February 2, 1973

Robert A. Brown, Acting Commissioner — Banks and Banking

Martin L. Wilk, Assistant — Attorney General

Indemnification of Savings Bank Trustees

By memorandum dated January 29, 1973, you transmitted to this office a letter dated January 18, 1973 addressed to you from Messrs. Roger A. Putnam and Michael T. Healy (counsel for the Savings Bank Association of Maine) which presents various arguments why they feel savings banks are permitted, under the present statutes, to purchase trustee and officer liability insurance and to indemnify trustees and officers from personal liability for their official acts.

In your memorandum you indicate that both you and Jack Keene disagree with the position taken by Messrs. Putnam and Healy in their letter of January 18. As I understand it, it is your position that since 9 M.R.S.A. § 472 (2), which relates to compensation of trustees, does not specifically authorize indemnification, indemnification of trustees (as opposed to officers) is not permissible under the existing statutory provisions.

You have requested our comments with respect to the respective positions taken by Messrs. Putnam and Healy on the one hand, and by Jack Keene and you on the other. As shall appear more fully hereafter, it is our opinion both of you have overlooked important factors which should be considered in analyzing the problem, and that each of you have misconstrued the pertinent existing statutory provisions. In our view, limited indemnification or reimbursement of litigation expenses is permissible under the present statutes, but indemnification of the vast scope and nature provided in the general corporation laws, 13-A M.R.S.A. § 719, is not applicable to saving banks.

While there has been no Maine case precisely on point, the law appears to be well settled that even in the absence of specific statutory authority, in appropriate circumstances corporate officers and directors are entitled to reimbursement for litigation expenses. The extent to which reimbursement is permitted, as well as the circumstances under which reimbursement is deemed proper in the absence of statute, varies from jurisdiction to jurisdiction. Some courts have held that reimbursement

is only proper where the successful defense of a suit by an officer or director results in a benefit to the corporation, while others have held that irrespective of any showing of direct or tangible benefit, officers and directors vindicated on the merits are entitled to reimbursement for expenses reasonably incurred by them in connection with the litigation. See generally, Ballantine on Corporations, § 157, pp. 371-73 (Callaghan and Company 1946); Feuer, Personal Liabilities of Corporate Officers and Directors, pp. 205-208 (Prentice-Hall 1961); 19 Am Jur 2d "Corporations" §§ 1395-96, pp. 789-91; 39 A.L.R. 2d 580 "Attorneys fees and other expenses incident to controversy respecting internal affairs of corporation as charge against corporation."

In Maine, the question of the extent to which indemnification is proper has largely been eliminated by 13-A M.R.S.A. § 719. This statute provides far-reaching authority to indemnify officers and directors on a variety of situations and clearly goes far beyond the kind of indemnification or reimbursement permitted at common law. Ballantine, Feuer, 19 Am Jur 2d and 39 A.L.R. 2d, ibid. Accordingly, unless 13-A M.R.S.A. § 719 is applicable to savings banks, it is extremely questionable that such pervasive indemnification would be permitted by the courts.

Messrs. Putnam and Healy argue that 9 M.R.S.A. § 443 (1), which relates generally to the powers of savings banks, incorporates 13-A M.R.S.A. § 719 by reference. We disagree.

Section 443 (1) provides:

> "1. Subject to corporation laws and this Title. Each savings bank, lawfully organized, shall be subject, except as otherwise provided, to the laws of Maine regulating corporations in general. The powers, privileges, duties and restrictions conferred and imposed upon any savings bank, by whatever name known, in its charter or act of incorporation, are so far abridged, enlarged or modified, that every such charter or act shall conform to this Title. Every such corporation possesses the powers, rights and privileges, and is subject to the duties, restrictions and liabilities herein conferred and imposed, anything in their respective charters or acts of incorporation to the contrary notwithstanding." (Emphasis supplied)

It is clear from the foregoing language that the Legislature has "otherwise provided" with respect to the powers of savings banks. Subsection 1 itself provides that the " . . . powers . . . /of/ any savings bank . . . shall conform to this Title" and that a saving bank " . . . possesses the powers . . . herein conferred . . . " (Emphasis supplied)

Based upon this language alone, there would not appear to be any basis to claim broad powers conferred upon general business corporations pursuant to the general corporate statutes were meant to be incorporated into the savings bank statutes by reference.

This conclusion is further supported by § 443 (2) which enumerates the specific powers which savings banks shall have. Section 443 provides, in pertinent part:

> "2. Specific powers. Every savings bank, subject to the restrictions and limitations contained in this Title, shall have the following powers; . . .
>
> D. To make and amend bylaws consistent with law;"

The restrictive language in the first sentence of subparagraph "2" clearly vitiates any contention that a savings bank may enact bylaws which, although consistent with law, are inconsistent with the savings bank statutes.

In this connection it should also be noted that the general corporation law specifically provides that it shall not apply "to any class of corporations to the extent that any provision of any other public law is specifically applicable to such class of corporations" and is inconsistent with the general corporate law. 13-A M.R.S.A. § 103 (2).

In short, savings banks have only those powers enumerated or reasonably inferred from 443 (2). Had the legislature intended savings banks to have, in addition to the specifically enumerated powers, those powers conferred upon general corporations, it could have, and presumably would have, expressly conferred such additional powers.

With respect to your position, we do not feel that indemnification may properly be considered "compensation" or a "fringe benefit." See generally, 42 CJS § 3 "Indemnity" p. 566.

Accordingly, we do feel that legislation specifically conferring power upon savings banks to indemnify its trustees in the manner permitted to general business corporations law under 13-A M.R.S.A. § 719, would be required before savings banks had such power. However, we do not feel that the reasoning outlined in your memorandum would provide a sound basis for requiring such additional legislation.

Martin L. Wilk
Assistant Attorney General

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