

ACT 190

S.B. NO. 1469

A Bill for an Act Relating to Directors and Officers Liability.

Be It Enacted by the Legislature of the State of Hawaii:

SECTION 1. Chapter 415, Hawaii Revised Statutes, is amended by adding a new section to be appropriately designated and to read as follows:

“§415- Limitation of liability of directors; shareholder approval required. (a) A corporation shall have the power to eliminate or limit the personal liability of its directors in any action brought by the shareholders or the corporation for monetary damages against any director of the corporation for a breach of fiduciary duty as a director, provided that:

- (1) The elimination or limitation shall be authorized, directed, or provided for, and approved by the shareholders of the corporation, in:
 - (A) The articles of incorporation of the corporation;
 - (B) Any duly adopted amendment of the articles of incorporation; or
 - (C) Any bylaw of the corporation, or amendment to the bylaws; and
- (2) The provision eliminating or limiting the personal liability of a corporation’s directors shall be adopted upon the affirmative vote of the holders of two-thirds of the shares represented at the shareholder’s

meeting and having voting power; provided that the vote also constitutes a majority of the shares having voting power.

(b) A corporation shall not have the power to eliminate or limit the personal liability of a director:

- (1) For any breach of the director's duty of loyalty to the corporation or its shareholders;
- (2) For any act or omission of the director not performed in good faith, or which involves intentional misconduct or knowing violation of law, or which constitutes a wilful or reckless disregard of the director's fiduciary duty;
- (3) For the director's wilful or negligent violation of any provision of this chapter regarding payment of dividends or stock purchase or redemption; or
- (4) For any transaction from which the director received an improper benefit.

(c) The shareholders of the corporation shall receive written notice of any proposal by the corporation to eliminate or limit the personal liability of the directors under subsection (a), and the corporation shall submit the written notice and the written proposal, if any, to the director of the department of commerce and consumer affairs. The department may adopt guidelines as to the form of the written notice which is to be sent to the shareholders notifying them of the proposal to eliminate or limit the personal liability of the directors.

(d) No provision pursuant to subsection (a)(1) shall be authorized by the corporation to eliminate or limit the liability of directors for acts, omissions, or causes of action occurring, accruing, or arising prior to the effective date of this section."

SECTION 2. Section 415-35, Hawaii Revised Statutes, is amended to read as follows:

"§415-35 Board of directors. (a) All corporate powers shall be exercised by or under authority of, and the business and affairs of a corporation shall be managed under the direction of, a board of directors except as may be otherwise provided in this chapter or the articles of incorporation. If any such provision is made in the articles of incorporation, the powers and duties conferred or imposed upon the board of directors by this chapter shall be exercised or performed to such extent and by such person or persons as shall be provided in the articles of incorporation. At least one member of every board of directors shall be a resident of this State. If there is no such director who is a member of the board, the board may not function except to elect a new director who is a resident of this State. Directors need not be shareholders of the corporation unless the articles of incorporation or bylaws so require. The articles of incorporation or bylaws may prescribe other qualifications for directors. The board of directors shall have authority to fix the compensation of directors unless otherwise provided in the articles of incorporation.

(b) A director shall perform the director's duties as a director, including the director's duties as a member of any committee of the board upon which the director may serve, in good faith, in a manner the director reasonably believes to be in the best interests of the corporation, and with such care as an ordinarily prudent person in a like position would use under similar circumstances. In determining the best interests of the corporation, a director, in addition to considering the interests of the corporation's shareholders, may consider, in the director's discretion, any of the following factors:

- (1) The interests of the corporation's employees, customers, suppliers and creditors;
- (2) The economy of the State and the nation;
- (3) Community and societal considerations, including, without limitation, the impact of any action upon the communities in or near which the corporation has offices or operations; and
- (4) The long-term as well as short-term interests of the corporation and its shareholders, including, without limitation, the possibility that these interests may be best served by the continued independence of the corporation.

(c) In performing the director's duties, a director shall be entitled to rely on information, opinions, reports, or statements, including financial statements and other financial data, in each case prepared or presented by:

- (1) One or more officers or employees of the corporation whom the director reasonably believes to be reliable and competent in the matters presented;
- (2) Counsel, public accountants, or other persons as to matters which the director reasonably believes to be within [such] that person's professional or expert competence; or
- (3) A committee of the board upon which the director does not serve, duly designated in accordance with a provision of the articles of incorporation or the bylaws, as to matters within its designated authority, which committee the director reasonably believes to merit confidence;

provided that the director shall not be considered to be acting in good faith if the director has or should have knowledge concerning the matter in question that would cause such reliance to be unwarranted. A director who so performs the director's duties shall have no liability by reason of being or having been a director of the corporation.

(d) A director of a corporation who is present at a meeting of its board of directors at which action on any corporate matter is taken shall be presumed to have assented to the action taken unless the director's dissent shall be entered in the minutes of the meeting or unless the director shall file the director's written dissent to the action with the secretary of the meeting before the adjournment thereof or shall forward such dissent by registered mail to the secretary of the corporation immediately after the adjournment of the meeting. The right to dissent shall not apply to a director who voted in favor of the action."

SECTION 3. Statutory material to be repealed is bracketed. New statutory material is underscored.¹

SECTION 4. This Act shall take effect upon its approval.

(Approved June 7, 1989.)

Note

1. Edited pursuant to HRS §23G-16.5.