

# MAINE STATE LEGISLATURE

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FIRST REGULAR SESSION

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ONE HUNDRED AND TENTH LEGISLATURE

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**Legislative Document**

**No. 1323**

S. P. 467

In Senate, March 17, 1981

Referred to the Committee on Judiciary. Sent down for concurrence and ordered printed.

MAY M. ROSS, Secretary of the Senate

Presented by Senator Trafton of Androscoggin.

Cosponsors: Representative Thompson of South Portland, Senator Clark of Cumberland, Representative McGowan of Pittsfield.

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STATE OF MAINE

IN THE YEAR OF OUR LORD NINETEEN HUNDRED AND EIGHTY-ONE

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**AN ACT to Provide Equal Access to Justice for Small Business.**

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

Sec. 1. 5 MRSA § 9065 is enacted to read:

§ 9065. Costs and fees of parties

1. Intent and purpose. The Legislature finds that certain individuals, partnerships, corporations and labor and other organizations may be deterred from seeking review of, or defending against, unreasonable governmental action because of the expense involved in securing the vindication of their rights in administrative proceedings. The Legislature further finds that, because of the greater resources and expertise of the State Government, the standard for an award of fees against the State should be different from the standard governing an award against a private litigant in certain situations.

It is the purpose of this section:

A. To diminish the deterrent effect of seeking review of, or defending against, unreasonable governmental action by providing in special situations, an award of attorney fees, expert witness fees and other costs against the State; and

**B. To insure the applicability in actions by or against the State of the common law and statutory exceptions to the "American rule" respecting the award of attorney fees.**

**2. Definitions. As used in this section, unless the context otherwise indicates, the following terms have the following meanings.**

**A. "Adjudicatory proceeding" means any proceeding subject to this subchapter except a proceeding for the purposes of establishing or fixing a rate or for the purposes of granting or renewing a license.**

**B. "Fees and other expenses" means the reasonable expenses of expert witnesses, the cost of any study, analysis, engineering report, test or project which is found by the presiding officer of the agency to be reasonably necessary for the preparation of the party's case, the cost of the party's personal absence from business at an hourly rate, reasonable attorney or agent fees and other reasonable and necessary costs directly related to the party's case. The amount of fees awarded under this section shall be based upon prevailing market rates for the kind and quality of the services furnished, except that:**

**(1) No expert may be compensated at a rate in excess of the highest rate or compensation for experts paid by the agency involved; and**

**(2) Attorney fees may not be awarded in excess of \$60 per hour unless the agency determines that an increase in the cost of living or special factors, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee.**

**C. "Party" means a person whose legal rights, duties or privileges are at issue, but excludes any individual whose net worth exceeded \$1,000,000 at the time the adjudication was initiated and any sole owner of an unincorporated business or any partnership, corporation, association, including a cooperative association as defined in the Agricultural Marketing Act, United States Code, Title 12, Section 1141j, Paragraph (a) or organization whose net worth exceeded \$5,000,000 at the time the adjudication was initiation.**

**3. Costs and fees of parties. Any agency that conducts an adjudicatory proceeding subject to this section shall award, to a party with a direct and personal interest other than the State, fees and other expenses incurred by that party in connection with that proceeding, unless the presiding officer finds that the position of the agency as a party to the proceedings was substantially justified or that special circumstances make an award unjust. The award shall be made at the conclusion of any adjudicatory proceeding, including but not limited, to conclusions by a decision, an informal disposition or termination of the proceeding by the State. The presiding officer of the agency may reduce the amount to be awarded, or deny an award, to the extent that the private party during the course of the proceedings engaged in conduct which unduly and unreasonably protracted the final resolution of the matter in controversy. The decision of the presiding officer under this section shall be made a part of the record and shall include**

written findings and conclusions and the reason or basis for the findings and conclusions.

4. **Procedures.** Any agency authorized to conduct an adjudicatory proceeding shall by rule establish uniform procedures for the submission and consideration of applications for an award under this section.

5. **Appeal.** Any party dissatisfied with the fee determination by the agency may appeal to the Superior Court to review the merits of the underlying decision of the agency determination. If the court grants the petition, it may modify the determination of the agency if it finds that the failure to make an award, or the calculation of the amount of the award, was not substantially justified based upon a de novo of the record.

6. **Payment of fees.** Notwithstanding any other statute, the fees and other expenses awarded under this section shall be paid by the agency from any sums available to the agency, except that no amounts shall be appropriated to any agency specifically for the purpose of paying fees and other expenses awarded under this section.

7. **Report.** The Secretary of State shall report annually to the Legislature on the amount of fees and other expenses awarded during the preceding fiscal year pursuant to this section. The report shall describe the number, nature and amount of the awards, the claims involved in the controversy and any other relevant information which may aid the Legislature in evaluating the scope and impact of such awards. Each agency shall provide the Secretary of State with such information as he deems necessary to comply with the requirements of this subsection.

Sec. 2. 14 MRSA § 1502-B is enacted to read:

§ 1502-B. Costs to the State

1. **Intent and purpose.** The Legislature finds that certain individuals, partnerships, corporations, labor and other organizations may be deterred from seeking review of, or defending against, unreasonable governmental action because of the expense involved in securing the vindication of their rights in civil actions. The Legislature further finds that, because of the greater resources and expertise of the State Government, the standard for an award of fees against the State should be different from the standard governing an award against a private litigant in certain situations.

It is the purpose of this section:

- A. To diminish the deterrent effect of seeking review of, or defending against, unreasonable governmental action by providing in special situations, an award of attorney fees, expert witness fees and other costs against the State; and
- B. To insure the applicability in actions by or against the State of the common law and statutory exception to the "American rule" respecting the award of attorney fees.

**2. Definition.** As used in this section, unless the context otherwise indicates, “fees and other expenses” means the reasonable expenses of expert witnesses, the cost of any study, analysis, engineering report, test or project which is found by the court to be reasonably necessary for the preparation of the party’s case, the cost of the party’s personal absence from business at an hourly rate, reasonable attorney fees and other reasonable and necessary costs related to the party’s case. The amount of fees awarded under this section shall be based upon prevailing market rates for the kind and quality of the services furnished, except that:

**A.** No expert may be compensated at a rate in excess of the highest rate of compensation for experts paid by the United States; and

**B.** Attorney fees may not be awarded in excess of \$60 per hour unless the court determines that an increase in the cost of living or special factors, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee.

**3. Award of fees and expenses.** In addition to any costs which may be awarded pursuant to any other authority and except as otherwise specifically provided by statute, a court shall award fees and other expenses to any party other than the State which in any civil action, other than cases sounding in tort, brought by the State in any court having jurisdiction of that action, unless the court finds that the position of the State was substantially justified or that special circumstances make an award unjust. The court, in its discretion, may reduce the amount to be awarded pursuant to this section or deny an award, to the extent that the private party, during the course of the proceedings engaged in conduct which unduly and unreasonably protracted the final resolution of the matter in controversy. A party seeking an award of the fees and other expenses shall, within 30 days of final judgment in the action, submit to the court an application which provides evidence of the party’s eligibility for the award and the amount sought, including an itemized statement from attorneys and experts stating the actual time expended in representing such party and the rate at which fees were computed.

**A.** “Party” means any individual whose net worth is less than \$1,000,000 at the time the civil action was filed, any sole owner of an unincorporated business, or any partnership, corporation, association, including a cooperative association as defined in the Agricultural Marketing Act, United States Code, Title 12, Section 1141j, Paragraph (a), or organization whose net worth was less than \$5,000,000 at the time the civil action was filed.

**B.** “State” includes any department, agency or other organization and any official of the United States acting in his official capacity.

**4. Fees for adjudicatory proceeding.** In awarding fees and other expenses under this subsection to a private party in any action for judicial review of an agency adjudication conducted pursuant to the Maine Administrative Procedure Act, Title 5, chapter 375, the court shall include in the award the fees and other

expenses for services performed during the administrative proceedings unless the court finds that during such proceedings the position of the United States was substantially justified, or that special circumstances make an award unjust.

5. Source of award. Fees and other expenses awarded under this subsection shall be paid by the particular department, agency or other organization from sums appropriated to it except that no sums may be appropriated to any such department, agency or other organization specifically for the purpose of paying fees and other expenses awarded under this section.

6. Report. The Director of the Administrative Office of the Courts shall report annually to the Legislature the amount of fees and other expenses awarded during the preceding fiscal year pursuant to this section. The report shall describe the number, nature and amount of the awards, the claims involved in the controversy and any other relevant information which may aid the Legislature in evaluating the scope and impact of such awards.

#### STATEMENT OF FACT

In recent years there has been a dramatic increase in the regulation of small business, and in the number of administrative and judicial proceedings brought against small business by regulatory agencies. The "American rule," a legal principle developed 200 years ago, requires that each party shall bear the cost of his litigation. As a consequence, today small businesses frequently find themselves opposing government, with its vastly greater resources. Often, a small business owner will pay a fine or agree to some act, simply to avoid litigation.

The purpose of this bill is to remedy this situation by providing that the presiding officer, in the case of an adjudicatory proceeding, and the judge, in a civil court case, shall award fees and other expenses incurred by a small business in defending itself, unless the agency's action against the business was substantially justified or special circumstances make the award unjust.