;

18 (c) "expenses" means reasonable costs, disbursements and
 19 counsel fees;

20 (d) "liabilities" means amounts paid or incurred in satis-
 21 faction of settlements, judgments, fines and penalties; and

22 (e) "proceeding" means any pending, threatened or com-
 23 pleted civil, criminal, administrative or arbitratve action, suit
 24 or proceeding, and any appeal therein and any inquiry or in-
 25 vestigation which could lead to such action, suit or proceeding.

26 (2) Any corporation organized for any purpose under any gen-
 27 eral or special law of this State shall have the power to indemnify
 28 a corporate agent against his expenses and liabilities in connec-
 29 tion with any proceeding involving the corporate agent by reason
 30 of his being or having been such a corporate agent, other than a
 31 proceeding by or in the right of the corporation, if

32 (a) such corporate agent acted in good faith and in a man-
 33 ner he reasonably believed to be in or not opposed to the best
 34 interests of the corporation; and

35 (b) with respect to any criminal proceeding, such corporate
 36 agent had no reasonable cause to believe his conduct was un-
 37 lawful. The termination of any proceeding by judgment, order,
 38 settlement, conviction or upon a plea of *nolo contendere* or its

39 equivalent, shall not of itself create a presumption that such
40 corporate agent did not meet the applicable standards of con-
41 duct set forth in paragraphs 14A:3-5 (2) (a) and 14A:3-5
42 (2) (b).

43 (3) Any corporation organized for any purpose under any gen-
44 eral or special law of this State shall have the power to indemnify
45 a corporate agent against his expenses in connection with any
46 proceeding by or in the right of the corporation to procure a judg-
47 ment in its favor which involves the corporate agent by reason of
48 his being or having been such corporate agent, if he acted in good
49 faith and in a manner he reasonably believed to be in or not op-
50 posed to the best interests of the corporation. However, in such
51 proceeding no indemnification shall be provided in respect of any
52 claim, issue or matter as to which such corporate agent shall have
53 been adjudged to be liable [for negligence or misconduct] to the
54 corporation, unless and only to the extent that the Superior Court
55 or the court in which such proceeding was brought shall deter-
56 mine upon application that despite the adjudication of liability,
57 but in view of all circumstances of the case, such corporate agent
58 is fairly and reasonably entitled to indemnity for such expenses as
59 the Superior Court or such other court shall deem proper.

60 (4) Any corporation organized for any purpose under any gen-
61 eral or special law of this State shall indemnify a corporate agent
62 against expenses to the extent that such corporate agent has been
63 successful on the merits or otherwise in any proceeding referred to
64 in subsections 14A:3-5(2) and 14A:3-5(3) or in defense of any
65 claim, issue or matter therein.

66 (5) Any indemnification under subsection 14A:3-5(2) and, un-
67 less ordered by a court, under subsection 14A:3-5(3), may be made
68 by the corporation only as authorized in a specific case upon a de-
69 termination that indemnification is proper in the circumstances
70 because the corporate agent met the applicable standard of con-
71 duct set forth in subsection 14A:3-5(2) or subsection 14A:3-5(3).
72 Unless otherwise provided in the certificate or incorporation or
73 bylaws, such determination shall be made

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

77 (b) if such a quorum is not obtainable, or, even if obtain-
78 able and such quorum of the board of directors or committee
79 by a majority vote of the disinterested directors so directs, by
80 independent legal counsel, in a written opinion, such counsel
81 to be designated by the board of directors; or

82 (e) by the shareholders if the certificate of incorporation or
83 bylaws or a resolution of the board of directors or of the
84 shareholders so directs.

85 (6) Expenses incurred by a corporate agent in connection with
86 a proceeding may be paid by the corporation in advance of the
87 final disposition of the proceeding [if authorized in the manner
88 provided in subsection 14A:3-5(5)] *as authorized by the board of*
89 *directors* upon receipt of an undertaking by or on behalf of the
90 corporate agent to repay such amount unless it shall ultimately be
91 determined that he is entitled to be indemnified as provided in this
92 section.

93 (7) (a) If a corporation upon application of a corporate agent
94 has failed or refused to provide indemnification as required under
95 subsection 14A:3-5(4) or permitted under subsections 14A:3-5
96 (2), 14A:3-5(3) and 14A:3-5(6), a corporate agent may apply to
97 a court for an award of indemnification by the corporation, and
98 such court

99 (i) may award indemnification to the extent authorized
100 under subsections 14A:3-5(2) and 14A:3-5(3) and shall award
101 indemnification to the extent required under subsection
102 14A:3-5(4), notwithstanding any contrary determination
103 which may have been made under subsection 14A:3-5(5); and

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

109 (b) Application for such indemnification may be made

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

112 (ii) to the Superior Court in a separate proceeding. If the
113 application is for indemnification arising out of a civil action,
114 it shall set forth reasonable cause for the failure to make ap-
115 plication for such relief in the action or proceeding in which
116 the expenses were or are to be incurred or other amounts were
117 or are to be paid.

118 The application shall set forth the disposition of any pre-
119 vious application for indemnification and shall be made in
120 such manner and form as may be required by the applicable
121 rules of court or, in the absence thereof, by direction of the
122 court to which it is made. Such application shall be upon notice
123 to the corporation. The court may also direct that notice shall

124 be given at the expense of the corporation to the shareholders
125 and such other persons as it may designate in such manner
126 as it may require.

127 (8) The indemnification *and advancement of expenses* provided
128 *by or granted pursuant to the other subsections of this section* shall
129 not exclude any other rights to which a corporate agent may be
130 entitled under a certificate of incorporation, bylaw, agreement,
131 vote of shareholders, or otherwise; *provided that no indemnifica-*
132 *tion shall be made to or on behalf of a corporate agent if a judg-*
133 *ment or other final adjudication adverse to the corporate agent*
134 *establishes that his acts or omissions (a) were in breach of his*
135 *duty of loyalty to the corporation or its shareholders, (b) were not*
136 *in good faith or involved a knowing violation of law or (c) resulted*
137 *in receipt by the corporate agent of an improper personal benefit.*

138 (9) Any corporation organized for any purpose under any gen-
139 eral or special law of this State shall have the power to purchase
140 and maintain insurance on behalf of any corporate agent against
141 any expenses incurred in any proceeding and any liabilities as-
142 serted against him by reason of his being or having been a cor-
143 porate agent, whether or not the corporation would have the
144 power to indemnify him against such expenses and liabilities under
145 the provisions of this section. *The corporation may purchase such*
146 *insurance from, or such insurance may be reinsured in whole or*
147 *in part by, an insurer owned by or otherwise affiliated with the*
148 *corporation, whether or not such insurer does business with other*
149 *insureds.*

150 (10) The powers granted by [Section 14A:3-5] *this section* may
151 be exercised by the corporation notwithstanding the absence of
152 any provision in its certificate of incorporation or bylaws autho-
153 rizing the exercise of such powers.

154 (11) Except as required by subsection 14A:3-5(4), no indemni-
155 fication shall be made or expenses advanced by a corporation under
156 this section, and none shall be ordered by a court, if such action
157 would be inconsistent with a provision of the certificate of incor-
158 poration, a bylaw, a resolution of the board of directors or of the
159 shareholders, an agreement or other proper corporate action, in
160 effect at the time of the accrual of the alleged cause of action as-
161 serted in the proceeding, which prohibits, limits or otherwise con-
162 ditions the exercise of indemnification powers by the corporation
163 or the rights of indemnification to which a corporate agent may
164 be entitled.

165 (12) *This section does not limit a corporation's power to pay or*
166 *reimburse expenses incurred by a corporate agent in connection*

167 *with the corporate agent's appearance as a witness in a proceed-*
 168 *ing at a time when the corporate agent has not been made a party.*
 169 *to the proceeding.*

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

2 14A:6-14. Liability of directors; reliance on corporate records.

3 Directors and members of any committee designated by the board
 4 shall discharge their duties in good faith and with that degree of
 5 diligence, care and skill which ordinarily prudent men would exer-
 6 cise under similar circumstances in like positions. In discharging
 7 their duties, directors and members of any committee designated
 8 by the board shall not be liable if, acting in good faith, they rely
 9 upon the opinion of counsel for the corporation or upon written
 10 reports setting forth financial data concerning the corporation and
 11 prepared by an independent public accountant or certified public
 12 accountant or firm of such accountants or upon financial state-
 13 ments, books of account or reports of the corporation represented
 14 to them to be correct by the president, the officer of the corporation
 15 having charge of its books of account, or the person presiding at
 16 a meeting of the board. *A director shall not be personally liable*
 17 *to the corporation or its shareholders for damages for breach of*
 18 *duty as a director if and to the extent that such liability has been*
 19 *eliminated or limited by a provision in the certificate of incorpora-*
 20 *tion authorized by subsection (2) of N. J. S. 14A:2-7.*

1 4. (New section) Notwithstanding the provisions of subsection
 2 (3) of N. J. S. 14A:2-7, the certificate of incorporation referred
 3 to therein may also provide that an officer of the corporation shall
 4 not be personally liable, or shall be liable only to the extent therein
 5 provided, to the corporation or its shareholders for damages for
 6 breach of any duty owed to the corporation or its shareholders,
 7 except that such provision shall not relieve an officer from liability
 8 for any breach of duty based upon an act or omission (a) in breach
 9 of such person's duty of loyalty to the corporation or its sharehold-
 10 ers, (b) not in good faith or involving a knowing violation of law
 11 or (c) resulting in receipt by such person of an improper personal
 12 benefit.

1 5. 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
 4 incorporation.

5 a. Any mutual insurer heretofore or hereafter incorporated
 6 under any general or special law of this State may change its name
 7 and extend its corporate existence or amend its charter or certificate
 8 of incorporation for any lawful purpose by a $\frac{3}{4}$ vote of its directors

9 present at any regular or special meeting, held in accordance with
 10 its charter and bylaws, held not less than 30 nor more than 90 days
 11 after notice of the proposed amendment has been given to the
 12 directors and to the commissioner.

13 b. Upon adoption, a certificate of such adoption setting forth
 14 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
 16 secretary or an assistant secretary under the corporate seal and
 17 shall be acknowledged or proved as in the case of deeds of real
 18 estate and shall be submitted to the commissioner for his approval.
 19 If the commissioner finds that such change of name, extension or
 20 amendment is in conformity with law and does not unreasonably
 21 affect the interests of the policyholders, he may endorse his ap-
 22 proval on the certificate. When so approved, it shall be filed in
 23 the Department of Insurance whereupon the charter or certificate
 24 of incorporation shall be deemed to be amended accordingly.

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

27 *d. To the extent that an amendment of the charter or certificate*
 28 *of incorporation of a mutual insurer is adopted in accordance with*
 29 *subsection (3) of N. J. S. 14A:2-7, or section 4 of this 1986 amen-*
 30 *datory and supplementary act, the commissioner shall approve*
 31 *such amendment unless he finds that its unreasonably affects the*
 32 *interest of the policyholders.*

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

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

5 A. Seven or more persons, of full age, may incorporate a bank
 6 on the terms and conditions prescribed by this act. Such persons
 7 shall execute and acknowledge a certificate of incorporation stating:

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

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

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

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

15 (5) The amount of surplus with which the bank will com-
 16 mence business;

17 (6) The amount of the fund reserved for organization ex-
 18 pense pursuant to section 5;

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

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

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

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

29 *The certificate of incorporation may provide that a director shall*
30 *not be personally liable, or shall be liable only to the extent therein*
31 *provided, to the bank or its stockholders for damages for breach*
32 *of any duty owed to the bank or its stockholders, except that such*
33 *provision shall not relieve a director from liability for any breach*
34 *of duty based upon an act or omission (a) in breach of such per-*
35 *son's duty of loyalty to the bank or its stockholders, (b) not in*
36 *good faith or involving a knowing violation of law or (c) resulting*
37 *in receipt by such person of an improper personal benefit.*

38 B. An officer, director or employee of any bank may be an in-
39 corporator of another bank when not inconsistent with such per-
40 son's fiduciary duty or other applicable law.

1 7. (New section) Notwithstanding the provisions of section 3
2 of P. L. 1948, c. 67 (C. 17:9A-3), the certificate of incorporation
3 referred to therein may also provide that an officer of the bank
4 shall not be personally liable, or shall be liable only to the extent
5 therein provided, to the bank or its stockholders for damages for
6 breach of any duty owed to the bank or its stockholders, except
7 that such provision shall not relieve an officer from liability for
8 any breach of duty based upon an act or omission (a) in breach
9 of such person's duty of loyalty to the bank or its stockholders,
10 (b) not in good faith or involving a knowing violation of law or
11 (c) resulting in receipt by such person of an improper personal
12 benefit.

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

3 2. Nine or more persons, over the age of 18 years, may incor-
4 porate a capital stock savings bank in this State on the terms and
5 provisions prescribed by this act. They shall execute and acknowl-
6 edge a certificate of incorporation stating:

7 a. The name by which the capital stock savings bank shall be
8 known;

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

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

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

17 e. The names and addresses of the incorporators;

18 f. The number of directors, or that the number of directors
19 shall be not less than a stated minimum or more than a stated
20 maximum;

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

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

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

28 *The certificate of incorporation may provide that a director shall*
29 *not be personally liable, or shall be liable only to the extent therein*
30 *provided, to the capital stock savings bank or its stockholders for*
31 *damages for breach of any duty owed to the capital stock savings*
32 *bank or its stockholders, except that such provision shall not re-*
33 *lieve a director from liability for an act or omission (a) in breach*
34 *of such person's duty of loyalty to the capital stock savings bank*
35 *or its stockholders, (b) not in good faith or involving a knowing*
36 *violation of law or (c) resulting in receipt by such person of an*
37 *improper personal benefit.*

1 9. (New section) Notwithstanding the provisions of section 2 of
2 P. L. 1982, c. 9 (C. 17:9A-8.2), the certificate of incorporation
3 referred to therein may also provide that an officer of the capital
4 stock savings bank shall not be personally liable, or shall be liable
5 only to the extent therein provided, to the capital stock savings
6 bank or its stockholders for damages for breach of any duty owed
7 to the capital stock savings bank or its stockholders, except that
8 such provisions shall not relieve an officer from liability for any
9 breach of duty based upon an act or omission (a) in breach of
10 such person's duty of loyalty to the capital stock savings bank
11 or its stockholders, (b) not in good faith or involving a knowing
12 violation of law or (c) resulting in receipt by such person of an
13 improper personal benefit.

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

3 250. Action against directors, managers, officers or employees;
4 indemnification.

5 A. As used in this section

6 (1) "Corporate agent" means any person who is or was a
7 director, officer, employee or agent of the indemnifying bank
8 or of any constituent banking institution or corporation
9 absorbed by the indemnifying bank in a consolidation or merger
10 or created by or owned by the indemnifying bank and any
11 person who is or was a director, officer, trustee, employee or
12 agent of any other enterprise, serving as such at the request of
13 the indemnifying bank, or of any constituent banking institu-
14 tion or corporation or the legal representative of any such
15 director, officer, trustee, employee or agent;

16 (2) "Other enterprise" means any domestic or foreign cor-
17 poration, other than the indemnifying bank, and any partner-
18 ship, joint venture, sole proprietorship, trust or other enter-
19 prise, whether or not for profit, served by a corporate agent;

20 (3) "Expenses" means reasonable costs, disbursements and
21 counsel fees;

22 (4) "Liabilities" means amounts paid or incurred in satis-
23 faction of settlements, judgments, fines and penalties;

24 (5) "Proceeding" means any pending, threatened or com-
25 pleted civil, criminal, administrative or arbitratve action,
26 suit or proceeding, and any appeal therein and any inquiry
27 or investigation which could lead to such action, suit or
28 proceeding;

29 (6) "Bank" includes savings bank *and capital stock savings*
30 *bank*;

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

33 B. Any bank of this State shall have the power to indemnify a
34 corporate agent against his expenses and liabilities in connection
35 with any proceeding involving the corporate agent by reason of
36 his being or having been such a corporate agent, other than a pro-
37 ceeding by or in the right of the bank, if

38 (1) Such corporate agent acted in good faith and in a man-
39 ner he reasonably believed to be in or not opposed to the best
40 interest of the bank;

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

44 The termination of any proceeding by judgment, order, settle-
45 ment, conviction or upon a plea of nolo contendere or its equivalent,

46 shall not of itself create a presumption that such corporate agent
47 did not meet the applicable standards of conduct set forth in sub-
48 divisions (1) and (2) of this subsection.

49 C. Any bank of this State shall have the power to indemnify a
50 corporate agent against his expenses in connection with any pro-
51 ceeding by or in the right of the bank to procure a judgment in its
52 favor which involves the corporate agent by reason of his being or
53 having been such corporate agent, if he acted in good faith and in
54 a manner he reasonably believed to be in or not opposed to the
55 best interests of the bank. However, in such proceeding no indemni-
56 fication shall be provided in respect of any claim, issue or matter as
57 to which such corporate agent shall have been adjudged to be
58 liable [for negligence or misconduct] *to the bank*, unless and only
59 to the extent that the Superior Court or other court in which such
60 proceeding was brought shall determine upon application that
61 despite the adjudication of liability, but in view of all circumstances
62 of the case, such corporate agent is fairly and reasonably entitled
63 to indemnity for such expenses as the Superior Court or other
64 court shall deem proper.

65 D. Any bank of this State shall indemnify a corporate agent
66 against expenses to the extent that such corporate agent has been
67 successful on the merits or otherwise in any proceeding referred to
68 in subsections B and C of this section or in defense of any claim,
69 issue or matter therein.

70 E. Any indemnification under subsection B of this section, and,
71 unless ordered by a court, under subsection C of this section, may
72 be made by the bank only as authorized in a specific case upon a
73 determination that indemnification is proper in the circumstances
74 because the corporate agent met the applicable standard of conduct
75 set forth in subsection B of this section or subsection C of this
76 section. Unless otherwise provided in the certificate of incorpora-
77 tion or bylaws, the determination shall be made

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

81 (b) If such a quorum is not obtainable, or, even if obtainable
82 and that quorum of the board of directors or committee by a
83 majority vote of the disinterested directors so directs, by
84 independent legal counsel in a written opinion, that independ-
85 ent legal counsel to be designated by the board of directors; or

86 (c) By the stockholders, if the certificate of incorporation
87 or bylaws or a resolution of the board of directors or of the
88 [shareholders] *stockholders* so directs, in the case of a bank

89 which is not a savings bank, and by the commission, in the
90 case of a savings bank.

91 F. Expenses incurred by a corporate agent in connection with
92 a proceeding may be paid by the bank in advance of the final dis-
93 position of the proceeding, if authorized [in the manner provided
94 in subsection D of this section] *by the board of directors*, upon
95 receipt of an undertaking by or on behalf of the corporate agent
96 to repay such amount unless it shall ultimately be determined
97 that he is entitled to be indemnified as provided in this section.

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

103 (2) May award indemnification to the extent authorized under
104 subsections B and C of this section and shall award indemnification
105 to the extent required under subsection D of this section, notwith-
106 standing any contrary determination which may have been made
107 under subsection E of this section; and

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

113 (4) Application for such indemnification may be made

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

116 (b) To the Superior Court in a separate proceeding. If the
117 application is for indemnification arising out of a civil action,
118 it shall set forth reasonable cause for the failure to make appli-
119 cation for such relief in the action or proceeding in which the
120 expenses were or are to be incurred or other amounts were or
121 are to be paid.

122 (5) The application shall set forth the disposition of any pre-
123 vious application for indemnification and shall be made in such
124 manner and form as may be required by the applicable rules of
125 court or, in the absence thereof, by direction of the court to which
126 it is made. Such application shall be upon notice to the bank. The
127 court may also direct that notice shall be given at the expense of the
128 bank to the stockholders of a bank other than a savings bank and
129 such other persons as it may designate in such manner as it may
130 require.

131 H. The indemnification *and advancement of expenses* provided
 132 by *or granted pursuant to the other subsections of this section* shall
 133 not exclude any other rights to which a corporate agent may be
 134 entitled under a certificate of incorporation, bylaw, agreement, vote
 135 of stockholders of a bank other than a savings bank, or otherwise;
 136 *provided that no indemnification shall be made to or on behalf of*
 137 *a corporate agent if a judgment or other final adjudication ad-*
 138 *verse to the corporate agent establishes that his acts or omissions*
 139 *(a) were in breach of his duty of loyalty to the bank or its stock-*
 140 *holders, (b) were not in good faith or involved a knowing violation*
 141 *of law or (c) resulted in receipt by the corporate agent of an im-*
 142 *proper personal benefit.*

143 I. Any bank of this State shall have the power to purchase and
 144 maintain insurance on behalf of any corporate agent against any
 145 expenses incurred in any proceeding and any liabilities asserted
 146 against him by reason of his being or having been a corporate
 147 agent, whether or not the bank would have the power to indemnify
 148 him against those expenses and liabilities under the provisions of
 149 this section. *The bank may purchase such insurance from, or such*
 150 *insurance may be reinsured in whole or in part by, an insurer*
 151 *owned by or otherwise affiliated with the bank, whether or not such*
 152 *insurer does business with other insureds.*

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

156 K. Except as required by subsection D of this section, no indemni-
 157 fication shall be made or expenses advanced by a corporation under
 158 this section, and none shall be ordered by the Superior Court or
 159 other court, if that action would be inconsistent with a provision of
 160 the certificate of incorporation, a bylaw, a resolution of the board
 161 of directors or of the **[shareholders]** *stockholders*, or an agree-
 162 ment or other proper corporate action, in effect at the time of the
 163 accrual of the alleged cause of action asserted in the proceeding,
 164 which prohibits, limits or otherwise conditions the exercise of
 165 indemnification powers by the corporation or the rights of indemni-
 166 fication to which a corporate agent may be entitled.

167 L. *This section does not limit a bank's power to pay or reimburse*
 168 *expenses incurred by a corporate agent in connection with the*
 169 *corporate agent's appearance as a witness in a proceeding at a*
 170 *time when the corporate agent has not been made a party to the*
 171 *proceeding.*

1 II. (New section) Notwithstanding the provisions of section 197
 2 of P. L. 1948, c. 67 (C. 17:9A-197), a savings bank may, by amend-

3 ing its certificate of incorporation in the manner provided in sec-
 4 tion 198 of P. L. 1948, c. 67 (C. 17:9A-198), provide that a manager
 5 shall not be personally liable, or shall be liable only to the extent
 6 therein provided, to the savings bank or its depositors for damages
 7 for breach of any duty owed to the savings bank or its depositors,
 8 except that such provision shall not relieve a manager or officer
 9 from liability for an act or omission (a) in breach of such person's
 10 duty of loyalty to the savings bank or its depositors, (b) not in
 11 good faith or involving a knowing violation of law or (c) resulting
 12 in receipt by such person of an improper personal benefit.

12A The Commissioner of Banking shall approve such amendment
 13 unless he finds that it unreasonably affects the interests of the
 14 depositors.

1 12. (New section) Notwithstanding the provisions of section 197
 2 of P. L. 1948, c. 67 (C. 17:9A-197), a savings bank may, by amend-
 3 ing its certificate of incorporation in the manner provided in sec-
 4 tion 198 of P. L. 1948, c. 67 (C. 17:9A-198), provide that an officer
 5 shall not be personally liable, or shall be liable only to the extent
 6 therein provided, to the savings bank or its depositors for damages
 7 for breach of any duty owed to the savings bank or its depositors,
 8 except that such provision shall not relieve a manager or officer
 9 from liability for an act or omission (a) in breach of such person's
 10 duty of loyalty to the savings bank or its depositors, (b) not in
 11 good faith or involving a knowing violation of law or (c) resulting
 12 in receipt by such person of an improper personal benefit.

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

1 13. (New section) An association may with the approval of the
 2 commissioner, amend its certificate of incorporation or bylaws, by
 3 a $\frac{2}{3}$ vote of its board present and voting at a duly convened regular
 4 or special meeting, to provide that a director shall not be personally
 5 liable, or shall be liable only to the extent therein provided, to the
 6 association or its members for damages for breach of any duty
 7 owed to the association or its members, except that the provision
 8 shall not relieve a director or officer from liability for an act or
 9 omission: a. in breach of that person's duty of loyalty to the asso-
 10 ciation or its members; b. not in good faith or involving a knowing
 11 violation of law; or c. resulting in receipt by that person of an
 12 improper personal benefit.

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

15 This section shall be applicable to federal associations, in addi-
16 tion to State associations, to the extent permitted by federal law.

1 14. (New section) An association may with the approval of the
2 commissioner, amend its certificate of incorporation or bylaws, by
3 a $\frac{2}{3}$ vote of its board present and voting at a duly convened regular
4 or special meeting, to provide that an officer shall not be personally
5 liable, or shall be liable only to the extent therein provided, to the
6 association or its members for damages for breach of any duty
7 owed to the association or its members, except that the provision
8 shall not relieve a director or officer from liability for an act or
9 omission: a. in breach of that person's duty of loyalty to the asso-
10 ciation or its members; b. not in good faith or involving a knowing
11 violation of law; or c. resulting in receipt by that person of an
12 improper personal benefit.

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

15 This section shall be applicable to federal associations, in addi-
16 tion to State associations, to the extent permitted by federal law.

1 15. (New section) A capital stock association may with the ap-
2 proval of the commissioner, amend its certificate of incorporation
3 or bylaws, by a $\frac{2}{3}$ vote of its board present and voting at a duly
4 convened regular or special meeting, to provide that a director shall
5 not be personally liable, or shall be liable only to the extent therein
6 provided, to the association or its stockholders for damages for
7 breach of any duty owed to the association or its stockholders, ex-
8 cept that the provision shall not relieve a director or officer from
9 liability for an act or omission: a. in breach of that person's duty
10 of loyalty to the association or its stockholders; b. not in good faith
11 or involving a knowing violation of law; or c. resulting in receipt
12 by that person of an improper personal benefit.

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

15 This section shall be applicable to federal associations, in addi-
16 tion to State associations, to the extent permitted by federal law.

1 16. (New section) A capital stock association may with the ap-
2 proval of the commissioner, amend its certificate of incorporation
3 or bylaws, by a $\frac{2}{3}$ vote of its board present and voting at a duly
4 convened regular or special meeting, to provide that an officer shall
5 not be personally liable, or shall be liable only to the extent therein
6 provided, to the association or its stockholders for damages for
7 breach of any duty owed to the association or its stockholders, ex-
8 cept that the provision shall not relieve a director or officer from
9 liability for an act or omission: a. in breach of that person's duty

10 of loyalty to the association or its stockholders; b. not in good faith
 11 or involving a knowing violation of law; or c. resulting in receipt
 12 by that person of an improper personal benefit.

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

15 This section shall be applicable to federal associations, in addi-
 16 tion to State associations, to the extent permitted by federal law.

1 17. This act shall take effect immediately and sections 4, 7, 9,
 2 12, 14 and 16 of this act shall expire on the 730th day after the
 3 effective date.

STATEMENT

Senate Substitute
 (S2510)

This Senate substitute for Senate Committee Substitute for Senate No. 2510 would permit certain corporations to include in their certificates of incorporation a provision eliminating or limiting the liability of directors or officers for damages to the corporation or its shareholders for breach of their duty of care. The immunity protection for officers of corporations provided in the bill would expire in two years after the effective date of the bill.

CORPORATIONS

Provides for limitation of liability of corporate directors and officers.

SENATE, No. 2510

STATE OF NEW JERSEY

INTRODUCED SEPTEMBER 15, 1986

By Senator LESNIAK

Referred to Committee on Labor, Industry and Professions

AN ACT providing for the elimination or limitation of personal liability of a director to a corporation or its shareholders in certain cases.

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

1 1. In addition to the information required to be set forth in the
2 certificate of incorporation pursuant to N. J. S. 14A:2-7, the
3 certificate of incorporation may contain a provision eliminating or
4 limiting the personal liability of a director to the corporation or its
5 shareholders for monetary damages for breach of fiduciary duty
6 as a director. No such provision shall eliminate or limit the:
7 liability of a director for any breach of the director's duty of
8 loyalty to the corporation or its shareholders; liability for acts or
9 omissions not in good faith or which involve intentional misconduct
10 or a knowing violation of law; liability under N. J. S. 14A:6-12; or
11 liability for any transaction from which the director derived an
12 improper personal benefit. No provision shall eliminate or limit
13 the liability of a director for any act or omission occurring prior
14 to the date when the provision becomes effective. For the purposes
15 of this section, "director" shall also include a member of the
16 governing body of a corporation which is not authorized to issue
17 capital stock.

1 2. This act shall take effect immediately.

STATEMENT (S 2510)

This bill allows the certificate of incorporation to contain provisions eliminating or limiting the personal liability of a director to a corporation or its shareholders in certain circumstances.

CORPORATIONS

Provides for the limitation of liability of directors to a corporation in certain cases.

SENATE LABOR, INDUSTRY AND PROFESSIONS
COMMITTEE

STATEMENT TO
SENATE COMMITTEE SUBSTITUTE FOR

SENATE, No. 2510

STATE OF NEW JERSEY

DATED: OCTOBER 20, 1986

This bill would permit New Jersey business corporations to include in their certificates of incorporation a provision eliminating or limiting the liability of directors or officers for damages to the corporation or its shareholders for breach of their duty of care. In regard to directors, officers and employees, it would also: (a) permit indemnification, if authorized in the certificate of incorporation or bylaws adopted by the shareholders, for amounts paid in satisfaction of judgments or settlements in derivative actions; (b) clarify the extent to which indemnification not expressly authorized by law is permissible; and (c) permit corporations to purchase directors' and officers' liability insurance from affiliated companies. The proposed changes will permit directors and officers to be protected against liability for damages to the corporation or its shareholders unless they have been guilty of breach of loyalty, bad faith or a knowing violation of law or through a breach of duty have received an improper personal benefit.

This bill would also permit New Jersey banks and capital stock savings banks to include in their certificates of incorporation a provision eliminating or limiting the liability of directors or officers for damages to the corporation or its stockholders for breach of their duty of care. In regard to directors, officers and employees of banks, savings banks and capital stock savings banks, it would also: (a) permit indemnification, if authorized in the certificate of incorporation or bylaws adopted by the stockholders, for amounts paid in satisfaction of judgments or settlements in derivative actions; (b) clarify the extent to which indemnification not expressly authorized by law is permissible; and (c) permit such corporations to purchase directors' and officers' liability insurance from affiliated companies. The proposed changes will permit directors and officers to be protected against liability for damages to the corporation or its stockholders unless they have been guilty of breach of loyalty, bad faith or a knowing violation of law or through a breach of duty have received an improper personal benefit.

Lastly, the bill allows mutual life and health insurers and mutual

savings banks to adopt these immunity and indemnification provisions if the Commissioner of Insurance or Banking, as the case may be, approves their adoption.

The changes would have no effect on tort or other claims by outsiders against directors or officers or on claims for injunction, rescission or other equitable relief.

The provisions of this bill sunset two years after enactment.

ASSEMBLY INSURANCE COMMITTEE
STATEMENT TO
SENATE SUBSTITUTE FOR
SENATE COMMITTEE SUBSTITUTE FOR
SENATE, No. 2510

STATE OF NEW JERSEY

DATED: JANUARY 12, 1987

This bill would permit corporations organized under Title 14A of the New Jersey Statutes, certain depository institutions, and certain insurance companies, to include a provision in their certificate of incorporation which limits or eliminates the liability of officers or directors of the corporation for damages for the breach of any duty owed to the corporation or its shareholders. The certificate of incorporation may not include a provision which relieves a director or officer from liability for any breach of duty based upon an act or omission relative to that person's duty of loyalty to the corporation or its shareholders, an act or omission which was not in good faith or which involved a knowing violation of law, or an act which results in the receipt by the officer or director of an improper personal benefit.

The bill would also amend the statutes relating to indemnification of directors, officers and employees to clarify the extent to which indemnification is expressly prohibited. The bill provides that no indemnification may be made to a corporate agent if a judgment or other final adjudication which is adverse to the corporate agent determines that his acts or omissions were in breach of his duty of loyalty to the corporation or its shareholders, were not in good faith or involved a knowing violation of law, or if they resulted in the receipt by the corporate agent of an improper personal benefit. The bill would also permit indemnification of corporate agents in cases in which they are witnesses to, but not a party to, a proceeding. The bill would permit corporations to purchase directors' and officers' liability insurance from affiliated companies.

In addition to the basic corporation law, the bill amends those corresponding sections of law which govern mutual insurers, banks, savings banks, and federally chartered savings and loan associations, in order to permit those institutions to take advantage of those provisions of the bill which provide for indemnification and the elimination or limiting of liability.

The provisions of the bill which provide for immunity to officers (as opposed to directors) would expire, or "sunset", two years following enactment.

The statutory changes would have no effect on tort or other claims by outsiders against directors or officers or on claims for injunction, rescission or other equitable relief.

The proponents of this bill consider the statutory changes to be essential in order to enable New Jersey corporations to continue to attract and retain capable management. The escalating cost and shrinking availability of directors' and officers' liability insurance, combined with management's increased exposure to liability in a time of hostile takeovers, "greenmail", "poison pills" and the like, have created a reluctance on the part of many to serve on boards of directors. Moreover this has led to what many believe to be an overly risk-averse approach to decision-making which is injuring both shareholders and the goal of economic efficiency.

This situation has caused states to seek better and less costly means of protecting directors and officers from exposure to personal liability. Delaware, New York and Pennsylvania are among a number of states which have recently amended their corporation statutes to permit corporations, with shareholder approval, to limit the liability of directors for damages to the corporation or its shareholders or to provide broader indemnification for directors and officers. The proposed bill has the same objective and is designed to keep New Jersey from falling behind in its efforts to assure that it remains an attractive State in which to be incorporated.



OFFICE OF THE GOVERNOR NEWS RELEASE

CN-001

Contact: JOHN SAMERJAN
609-292-8956 OR 292-6000 EXT. 207

TRENTON, N.J. 08625

Release: WED., FEB. 4, 1987

Governor Thomas H. Kean today signed legislation to permit business corporations, banks and certain insurance companies to provide for immunity for corporate officers and directors with respect to derivative suits brought by or on behalf of those corporations or their stockholders.

S-2510, sponsored by Senator Raymond Lesniak, D-Union.

Legislation of this type was considered necessary because many corporations are having difficulty attracting and retaining board members due to the threat of law suits and the lack of sufficient insurance coverage.

The legislation allows corporations to protect individuals who have undertaken decisions in good faith but does not protect breaches of loyalty, acts in bad faith or intentional wrongdoing.

The legislation is effective immediately.

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