

MAINE STATE LEGISLATURE

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118th MAINE LEGISLATURE

FIRST REGULAR SESSION-1997

Legislative Document

No. 893

S.P. 285

In Senate, February 6, 1997

**An Act to Conform the Provisions of the Maine Business Corporation
Act Regarding Derivative Proceedings to the Provisions of the Federal
Revised Model Business Corporations Act.**

Reference to the Committee on Business and Economic Development suggested and
ordered printed.

A handwritten signature in cursive script that reads "Joy J. O'Brien".

JOY J. O'BRIEN
Secretary of the Senate

Presented by Senator BENOIT of Franklin.

2 **Be it enacted by the People of the State of Maine as follows:**

4 **Sec. 1. 13-A MRSA §627**, as amended by PL 1973, c. 455, is
repealed.

6 **Sec. 2. 13-A MRSA §§628 to 635** are enacted to read:

8 **§628. Definitions**

10 As used in sections 628 to 635, unless the context otherwise
12 indicates, the following terms have the following meanings.

14 1. **Derivative proceeding.** "Derivative proceeding" means a
civil suit in the right of a domestic corporation or, to the
16 extent provided in section 635, in the right of a foreign
corporation.

18 2. **Shareholder.** "Shareholder," in addition to the meaning
20 set forth in section 102, subsection 17, includes a beneficial
owner whose shares are held in a voting trust or held by a
22 nominee on the beneficial owner's behalf.

24 **§629. Standing**

26 A shareholder may not commence or maintain a derivative
proceeding unless the shareholder:

28 1. **Shareholder; time became.** Was a shareholder of the
30 corporation at the time of the act or omission complained of or
became a shareholder through transfer by operation of law from
32 one who was a shareholder at that time; and

34 2. **Represents corporation.** Fairly and adequately
represents the interests of the corporation in enforcing the
36 right of the corporation.

38 **§630. Demand**

40 A shareholder may not commence a derivative proceeding until:

42 1. **Written demand.** A written demand has been made upon the
corporation to take suitable action; and

44 2. **Expiration period.** Ninety days have expired from the
46 date that demand was made unless the shareholder has earlier been
notified that the demand has been rejected by the corporation or
48 unless irreparable injury to the corporation would result by
waiting for the expiration of the 90-day period.

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§631. Stay of proceedings

If the corporation commences an inquiry into the allegations made in the demand or complaint, the court may stay any derivative proceeding for a period the court determines appropriate.

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§632. Dismissal

1. **Dismissal of proceeding.** A derivative proceeding must be dismissed by the court on motion by the corporation if one of the groups specified in subsection 2 or 6 has determined in good faith after conducting a reasonable inquiry that the maintenance of the derivative proceeding is not in the best interest of the corporation.

2. **Determination.** Unless a panel is appointed pursuant to subsection 6, the determination in subsection 1 must be made by:

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A. A majority vote of independent directors present at a meeting of the board of directors if the independent directors constitute a quorum; or

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B. A majority vote of a committee consisting of 2 or more independent directors appointed by majority vote of independent directors present at a meeting of the board of directors, whether or not the independent directors constitute a quorum.

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3. **Director; independent.** None of the following by itself cause a director to be considered not independent for purposes of this section:

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A. The nomination or election of the director by persons who are defendants in the derivative proceeding or against whom action is demanded;

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B. The naming of the director as a defendant in the derivative proceeding or as a person against whom action is demanded; or

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C. The approval by the director of the act being challenged in the derivative proceeding or demand if the act resulted in no personal benefit to the director.

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4. **Derivative proceeding.** If a derivative proceeding is commenced after a determination has been made rejecting a demand by a shareholder, the complaint must allege with particularity facts establishing either that a majority of the board of

2 directors did not consist of independent directors at the time
3 the determination was made or that the requirements of subsection
4 1 have not been met.

5 5. Burden of proof. If a majority of the board of
6 directors does not consist of independent directors at the time
7 the determination is made, the corporation has the burden of
8 proving that the requirements of subsection 1 have been met. If
9 a majority of the board of directors consists of independent
10 directors at the time the determination is made, the plaintiff
11 has the burden of proving that the requirements of subsection 1
12 have not been met.

13 6. Panel. The court may appoint a panel of one or more
14 independent persons upon motion by the corporation to make a
15 determination whether the maintenance of the derivative
16 proceeding is in the best interests of the corporation. The
17 plaintiff has the burden of proving that the requirements of
18 subsection 1 have not been met.

20 §633. Discontinuance or settlement

21 A derivative proceeding may not be discontinued or settled
22 without the court's approval. If the court determines that a
23 proposed discontinuance or settlement substantially affects the
24 interest of the corporation's shareholders or a class of
25 shareholders, the court shall direct that notice to be given to
26 the shareholders affected.

28 §634. Payment of expenses

29 On termination of a derivative proceeding the court may:

30 1. Corporation pay plaintiff's expenses. Order the
31 corporation to pay the plaintiff's reasonable expenses, including
32 counsel fees, incurred in the proceeding if the court finds that
33 the proceeding has resulted in a substantial benefit to the
34 corporation; or

35 2. Plaintiff pay defendant's expenses. Order the plaintiff
36 to pay any defendant's reasonable expenses, including counsel
37 fees, incurred in defending the proceeding if the court finds
38 that the proceeding was commenced or maintained without
39 reasonable cause or for an improper purpose.

40 §635. Applicability to foreign corporations

41 In a derivative proceeding in the right of a foreign
42 corporation, the matters covered by this chapter are governed by
43 the laws of the jurisdiction of incorporation of the foreign
44 corporation except for sections 631, 633 and 634.

