

MAINE STATE LEGISLATURE

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ONE HUNDRED AND SEVENTH LEGISLATURE

Legislative Document

No. 611

H. P. 492 House of Representatives, February 11, 1975
Referred to Committee on Business Legislation. Sent up for concurrence
and ordered printed.

EDWIN H. PERT, Clerk

Presented by Mr. Lynch of Livermore Falls.
Cosponsor: Mr. Rollins of Dixfield.

STATE OF MAINE

IN THE YEAR OF OUR LORD NINETEEN HUNDRED
SEVENTY-FIVE

AN ACT Relating to the Indemnification Provisions of the Maine Business
Corporation Act.

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

13-A MRSA § 719, as enacted by PL 1971, c. 439, § 1, is repealed and the
following enacted in place thereof:

§ 719. Indemnification of officers, directors, employees and
agents; insurance

1. Corporations; power to indemnify. A corporation shall have power to
indemnify or if so provided in the bylaws shall in all cases indemnify any
person who was or is a party or is threatened to be made a party to any
threatened, pending or completed action, suit or proceeding whether civil,
criminal, administrative or investigative, by reason of the fact that he is or
was a director, officer, employee or agent of the corporation, or is or was
serving at the request of the corporation as a director, officer, employee or
agent of another corporation, partnership, joint venture, trust or other en-
terprise, against expenses, including attorneys' fees, judgments, fines and
amounts paid in settlement actually and reasonably incurred by him in con-
nection with such action, suit or proceeding; provided that no indemnification
shall be provided for any person with respect to any matter as to which he
shall have been finally adjudicated in any action, suit or proceeding not to
have acted in good faith in the reasonable belief that his action was in the
best interests of the corporation. The termination of any action, suit or pro-
ceeding by judgment, order or conviction adverse to such person, or by set-

tlement or plea of nolo contendere or its equivalent, shall not of itself create a presumption that such person did not act in good faith in the reasonable belief that his action was in the best interests of the corporation.

2. Right to indemnification. Any provision of subsections 1 or 3 to the contrary notwithstanding, to the extent that a director, officer, employee or agent of a corporation has been successful on the merits or otherwise in defense of any action, suit or proceeding referred to in subsection 1, or in defense of any claim, issue or matter therein, he shall be indemnified against expenses, including attorneys' fees, actually and reasonably incurred by him in connection therewith. The right to indemnification granted by this subsection may be enforced by a separate action against the corporation, if an order for indemnification has not been entered by a court in any action, suit or proceeding in respect of which indemnification is sought.

3. Applicable standard of conduct; determination. Any indemnification under subsection 1, unless ordered by a court or required by the bylaws, shall be made by the corporation only as authorized in the specific case upon a determination that indemnification of the director, officer, employee or agent is proper in the circumstances because he has met the applicable standard of conduct set forth in subsection 1. Such determination shall be made by the board of directors by a majority vote of a quorum consisting of directors who were not parties to such action, suit or proceeding, or if such a quorum is not obtainable, or even if obtainable if a quorum of disinterested directors so directs, by independent legal counsel in a written opinion, or by the shareholders. Such a determination, once made, whether by directors, counsel or shareholders, shall be irrevocable; and upon the making of such determination, the director, officer, employee or agent may enforce the indemnification against the corporation by a separate action against it, notwithstanding any attempted or actual subsequent action by the directors, counsel or shareholders.

4. Expenses of suit or proceeding. Expenses incurred in defending a civil or criminal action, suit or proceeding may be paid by the corporation in advance of the final disposition of such action, suit or proceeding, as authorized by the board of directors in the manner provided in subsection 3, upon receipt of an undertaking by or on behalf of the director, officer, employee or agent to repay such amount, unless it shall ultimately be determined that he is entitled to be indemnified by the corporation as authorized in this section.

5. Indemnification not exclusive of other rights. The indemnification provided by this section shall not be deemed exclusive of any other rights to which those indemnified may be entitled under any bylaw, agreement, vote of stockholders or disinterested directors or otherwise, both as to action in his official capacity and as to action in another capacity while holding such office, and shall continue as to a person who has ceased to be a director, officer, employee or agent and shall inure to the benefit of the heirs, executors and administrators of such a person. A right to indemnification required by the bylaws may be enforced by a separate action against the corporation, if

an order for indemnification has not been entered by a court in any action, suit or proceeding in respect of which indemnification is sought.

6. Insurance. A corporation shall have power to purchase and maintain insurance on behalf of any person who is or was a director, officer, employee or agent of the corporation, or is or was serving at the request of the corporation as a director, officer, employee or agent of another corporation, partnership, joint venture, trust or other enterprise against any liability asserted against him and incurred by him in any such capacity, or arising out of his status as such, whether or not the corporation would have the power to indemnify him against such liability under this section.

STATEMENT OF FACT

The purpose of this Act is to strengthen by amendment the indemnification provisions of the Maine Business Corporation Act by incorporating the greater protection of the comparable Massachusetts Statute, Section 67 of Chapter 156B.

The present law limits indemnification in derivative actions, those brought by or in the right of the corporation, to expenses only. This amendment extends full indemnification to derivative actions.

The proposed amendment clarifies the right of directors, officers, employees or agents of a corporation to enforce indemnification, which has been provided by the corporation by making such indemnification irrevocable and by providing for separate action against the corporation in the event indemnification is not upheld by the corporation.

This Act also changes the language of the standard of conduct to conform to the standard of conduct provided in the Massachusetts statute.