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HOUSE FILE 606

MAR 30 1983

BY COMMITTEE ON JUDICIARY AND
LAW ENFORCEMENT

Place On Calendar

(Formerly Study Bill 215)

Passed House, Date 4-7-83 (p. 1122) Passed Senate, Date 4-13-83 (p. 1232)

Vote: Ayes 96 Nays 0 Vote: Ayes 45 Nays 0

Approved May 3, 1983 (p. 1764)

A BILL FOR

1 An Act permitting or requiring a corporation to indemnify
 2 a director, officer, employee, or agent of the corporation
 3 for judgments, penalties, fines, settlements, and
 4 reasonable expenses actually incurred as a defendant or
 5 respondent in an administrative or court proceeding.

6 BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF IOWA:

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HF 606

1 Section 1. NEW SECTION. 496A.4A INDEMNIFICATION OF
2 DIRECTORS AND OFFICERS.

3 1. As used in this section:

4 a. "Director" means any person who is or was a director
5 of the corporation and any person who, while a director of
6 the corporation, is or was serving at the request of the
7 corporation as a director, officer, partner, trustee, employee
8 or agent of another foreign or domestic corporation,
9 partnership, joint venture, trust, other enterprise or employee
10 benefit plan.

11 b. "Corporation" includes any domestic or foreign
12 predecessor entity of the corporation in a merger,
13 consolidation or other transaction in which the predecessor's
14 existence ceased upon consummation of the transaction.

15 c. "Expenses" includes attorneys' fees.

16 d. "Official capacity" means:

17 (1) When used with respect to a director, the office of
18 director in the corporation, and

19 (2) When used with respect to a person other than a
20 director, as contemplated in subsection 9, the elective or
21 appointive office in the corporation held by the officer or
22 the employment or agency relationship undertaken by the
23 employee or agent in behalf of the corporation,
24 but in each case does not include service for any other foreign
25 or domestic corporation or any partnership, joint venture,
26 trust, other enterprise, or employee benefit plan.

27 e. "Party" includes a person who was, is, or is threatened
28 to be made, a named defendant or respondent in a proceeding.

29 f. "Proceeding" means any threatened, pending or completed
30 action, suit or proceeding, whether civil, criminal,
31 administrative or investigative.

32 2. A corporation shall have power to indemnify any person
33 made a party to any proceeding by reason of the fact that
34 the person is or was a director if:

35 a. The person acted in good faith; and

1 b. The person reasonably believed

2 (1) In the case of conduct in the person's official
3 capacity with the corporation, that the conduct was in its
4 best interests, and

5 (2) In all other cases, that the person's conduct was
6 at least not opposed to its best interests, and

7 c. In the case of any criminal proceeding, the person
8 had no reasonable cause to believe the person's conduct was
9 unlawful.

10 Indemnification may be made against judgments, penalties,
11 fines, settlements and reasonable expenses, actually incurred
12 by the person in connection with the proceeding; except that
13 if the proceeding was by or in the right of the corporation,
14 indemnification may be made only against such reasonable
15 expenses and shall not be made in respect of any proceeding
16 in which the person shall have been adjudged to be liable
17 to the corporation. The termination of any proceeding by
18 judgment, order, settlement, conviction, or upon a plea of
19 nolo contendere or its equivalent, shall not, of itself, be
20 determinative that the person did not meet the requisite
21 standard of conduct set forth in this subsection.

22 3. A director shall not be indemnified under subsection
23 2 in respect of any proceeding charging improper personal
24 benefit to the director, whether or not involving action in
25 the director's official capacity, in which the director shall
26 have been adjudged to be liable on the basis that personal
27 benefit was improperly received by the director.

28 4. Unless limited by the articles of incorporation,

29 a. A director who has been wholly successful, on the
30 merits or otherwise, in the defense of any proceeding referred
31 to in subsection 2 shall be indemnified against reasonable
32 expenses incurred by the director in connection with the
33 proceeding; and

34 b. A court of appropriate jurisdiction, upon application
35 of a director and such notice as the court shall require,

1 shall have authority to order indemnification in the following
2 circumstances:

3 (1) If it determines a director is entitled to
4 reimbursement under paragraph a, the court shall order
5 indemnification, in which case the director shall also be
6 entitled to recover the expenses of securing such
7 reimbursement; or

8 (2) If it determines that the director is fairly and
9 reasonably entitled to indemnification in view of all the
10 relevant circumstances, whether or not the director has met
11 the standard of conduct set forth in subsection 2 or has been
12 adjudged liable in the circumstances described in subsection
13 3, the court may order such indemnification as the court shall
14 deem proper, except that indemnification with respect to any
15 proceeding by or in the right of the corporation or in which
16 liability shall have been adjudged in the circumstances
17 described in subsection 3 shall be limited to expenses.
18 A court of appropriate jurisdiction may be the same court
19 in which the proceeding involving the director's liability
20 took place.

21 5. No indemnification under subsection 2 shall be made
22 by the corporation unless authorized in the specific case
23 after a determination has been made that indemnification of
24 the director is permissible in the circumstances because the
25 director has met the standard of conduct set forth in
26 subsection 2. Such determination shall be made:

27 a. By the board of directors by a majority vote of a
28 quorum consisting of directors not at the time parties to
29 the proceeding; or

30 b. By special legal counsel, selected by the board of
31 directors by vote as set forth in paragraph a of this
32 subsection 5, or, if the requisite quorum of the full board
33 cannot be obtained therefor, by a majority vote of the full
34 board, in which selection directors who are parties may
35 participate; or

1 c. By the shareholders.
 2 Authorization of indemnification and determination as to
 3 reasonableness of expenses shall be made in the same manner
 4 as the determination that indemnification is permissible,
 5 except that if the determination that indemnification is
 6 permissible is made by special legal counsel, authorization
 7 of indemnification and determination as to reasonableness
 8 of expenses shall be made in a manner specified in paragraph
 9 b of this subsection for the selection of such counsel.
 10 Shares held by directors who are parties to the proceeding
 11 shall not be voted on the subject matter under this subsection
 12 5.

13 6. Reasonable expenses incurred by a director who is a
 14 party to a proceeding may be paid or reimbursed by the
 15 corporation in advance of the final disposition of such
 16 proceeding upon receipt by the corporation of

17 a. A written affirmation by the director of the director's
 18 good faith belief that the director has met the standard of
 19 conduct necessary for indemnification by the corporation as
 20 authorized in this section, and

21 b. A written undertaking by or on behalf of the director
 22 to repay such amount if it shall ultimately be determined
 23 that the director has not met such standard of conduct, and
 24 after determination that the facts then known to those making
 25 the determination would not preclude indemnification under
 26 this section. The undertaking required by this paragraph
 27 shall be an unlimited general obligation of the director but
 28 need not be secured and may be accepted without reference
 29 to financial ability to make repayment. Determinations and
 30 authorizations of payments under this subsection 6 shall be
 31 made in the manner specified in subsection 5.

32 7. No provision for the corporation to indemnify or to
 33 advance expenses to a director who is made a party to a
 34 proceeding, whether contained in the articles of incorporation,
 35 the bylaws, a resolution of shareholders or directors, an

1 agreement or otherwise, except as contemplated by subsection
2 10, shall be valid unless consistent with this section or,
3 to the extent that indemnity hereunder is limited by the
4 articles of incorporation, consistent therewith. Nothing
5 contained in this section shall limit the corporation's power
6 to pay or reimburse expenses incurred by a director in
7 connection with the director's appearance as a witness in
8 a proceeding at a time when the director has not been made
9 a named defendant or respondent in the proceeding.

10 8. For purposes of this section, the corporation shall
11 be deemed to have requested a director to serve an employee
12 benefit plan whenever the performance by the director of the
13 director's duties to the corporation also imposes duties on,
14 or otherwise involves services by, the director to the plan
15 or participants or beneficiaries of the plan; excise taxes
16 assessed on a director with respect to an employee benefit
17 plan pursuant to applicable law shall be deemed fines; and
18 action taken or omitted by the director with respect to an
19 employee benefit plan in the performance of the director's
20 duties for a purpose reasonably believed by the director to
21 be in the interest of the participants and beneficiaries of
22 the plan shall be deemed to be for a purpose which is not
23 opposed to the best interests of the corporation.

24 9. Unless limited by the articles of incorporation:
25 a. An officer of the corporation shall be indemnified
26 as and to the same extent provided in subsection 4 for a
27 director and shall be entitled to the same extent as a director
28 to seek indemnification pursuant to the provisions of
29 subsection 4;

30 b. A corporation shall have the power to indemnify and
31 to advance expenses to an officer, employee or agent of the
32 corporation to the same extent that it may indemnify and
33 advance expenses to directors pursuant to this section; and

34 c. A corporation, in addition, shall have the power to
35 indemnify and to advance expenses to an officer, employee

1 or agent who is not a director to such further extent,
2 consistent with law, as may be provided by its articles of
3 incorporation, bylaws, general or specific action of its board
4 of directors, or contract.

5 10. A corporation shall have power to purchase and maintain
6 insurance on behalf of any person who is or was a director,
7 officer, employee or agent of the corporation, or who, while
8 a director, officer, employee or agent of the corporation,
9 is or was serving at the request of the corporation as a
10 director, officer, partner, trustee, employee or agent of
11 another foreign or domestic corporation, partnership, joint
12 venture, trust, other enterprise or employee benefit plan,
13 against any liability asserted against the person and incurred
14 by the person in any such capacity or arising out of the
15 person's status as such, whether or not the corporation would
16 have the power to indemnify the person against such liability
17 under the provisions of this section.

18 11. Any indemnification of, or advance of expenses to,
19 a director in accordance with this section, if arising out
20 of a proceeding by or in the right of the corporation, shall
21 be reported in writing to the shareholders with or before
22 the notice of the next shareholders' meeting.

23 Sec. 2. Section 491.3, subsection 8, Code 1983, is amended
24 to read as follows:

25 8. A corporation organized under or subject to this chapter
26 may make indemnification as provided in section 496A-4 496A.4A.

27 Sec. 3. Section 491.16, Code 1983, is amended to read
28 as follows:

29 491.16 INDEMNIFICATION OF OFFICERS, DIRECTORS, EMPLOYEES
30 AND AGENTS--INSURANCE. The provisions of section 496A-4,
31 ~~subsection 19,~~ 496A.4A shall apply to corporations organized
32 under or subject to this chapter.

33 Sec. 4. Section 496A.4, subsection 19, Code 1983, is
34 amended by striking the subsection.

35 Sec. 5. Section 524.801, subsection 8, Code 1983, is

1 amended to read as follows:

2 8. To indemnify any director, officer or employee, a
3 former director, officer or employee of the state bank in
4 the manner and in the instances authorized by section 496A-4,
5 ~~subsection-19~~ 496A.4A.

6 Sec. 6. Section 534.8, subsection 4, Code 1983, is amended
7 to read as follows:

8 4. Any association operating under this chapter shall
9 have the power to indemnify any present or former director,
10 officer or employee in the manner and in the instances
11 authorized in section 496A-4, ~~subsection-19~~ 496A.4A.

12 EXPLANATION

13 The bill permits a corporation to indemnify a current or
14 former director or officer of the corporation for judgments,
15 penalties, fines, settlements, and reasonable expenses actually
16 incurred as a defendant or respondent in a court or
17 administrative proceeding. The director or officer must meet
18 standards of conduct before indemnification is permitted.

19 The bill enacts a new section 496A.4A to indicate its
20 desirable placement after section 496A.4.

21 This bill becomes effective July 1 following enactment.

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HOUSE FILE 606

AN ACT

PERMITTING OR REQUIRING A CORPORATION TO INDEMNIFY A DIRECTOR,
OFFICER, EMPLOYEE, OR AGENT OF THE CORPORATION FOR JUDGMENTS,
PENALTIES, FINES, SETTLEMENTS, AND REASONABLE EXPENSES
ACTUALLY INCURRED AS A DEFENDANT OR RESPONDENT IN AN ADMINIS-
TRATIVE OR COURT PROCEEDING.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF IOWA:

Section 1. NEW SECTION. 496A.4A INDEMNIFICATION OF
DIRECTORS AND OFFICERS.

1. As used in this section:

a. "Director" means any person who is or was a director
of the corporation and any person who, while a director of
the corporation, is or was serving at the request of the
corporation as a director, officer, partner, trustee, employee
or agent of another foreign or domestic corporation,
partnership, joint venture, trust, other enterprise or employee
benefit plan.

b. "Corporation" includes any domestic or foreign
predecessor entity of the corporation in a merger,
consolidation or other transaction in which the predecessor's
existence ceased upon consummation of the transaction.

c. "Expenses" includes attorneys' fees.

d. "Official capacity" means:

(1) When used with respect to a director, the office of
director in the corporation, and

(2) When used with respect to a person other than a
director, as contemplated in subsection 9, the elective or
appointive office in the corporation held by the officer or
the employment or agency relationship undertaken by the
employee or agent in behalf of the corporation,
but in each case does not include service for any other foreign
or domestic corporation or any partnership, joint venture,
trust, other enterprise, or employee benefit plan.

e. "Party" includes a person who was, is, or is threatened
to be made, a named defendant or respondent in a proceeding.

f. "Proceeding" means any threatened, pending or completed
action, suit or proceeding, whether civil, criminal,
administrative or investigative.

2. A corporation shall have power to indemnify any person
made a party to any proceeding by reason of the fact that
the person is or was a director if:

a. The person acted in good faith; and

b. The person reasonably believed

(1) In the case of conduct in the person's official
capacity with the corporation, that the conduct was in its
best interests, and

(2) In all other cases, that the person's conduct was
at least not opposed to its best interests, and

c. In the case of any criminal proceeding, the person
had no reasonable cause to believe the person's conduct was
unlawful.

Indemnification may be made against judgments, penalties, fines, settlements and reasonable expenses, actually incurred by the person in connection with the proceeding; except that if the proceeding was by or in the right of the corporation, indemnification may be made only against such reasonable expenses and shall not be made in respect of any proceeding in which the person shall have been adjudged to be liable to the corporation. The termination of any proceeding by judgment, order, settlement, conviction, or upon a plea of nolo contendere or its equivalent, shall not, of itself, be determinative that the person did not meet the requisite standard of conduct set forth in this subsection.

3. A director shall not be indemnified under subsection 2 in respect of any proceeding charging improper personal benefit to the director, whether or not involving action in the director's official capacity, in which the director shall have been adjudged to be liable on the basis that personal benefit was improperly received by the director.

4. Unless limited by the articles of incorporation,

a. A director who has been wholly successful, on the merits or otherwise, in the defense of any proceeding referred to in subsection 2 shall be indemnified against reasonable expenses incurred by the director in connection with the proceeding; and

b. A court of appropriate jurisdiction, upon application of a director and such notice as the court shall require, shall have authority to order indemnification in the following circumstances:

(1) If it determines a director is entitled to reimbursement under paragraph a, the court shall order indemnification, in which case the director shall also be entitled to recover the expenses of securing such reimbursement; or

(2) If it determines that the director is fairly and reasonably entitled to indemnification in view of all the

relevant circumstances, whether or not the director has met the standard of conduct set forth in subsection 2 or has been adjudged liable in the circumstances described in subsection 3, the court may order such indemnification as the court shall deem proper, except that indemnification with respect to any proceeding by or in the right of the corporation or in which liability shall have been adjudged in the circumstances described in subsection 3 shall be limited to expenses. A court of appropriate jurisdiction may be the same court in which the proceeding involving the director's liability took place.

5. No indemnification under subsection 2 shall be made by the corporation unless authorized in the specific case after a determination has been made that indemnification of the director is permissible in the circumstances because the director has met the standard of conduct set forth in subsection 2. Such determination shall be made:

a. By the board of directors by a majority vote of a quorum consisting of directors not at the time parties to the proceeding; or

b. By special legal counsel, selected by the board of directors by vote as set forth in paragraph a of this subsection 5, or, if the requisite quorum of the full board cannot be obtained therefor, by a majority vote of the full board, in which selection directors who are parties may participate; or

c. By the shareholders.

Authorization of indemnification and determination as to reasonableness of expenses shall be made in the same manner as the determination that indemnification is permissible, except that if the determination that indemnification is permissible is made by special legal counsel, authorization of indemnification and determination as to reasonableness of expenses shall be made in a manner specified in paragraph b of this subsection for the selection of such counsel.

Shares held by directors who are parties to the proceeding shall not be voted on the subject matter under this subsection 5.

6. Reasonable expenses incurred by a director who is a party to a proceeding may be paid or reimbursed by the corporation in advance of the final disposition of such proceeding upon receipt by the corporation of

a. A written affirmation by the director of the director's good faith belief that the director has met the standard of conduct necessary for indemnification by the corporation as authorized in this section, and

b. A written undertaking by or on behalf of the director to repay such amount if it shall ultimately be determined that the director has not met such standard of conduct, and after determination that the facts then known to those making the determination would not preclude indemnification under this section. The undertaking required by this paragraph shall be an unlimited general obligation of the director but need not be secured and may be accepted without reference to financial ability to make repayment. Determinations and authorizations of payments under this subsection 6 shall be made in the manner specified in subsection 5.

7. No provision for the corporation to indemnify or to advance expenses to a director who is made a party to a proceeding, whether contained in the articles of incorporation, the bylaws, a resolution of shareholders or directors, an agreement or otherwise, except as contemplated by subsection 10, shall be valid unless consistent with this section or, to the extent that indemnity hereunder is limited by the articles of incorporation, consistent therewith. Nothing contained in this section shall limit the corporation's power to pay or reimburse expenses incurred by a director in connection with the director's appearance as a witness in a proceeding at a time when the director has not been made a named defendant or respondent in the proceeding.

8. For purposes of this section, the corporation shall be deemed to have requested a director to serve an employee benefit plan whenever the performance by the director of the director's duties to the corporation also imposes duties on, or otherwise involves services by, the director to the plan or participants or beneficiaries of the plan; excise taxes assessed on a director with respect to an employee benefit plan pursuant to applicable law shall be deemed fines; and action taken or omitted by the director with respect to an employee benefit plan in the performance of the director's duties for a purpose reasonably believed by the director 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.

9. Unless limited by the articles of incorporation:

a. An officer of the corporation shall be indemnified as and to the same extent provided in subsection 4 for a director and shall be entitled to the same extent as a director to seek indemnification pursuant to the provisions of subsection 4;

b. A corporation shall have the power to indemnify and to advance expenses to an officer, employee or agent of the corporation to the same extent that it may indemnify and advance expenses to directors pursuant to this section; and

c. A corporation, in addition, shall have the power to indemnify and to advance expenses to an officer, employee or agent who is not a director to such further extent, consistent with law, as may be provided by its articles of incorporation, bylaws, general or specific action of its board of directors, or contract.

10. A corporation shall have power to purchase and maintain insurance on behalf of any person who is or was a director, officer, employee or agent of the corporation, or who, while a director, officer, employee or agent of the corporation, is or was serving at the request of the corporation as a

director, officer, partner, trustee, employee or agent of another foreign or domestic corporation, partnership, joint venture, trust, other enterprise or employee benefit plan, against any liability asserted against the person and incurred by the person in any such capacity or arising out of the person's status as such, whether or not the corporation would have the power to indemnify the person against such liability under the provisions of this section.

11. Any indemnification of, or advance of expenses to, a director in accordance with this section, if arising out of a proceeding by or in the right of the corporation, shall be reported in writing to the shareholders with or before the notice of the next shareholders' meeting.

Sec. 2. Section 491.3, subsection 8, Code 1983, is amended to read as follows:

8. A corporation organized under or subject to this chapter may make indemnification as provided in section ~~496A+4~~ 496A.4A.

Sec. 3. Section 491.16, Code 1983, is amended to read as follows:

491.16 INDEMNIFICATION OF OFFICERS, DIRECTORS, EMPLOYEES AND AGENTS--INSURANCE. The provisions of section ~~496A+4~~ ~~subsection-19~~ 496A.4A shall apply to corporations organized under or subject to this chapter.

Sec. 4. Section 496A.4, subsection 19, Code 1983, is amended by striking the subsection.

Sec. 5. Section 524.801, subsection 8, Code 1983, is amended to read as follows:

8. To indemnify any director, officer or employee, a former director, officer or employee of the state bank in the manner and in the instances authorized by section ~~496A+4~~ ~~subsection-19~~ 496A.4A.

Sec. 6. Section 534.8, subsection 4, Code 1983, is amended to read as follows:

4. Any association operating under this chapter shall have the power to indemnify any present or former director,

officer or employee in the manner and in the instances authorized in section ~~496A+4~~ ~~subsection-19~~ 496A.4A.

DONALD D. AVENSON
Speaker of the House

ROBERT T. ANDERSON
President of the Senate

I hereby certify that this bill originated in the House and is known as House File 606, Seventieth General Assembly.

JOSEPH O'HERN
Chief Clerk of the House

Approved *May 3*, 1983

TERRY E. BRANSTAD
Governor