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## Maine Corporation Law & Practice, 2nd Edition

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## BOOK REVIEW

### *MAINE CORPORATION LAW & PRACTICE, 2ND EDITION*

by James B. Zimpritch, Esq.

(Standish, Maine: Tower Publishing, 2004, pp. 646, \$145.00)

*Reviewed by George F. Eaton, II, and Kristy M. Smith*

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## BOOK REVIEW

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## I. BACKGROUND

In 2001, several members of the Business Law Section of the Maine Bar Association convened the Corporate Law Revision Committee (the Committee), which set out to adapt the Model Business Corporation Act<sup>1</sup> (the Model Act) for use in Maine. Maine's corporation law had not benefited from a comprehensive overhaul since 1971, and notwithstanding periodic updates of specific components of the statutory regime over the years, a thorough and comprehensive revision was needed to keep pace with modern corporate law and practice in the twenty-first century.<sup>2</sup> The Committee's efforts, under the leadership of James B. Zimpritch, Esq., widely acknowledged as the "Dean" of Maine's corporate bar, resulted in a new Maine Business Corporation Act, codified in Title 13-C of the Maine Revised Statutes (the New Act), taking effect on July 1, 2003 and replacing Title 13-A of the Maine Revised Statutes (the Prior Act).<sup>3</sup>

While operating under the Prior Act, practitioners, judges and scholars in the State of Maine had come to rely heavily on the first edition of Zimpritch's *Maine Corporation Law & Practice*<sup>4</sup> (Zimpritch, 1st. ed.) as the primary authority on the Prior Act. Zimpritch, 1st ed. served both as a practical user's guide for the occasional corporate law practitioner and as a source of thorough and scholarly discussion of the finer points of Maine's corporate law for those practitioners and academics who considered corporate law their familiar waters, but who nevertheless appreciated a reliable navigational aid when the fog descended or when exploring an unfamiliar cove in an otherwise familiar bay.

II. JAMES B. ZIMPRITCH, MAINE CORPORATION LAW & PRACTICE  
(2ND ED., 2004)

While much of the New Act has the look and feel of the Prior Act, in the process of refining and adding flexibility to Maine's traditional corporate law con-

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1. MODEL BUS. CORP. ACT (3d. ed. 1998, Supp. 2000/01/02).

2. *Rewriting Maine's Business Corporation Act* 17 ME. B. J. 40, 41 (Maine State Bar Association 2002).

3. P.L. 2002, ch. 640. Subsequently, P.L. 2003, ch. 344 was enacted making several house-keeping, conforming changes, and other amendments to the New Act. P.L. 2003, ch. 344 was also effective on July 1, 2003. The second edition of Zimpritch's *Maine Corporation Law & Practice* is current through the 2004 changes to the Maine Business Corporation Act, and supplements are planned to keep the treatise current. JAMES B. ZIMPRITCH, MAINE CORPORATION LAW & PRACTICE (Tower Publishing, 2d ed. 2004) (1993) [hereinafter ZIMPRITCH, 2d ed.].

4. JAMES B. ZIMPRITCH, MAINE CORPORATION LAW & PRACTICE (Prentice Hall Law & Business 1993).

cepts and principles, many fundamental changes were adopted, and several important differences have surfaced between the New Act and the Prior Act—differences that create new opportunities, ambiguities, and traps for the unwary. Thus, the notion of sailing among the rocks and shoals of the harbors and bays presented by the New Act without a second edition of the Zimpritch book close at hand was unthinkable among members of the Maine corporate bar. It was not until Zimpritch's 2nd Edition of *Maine Corporation Law & Practice*<sup>5</sup> (Zimpritch, 2nd ed.) became available in late 2004 that Maine corporate practitioners were armed with state-of-the-art instruments necessary to fathom the nuances of the New Act and take advantage of its many new opportunities.

Zimpritch's concise style and organizational approach are clearly geared to meet the needs of the general practitioner while at the same time satisfying the sometimes more complex needs of the corporate bar, legal scholars, or the judiciary. The treatise is organized into seventeen chapters corresponding to each chapter of the New Act, followed by a final chapter covering the Revised Maine Securities Act.<sup>6</sup> In each chapter Zimpritch lucidly explains the statute and case law, identifies both evident and more obscure legal issues, occasionally offers his own valued opinion, and provides detailed footnotes loaded with citations and commentary pointing the reader to additional resources for further insight into particular issues. Because Maine is not a bastion of corporate law and corporate litigation, the abundant information in the footnotes, pointing the reader to more fertile ground, is at least as important and rewarding to the reader as the text itself.

Zimpritch provides numerous references to the Model Act and its official commentary, which is continuously updated by the American Bar Association's Committee on Corporate Laws. One hopes that Maine corporate law under the New Act will benefit by its reliance on the Model Act, which has been adopted in over half of the states<sup>7</sup> and is thought to represent the state-of-the-art in corporate law.

### III. ZIMPRITCH, 2ND EDITION AS A TOOL FOR COUNSELORS TO CLOSELY HELD CORPORATIONS

A comprehensive discussion of Zimpritch, 2nd ed. and the New Act is beyond the scope of this book review. However, much of a corporate lawyer's time and

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5. ZIMPRITCH, 2d ed., *supra* note 3.

6. ME. REV. STAT. ANN. tit. 32, §§ 10101-10713 (West 1999 and Supp. 2004).

7. All or substantially all of the provisions of the Model Act have been adopted in 26 states. See state corporation statutes beginning at the following citations: ALA. CODE § 10-2B-1.01(2004); ARIZ. REV. STAT. § 10-120 (2004); ARK. CODE ANN. § 4-27-101 (West 2005); CONN. GEN. STAT. ANN. § 33-600 (West 2005); FLA. STAT. ANN. § 607.0101 (West 2005); GA. CODE ANN. § 14-2-101 (West 2005); IDAHO CODE § 30-1-101 (West 2005); IND. CODE ANN. § 23-1-17-1 (West 2005); IOWA CODE § 490.101 (2005); KY. REV. STAT. ANN. § 271B.1-010 (West 2005); ME. REV. STAT. ANN. tit. 13-C § 101 (West 2005); MISS. CODE ANN. § 79-4-1.01 (2005); MONT. CODE ANN. § 35-1-112 (2005); NEB. REV. STAT. § 21-2001 (2005); N.H. REV. STAT. ANN. § 239-A:1.01 (2005); N.C. GEN. STAT. § 55-1-01 (2005); OR. REV. STAT. § 60.001 (2005); R.I. GEN. LAWS § 7-1.2-101 (2005) (effective July 1, 2005); S.C. CODE ANN. § 33-1-101 (2005); TENN. CODE ANN. § 48-11-101 (2005); UTAH CODE ANN. § 16-10a-101 (2005); VT. STAT. ANN. tit 11A § 1.01 (2005); VA. CODE ANN. § 13.1-601 (West 2005); WASH. REV. CODE § 23B.01.010 (2005); WIS. STAT. ANN. § 180.0101 (2005); WYO. STAT. ANN. § 17-16-101 (West 2005). Five jurisdictions have adopted their corporate statutes based on the 1969 version of the Model Act. See ALASKA STAT. § 10.01.005 (West 2004); D.C. CODE ANN. § 29-101.01 (2005); HAW. REV. STAT. § 414-1 (2005); N.M. STAT. ANN. § 53-11-1 (West 2005); S.D. CODIFIED LAWS § 47-1 (West 2005).

skill should be devoted to properly structuring corporations and the relationship among their stakeholders<sup>8</sup> at the formative stage. Capable corporate lawyers should customize articles of incorporation, bylaws, and shareholder agreements to the specific needs of the stakeholders, rather than adopting a one-size-fits-all boilerplate approach. Under the New Act, new concepts of corporate finance and increased flexibility in "private ordering" permitted in shareholder agreements provide corporate practitioners with more opportunities, and arguably more responsibility, to properly customize (and oftentimes dramatically simplify) closely held corporate organizational documents to address precisely the circumstances and needs of the entity's stakeholders. Most general practitioners with a significant closely held corporate component to their practice will find that Chapters 6 (Corporate Finance), 7 (Shareholders), and 8 (Directors and Officers) of the treatise contain the most important information and advice with respect to the proper formation of new closely held corporations.<sup>9</sup>

### A. Increased Flexibility in Corporate Finance

Zimpritch intelligibly and thoughtfully introduces the many changes adopted under the New Act with respect to corporate finance. The Committee sought to modernize this section of the Maine corporation statute and increase the flexibility afforded to small business corporations in this area. In doing so, it proposed adoption of sections 601 and 602 of the New Act, which allow the board of directors of a corporation to create partnership-like attributes for a corporation's shares. Practitioners should use this flexibility to tailor the rights and preferences of shares to the specific needs of their corporate client. Section 601 of the New Act, *inter alia*, eliminates the traditional rule that shares within a single class of stock must be treated equally and allows for variation among holders of the same class of stock as long as it is set forth in the articles of incorporation.<sup>10</sup> Zimpritch offers a com-

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8. The Authors use the word "stakeholders" to refer not only to stockholders, but also to holders of other securities issued by the corporation, as well as directors, officers, agents, employees, and others with an economic interest or governance role in the enterprise.

9. ZIMPRITCH, 2nd ed., *supra* note 3. Closely-held corporations are quite different from large corporations, and the thoughtful practitioner should draft corporate documents with these differences in mind.

[From the perspective of] the majority of academics who identify themselves as corporate law scholars . . . corporate law is really the law of the megafirm characterized by passive owners who hold diversified portfolios and whose risk is defined by the amount invested in each stock within the portfolio. For publicly-held firms, law's efforts are directed to issues of governance and management accountability. At least in theory, most partnerships and close corporations share the common characteristics of owners who are small enough in numbers to be capable of private ordering through contract. Their investments in their firms often are substantial, nondiversified, and illiquid. The exit option provided by securities markets serving shareholders in publicly-held firms is not available, with the consequence that disgruntled shareholders in close corporations must suffer their unhappy circumstances for extended periods of time. Moreover, these owners may invest their energy as well as their money, and a quick glance at a balance sheet to assess capital contributions provides only a small measure of what they have invested in their firms.

Robert W. Hillman, *THE BARGAIN IN THE FIRM: PARTNERSHIP LAW, CORPORATE LAW, AND PRIVATE ORDERING WITHIN CLOSELY-HELD BUSINESS ASSOCIATIONS* (2004), Section IV, available at <http://home.law.uiuc.edu/~ribstein/Hillman.doc>.

10. ME. REV. STAT. ANN. tit. 13-C, § 601(5) (West 2005).

prehensive discussion of some circumstances under which a corporation can utilize disparate treatment of shares to the advantage of minority shareholders to protect their interests from a hostile takeover.<sup>11</sup> Furthermore, section 622 of the New Act reverses a troublesome provision of the Prior Act by allowing future consideration, such as future services or investor promissory notes, to be accepted as payment for the issuance of shares.<sup>12</sup>

The combined effect of these two changes would allow the issuance of shares within a single class of stock to a passive financial investor and an individual active in the business who receives shares by virtue of her commitment to perform future services. That class of shares could nevertheless provide that shareholders who contribute money for shares would be entitled to a priority return on their investment through dividend or profit distributions ahead of shareholders who committed to perform services for shares.<sup>13</sup>

As one commentator states, "Section [601] sanctions, even invites, unlimited creativity in designing forms of equity investment to meet investment needs."<sup>14</sup> Subsection 3 authorizes one or more series or classes of stock that (1) have special, conditional or limited voting rights or no right to vote (subject to statutory voting requirements); (2) are redeemable or convertible under several different circumstances; (3) are entitled to distributions calculated in any manner; or (4) have distribution preferences over other classes or series of stock.<sup>15</sup> Section 601(3) is not intended to be an exclusive listing of the characteristics that may be attributed to shares of a corporation.<sup>16</sup> Practitioners must be cognizant, however, that a detailed description of the rights associated with various series or classes of shares must be included in the articles of incorporation.<sup>17</sup>

### *B. New Options for Private Ordering and Shareholder Agreements*

In section 7.14, Zimpritch discusses private ordering and shareholder agreements under section 743 of the New Act<sup>18</sup> and explains the tremendous flexibility available under the New Act for structuring closely-held corporations. Zimpritch offers a comprehensive historical look at the development of the shareholder agreement leading up to the adoption of section 743.<sup>19</sup> Practitioners would be wise to familiarize themselves with the contents of this section and should strive to utilize all that the New Act has to offer for the benefit of their clients. Section 743 allows closely-held corporations to create a "private order" that is *otherwise inconsistent with* traditional notions of corporate governance, thereby allowing small corporations to tailor their business practices to their specific needs.<sup>20</sup>

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11. ZIMPRITCH, 2d ed., *supra* note 3, § 6.3[c].

12. ME. REV. STAT. ANN. tit. 13-C, § 622(2) (West 2005).

13. Of course practitioners would need to be mindful of the tax implications of such an arrangement, such as the limitation of not more than one class of stock for an S corporation. I.R.C. § 1361(b)(1)(D) (West 2002).

14. Bayless Manning, *Assets in and Assets out: Chapter VI of the Revised Model Business Corporation Act*, 63 TEX. L. REV. 1527, 1531 (1985).

15. ME. REV. STAT. ANN. tit. 13-C, § 601(3) (West 2005).

16. *Id.*

17. ZIMPRITCH, 2d ed., *supra* note 3, § 6.3[a].

18. *Id.* § 7.14.

19. *Id.* § 7.14[a], at 186-87.

20. *Id.* at 186.

Small business owners often seek the advice of counsel initially for assistance in determining whether it is in the best interests of the company to organize as a corporate entity. Initial consultation frequently involves discussion as to the choices of entities available to business owners and the advantages and disadvantages of each as they pertain to the needs and desires of the particular client. Small business owners and practitioners alike may be reluctant to opt for a corporate form because of the perceived rigidity that comes with corporate governance and may instead tend to lean towards the LLC form because of the flexibility that an operating agreement affords the company. The ability to create a private-order corporation means "shareholders will have greater freedom to 'tailor the rules of their enterprise' to their needs, [and may rely on the fact] that such private ordering will be upheld by the courts."<sup>21</sup>

Section 743 of the New Act allows shareholders of closely-held corporations to adopt governance procedures that are otherwise *inconsistent* with customary corporate concepts found in other provisions of the New Act.<sup>22</sup> Shareholders may elect to establish their own governance procedures without regard to otherwise applicable governance provisions of the New Act. Shareholder agreements that comply with section 743 are provided a "safe harbor" and will be effective even though they otherwise buck the traditional rules of corporate governance, provided they are not contrary to public policy. Section 743 sets forth seven categories of shareholder agreements that are authorized and effective under the New Act and that enable shareholders of closely-held corporations to enjoy the benefits of the limited liability inherent in a corporation while maintaining the simplicity and flexibility of an informal partnership or a LLC.<sup>23</sup>

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21. Report of Department of the Secretary of State and Corporate Law Revision Committee to the Judiciary Committee: Summary of L.D. 361, An Act to Adopt the Model Business Corporation Act in Maine (Nov. 14, 2001), reprinted in ZIMPRITCH, 2d ed., *supra* note 3, app. A, at A-11; and in *Rewriting Maine's Business Corporation Act*, *supra* note 2, at 43.

22. ZIMPRITCH, 2d ed., *supra* note 3, § 7.14[c], at 188.

23. ME. REV. STAT. ANN. tit. 13-C, § 743(1) (West 2005). Section 743 provides:

An agreement among the shareholders of a corporation that complies with this section is effective among the shareholders and the corporation even though it is inconsistent with one or more other provisions of this Act in that it:

- A. Eliminates the board of directors or restricts the discretion or powers of the board of directors;
- B. Governs the authorization or making of distributions whether or not in proportion to ownership of shares, subject to the limitations in section 651;
- C. Establishes who are directors or officers of the corporation or their terms of office or manner of selection or removal;
- D. Governs, in general or in regard to specific matters, the exercise or division of voting power by or between the shareholders and directors or by or among any of them, including use of weighted voting rights or director proxies;
- E. Establishes the terms and conditions of any agreement for the transfer or use of property or the provision of services between the corporation and any shareholder, director, officer or employee of the corporation or among any of them;
- F. Transfers to one or more shareholders or other persons all or part of the authority to exercise the corporate powers or to manage the business and affairs of the corporation, including the resolution of any issue about which there exists a deadlock among directors or shareholders;
- G. Requires dissolution of the corporation at the request of one or more of the shareholders or upon the occurrence of a specified event or contingency; or

Zimpritch clearly and concisely articulates the expansiveness of these categories in Section 7.14[c][ii] by explaining, *inter alia*, that shareholder agreements of closely-held corporations can be drafted to eliminate or reallocate the discretion of the board or directors; authorize distributions that are not in proportion to share ownership; alter the manner in which directors are elected; restructure voting rights of shareholders and directors; or alter the manner in which business affairs are managed.<sup>24</sup> Additionally, a catch-all provision validates shareholder agreements which "[o]therwise [govern] the exercise of the corporate powers or the management of the business and affairs of the corporation or the relationship among the shareholders, the directors and the corporation or among any of them, and is not contrary to public policy."<sup>25</sup>

The "contrary to public policy" language serves as a signal that section 743 is not unlimited in its scope and practitioners are warned that "[t]hose relying on [section 743(1)(H)] should proceed with caution as it is likely that the courts, not the [New] Act or the official comments, will determine the enforceability of arrangements" premised on the apparent breadth of section 743(1)(H).<sup>26</sup>

In addition to the breadth of section 743, closely-held corporations can take advantage of the flexibility provided by section 743 with relative ease. Relaxed formal requirements are easy to comply with and only demand that a written agreement exists among the shareholders.<sup>27</sup> Any shareholder agreement seeking the validation protection of section 743 must be signed by all shareholders at the time of adoption and may only be amended by unanimous shareholder consent, unless the agreement itself provides that amendments may be made by consent of less than all of the shareholders.<sup>28</sup> Notice of a shareholder agreement under section 743 is afforded to third parties by requiring that share certificates bear a legend indicating that the shares are subject to a shareholder agreement or that the information statement sent in lieu of certificates contains this disclosure.<sup>29</sup>

It is important that a section 743 private ordering arrangement set forth in the corporation's bylaws or a separate shareholder agreement adopted by all share-

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H. Otherwise governs the exercise of the corporate powers or the management of the business and affairs of the corporation or the relationship among the shareholders, the directors and the corporation, or among any of them, and is not contrary to public policy.

*Id.*

24. ZIMPRITCH, 2d ed., *supra* note 3, § 7.14[c][ii].

25. ME. REV. STAT. ANN. tit. 13-C, § 743(1)(H) (West 2005).

26. Michael E. High, *Shareholders*, in MAINE'S NEW CORPORATE LAW: EXPLORING NEW TECHNIQUES, AVOIDING DANGEROUS TRAPS 39, 42 (Maine State Bar Ass'n Continuing Legal Education 2003). High also suggests that practitioners exercise caution in the following areas that may prove to be a violation of public policy and thereby an unenforceable provision of a shareholder agreement under section 743: (1) waiver of a shareholder's right to inspect corporate records; (2) waiver of a shareholder's right to bring a derivative suit; (3) waiver of a shareholder's dissenter's rights; and (4) waiver of a shareholder's right to seek dissolution for waste of corporate assets. *Id.* at 47-48.

27. ME. REV. STAT. ANN. tit. 13-C, § 743(2)(A)(2) (West 2005).

28. *Id.* § 743(2)(B).

29. *Id.* § 743(3). Section 743(3) also provides that, notwithstanding whether a share certificate in fact contains the required legend, transferees of the shares will be bound by the terms of the shareholder agreement. *Id.* However, purchasers of shares subject to a shareholder agreement who did not have knowledge of the existence of such an agreement are entitled to rescind their purchase. *Id.*



holders at the time of its adoption and meeting the other requirements of the statute is automatically binding on future shareholders and transferees of initial shareholders.<sup>30</sup> Zimpritch offers an insightful discussion on the consideration given to section 743's ability to bind unknowing transferees of stock to the terms of a shareholder agreement.<sup>31</sup> Even if stock certificates are not properly legended, purchasers who do not have actual or deemed knowledge of the arrangement are nonetheless bound by its terms, but they do have a right of rescission against the seller.<sup>32</sup>

The options for altering the traditional form of corporate governance provided by section 743 appear to be limited only by public policy considerations and the imagination of corporate counsel. A Maine corporation with only one individual who wears the hats of sole shareholder, sole director, and president of the corporation should not be required to hold annual meetings for election of directors and officers. The provisions of section 743 would allow this corporation to adopt a shareholder agreement<sup>33</sup> that dispenses with the requirements of annual meetings and issuance of stock certificates, and names the sole shareholder as director and president until his/her resignation. One commentator suggests that section 743 may even allow a corporation to dispense with the requirement of corporate by-laws or maintenance of certain corporate records.<sup>34</sup> Adoption of this type of shareholder agreement should not expose the shareholder to increased risk of piercing the corporate veil because such an individual is expressly afforded the protection of section 743(6), which provides:

The existence or performance of an agreement authorized by this section is not a ground for imposing personal liability on any shareholder for the acts or debts of the corporation even if the agreement or its performance treats the corporation as if it were a partnership or results in failure to observe the corporate formalities otherwise applicable to the matters governed by the agreement.<sup>35</sup>

The flexibility afforded by section 743, along with the express protection against piercing the corporate veil for failure to observe corporate formalities, is a major departure from traditional corporate law and an opportunity that should not be overlooked by practitioners. Corporate practitioners who fail to become intimately familiar with section 743 and the wide range of flexibility it offers, are likely to miss out on important opportunities available to their clients.

### *C. Important Changes and Clarification to the Director Liability Provisions*

A second critical section in both the New Act and in Zimpritch, 2d ed. relates to the liabilities imposed on a corporation's directors. A director of a corporation owes a duty to the corporation when he/she is involved in decision-making on behalf of the corporation or oversight of corporate matters.<sup>36</sup> The duty of loyalty

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30. See *id.*

31. ZIMPRITCH, 2d ed., *supra* note 3, § 7.14[e].

32. *Id.* Arguably, establishing all of the customary terms of a shareholder transfer restriction and buy-sell agreement in a private ordering arrangement as part of the bylaws of the corporation could reduce or eliminate the need to follow the traditional and sometimes difficult or impossible precautionary approach of obtaining the signatures of spouses of shareholders in shareholder agreements.

33. A shareholder agreement may exist even if there is only one shareholder. *Id.* § 7.14[d].

34. High, *supra* note 26, at 44-45.

35. ME. REV. STAT. ANN. tit. 13-C, § 743(6) (West 2005).

36. ZIMPRITCH, 2d ed., *supra* note 3, § 8.7[b][i].

owed by a director to the corporation has largely developed through common law and is discussed in depth in section 8.7[c][i] of Zimpritch, 2d ed. The New Act attempts to codify two facets of the duty of loyalty by requiring that a director act "[i]n good faith . . . and [i]n a manner the director reasonably believes to be in the best interests of the corporation."<sup>37</sup> Section 831(2) of the New Act sets forth the duty of care owed by a director as "care that a person in a like position would reasonably believe appropriate under similar circumstances."<sup>38</sup>

A far-reaching provision in the New Act is section 202(2)(D), which drastically limits the circumstances under which a director can be held liable for his/her actions or failure to act as a director. Section 202(2)(D) provides that the articles of incorporation may include a provision that limits or eliminates the liability of a director for breaches of duty to the corporation or to the shareholders except under the reasons enumerated therein.<sup>39</sup> While section 202(2)(D) affords broad protection to directors, Zimpritch accurately notes that section 202(2)(D) does have limitations in its application.<sup>40</sup> The protection afforded by section 202(2)(D) is limited to breaches of duty to the corporation or the shareholders and is inapplicable for liability owed to third parties and is also inapplicable to officers.<sup>41</sup>

Exceptions to the liability protection in section 202(2)(D) provide that a director cannot escape liability for "financial benefit[s] received by a director to which the director is not entitled; an intentional infliction of harm on the corporation or its shareholders; . . . a violation of section 833 [liability for unlawful distributions]; or . . . [a]n intentional violation of criminal law."<sup>42</sup> The Committee recommended that the articles of incorporation form published by the office of the Secretary of State include a "check the box" format allowing corporations to opt-in for the protections afforded by section 202(2)(D).<sup>43</sup> The Secretary of State ultimately adopted this recommendation and it is now very easy for corporations to take advantage of this section.<sup>44</sup> Zimpritch cautions the corporate practitioner, however, that "[w]hile likely to be elected in most circumstances, it may not be the ideal election in every case, and the incorporator(s) should carefully consider the ramifications of the election."<sup>45</sup>

A second check-the-box election on the standard Maine articles of incorporation form with respect to director liability available in the articles of incorporation is an election for mandatory indemnification of directors and officers. The New Act permits indemnification of a director if his/her conduct was made in good faith and the director reasonably believed it to be in the best interests of the corporation.<sup>46</sup> Additionally, section 852 allows broader indemnification to be "made per-

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37. ME. REV. STAT. ANN. tit. 13-C, § 831(1) (West 2005).

38. *Id.* § 831(2).

39. *Id.* § 202(2)(D).

40. ZIMPRITCH, 2d ed., *supra* note 3, § 2.3[b][iii].

41. *Id.*

42. ME. REV. STAT. ANN. tit. 13-C, § 202(2)(D) (West 2005). A similar standard is set for indemnification of corporate officers in section 857(1). *Id.* § 857(1).

43. Gregory S. Fryer, *Directors and Officers: Duties and Liabilities*, in MAINE'S NEW CORPORATE LAW, *supra* note 26, at 86.

44. The form adopted by the Maine Secretary of State for articles of incorporation is available at <http://www.maine.gov/sos/cec/corp/>.

45. ZIMPRITCH, 2d ed., *supra* note 3, § 2.3[b][iii].

46. ME. REV. STAT. ANN. tit. 13-C, § 852(1) (West 2005).

missible or obligatory" under the articles of incorporation.<sup>47</sup> Zimpritch explains that the ramifications of electing expanded indemnification for officers and directors include a shifting of the burden to the corporation to establish

that a director or officer is *not* entitled to indemnification or advances because one of the four exceptions applies, whereas under the general indemnification provisions of the Act, the director or officer has the burden of establishing his good faith and reasonable belief regarding best interest of the corporation . . . and [the provisions of] the Articles of Incorporation are more difficult to amend, requiring shareholder approval, and hence provide greater certainty to directors and officers.<sup>48</sup>

Although counselors of closely held corporations will usually take advantage of the broadest possible exculpatory and indemnity provisions under the New Act, they should not do so without first considering the perspective of their clients in the specific stakeholder environment at hand. For example, imagine the counselor for a passive investor shareholder in a closely held corporation. The broadest possible exculpation and indemnity might not be in the best interest of that investor. A passive investor might prefer that a director seeking indemnification, rather than the corporation, have the burden of establishing that his conduct meets the applicable standards in the New Act. Furthermore, under the New Act, a provision requiring indemnification to the fullest extent of the law is deemed to obligate the corporation to advance expenses as well, unless otherwise specifically provided. Finally, under a private ordering arrangement pursuant to Section 743, it would be possible to fashion customized performance standards for one or more directors and/or officers (in which very specific performance standards, and consequences for failure to meet those standards, tailored to the specific business objectives of the closely held corporation are adopted), and the careful counselor would not want to nullify the effectiveness of those contractual standards by casually adopting the New Act's broadest exculpatory and indemnity provisions.

#### IV. CONCLUSION

Zimpritch, 2d ed. is now and will continue to serve as an excellent resource for corporate practitioners and members of the judiciary for questions both simple and complex regarding the New Act. Zimpritch has done a tremendous service to members of the Maine Bar in offering his knowledge and expertise in corporate law matters to his colleagues. Maine corporate practitioners would be further benefited by a more in-depth discussion of the possible uses of section 743 to create private-ordering for closely-held corporations with corresponding sample forms, and the nuances to be considered in determining whether or not to take advantage of the director indemnification available under section 202(2)(D) in future editions of the Zimpritch treatise.

Chapters 6 (Corporate Finance), 7 (Shareholders), and 8 (Directors and Officers) of the New Act provide corporate counselors with new and improved tools for properly customizing and structuring the organizational documents of new corporations to fit the specific needs and priorities of their clients. Counselors now have

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47. *Id.* See also FRYER, *supra* note 43, at 97.

48. ZIMPRITCH, 2d ed., *supra* note 3, § 2.3[b][iv].

a heightened responsibility to understand and properly utilize these statutory opportunities and to avoid some associated rocks and shoals. As has been the case with the first edition of Zimpritch under the Prior Act, the second edition of Zimpritch is "required equipment" for those sailing in the new harbors and coves of the New Act. In the closely held corporate context, one hopes that Zimpritch will give practitioners the requisite confidence to fashion specific contractual and partnership-like concepts that take advantage of the corporate finance, private ordering, and director/officer liability provisions of the New Act, rather than casually adopting form bylaws and shareholder agreements with customary and traditional corporate concepts. Including in the articles of incorporation and bylaws those concepts formerly found in a separate shareholders agreement should be the rule rather than the exception under the New Act. This approach will most concisely and effectively take full advantage of private ordering opportunities, much the same way members of limited liability companies package their rights and obligations in articles of organization and operating agreements.<sup>49</sup>

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49. See, e.g., Michael B. Peisner, *Forms for Flexible Entities: LLC Agreements with Corporate Characteristics and By-Laws with LLC Characteristics*, in BUSINESS LAW INSTITUTE, 169 (Maine State Bar Ass'n Continuing Legal Education 2004).