

MAINE STATE LEGISLATURE

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1 c. 394, §2, is further amended by adding at the end a
2 new paragraph to read:

3 A director shall not be held personally liable for
4 monetary damages for failure to discharge any duty as
5 a director unless the director is found not to have
6 acted honestly or in the reasonable belief that the
7 action was in or not opposed to the best interests of
8 the corporation or its shareholders.

9 **Sec. 2. 13-A MRSA §719, as repealed and**
10 **replaced by PL 1975, c. 439, §7, is amended to read:**

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

13 1. A corporation shall have power to indemnify,
14 or if so provided in the bylaws shall in all cases
15 indemnify, any person who was or is a party or is
16 threatened to be made a party to any threatened,
17 pending or completed action, suit or proceeding,
18 whether civil, criminal, administrative or
19 investigative, by reason of the fact that he is or was
20 a director, officer, employee or agent of the
21 corporation, or is or was serving at the request of
22 the corporation as a director, officer, trustee,
23 partner, fiduciary, employee or agent of another
24 corporation, partnership, joint venture, trust,
25 pension or other employee benefit plan or other
26 enterprise, against expenses, including attorney's
27 attorneys' fees, judgments, fines and amounts paid in
28 settlement actually and reasonably incurred by him in
29 connection with such action, suit or proceeding;
30 provided that no indemnification shall be provided for
31 any person with respect to any matter as to which he
32 shall have been finally adjudicated in any action,
33 suit or proceeding not to have acted in good faith in
34 the reasonable belief that his action was in the best
35 interests of the corporation or, with respect to any
36 criminal action or proceeding, had reasonable cause to
37 believe that his conduct was unlawful.:

38 A. Not to have acted honestly or in the
39 reasonable belief that that person's action was in
40 or not opposed to the best interests of the

1 corporation or its shareholders or, in the case of
2 a person serving as a fiduciary of an employee
3 benefit plan or trust, in or not opposed to the
4 best interests of that plan or trust or its
5 participants or beneficiaries; or

6 B. With respect to any criminal action or
7 proceeding, to have had reasonable cause to
8 believe that that person's conduct was unlawful.

9 The termination of any action, suit or proceeding by
10 judgment, order or conviction adverse to such person,
11 or by settlement or plea of nolo contendere or its
12 equivalent, shall not of itself create a presumption
13 that such person did not act in good faith honestly
14 or in the reasonable belief that his action was in or
15 not opposed to the best interests of the corporation
16 or its shareholders or, in the case of a person
17 serving as a fiduciary of an employee benefit plan or
18 trust, in or not opposed to the best interests of that
19 plan or trust or its participants or beneficiaries
20 and, with respect to any criminal action or
21 proceeding, had reasonable cause to believe that his
22 conduct was unlawful.

23 1-A. Notwithstanding any provision of subsection
24 1, a corporation shall not have the power to indemnify
25 any person with respect to any claim, issue or matter
26 asserted by or in the right of the corporation as to
27 which that person is finally adjudicated to be liable
28 to the corporation unless the court in which the
29 action, suit or proceeding was brought shall determine
30 that, in view of all the circumstances of the case,
31 that person is fairly and reasonably entitled to
32 indemnity for such amounts as the court shall deem
33 reasonable.

34 2. Any provision of subsections subsection 1,
35 1-A or 3 to the contrary notwithstanding, to the
36 extent that a director, officer, employee or agent of
37 a corporation has been successful on the merits or
38 otherwise in defense of any action, suit or proceeding
39 referred to in subsection 1 or 1-A, or in defense of
40 any claim, issue or matter therein, he shall be
41 indemnified against expenses, including attorneys'

1 fees, actually and reasonably incurred by him in
2 connection therewith. The right to indemnification
3 granted by this subsection may be enforced by a
4 separate action against the corporation, if an order
5 for indemnification is not entered by a court in the
6 action, suit or proceeding wherein he was successful
7 on the merits or otherwise.

8 3. Any indemnification under subsection 1, unless
9 ordered by a court or required by the bylaws, shall be
10 made by the corporation only as authorized in the
11 specific case upon a determination that
12 indemnification of the director, officer, employee or
13 agent is proper in the circumstances because he has
14 met the applicable standard of conduct set forth in
15 subsection 1 and in the best interests of the
16 corporation. Such determination shall be made by the
17 board of directors by a majority vote of a quorum
18 consisting of directors who were not parties to such
19 action, suit or proceeding, or if such a quorum is not
20 obtainable, or even if obtainable, if a quorum of
21 disinterested directors so directs, by independent
22 legal counsel in a written opinion, or by the
23 shareholders. Such a determination, once made by
24 the board of directors may not be revoked by the
25 board of directors, and, upon the making of such
26 determination by the board of directors, the
27 director, officer, employee or agent may enforce the
28 indemnification against the corporation by a separate
29 action notwithstanding any attempted or actual
30 subsequent action by the board of directors.

31 4. Expenses incurred in defending a civil, or
32 criminal, administrative or investigative action, suit
33 or proceeding may as authorized by the board of
34 directors in the manner provided in subsection 3 upon
35 receipt of an undertaking by or on behalf of the
36 director, officer, employee or agent to repay such
37 amount, unless it shall ultimately be determined that
38 he is entitled to be indemnified by the corporation as
39 authorized in this section be authorized and paid by
40 the corporation in advance of the final disposition of
41 that action, suit or proceeding upon a determination
42 made in accordance with the procedure established in
43 subsection 3 that, based solely on the facts then

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

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

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

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

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

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

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

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 his
10 official capacity and as to action in another capacity
11 while holding such office, and shall continue as to a
12 person who has ceased to be a director, officer,
13 employee, ~~or~~ agent, trustee, partner or fiduciary
14 and shall inure to the benefit of the heirs, executors
15 and administrators of such a person. A right to
16 indemnification required by the bylaws may be enforced
17 by a separate action against the corporation, if an
18 order for indemnification has not been entered by a
19 court in any action, suit or proceeding in respect to
20 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 him
30 and incurred by him in any such capacity, or arising
31 out of his status as such, whether or not the
32 corporation would have the power to indemnify him
33 against such liability under this section.

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

38 STATEMENT OF FACT

39 This new draft deletes all portions of the
40 original bill which relate to nonprofit corporations.

1 It replaces the provision in the original bill
2 allowing corporations to give immunity to directors
3 with a new provision in section 1 that states the
4 liability of directors according to the business
5 judgment rule. The new draft keeps the
6 indemnification provisions from the original bill.
7 The indemnification section of current law is
8 modernized and amended to reflect the business
9 judgment rule stated in section 1 of this new draft.

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