

MAINE STATE LEGISLATURE

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L.D. 2549

(Filing No. S- 348)

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STATE OF MAINE
SENATE
113TH LEGISLATURE
SECOND REGULAR SESSION

7 SENATE AMENDMENT " A " to H.P. 1863, L.D. 2549,
8 Bill, "AN ACT to Amend the Maine Business Corporation
9 Act to Define the Liability of Directors and to
10 Modernize Indemnification Provisions."

11 Amend the bill by striking out all of section 2
12 and inserting in its place the following:

13 'Sec. 2. 13-A MRSA §719, as repealed and
14 replaced by PL 1975, c. 439, §7, is repealed and the
15 following enacted in its place:

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

18 1. A corporation shall have power to indemnify
19 or, if so provided in the bylaws, shall in all cases
20 indemnify, any person who was or is a party or is
21 threatened to be made a party to any threatened,
22 pending or completed action, suit or proceeding,
23 whether civil, criminal, administrative or
24 investigative, by reason of the fact that that person
25 is or was a director, officer, employee or agent of
26 the corporation, or is or was serving at the request
27 of the corporation as a director, officer, trustee,
28 partner, fiduciary, employee or agent of another
29 corporation, partnership, joint venture, trust,
30 pension or other employee benefit plan or other
31 enterprise, against expenses, including attorneys'

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1 fees, judgments, fines and amounts paid in settlement
2 actually and reasonably incurred by that person in
3 connection with such action, suit or proceeding;
4 provided that no indemnification may be provided for
5 any person with respect to any matter as to which that
6 person shall have been finally adjudicated:

7 A. Not to have acted honestly or in the
8 reasonable belief that that person's action was in
9 or not opposed to the best interests of the
10 corporation or its shareholders or, in the case of
11 a person serving as a fiduciary of an employee
12 benefit plan or trust, in or not opposed to the
13 best interests of that plan or trust, or its
14 participants or beneficiaries; or

15 B. With respect to any criminal action or
16 proceeding, to have had reasonable cause to
17 believe that that person's conduct was unlawful.

18 The termination of any action, suit or proceeding by
19 judgment, order or conviction adverse to that person,
20 or by settlement or plea of nolo contendere or its
21 equivalent, shall not of itself create a presumption
22 that that person did not act honestly or in the
23 reasonable belief that that person's action was in or
24 not opposed to the best interests of the corporation
25 or its shareholders or, in the case of a person
26 serving as a fiduciary of an employee benefit plan or
27 trust, in or not opposed to the best interests of that
28 plan or trust or its participants or beneficiaries
29 and, with respect to any criminal action or
30 proceeding, had reasonable cause to believe that that
31 person's conduct was unlawful.

32 1-A. Notwithstanding any provision of subsection
33 1, a corporation shall not have the power to indemnify
34 any person with respect to any claim, issue or matter
35 asserted by or in the right of the corporation as to
36 which that person is finally adjudicated to be liable
37 to the corporation unless the court in which the
38 action, suit or proceeding was brought shall determine
39 that, in view of all the circumstances of the case,
40 that person is fairly and reasonably entitled to
41 indemnity for such amounts as the court shall deem
42 reasonable.

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1 2. Any provision of subsection 1, 1-A or 3 to the
2 contrary notwithstanding, to the extent that a
3 director, officer, employee or agent of a corporation
4 has been successful on the merits or otherwise in
5 defense of any action, suit or proceeding referred to
6 in subsection 1 or 1-A, or in defense of any claim,
7 issue or matter therein, that director, officer,
8 employee or agent shall be indemnified against
9 expenses, including attorneys' fees, actually and
10 reasonably incurred by that director, officer,
11 employee or agent in connection therewith. The right
12 to indemnification granted by this subsection may be
13 enforced by a separate action against the corporation,
14 if an order for indemnification is not entered by a
15 court in the action, suit or proceeding wherein that
16 director, officer, employee or agent was successful on
17 the merits or otherwise.

18 3. Any indemnification under subsection 1, unless
19 ordered by a court or required by the bylaws, shall be
20 made by the corporation only as authorized in the
21 specific case upon a determination that
22 indemnification of the director, officer, employee or
23 agent is proper in the circumstances and in the best
24 interests of the corporation. That determination
25 shall be made by the board of directors by a majority
26 vote of a quorum consisting of directors who were not
27 parties to that action, suit or proceeding, or if such
28 a quorum is not obtainable, or even if obtainable, if
29 a quorum of disinterested directors so directs, by
30 independent legal counsel in a written opinion, or by
31 the shareholders. Such a determination once made may
32 not be revoked and, upon the making of that
33 determination, the director, officer, employee or
34 agent may enforce the indemnification against the
35 corporation by a separate action notwithstanding any
36 attempted or actual subsequent action by the board of
37 directors.

38 4. Expenses incurred in defending a civil,
39 criminal, administrative or investigative action, suit
40 or proceeding may be authorized and paid by the
41 corporation in advance of the final disposition of
42 that action, suit or proceeding upon a determination
43 made in accordance with the procedure established in

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1 subsection 3 that, based solely on the facts then
2 known to those making the determination and without
3 further investigation, the person seeking
4 indemnification satisfied the standard of conduct
5 prescribed by subsection 1, or if so provided in the
6 bylaws, these expenses shall in all cases be
7 authorized and paid by the corporation in advance of
8 the final disposition of that action, suit or
9 proceeding upon receipt by the corporation of:

10 A. A written undertaking by or on behalf of the
11 officer, director, employee or agent to repay that
12 amount if that person is finally adjudicated:

13 (1) Not to have acted honestly or in the
14 reasonable belief that that person's action
15 was in or not opposed to the best interests
16 of the corporation or its shareholders or, in
17 the case of a person serving as a fiduciary
18 of an employee benefit plan or trust, in or
19 not opposed to the best interests of such
20 plan or trust or its participants or
21 beneficiaries;

22 (2) With respect to any criminal action or
23 proceeding, to have had reasonable cause to
24 believe that the person's conduct was
25 unlawful; or

26 (3) With respect to any claim, issue or
27 matter asserted in any action, suit or
28 proceeding brought by or in the right of the
29 corporation, to be liable to the corporation,
30 unless the court in which that action, suit
31 or proceeding was brought permits
32 indemnification in accordance with subsection
33 2; and

34 B. A written affirmation by the officer,
35 director, employee or agent that the person has
36 met the standard of conduct necessary for
37 indemnification by the corporation as authorized
38 in this section.

39 The undertaking required by paragraph A shall be an
40 unlimited general obligation of the person seeking the

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1 advance, but need not be secured and may be accepted
2 without reference to financial ability to make the
3 repayment.

4 5. The indemnification and entitlement to
5 advances of expenses provided by this section shall
6 not be deemed exclusive of any other rights to which
7 those indemnified may be entitled under any bylaw,
8 agreement, vote of stockholders or disinterested
9 directors or otherwise, both as to action in that
10 person's official capacity and as to action in another
11 capacity while holding such office, and shall continue
12 as to a person who has ceased to be a director,
13 officer, employee, agent, trustee, partner or
14 fiduciary and shall inure to the benefit of the heirs,
15 executors and administrators of such a person. A
16 right to indemnification required by the bylaws may be
17 enforced by a separate action against the corporation,
18 if an order for indemnification has not been entered
19 by a court in any action, suit or proceeding in
20 respect to which indemnification is sought.

21 6. A corporation shall have power to purchase and
22 maintain insurance on behalf of any person who is or
23 was a director, officer, employee or agent of the
24 corporation, or is or was serving at the request of
25 the corporation as a director, officer, trustee,
26 partner, fiduciary, employee or agent of another
27 corporation, partnership, joint venture, trust,
28 pension or other employee benefit plan or other
29 enterprise against any liability asserted against that
30 person and incurred by that person in any such
31 capacity, or arising out of that person's status as
32 such, whether or not the corporation would have the
33 power to indemnify that person against such liability
34 under this section.

35 7. For purposes of this section, references to
36 the "corporation" shall include, in addition to the
37 surviving corporation or new corporation, any
38 participating corporation in a consolidation or
39 merger.

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STATEMENT OF FACT

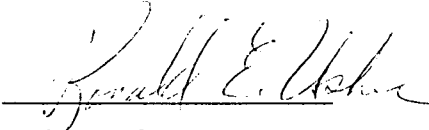
2 This amendment is presented on behalf of the
3 Committee on Bills in Second Reading to correct a
4 technical error.

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5115031888

6 (Sen. USHER)

7 SPONSORED BY:

A handwritten signature in cursive script, appearing to read "Ronald E. Usher", is written over a horizontal line.

8

COUNTY: Cumberland

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