

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:

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2 law are REPEALED.

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

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

7 (a) A corporation may indemnify any director, officer or key person
8 against expenses, including judgments, fines, excise taxes, amounts paid
9 in settlement, attorneys' fees, court costs and disbursements actually
10 and necessarily incurred as a result of action or proceeding, or any
11 appeal thereof, arising out of service as a director, officer or key
12 person (1) who was or is a party or is threatened to be made a party to
13 any threatened, pending or contemplated action or proceeding, or any
14 appeal thereof, whether civil, criminal, administrative or investigative
15 (including an action by or in the right of the corporation and/or by its
16 members, if any, or in the right of any other corporation of any kind,
17 domestic or foreign and/or by its members, if any), or by any partner-
18 ship, joint venture, trust, employee benefit plan or other enterprise;
19 and (2) who has met the standards of conduct set forth in section 717
20 (duty of directors and officers and key persons) and elsewhere in this
21 article and who is entitled to the protection of section 720-a of this
22 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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1 the extent applicable, and (3) with respect to any criminal action or
2 proceeding, who had reasonable cause to believe that her or his conduct
3 was lawful. A director, officer or key person who may be indemnified
4 under this section shall include a person (i) whose testator or intes-
5 tate is or was a director, officer or key person of the corporation, or
6 (ii) who is or was serving in any capacity at the request of the corpo-
7 ration as a director, officer or key person of another corporation,
8 partnership, joint venture, trust, estate, employee benefit plan or
9 other enterprise.

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

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

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

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

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

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

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

3 (4) by the members, if any.

4 (f) A right to indemnification or to advancement of expenses arising
5 under a provision of the certificate of incorporation, a bylaw or a
6 resolution of the board or of a committee thereof shall not be elimi-
7 nated or impaired by an amendment to the certificate of incorporation to
8 the bylaws or to the resolution after the occurrence of the act or omis-
9 sion that is the subject of the civil, criminal, administrative or
10 investigative action or proceeding for which indemnification or advance-
11 ment of expenses is sought, unless the provision in effect at the time
12 of such act or omission explicitly authorizes such elimination or
13 impairment after such action or omission has occurred.

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

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

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

44 (j) For the purpose of this section, a corporation shall be deemed to
45 have requested a person to serve an employee benefit plan where the
46 performance by such person of her or his duties to the corporation also
47 imposes duties on, or otherwise involves services by, such person to the
48 plan or participants or beneficiaries of the plan; excise taxes assessed
49 on a person with respect to an employee benefit plan pursuant to appli-
50 cable law shall be considered fines; and action taken or omitted by a
51 person with respect to an employee benefit plan in the performance of
52 such person's duties for a purpose reasonably believed by such person to
53 be in the interest of the participants and beneficiaries of the plan
54 shall be deemed to be for a purpose which is not opposed to the best
55 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 ~~[(a)]~~ (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

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

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

5 § 720-a. Liability of directors, officers, key persons and trustees.

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

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