

SENATE No. 175

By Mr. Wetmore, a petition (accompanied by bill, Senate, No. 175) of H. Kenneth Fish and Robert D. Wetmore for legislation to provide indemnification of directors and officers of charitable corporations. Commerce and Labor.

The Commonwealth of Massachusetts

In the Year One Thousand Nine Hundred and Eighty-one.

AN ACT RELATIVE TO INDEMNIFICATION OF DIRECTORS AND OFFICERS
OF CHARITABLE CORPORATIONS.

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

1 SECTION 1. Chapter 180 of the General Laws shall be amend-
2 ed by striking the last paragraph of Section 6 in its entirety
3 and substituting therefor the following: —

4 Indemnification of corporate personnel may be provided by a
5 corporation as follows: —

6 (a) A corporation shall have the power to indemnify its
7 directors and officers against all expenses (as herein defined)
8 incurred by them in connection with any proceeding (as here-
9 in defined) in which they are involved as a result of their serv-
10 ing in such capacities, except that (i) no indemnification shall
11 be provided for any director or officer regarding any matter
12 as to which it shall be finally determined that he did not act
13 in good faith and in the reasonable belief that his action was in
14 the best interests of the corporation, or with respect to a crim-
15 inal matter, that he had reasonable cause to believe that his
16 conduct was unlawful, and (ii) indemnification may be pro-
17 vided with respect to a claim that an officer or director re-
18 ceived an improper personal benefit by reason of his position,
19 regardless of whether the claim arises out of his service in
20 such capacity, subject to the provisions of clause (i), unless it
21 is finally determined that such an improper personal benefit
22 was received by the director or officer.

23 (b) The determination of whether the corporation has the
24 power to indemnify a director or officer under subparagraph
25 (a) of this section and any award of indemnification may be
26 made

27 (i) by a majority vote of a quorum of the directors con-
28 sisting of persons who are not at that time parties to the pro-
29 ceeding; or

30 (ii) if such quorum cannot be obtained, by a majority vote
31 of a committee of two or more directors who are not at that
32 time parties to the proceeding and are selected for this purpose
33 by the full board (in which selection directors who are parties
34 may participate); or

35 (iii) if such a committee cannot be selected, by a majority
36 vote of all the directors then in office, which majority may in-
37 clude directors who are parties to the proceeding.

38 The determination of whether the corporation has power
39 to indemnify a director or officer may also be made by inde-
40 pendent legal counsel appointed for the purpose by vote of a
41 majority of such a disinterested quorum or committee of the
42 directors, or if there is no such quorum or committee of the
43 directors, by vote of a majority of the directors, which ma-
44 jority may include persons who are parties to the proceed-
45 ing; and any award of indemnification which said counsel has
46 determined that the corporation has power to grant shall be
47 made in the manner provided above for appointment of said
48 counsel. Notwithstanding the foregoing, in the case of a pro-
49 ceeding by or in the right of the corporation in which a di-
50 rector or officer is adjudged liable to the corporation, indemni-
51 fication shall be provided only upon a determination by a court
52 having jurisdiction that in view of all the circumstances of the
53 case said director or officer is fairly and reasonably entitled to
54 indemnity for such expenses as the court shall deem proper.

55 (c) Unless the articles of organization or by-laws of the
56 corporation otherwise provide, if a director or officer of the
57 corporation has been wholly successful on the merits in de-
58 fense of any proceeding in which he was involved by reason
59 of his position or as a result of his serving in such capacity
60 (including termination of investigative or other proceedings
61 without a finding of fault on the part of the director or of-

62 ficer), he shall be indemnified by the corporation against all
63 expenses incurred by him in connection therewith.

64 (d) For purposes of this section

65 (1) A "director or officer" also includes (i) a director or
66 officer of the corporation serving at the request of the cor-
67 poration as a director, officer, employee, trustee, partner or
68 other agent of another organization, and (ii) any person who
69 formerly served as a director or officer;

70 (2) "Expenses" means all expenses (including attorneys'
71 fees and disbursements) actually and reasonably incurred in
72 defense of a proceeding or in seeking indemnification under
73 subparagraph (c) of this section and, except for claims by or
74 in the right of the corporation or alleging that a director or
75 officer received an improper personal benefit, any judgments,
76 awards, fines, penalties and reasonable amounts paid in set-
77 tlement of a proceeding; and

78 (3) A "proceeding" is any threatened, pending or completed
79 action, suit or proceeding, whether civil, criminal, administra-
80 tive or investigative.

81 (e) Expenses incurred by a director or officer in defending
82 any proceeding may be paid by the corporation in advance of
83 its final disposition to the extent authorized as provided in
84 subparagraph (b) of this section, upon receipt of (i) a writ-
85 ten affirmation of the person being indemnified of his good
86 faith belief that his conduct was consistent with the stand-
87 ards set forth above, and (ii) his written undertaking to re-
88 pay such amount if it is ultimately determined that he is not
89 eligible to be indemnified, which undertaking shall be an un-
90 limited general obligation but need not be secured and may be
91 accepted without regard to the financial ability of such person
92 to make repayment; provided, that no such advance payment
93 shall be made if a determination shall have been made by a
94 court or by the directors, committee, or counsel who propose to
95 act on the matter pursuant to subparagraph (b) that the cir-
96 cumstances known at that time (without any further investiga-
97 tion) establish that the corporation ultimately will have no
98 power to indemnify said person.

99 (f) A corporation shall have power to purchase and main-
100 tain insurance on behalf of any director or officer against any

101 liability or cost incurred by him as a director or officer or arising out of his status as such, whether or not the corporation would have power to indemnify him against such liability or cost.

105 (g) Notwithstanding the provisions of this section, a corporation may adopt provisions relating to indemnification of its directors or officers in (i) its articles of organization, (ii) a by-law adopted by its members, or (iii) a general vote adopted by a majority of a quorum of its members, and specific rights to indemnification may be granted under any other agreement or arrangement approved by a majority vote of a quorum of such members or of disinterested directors; provided, that the standards set forth in any such provisions, agreements or arrangements for determining whether the corporation has power to indemnify a director or officer may not be more lenient than those set forth in subparagraph (a) of this section. In addition, a corporation shall have power to indemnify any of its agents or employees who are not directors or officers on any terms consistent with law which it deems to be appropriate. The absence of any express provision for indemnification shall not limit any right of indemnification existing independently of this section.

123 (h) The indemnification provided by this section shall inure to the benefit of the heirs and personal representatives of a director or officer.

126 (i) If a corporation or any of its directors or officers sponsors or undertakes any responsibility as a fiduciary with respect to an employee benefit plan, then, for purposes of indemnification of such persons under this section (i) a "director" or "officer" shall be deemed to include any director or officer of the corporation whose duties involve duties or services to said plan or its participants or beneficiaries, (ii) such director or officer shall be deemed to have acted in good faith in the reasonable belief that his action was in the best interests of the corporation if he acted in good faith in the reasonable belief that his action was in the best interests of the participants or beneficiaries of said plan and (iii) "expenses" shall be deemed to include any taxes or penalties assessed on

139 such director or officer with respect to said plan under ap-
140 plicable law.

1 SECTION 2. Amendment of Section 6 of Chapter 180 by this
2 Act shall not invalidate any provisions in the articles of or-
3 ganization, by-laws or corporate action or agreements of any
4 corporation subject to chapter 180 relating to the indemnifica-
5 tion of its officers or directors, which are inconsistent with
6 Section 6 as amended by this Act; however, such provisions
7 shall be deemed limited by, and indemnity thereunder shall be
8 payable only in accordance with, the provisions of Section 6
9 as amended by this Act, with respect to any claims or pro-
10 ceedings initiated subsequent to the effective date of this Act.

1 SECTION 3. This Act shall take effect on its passage.

