

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 1989

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HOUSE BILL 719*
Committee Substitute Without Prejudice 7/14/89

Short Title: Securities Enforcement.

(Public)

Sponsors:

Referred to:

March 20, 1989

1 A BILL TO BE ENTITLED
2 AN ACT TO AMEND THE NORTH CAROLINA SECURITIES ACT AND THE
3 INVESTMENT ADVISERS ACT BY ESTABLISHING AN INVESTOR
4 SECURITY FUND AND BY ENHANCING THE ENFORCEMENT
5 PROVISIONS OF THOSE ACTS.

6 The General Assembly of North Carolina enacts:

7 Section 1. Chapter 78A of the General Statutes is amended by adding a new
8 section to read:

9 **"§ 78A-11. Unlawful telephone rooms.**

10 It is unlawful for any person to willfully manage, directly or indirectly, supervise,
11 control or own, either alone or in association with others, any telephone room in this
12 State. 'Telephone room' means an enterprise in which two or more persons engage in
13 telephone communications with members of the public using two or more telephones at
14 one location, or more than one location in a common scheme or enterprise, in violation
15 of G.S. 78A-8 or G.S. 78A-12. It is an affirmative defense to a charge of a violation of
16 this section that the person acted in good faith and did not directly or indirectly induce
17 an act or acts constituting a violation of G.S. 78A-8 or G.S. 78A-12."

18 Sec. 2. Chapter 78A of the General Statutes is amended by adding a new
19 section to read:

20 **"§ 78A-12. Manipulation of market.**

21 (a) Without limiting the general applicability of G.S. 78A-8, it is unlawful for
22 any person to:

23 (1) Willfully quote a fictitious price with respect to a security;

- 1 (2) Effect a transaction in a security which involves no change in the
2 beneficial ownership of the security for the purpose of creating a false
3 or misleading appearance of active trading in a security or a false or
4 misleading appearance of activity with respect to the market for the
5 security;
6 (3) Enter an order for the purchase of a security with the knowledge that
7 an order of substantially the same size and at substantially the same
8 time and price for the sale of the security has been, or will be, entered
9 by or for the same person, or an affiliated person, for the purpose of
10 creating a false or misleading appearance of active trading in a security
11 or a false or misleading appearance of activity with respect to the
12 market for the security;
13 (4) Enter an order for the sale of security with knowledge that an order of
14 substantially the same size and at substantially the same time and price
15 for the purchase of the security has been, or will be, entered by or for
16 the same person, or an affiliated person, for the purpose of creating a
17 false or misleading appearance of active trading in a security or a false
18 or misleading appearance of activity with respect to the market for the
19 security; or
20 (5) Employ any other deceptive or fraudulent device, scheme, or artifice to
21 manipulate the market in a security.

22 (b) A transaction effected in compliance with the applicable provisions of the
23 Securities Exchange Act of 1934 and the rules and regulations of the Securities and
24 Exchange Commission thereunder is not a manipulation of the market under subsection
25 (a) of this section."

26 Sec. 3. G.S. 78A-45(c) reads as rewritten:

27 "(c) All fees provided for under this Chapter shall be collected by the Administrator
28 and shall be paid over to the State Treasurer to go into the ~~general fund~~-General Fund, or
29 shall be paid as otherwise directed by provisions of Chapter 78A, Chapter 78C, or
30 Chapter 78D of the General Statutes."

31 Sec. 4. G.S. 78A-47 is amended by adding a new subsection to read:

32 "(c) The Administrator may issue an order against an applicant, registered person,
33 or other person who willfully violates this Chapter or a rule or order of the
34 Administrator under this Chapter:

35 (1) Imposing a civil penalty up to a maximum of two thousand five
36 hundred dollars (\$2,500) for a single violation or of twenty-five
37 thousand dollars (\$25,000) for multiple violations in a single
38 proceeding or a series of related proceedings;

39 (2) Requiring reimbursement of the costs of investigation.

40 No order under this subsection may be entered without prior notice of an opportunity
41 for hearing."

42 Sec. 5. G.S. 78A-46(a) reads as rewritten:

43 "(a) The Administrator in his discretion

- 1 (1) May make such public or private investigations within or outside of
2 this State as he deems necessary to determine whether any person has
3 violated or is about to violate any provision of this Chapter or any rule
4 or order hereunder, or to aid in the enforcement of this Chapter or in
5 the prescribing of rules and forms hereunder,
6 (2) May require or permit any person to file a statement in writing, under
7 oath or otherwise as the Administrator determines, as to all the facts
8 and circumstances concerning the matter to be investigated, ~~and~~
9 (3) May publish information concerning any violation of this Chapter or
10 any rule or order hereunder, ~~and~~
11 (4) May appoint securities law enforcement agents and other enforcement
12 personnel.
13 a. Subject Matter Jurisdiction – The responsibility of an agent
14 shall be enforcement of this Chapter and Chapter 78C of the
15 General Statutes.
16 b. Territorial Jurisdiction – A securities law enforcement agent is a
17 State officer with jurisdiction throughout the State.
18 c. Service of Orders of the Administrator – Securities law
19 enforcement agents may serve and execute notices, orders, or
20 demands issued by the Administrator for the surrender of
21 registrations or relating to any administrative proceeding.
22 While serving and executing such notices, orders, or demands,
23 securities law enforcement agents shall have all the power and
24 authority possessed by law enforcement officers when
25 executing an arrest warrant."

26 Sec. 6. G.S. 78A-47(a) reads as rewritten:

27 "(a) Whenever it appears to the Administrator that any person has engaged or is about
28 to engage in any act or practice constituting a violation of any provision of this Chapter
29 or any rule or order hereunder, he may in his discretion bring an action in any court of
30 competent jurisdiction to enjoin the acts or practices and to enforce compliance with
31 this Chapter or any rule or order hereunder. Upon a proper showing a permanent or
32 temporary injunction, restraining order, or writ of mandamus shall be granted and a
33 receiver or conservator may be appointed for the defendant or the defendant's assets. In
34 addition to any other remedies provided by this Chapter, the Administrator may apply to
35 the court hearing this matter for an order of restitution whereby the defendants in such
36 action shall be ordered to make restitution of these sums shown by the Administrator to
37 have been obtained by them in violation of any of the provisions of this Chapter. Such
38 restitution shall, at the option of the court, be payable to the Administrator or receiver
39 appointed pursuant to this section or directly to the persons whose assets were obtained
40 in violation of this Chapter. The court may not require the Administrator to post a
41 bond."

42 Sec. 7. Chapter 78A of the General Statutes is amended by adding a new
43 section to read:

44 "**§ 78A-51. Investor Security Fund.**

- 1 (a) Definitions. When used in this section, unless the context otherwise requires:
2 (1) 'Administrator' means the Secretary of State.
3 (2) 'Fund' means the Investor Security Fund of the North Carolina
4 Department of the Secretary of State.
5 (3) 'Violator' means one who, at the time of the act complained of, was
6 registered, or should have been registered, pursuant to the provisions
7 of G.S. 78A or G.S. 78C. The fact that the act complained of took
8 place outside the State of North Carolina does not necessarily mean
9 that the violator was not acting as a securities dealer or salesman or as
10 an investment adviser in North Carolina.
11 (4) 'Claimant' means a person who has suffered a reimbursable loss
12 because of the wrongful conduct of a violator and has filed an
13 application for reimbursement.
14 (5) 'Wrongful conduct' means wrongful acts committed by a violator
15 against a claimant in the manner of embezzlement, fraud, the wrongful
16 taking or conversion of monies or other property, or market
17 manipulation.
18 (6) a. 'Reimbursable losses' means only those losses of money or other
19 property which meet all of the following tests:
20 1. The wrongful conduct which occasioned the loss
21 occurred on or after January 1, 1987;
22 2. The loss was caused by the wrongful conduct of a
23 violator acting either as a securities dealer or salesman,
24 as an investment adviser or investment adviser
25 representative, or in a fiduciary capacity customary to
26 the securities or investment adviser industries in the
27 matter in which the loss arose as set out in subdivision
28 (3) of this subsection;
29 3. The Administrator is satisfied that the claimant has
30 exhausted all viable means to collect claimant's losses
31 and has complied with this section.
32 b. The following shall be excluded from the definition of
33 'reimbursable losses':
34 1. Losses of spouses, children, parents, grandparents,
35 siblings, partners, associates, and employees of the
36 violator causing the losses.
37 2. Losses covered by any bond, surety agreement, or
38 insurance contract to the extent covered thereby.
39 3. Losses which have been otherwise received from or paid
40 by or on behalf of the violator who committed the
41 wrongful conduct.
42 (b) Creation of Fund. The Administrator shall establish a trust fund to be known
43 as the Investor Security Fund.
44 (c) Applications for Reimbursement.

- 1 (1) The Administrator shall prepare and make available an 'Application
2 for Reimbursement' form which shall require the following minimum
3 information:
- 4 a. The name and address of the applicant;
5 b. The name and address of the violator who engaged in the
6 wrongful conduct;
7 c. The amount of the alleged loss for which application is made;
8 d. The date or period of time during which the alleged loss was
9 incurred;
10 e. A general statement of facts relative to the application;
11 f. Verification by the claimant;
12 g. All supporting documents, including:
13 1. Copies of all court proceedings against the violator;
14 2. Copies of all documents showing any reimbursement or
15 receipt of funds in payment of any portion of the loss.
- 16 (2) The application shall contain the following statement in boldface type:
17 'IN ESTABLISHING THE INVESTOR SECURITY FUND
18 PURSUANT TO AN ACT OF THE NORTH CAROLINA
19 GENERAL ASSEMBLY, THE NORTH CAROLINA
20 DEPARTMENT OF THE SECRETARY OF STATE DID NOT
21 CREATE NOR ACKNOWLEDGE ANY LEGAL RESPONSIBILITY
22 FOR THE ACTS OF INDIVIDUAL VIOLATORS IN THE
23 SECURITIES OR INVESTMENT ADVISER INDUSTRIES. ALL
24 REIMBURSEMENTS OF LOSSES FROM THE INVESTOR
25 SECURITY FUND SHALL BE A MATTER OF GRACE IN THE
26 SOLE DISCRETION OF THE ADMINISTRATOR OF THE FUND
27 AND NOT A MATTER OF RIGHT. NO APPLICANT OR
28 MEMBER OF THE PUBLIC SHALL HAVE ANY RIGHT IN THE
29 INVESTOR SECURITY FUND AS A THIRD PARTY
30 BENEFICIARY OR OTHERWISE.'
- 31 (3) An application shall be filed in the office of the North Carolina
32 Department of the Secretary of State in Raleigh, North Carolina, to the
33 attention of the Investor Security Fund.
- 34 (d) Processing Applications.
- 35 (1) The Administrator may cause a reasonable investigation of any
36 application filed with the North Carolina Department of the Secretary
37 of State. The Administrator shall conduct such investigation or review
38 as he deems necessary or desirable in order to determine whether the
39 application is for a reimbursable loss and to guide the Administrator in
40 determining the extent, if any, to which the claimant should be
41 reimbursed. After considering a report on an application, the
42 Administrator may request that testimony be presented concerning the
43 application. In all cases, the alleged violator or his personal

- 1 representative shall be given an opportunity to be heard by the
2 Administrator if he so requests.
- 3 (2) The Administrator shall, in his discretion, determine the amount of
4 loss, if any, for which the claimant should be reimbursed. In making
5 such decisions, the Administrator shall consider the following:
- 6 a. The negligence, if any, of the claimant that contributed to the
7 loss;
- 8 b. The comparative hardship that the claimant suffered because of
9 the loss;
- 10 c. The total amount of reimbursable losses of claimant on account
11 of one violator or association of violators;
- 12 d. The total amount of reimbursable losses in previous years for
13 which total reimbursement has not been made and the total
14 assets of the Fund;
- 15 e. The total amount of insurance or other source of funds available
16 to compensate the claimant for the loss.
- 17 (3) The Administrator may, in his discretion, allow further reimbursement,
18 in any year, of a reimbursable loss allowed by him in prior years with
19 respect to a loss which has not been fully reimbursed.
- 20 (4) A claimant may be advised of the status of the Administrator's
21 consideration of his application and shall be advised of the final
22 determination of the Administrator.
- 23 (5) All applications, proceedings, investigations, and reports involving
24 applications for reimbursement shall be kept confidential until and
25 unless the Administrator authorizes reimbursement to the claimant, or
26 until the violator requests that the matter be made public. All
27 participants in the application, investigation, or proceeding (including
28 the claimant) shall conduct themselves so as to maintain the
29 confidentiality of the application, investigation, or proceeding. This
30 provision shall not be construed to deny relevant information to law
31 enforcement or regulatory agencies, or to any other entity to whom the
32 Administrator authorizes release of information.
- 33 (6) The Administrator may, in his discretion, afford the claimant a
34 reconsideration of his or her application; otherwise, such rejection is
35 final, and the Administrator shall give no further consideration to that
36 application or another application by the same claimant based upon the
37 same alleged facts.
- 38 (e) Funding.
- 39 (1) The trust shall be funded by a portion of the fines collected pursuant to
40 G.S. 78A-47(c), and G.S. 78C-28(c).
- 41 (2) The portion of the fines collected under the provisions of G.S. 78A-
42 47(c) and G.S. 78C-28(c) that are placed in the Investor Security Fund
43 shall be determined by the Administrator, and

1 (3) The fund shall be placed in an interest-bearing account. The
2 Administrator may use the interest to continue the Investor Awareness
3 Program or transfer it to the Anti-Trust Fund, or both.

4 (f) Subrogation for Reimbursement Made. In the event reimbursement is made
5 to a claimant, the North Carolina Department of the Secretary of State shall be
6 subrogated in the amount of reimbursement and may bring such action as is deemed
7 advisable against the violator, his assets, or his estate. Such action may be brought in
8 the name of the claimant, or in the name of the North Carolina Department of the
9 Secretary of State. The claimant shall be required to execute a 'subrogation agreement'
10 to authorize the action. Upon commencement of an action by the Administrator
11 pursuant to his subrogation rights, he shall advise the reimbursed claimant at his last
12 known address. A reimbursed claimant may then join in such action to press an
13 application for his or her loss in excess of the amount of the above reimbursement. Any
14 amounts recovered from the violator by the Administrator in excess of the amount to
15 which the Fund is subrogated, less the Administrator's actual costs of such recovery,
16 shall be paid to or retained by the claimant as the case may be.

17 Before receiving a payment from the Fund, the person who is to receive such
18 payment or his legal representative shall execute and deliver to the Administrator a
19 written agreement stating that in the event the reimbursed claimant or his estate should
20 ever receive any restitution from the violator or his estate, the reimbursed claimant
21 agrees that the Fund shall be repaid up to the amount of the reimbursement from the
22 Fund plus expenses."

23 Sec. 8. G.S. 78A-56 reads as rewritten:

24 **"§ 78A-56. Civil liabilities.**

25 (a) Any person who:

- 26 (1) Offers or sells a security in violation of G.S. 78A-8(a)(1) and (3), 78A-
27 10(b), 78A-12, 78A-24, or 78A-36(a), or of any rule or order under
28 G.S. 78A-49(d) which requires the affirmative approval of sales
29 literature before it is used, or of any condition imposed under G.S.
30 78A-27(d) or 78A-28(g), or
31 (2) Offers or sells a security by means of any untrue statement of a
32 material fact or any omission to state a material fact necessary in order
33 to make the statements made, in the light of the circumstances under
34 which they were made, not misleading (the purchaser not knowing of
35 the untruth or omission), and who does not sustain the burden of proof
36 that he did not know, and ~~did not act in reckless disregard,~~ in the exercise
37 of reasonable care could not have known, of the untruth or omission, is
38 liable to the person purchasing the security from him, who may sue
39 either at law or in equity to recover the consideration paid for the
40 security, together with interest at the legal rate from the date of
41 payment, costs, and reasonable attorneys' fees, less the amount of any
42 income received on the security, upon the tender of the security, or for
43 damages if he no longer owns the security. Damages are the amount
44 that would be recoverable upon a tender less the value of the security

1 when the purchaser disposed of it and interest at the legal rate as
2 provided by G.S. 24-1 from the date of disposition.

3 (b) Any person who purchases a security by means of any untrue statement of a
4 material fact or any omission to state a material fact necessary in order to make the
5 statements made, in the light of the circumstances under which they are made, not
6 misleading (the seller not knowing of the untruth or omission), and who does not sustain
7 the burden of proof that he did not know, and in the exercise of reasonable care could
8 not have known, of the untruth or omission, shall be liable to the person selling the
9 security to him, who may sue either at law or in equity to recover the security, plus any
10 income received by the purchaser thereon, upon tender of the consideration received, or
11 for damages if the purchaser no longer owns the security. Damages are the excess of the
12 value of the security when the purchaser disposed of it, plus interest at the legal rate
13 from the date of disposition, over the consideration paid for the security.

14 (c) Every person who directly or indirectly controls a person liable under
15 subsection (a) or (b), every partner, officer, or director of such a person, every person
16 occupying a similar status or performing similar functions, every employee of such a
17 person who materially aids in the act or transaction, and every dealer or salesman who
18 materially aids in the sale are also liable jointly and severally with and to the same
19 extent as such person, unless the person who is so liable sustains the burden of proof
20 that he did not know, and ~~did not act in reckless disregard, in the exercise of reasonable~~
21 care should not have known, of the existence of the facts by reason of which the liability
22 is alleged to exist. There is contribution as in cases of contract among the several
23 persons so liable.

24 (d) Any tender specified in this section may be made at any time before entry of
25 judgment. Tender shall require only notice of willingness to exchange the security for
26 the amount specified. Any notice may be given by service as in civil actions or by
27 certified mail addressed to the last known address of the person liable.

28 (e) Every cause of action under this statute survives the death of any person who
29 might have been a plaintiff or defendant.

30 (f) No person may sue ~~under this section more than two years after the sale or~~
31 contract of sale:

32 (1) Under G.S. 78A-24, G.S. 78A-36(a), or any rule or order under G.S.
33 78A-49(d) which requires the affirmative approval of sales literature
34 before it is used, or any condition imposed under G.S. 78A-27(d) or
35 G.S. 78A-28(g) unless such action is brought within two years after the
36 sale or contract of sale; or

37 (2) Under G.S. 78A-8, 78A-10(b), or 78A-12 unless such action is brought
38 within the shorter of:

39 a. Three years after the sale or contract of sale, or

40 b. Two years after the plaintiff receives actual notice of, or, upon
41 the exercise of reasonable diligence, should have known of the
42 facts constituting the violation.

43 (g) (1) No purchaser may sue under this section if, before suit is
44 commenced, the purchaser has received a written offer stating the

1 respect in which liability under this section may have arisen and
2 fairly advising the purchaser of his rights; offering to repurchase the
3 security for cash payable on delivery of the security equal to the
4 consideration paid, together with interest at the legal rate as provided
5 by G.S. 24-1 from the date of payment, less the amount of any
6 income received on the security or, if the purchaser no longer owns
7 the security, offering to pay the purchaser upon acceptance of the
8 offer an amount in cash equal to the damages computed in
9 accordance with subsection (a); and stating that the offer may be
10 accepted by the purchaser at any time within 30 days of its receipt;
11 and the purchaser has failed to accept such offer in writing within
12 the specified period.

13 (2) No seller may sue under this section if, before suit is commenced, the
14 seller has received a written offer stating the respect in which liability
15 under this section may have arisen and fairly advising the seller of his
16 rights; offering to return the security plus the amount of any income
17 received thereon upon payment of the consideration received, or, if the
18 purchaser no longer owns the security, offering to pay the seller upon
19 acceptance of the offer an amount in cash equal to the damages
20 computed in accordance with subsection (b); and providing that the
21 offer may be accepted by the seller at any time within 30 days of its
22 receipt; and the seller has failed to accept such offer in writing within
23 the specified period.

24 (3) Offers shall be in the form and contain the information the
25 Administrator by rule prescribes. Every offer under subsection (g)
26 shall be delivered to the offeree or sent by certified mail addressed to
27 him at his last known address. If an offer is not performed in
28 accordance with its terms, suit by the offeree under this section shall
29 be permitted without regard to this subsection.

30 (h) No person who has made or engaged in the performance of any contract in
31 violation of any provision of this Chapter or any rule or order hereunder, or who has
32 acquired any purported right under any such contract with knowledge of the facts by
33 reason of which its making or performance was in violation, may base any suit on the
34 contract.

35 (i) Any condition, stipulation, or provision binding any person acquiring any
36 security to waive compliance with any provision of this Chapter or any rule or order
37 hereunder is void.

38 (j) The rights and remedies provided by this Chapter are in addition to any other
39 rights or remedies that may exist at law or in equity, but this Chapter does not create any
40 cause of action not specified in this section or G.S. 78A-37(d)."

41 Sec. 9. G.S. 78A-57 reads as rewritten:

42 "**§ 78A-57. Criminal penalties.**

43 (a) Any person who willfully violates any provision of this Chapter except G.S.
44 78A-8, ~~G.S.~~78A-9, 78A-11, or 78A-12, or who willfully violates any rule or order

1 under this Chapter, or who willfully violates G.S. 78A-9 knowing the statement made to
2 be false or misleading in any material respect, shall upon conviction be punished as a
3 Class I felon; but no person may be imprisoned for the violation of any rule or order if
4 he proves that he had no knowledge of the rule or order. Any person who willfully
5 violates G.S. 78A-8, 78A-11, or 78A-12 shall upon conviction be punished as a Class H
6 felon.

7 (a1) In lieu of a fine otherwise authorized by law, a person who has been
8 convicted of or who has pleaded guilty or no contest to having engaged in conduct in
9 violation of the provisions of this Chapter may be sentenced to pay a fine that does not
10 exceed the greater of three times the gross value gained or three times the gross loss
11 caused by such conduct, plus court costs and the costs of investigation and prosecution,
12 reasonably incurred.

13 (a2) The Administrator shall establish a trust fund to be known as the Anti-Fraud
14 Trust Fund. Any amounts assessed as costs of investigation and prosecution under this
15 subsection shall be deposited in the trust fund. Funds deposited in such trust fund shall
16 be used for investigation and prosecution of civil and criminal actions arising under the
17 provisions of Chapters 78A, 78C, and 78D.

18 (b) The Administrator may refer such evidence as is available concerning
19 violations of this Chapter or of any rule or order hereunder to ~~the Attorney General or the~~
20 proper district attorney, who may, with or without such a reference, institute the
21 appropriate criminal proceedings under this Chapter. Upon receipt of such reference, the
22 district attorney may request that a duly employed attorney of the Administrator
23 prosecute or assist in the prosecution of such violation or violations on behalf of the
24 State. Upon approval of the Administrator, such employee shall be appointed a special
25 prosecutor for the district attorney to serve without compensation from the district
26 attorney. Such special prosecutor shall have all the powers and duties prescribed by law
27 for district attorneys and such other powers and duties as are lawfully delegated to such
28 special prosecutor by the district attorney.

29 (c) Nothing in this Chapter limits the power of the State to punish any person for
30 any conduct which constitutes a crime by statute or at common law."

31 Sec. 10. G.S. 78C-26(c) reads as rewritten:

32 "(c) All fees provided for under this Chapter shall be collected by the
33 Administrator and shall be paid over to the State Treasurer to go into the General Fund.
34 Fund, or shall be paid as otherwise directed by the provisions of this Chapter."* ♦

35 Sec. 11. G.S. 78C-28 is amended by adding a new subsection to read:

36 "(c) The Administrator may issue an order against an applicant, registered person,
37 or other person who willfully violates this Chapter or a rule or order of the
38 Administrator under this Chapter:

39 (1) Imposing a civil penalty up to a maximum of two thousand five
40 hundred dollars (\$2,500) for a single violation or of twenty-five
41 thousand dollars (\$25,000) for multiple violations in a single
42 proceeding or a series of related proceedings.

43 (2) Requiring reimbursement of the costs of investigation.

1 No order under this subsection may be entered without prior notice of an opportunity
2 for hearing."

3 Sec. 12. G.S. 78C-28(a) reads as rewritten:

4 "(a) Whenever it appears to the Administrator that any person has engaged or is about
5 to engage in any act or practice constituting a violation of any provision of this Chapter
6 or any rule or order hereunder, he may in his discretion bring an action in any court of
7 competent jurisdiction to enjoin the acts or practices and to enforce compliance with
8 this Chapter or any rule or order hereunder. Upon a proper showing a permanent or
9 temporary injunction, restraining order, or writ of mandamus shall be granted and a
10 receiver or conservator may be appointed for the defendant or the defendant's assets. In
11 addition to any other remedies provided by this Chapter, the department may apply to
12 the court hearing this matter for an order of restitution whereby the defendants in such
13 action shall be ordered to make restitution of those sums shown by the department to
14 have been obtained by them in violation of any of the provisions of this Chapter. Such
15 restitution shall, at the option of the court, be payable to the Administrator or receiver
16 appointed pursuant to this section or directly to the persons whose assets were obtained
17 in violation of this Chapter. The court may not require the Administrator to post a
18 bond."

19 ♦ Sec. 13. G.S. 78C-38 reads as rewritten:

20 "§ 78C-38. **Civil liabilities.**

21 (a) Any person who:

- 22 (1) Engages in the business of advising others, for compensation, either
23 directly or through publications or writings, as to the value of
24 securities or as to the advisability of investing in, purchasing, or selling
25 securities, or who, for compensation and as a part of a regular
26 business, issues or promulgates analyses or reports concerning
27 securities, in violation of G.S. 78C-8(b), G.S. 78C-16(a) or (b) (an
28 action pursuant to a violation of G.S. 78C-16(b) may not be
29 maintained except by those persons who directly received advice from
30 the unregistered investment adviser representative), G.S. 78C-10(b), or
31 of any rule or order under G.S. 78C-30(d) which requires the
32 affirmative approval of sales literature before it is used, or
33 (2) Receives, directly or indirectly, any consideration from another person
34 for advice as to the value of securities or their purchase or sale,
35 whether through the issuance of analyses, reports or otherwise and
36 employs any device, scheme, or artifice to defraud such other person
37 or engages in any act, practice or course of business which operates or
38 would operate as a fraud or deceit on such other person, in violation of
39 G.S. 78C-8(a)(1) or (2),

40 is liable to any person who is given such advice in such violation, who may sue either at
41 law or in equity to recover (i) the consideration paid for such advice together with
42 interest thereon at the legal rate as provided in G.S. 24-1 from the date of payment of
43 the consideration, plus (ii) the actual damages to such person proximately caused by
44 such violation, plus (iii) costs of the action and reasonable attorneys' fees. An action

1 based on violation of G.S. 78C-8(b) may not prevail where the person accused of the
2 violation sustains the burden of proof that he did not know, and in the exercise of
3 reasonable care could not have known of the existence of the facts by reason of which
4 the liability is alleged to exist.

5 (b) Every person who directly or indirectly controls a person liable under
6 subsection (a) of this section, including every partner, officer, or director of such a
7 person, every person occupying a similar status or performing similar functions, every
8 employee or associate of such a person who materially aids in the conduct giving rise to
9 the liability, and every dealer or salesman who materially aids in such conduct is liable
10 jointly and severally with and to the same extent as such person, unless able to sustain
11 the burden of proof that he did not know, and ~~did not act in reckless disregard in the~~
12 exercise of reasonable care should not have known of the existence of the facts by
13 reason of which the liability is alleged to exist. There is contribution as in cases of
14 contract among the several persons so liable and as provided among tort-feasors
15 pursuant to Chapter 1B of the General Statutes.

16 (c) Every cause of action under this statute survives the death of any person who
17 might have been a plaintiff or defendant.

18 (d) No person may sue under this section more than three years after the
19 rendering of investment advice in violation of this Chapter, except that in the case of a
20 violation of G.S. 78C-8(a)(1) or (2) a person may sue under this section within two
21 years after such person discovers or should have discovered, the facts constituting the
22 violation.

23 (e) No person who has made or engaged in the performance of any contract in
24 violation of any provision of this Chapter or any rule or order hereunder, or who has
25 acquired any purported right under any such contract with knowledge of the facts by
26 reason of which its making or performance was in violation, may base any suit on the
27 contract.

28 (f) Any condition, stipulation, or provision binding any person receiving any
29 investment advice to waive compliance with any provision of this Chapter or any rule or
30 order hereunder is void.

31 (g) The rights and remedies provided by this Chapter are in addition to any other
32 rights or remedies that may exist at law or in equity, but this Chapter does not create any
33 cause of action not specified in this section or G.S. 78C-17(e)."

34 Sec. 14. G.S. 78C-39 reads as rewritten:

35 **"§ 78C-39. Criminal penalties.**

36 (a) Any person who willfully violates any provision of this Chapter except G.S.
37 78C-9 or who willfully violates G.S. 78C-8(a)(1), (2) and (b) and G.S. 78C-9 knowing
38 the statement made to be false or misleading in any material respect, shall upon
39 conviction be punished as a Class I felon. Any person who willfully violates G.S. 78C-
40 8(a)(1), (2) and (b) shall upon conviction be punished as a Class H felon.

41 (a1) In lieu of a fine otherwise authorized by law, a person who has been
42 convicted of or who has pleaded guilty or no contest to having engaged in conduct in
43 violation of the provisions of this Chapter may be sentenced to pay a fine that does not
44 exceed the greater of three times the gross value gained or three times the gross loss

1 caused by such conduct, plus court costs and the costs of investigation and prosecution,
2 reasonably incurred.

3 (b) The Administrator may refer such evidence as is available concerning
4 violations of this Chapter or of any rule or order hereunder to the Attorney General or
5 the proper district attorney, who may, with or without such a reference, institute the
6 appropriate criminal proceedings under this Chapter. Upon receipt of such reference,
7 the Attorney General or the district attorney may request that a duly employed attorney
8 of the Administrator prosecute or assist in the prosecution of such violation or violations
9 on behalf of the State. Upon approval of the Administrator, such employee shall be
10 appointed a special prosecutor for the Attorney General or the district attorney to serve
11 without compensation from the Attorney General or district attorney. Such special
12 prosecutor shall have all the powers and duties prescribed by law for assistant attorneys
13 general or district attorneys and such other powers and duties as are lawfully delegated
14 to such special prosecutor by the Attorney General or the district attorney.

15 (c) Nothing in this Chapter limits the power of the State to punish any person for
16 any conduct which constitutes a crime by statute or at common law."

17 Sec. 15. This act shall become effective October 1, 1989.