

# MAINE STATE LEGISLATURE

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# 118th MAINE LEGISLATURE

## FIRST REGULAR SESSION-1997

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Legislative Document

No. 893

S.P. 285

In Senate, February 6, 1997

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**An Act to Conform the Provisions of the Maine Business Corporation  
Act Regarding Derivative Proceedings to the Provisions of the Federal  
Revised Model Business Corporations Act.**

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Reference to the Committee on Business and Economic Development suggested and  
ordered printed.

A handwritten signature in cursive script, reading "Joy J. O'Brien".

JOY J. O'BRIEN  
Secretary of the Senate

Presented by Senator BENOIT of Franklin.

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

4 **Sec. 1. 13-A MRSA §627**, as amended by PL 1973, c. 455, is  
repealed.

6 **Sec. 2. 13-A MRSA §§628 to 635** are enacted to read:

8 **§628. Definitions**

10 As used in sections 628 to 635, unless the context otherwise  
12 indicates, the following terms have the following meanings.

14 **1. Derivative proceeding.** "Derivative proceeding" means a  
16 civil suit in the right of a domestic corporation or, to the  
extent provided in section 635, in the right of a foreign  
corporation.

18 **2. Shareholder.** "Shareholder," in addition to the meaning  
20 set forth in section 102, subsection 17, includes a beneficial  
owner whose shares are held in a voting trust or held by a  
nominee on the beneficial owner's behalf.

22 **§629. Standing**

24 A shareholder may not commence or maintain a derivative  
26 proceeding unless the shareholder:

28 **1. Shareholder; time became.** Was a shareholder of the  
30 corporation at the time of the act or omission complained of or  
became a shareholder through transfer by operation of law from  
one who was a shareholder at that time; and

32 **2. Represents corporation.** Fairly and adequately  
34 represents the interests of the corporation in enforcing the  
right of the corporation.

36 **§630. Demand**

38 A shareholder may not commence a derivative proceeding until:

40 **1. Written demand.** A written demand has been made upon the  
42 corporation to take suitable action; and

44 **2. Expiration period.** Ninety days have expired from the  
46 date that demand was made unless the shareholder has earlier been  
notified that the demand has been rejected by the corporation or  
48 unless irreparable injury to the corporation would result by  
waiting for the expiration of the 90-day period.

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**§631. Stay of proceedings**

If the corporation commences an inquiry into the allegations made in the demand or complaint, the court may stay any derivative proceeding for a period the court determines appropriate.

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**§632. Dismissal**

1. **Dismissal of proceeding.** A derivative proceeding must be dismissed by the court on motion by the corporation if one of the groups specified in subsection 2 or 6 has determined in good faith after conducting a reasonable inquiry that the maintenance of the derivative proceeding is not in the best interest of the corporation.

2. **Determination.** Unless a panel is appointed pursuant to subsection 6, the determination in subsection 1 must be made by:

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A. A majority vote of independent directors present at a meeting of the board of directors if the independent directors constitute a quorum; or

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B. A majority vote of a committee consisting of 2 or more independent directors appointed by majority vote of independent directors present at a meeting of the board of directors, whether or not the independent directors constitute a quorum.

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3. **Director; independent.** None of the following by itself cause a director to be considered not independent for purposes of this section:

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A. The nomination or election of the director by persons who are defendants in the derivative proceeding or against whom action is demanded;

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B. The naming of the director as a defendant in the derivative proceeding or as a person against whom action is demanded; or

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C. The approval by the director of the act being challenged in the derivative proceeding or demand if the act resulted in no personal benefit to the director.

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4. **Derivative proceeding.** If a derivative proceeding is commenced after a determination has been made rejecting a demand by a shareholder, the complaint must allege with particularity facts establishing either that a majority of the board of

2 directors did not consist of independent directors at the time  
3 the determination was made or that the requirements of subsection  
4 1 have not been met.

5 5. Burden of proof. If a majority of the board of  
6 directors does not consist of independent directors at the time  
7 the determination is made, the corporation has the burden of  
8 proving that the requirements of subsection 1 have been met. If  
9 a majority of the board of directors consists of independent  
10 directors at the time the determination is made, the plaintiff  
11 has the burden of proving that the requirements of subsection 1  
12 have not been met.

13 6. Panel. The court may appoint a panel of one or more  
14 independent persons upon motion by the corporation to make a  
15 determination whether the maintenance of the derivative  
16 proceeding is in the best interests of the corporation. The  
17 plaintiff has the burden of proving that the requirements of  
18 subsection 1 have not been met.

### 20 §633. Discontinuance or settlement

21 A derivative proceeding may not be discontinued or settled  
22 without the court's approval. If the court determines that a  
23 proposed discontinuance or settlement substantially affects the  
24 interest of the corporation's shareholders or a class of  
25 shareholders, the court shall direct that notice to be given to  
26 the shareholders affected.

### 28 §634. Payment of expenses

29 On termination of a derivative proceeding the court may:

30 1. Corporation pay plaintiff's expenses. Order the  
31 corporation to pay the plaintiff's reasonable expenses, including  
32 counsel fees, incurred in the proceeding if the court finds that  
33 the proceeding has resulted in a substantial benefit to the  
34 corporation; or

35 2. Plaintiff pay defendant's expenses. Order the plaintiff  
36 to pay any defendant's reasonable expenses, including counsel  
37 fees, incurred in defending the proceeding if the court finds  
38 that the proceeding was commenced or maintained without  
39 reasonable cause or for an improper purpose.

### 40 §635. Applicability to foreign corporations

41 In a derivative proceeding in the right of a foreign  
42 corporation, the matters covered by this chapter are governed by  
43 the laws of the jurisdiction of incorporation of the foreign  
44 corporation except for sections 631, 633 and 634.

2           **Sec. 3. Application.** Notwithstanding the terms of the Maine  
Revised Statutes, Title 1, section 302, Title 13-A, sections 628  
4 to 635 as enacted by this Act apply to any derivative proceeding  
currently pending against a domestic corporation.  
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**SUMMARY**

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12           This bill repeals section 627 of the Maine Business  
Corporation Act and replaces it with the appropriate provisions  
14 from the Revised Model Business Corporation Act. In 1990,  
following extensive study and debate, the American Bar  
16 Association's Committee on Corporate Laws completed a revision of  
the derivative suit sections of the model act. Those provisions  
18 of the model act, which have been adopted in whole or with minor  
changes by 13 states, strike a balance between a corporation's  
20 right to govern its own business and be free from meritless,  
resource-draining suits on the one hand, and the shareholders'  
22 legitimate need to protect the interest of the corporation  
through use of the court system on the other.