STATE OF NEW YORK

5747

2019-2020 Regular Sessions

IN SENATE

May 14, 2019

Introduced by Sen. COMRIE -- read twice and ordered printed, and when printed to be committed to the Committee on Corporations, Authorities and Commissions

AN ACT to amend the not-for-profit corporation law, in relation to the indemnification of directors, officers and key persons; and to repeal sections 721, 722 and 723 of the not-for-profit corporation law relating thereto

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Sections 721, 722 and 723 of the not-for-profit corporation law are REPEALED.

§ 2. The not-for-profit corporation law is amended by adding a new section 721 to read as follows:

§ 721. Authorization for indemnification of directors, officers or key persons; insurance.

(a) A corporation may indemnify any director, officer or key person against expenses, including judgments, fines, excise taxes, amounts paid in settlement, attorneys' fees, court costs and disbursements actually and necessarily incurred as a result of action or proceeding, or any appeal thereof, arising out of service as a director, officer or key person (1) who was or is a party or is threatened to be made a party to any threatened, pending or contemplated action or proceeding, or any appeal thereof, whether civil, criminal, administrative or investigative (including an action by or in the right of the corporation and/or by its members, if any, or in the right of any other corporation of any kind, domestic or foreign and/or by its members, if any), or by any partnership, joint venture, trust, employee benefit plan or other enterprise; and (2) who has met the standards of conduct set forth in section 717 (duty of directors and officers and key persons) and elsewhere in this article and who is entitled to the protection of section 720-a of this article (liability of directors, officers, key persons and trustees) to

EXPLANATION--Matter in *italics* (underscored) is new; matter in brackets [-] is old law to be omitted.

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the extent applicable, and (3) with respect to any criminal action or proceeding, who had reasonable cause to believe that her or his conduct was lawful. A director, officer or key person who may be indemnified under this section shall include a person (i) whose testator or intestate is or was a director, officer or key person of the corporation, or (ii) who is or was serving in any capacity at the request of the corporation as a director, officer or key person of another corporation, partnership, joint venture, trust, estate, employee benefit plan or other enterprise.

(b) The termination of any action or proceeding, including an action by or in the right of the corporation and/or by its members, by judgment, order, settlement, adjudging liability to the director, officer or key person, conviction or upon a plea of nolo contendere or its equivalent shall not necessarily create a presumption that the (1) director, officer or key person did not act in accordance with the standards of care set forth in subdivision (a) of this section, and (2) with respect to any criminal action or proceeding, did not have reasonable cause to believe that the director's, officer's or key person's conduct was unlawful.

(c) No indemnification shall be made by the corporation if such director, officer or key person shall have been adjudged to be liable, including liability to the corporation, unless and only to the extent that the court, in which such action or proceeding was brought, shall determine, upon application, that, despite the adjudication of liability but in view of all the circumstances of the case, such director, officer or key person is fairly and reasonably entitled to indemnification with respect to all or any of the judgments, fines, excise taxes, amounts paid in settlement, attorneys' fees, court costs and disbursements actually and necessarily incurred, because the director, officer or key person had made a good faith effort to meet the standards of conduct set forth in this article.

(d) Expenses, including attorneys' fees, court costs and disbursements, incurred by a director, officer or key person of the corporation or by persons serving at the request of the corporation as directors, officers or key persons of another corporation, partnership, joint venture, trust or other enterprise, in defending any civil, criminal, administrative or investigative action or proceeding, arising out of such service, may be paid, if authorized in accordance with paragraph (e) of this section, in advance of the final disposition of such action or proceeding, upon receipt by the corporation of an undertaking in accordance with article 25 of the civil practice law and rules by or on behalf of such director, officer or key person to repay such amount if she or he shall ultimately be determined not to be entitled to be indemnified as authorized in this section.

(e) Any indemnification or advancement under this section, except for one ordered by a court, shall be made only in the specific action or proceeding upon a determination that indemnification of the present or former director, officer or key person is proper in the circumstances because the person has met or in the case of an advance can be reasonably expected to meet the applicable standard of conduct set forth in paragraph (a) of this section:

(1) by a majority vote of the directors of the corporation who are not parties to such action or proceeding, even though less than a quorum;

(2) by a committee of such directors designated by majority vote of such directors, even though less than a quorum;

(3) if there are no such directors, or if such directors so direct, by independent legal counsel in a reasoned written opinion; or

(4) by the members, if any.

(f) A right to indemnification or to advancement of expenses arising under a provision of the certificate of incorporation, a bylaw or a resolution of the board or of a committee thereof shall not be eliminated or impaired by an amendment to the certificate of incorporation to the bylaws or to the resolution after the occurrence of the act or omission that is the subject of the civil, criminal, administrative or investigative action or proceeding for which indemnification or advancement of expenses is sought, unless the provision in effect at the time of such act or omission explicitly authorizes such elimination or impairment after such action or omission has occurred.

(g) A corporation may purchase and maintain insurance on behalf of any person who is or was a director, officer or key person of the corporation, or is or was serving at the request of the corporation as a director, officer or key person of another corporation, partnership, joint venture, trust, estate, employee benefit or other enterprise, against any liability asserted against such person and incurred by such person in any such capacity, or arising out of such person's status as such, whether or not the corporation would have the power to indemnify such person against such liability under this section.

(h) For purposes of this section, references to "the corporation" shall include, in addition to a consolidated or surviving corporation, any constituent corporation, including any constituent of a constituent, absorbed in a consolidation or merger which, if its separate existence had continued, would have had power and authority to indemnify its directors, officers or key persons that any person who is or was a director, officer or key person of such constituent corporation, or is or was serving at the request of such constituent corporation as a director, officer or key person of another corporation, partnership, joint venture, trust, estate, employee benefit plan or other enterprise, shall stand in the same position under this section with respect to the resulting or surviving corporation as such person would have with respect to such constituent corporation if its separate existence had continued.

(i) The indemnification and advancement of expenses provided by, or granted pursuant to, this section shall continue as to a person who has ceased to be a director, officer or key person and shall inure to the benefit of her or his heirs, executors and administrators if that person was a director, officer or key person at the time the cause of action or claim arose or prosecution was threatened or information or indictment was filed.

(j) For the purpose of this section, a corporation shall be deemed to have requested a person to serve an employee benefit plan where the performance by such person of her or his duties to the corporation also imposes duties on, or otherwise involves services by, such person to the plan or participants or beneficiaries of the plan; excise taxes assessed on a person with respect to an employee benefit plan pursuant to applicable law shall be considered fines; and action taken or omitted by a person with respect to an employee benefit plan in the performance of such person's duties for a purpose reasonably believed by such person to be in the interest of the participants and beneficiaries of the plan shall be deemed to be for a purpose which is not opposed to the best interests of the corporation.

§ 3. Section 724 of the not-for-profit corporation law, as amended by chapter 368 of the laws of 1987, paragraph (a) as amended by chapter 549 of the laws of 2013, is renumbered section 722 and amended to read as follows:

§ 722. Indemnification of directors [~~and~~], officers **or key persons** by a court.

(a) Notwithstanding the failure of a corporation to provide indemnification, and despite any contrary resolution of the board**, of a committee thereof** or of the members in the specific case under section [~~723~~] **721** [~~(Payment of indemnification other than by court award)~~] **(Authorization for indemnification of directors, officers or key persons; insurance)**, indemnification [~~shall~~] **may** be awarded by a court to the extent authorized under section [~~722 (Authorization for indemnification of directors and officers), and paragraph (a) of section 723 (Payment of indemnification other than by court award)~~] **721 (Authorization for indemnification of directors, officers or key persons; insurance)**. Application therefor shall be made on notice to the attorney general and may be made, in every case, either:

(1) In the civil action or proceeding in which the expenses were incurred or other amounts were paid, or

(2) To the supreme court in a separate proceeding, in which case the application shall set forth the disposition of any previous application made to any court for the same or similar relief and also reasonable cause for the failure to make application for such relief in the action or proceeding in which the expenses were incurred or other amounts were paid.

(b) The application shall be made in such manner and form as may be required by the applicable rules of court or, in the absence thereof, by direction of a court to which it is made. Such application shall be upon notice to the corporation. The court may also direct that notice be given at the expense of the corporation to the members and such other persons as it may designate in such manner as it may require.

(c) Where indemnification is sought by judicial action, the court may allow a person such reasonable expenses, including attorneys' fees, during the pendency of the litigation as are necessary in connection with his defense therein, if the court shall find that the defendant has by his pleadings or during the course of the litigation raised genuine issues of fact or law.

§ 4. Section 725 of the not-for-profit corporation law is renumbered section 723.

§ 5. The section heading and subdivision (a) of section 723 of the not-for-profit corporation law, as amended by chapter 368 of the laws of 1987 and such section as renumbered by section 4 of this act, are amended to read as follows:

Other provisions affecting indemnification of directors [~~and~~], officers **and key persons**.

(a) All expenses incurred in defending a civil or criminal action or proceeding which are advanced by the corporation under paragraph [~~(c)~~] **(d)** of section [~~723~~] **721** [~~(Payment of indemnification other than by court award)~~] **(Authorization for indemnification of directors, officers or key persons; insurance)** or allowed by a court under paragraph (c) of section [~~724 (Indemnification of directors and officers by a court)~~] **722 (Indemnification of directors, officers or key persons by a court)** shall be repaid in case the person receiving such advancement or allowance is ultimately found, under the procedure set forth in this article, not to be entitled to indemnification or, where indemnification is granted, to

the extent the expenses so advanced by the corporation or allowed by the court exceed the indemnification to which he is entitled.

§ 6. Section 720-a of the not-for-profit corporation law, as added by chapter 220 of the laws of 1986, is amended to read as follows:

§ 720-a. Liability of directors, officers**, key persons** and trustees.

Except as provided in sections [~~seven hundred nineteen~~] **719** and [~~seven hundred twenty~~] **720** of this chapter, and except any action or proceeding brought by the attorney general or, in the case of a charitable trust, an action or proceeding against a trustee brought by a beneficiary of such trust, no person serving without **salary or other** compensation as a director, officer or trustee of a corporation, association, organization or trust described in section 501 (c) (3) of the United States internal revenue code shall be liable to any person other than such corporation, association, organization or trust based solely on his or her conduct in the execution of such office unless the conduct of such director, officer or trustee with respect to the person asserting liability constituted gross negligence or was intended to cause the resulting harm to the person asserting such liability. For purposes of this section, such a director, officer or trustee shall not be considered compensated solely by reason of payment of his or her actual expenses incurred in attending meetings or otherwise in the execution of such office.

§ 7. This act shall take effect on January 1, 2020, provided, however, that rights to indemnification that accrued prior to such effective date shall be determined by the not-for-profit corporation law as then in effect, unless the director, officer or key person elects to have those rights or obligations determined by the not-for-profit corporation law as amended by this act.