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Maine Corporation Law & Practice

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BOOK REVIEW

MAINE CORPORATION LAW & PRACTICE. By James B. Zimpritch
(Prentice Hall, \$110.00)

*Reviewed by Gregory S. Fryer**

The scarcity of case law in Maine on corporate law issues of the day is a fact of life for corporate law practitioners in this State. While courts in more populous states fill library shelves with an ever-growing mix of corporate law decisions, we in Maine often can only wonder which way our own courts would turn if presented with those same issues.

Faced with a limited amount of local case law, corporate lawyers here might rarely venture beyond well-hewn traditions were it not for two—and now three—fortunate developments.

First and foremost is the Maine Business Corporation Act.¹ The Act is the product of immense effort on the part of a committee of Maine business lawyers who in 1971 presented the Legislature with a statutory framework so pragmatic and flexible as to have survived the last two tumultuous decades with surprisingly few signs of age.² The second fortunate development is a set of post-1971 decisions from the Maine Supreme Judicial Court, sitting as the Law Court, that have been broadly supportive of the corporate form and of directors' managerial discretion.³ The third fortunate development has been the recent appearance of James Zimpritch's treatise *Maine Corporation Law & Practice*,⁴ a large and patient work that helps

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1. ME. REV. STAT. ANN. tit. 13-A, §§ 101-1406 (West 1981 & Supp. 1991-1992) (sometimes referred to herein as the "Act").

2. The Act is largely patterned after the 1950 version of the Model Business Corporation Act, as supplemented by wisdom gleaned from other states' statutes (particularly the corporation statutes of South Carolina, which had recently been revised) and from the 1969 revisions to the Model Act. See JAMES B. ZIMPRITCH, *MAINE CORPORATION LAW & PRACTICE* § 1.1 (Supp. 1991).

3. See *Rosenthal v. Rosenthal*, 543 A.2d 348 (Me. 1988) (limiting grounds for judicial review of director decisions); *Curtis v. Lehigh Footwear, Inc.*, 516 A.2d 558 (Me. 1986) (limiting grounds for shareholder liability for corporate acts); *Webber v. Webber Oil Co.*, 495 A.2d 1215 (Me. 1985) (limiting grounds for judicial removal of officers); *Gay v. Gay's Super Markets, Inc.*, 343 A.2d 577 (Me. 1975) (limiting grounds for judicial review of director discretion to declare dividends). See also *In re Valuation of Common Stock of McLoon Oil Co.*, 565 A.2d 997, 1001 (Me. 1989) (acknowledging that one purpose of the Act was to afford a corporation "the greatest possible flexibility with its structures and procedures").

4. ZIMPRITCH, *supra* note 2. *MAINE CORPORATION LAW & PRACTICE* is published by Prentice Hall Law & Business as part of its National Corporation Law Series.

the reader place the Maine Business Corporation Act and Maine Law Court decisions (both old and new) in a broader analytical framework.

In *Maine Corporation Law & Practice* James Zimpritch has not been content merely to summarize the Act and cross-reference the case law. Every chapter attempts to place the relevant statutory provisions in some useful context⁵—in context with other provisions of the Act, in context with prior Maine corporation statutes, in context with the Model Business Corporation Act or with statutory provisions from certain other states, in context with decisions of courts in Maine and selected cases from other jurisdictions, and so forth. In the words of the author, “A purpose of this book has been to *draw together the authorities that exist*, in an effort to *explain* the corporate law of Maine.”⁶

Even with the assistance of several other partners and associates from Maine’s largest law firm,⁷ the drafting of this treatise was an enormous undertaking, stretching over three years. The text runs to more than 500 pages, cites more than 370 cases, and includes more than 1,600 footnotes. While explaining the corporate law of Maine is not so large a project as explaining the corporate law of, say, Delaware,⁸ not many full-time lawyers would have the courage, the energy, or the discipline to complete such an effort. In fact, the last Maine lawyer who undertook to do so was Herbert M. Heath, whose book entitled *A Manual of Maine Corporation Law* was published in 1907.⁹ I daresay it will be a while before another seeks the status of successor to Messrs. Heath and Zimpritch.

In *Maine Corporation Law & Practice* James Zimpritch has patiently woven together a large number of authorities and has produced a thoughtful and coherent explanation of Maine corporate law. A subject this complex and subtle has many possible “explanations.” To his credit, Zimpritch offers an explanation that is neither submissive (explaining away inconsistencies in the law) nor domineering (explaining how the law ought to be). Instead he has sought

5. Even the tiny chapter on Secretary of State filing fees (encompassing a mere eight lines of text) ventures a brief comment.

6. ZIMPRITCH, *supra* note 2, at xxi (emphasis added).

7. Zimpritch is a partner in the firm of Pierce, Atwood, Scribner, Allen, Smith & Lancaster.

8. Zimpritch’s treatise was in many ways modeled after another Prentice Hall treatise on Delaware corporate law, R. FRANKLIN BALOTTI & JESSE A. FINKELSTEIN, *THE DELAWARE LAW OF CORPORATIONS AND BUSINESS ORGANIZATIONS* (1986). The Delaware treatise, now in its second edition, comprises six volumes of text, forms, and statutes (including a volume devoted to limited partnerships). One chapter alone (pertaining to officers and directors) has over 1,100 footnotes.

9. HERBERT M. HEATH, *A MANUAL OF MAINE CORPORATION LAW* (1907). That book was revised ten years later by Mr. Heath’s law partner, Charles L. Andrews. HERBERT M. HEATH & CHARLES L. ANDREWS, *A MANUAL OF MAINE CORPORATION LAW* (2d ed. Loring Short & Harmon 1917).

to describe the law as it is today, and to do so in a way that will be useful to those judges and lawyers who use and interpret the Act. And useful it is.

The book is divided into fourteen chapters that track the fourteen subchapters of the Maine Business Corporation Act.¹⁰ Within each chapter, sections of the Act are generally discussed in numerical order (but with copious cross-references to later and earlier discussions of other relevant sections). Chapters are written so that each one will be understandable on its own. The result is a statutory commentary that can be read in virtually any order.

In every work of this kind, deciding what to leave out can be as difficult as deciding what to include. Here again, pragmatism prevails. The more mechanical aspects of the statute are dealt with swiftly; Chapters 5 through 7 (discussing the attributes of corporate stock and the relative rights and responsibilities of corporate shareholders, directors, and officers) constitute fully half of the text. Esoteric issues are generally relegated to the footnotes, or are banished altogether. Absent, too, are lengthy diatribes about perceived shortcomings of the law. Although Zimpritch is not shy about criticizing particular statutory provisions or judicial rulings, he generally states his criticisms concisely and with the humility of one who recognizes that his will not be the last word on the subject. (This, too, is useful to future litigants or lobbyists who may one day wish to quote this treatise in the course of arguing in favor of overturning these provisions or rulings.)

Particularly impressive is Zimpritch's discussion of the business judgment rule.¹¹ In contrast to the explosion of litigation over this subject elsewhere, relatively few decisions of Maine courts prior to 1988 had shed light on the extent to which the courts of this state would review allegedly defective decisions of corporate directors. In 1988 the Law Court handed down *Rosenthal v. Rosenthal*,¹² which held that Maine courts will not review informed business decisions

10. A fifteenth chapter (written by attorney David J. Champoux, also of Pierce, Atwood) contains a fairly straightforward summary of the Revised Maine Securities Act. Presumably, this chapter has been included because that statute (together with applicable federal securities laws and, in many cases, the securities laws of other states) significantly affects the manner in which corporations in Maine may raise capital. Mr. Champoux's summary of the Revised Maine Securities Act is not limited to its effect on corporate entities, however, and thus may be of some use to lawyers advising non-corporate issuers (such as limited partnerships). Due no doubt to limitations of space and purpose, the securities law issues that tend to pose the greatest problems for practitioners—such as the definition of a "security," the extent to which disclosures must be made to potential purchasers or sellers, the attributes of a "general solicitation" or "public offering," and the circumstances under which two offerings will be deemed to be a single, integrated offering—are not discussed in this chapter.

11. See ZIMPRITCH, *supra* note 2, § 7.8.

12. 543 A.2d 348 (Me. 1988).

made by directors unless it is shown that the directors were motivated primarily by fraud or bad faith.¹³ Several weeks earlier, the Legislature had enacted an amendment to Section 716 of the Maine Business Corporation Act, which amendment provided that directors will not be liable for monetary damages except in cases where a director is found not to have acted either honestly or in the reasonable belief that his or her action was in (or not opposed to) the best interests of the corporation or its shareholders.¹⁴ Both of these formulations—statutory and judicial—are intended to excuse honest mistakes in judgment, but each differs somewhat from the other. Zimpritch explores the question of whether the statutory formulation preempts the judicial one. In an adroit and comprehensive analysis, he discusses the purposes and history of each and concludes that Section 716 as amended and the business judgment rule as developed in *Rosenthal* should be construed to provide independent, non-exclusive measures of protection for directors.

As one would expect in a work of this kind, the text is supplemented by a reprint of the Maine Business Corporation Act,¹⁵ a section containing various routine corporate forms, a table of cases, and a subject matter index. Also included is a reprint of one of Zimpritch's pet cases.¹⁶

To all this well-deserved praise, I would add a word of caution. A work of this kind is inevitably the product of the unique perspective and experience of its author. So too, any evaluation of this work will be influenced by the perspective and experiences of its reader.¹⁷ It is

13. *Id.* at 353.

14. P.L. 1987, ch. 663 (amending ME. REV. STAT. ANN. tit. 13-A, § 716 (West 1981)) (adopted Apr. 1, 1988; effective Aug. 4, 1988).

15. Inexplicably for a book of this quality and cost, the typeface of the statutory reprint is minuscule, its reproductive quality atrocious, and its proofreading suspect. Certain subsections appear in (smudged) bold type, apparently in an attempt to indicate that they have been amended since the Act was originally adopted. A glance at the statute reveals, however, that many amended provisions are not in boldface (for example, the second and third paragraphs of Section 716, which were added in 1985 and 1988, respectively, and which are discussed at length at pages 286-87 and 295-97 of the text). These flaws I attribute to the publisher, not the author.

16. *Brown v. Valle's Steak House*, No. CV-82-590 (Me. Super. Ct., Cum. Cty.) (August 17, 1982) (authored by the Chief Justice of the Maine Supreme Judicial Court, sitting by designation). This case is not reported by West Publishing.

17. A case in point is Zimpritch's description of two anti-takeover provisions enacted during the mid-1980s. Section 611-A, drafted by lawyers at Pierce Atwood, receives a far more flattering description than Section 910, drafted by lawyers from my own firm. Compare ZIMPRITCH, *supra* note 2, at 165 ("Section 611-A is designed expressly to provide added protection to shareholders of Maine corporations subject to substantial share accumulations, who wish to retain their investment in a corporation, against subsequent coercion and unfair dealings between an acquiror and the corporation.") with *id.* at 370 ("Perhaps because Section 910 was the subject of little debate by the Legislature and was quickly approved, the statute contains a substantial number of ambiguities and provisions that are perhaps overly-broadly drafted that

important to bear in mind that Zimpritch's explanation of Maine law does not purport to be more than *an* explanation. As the author himself candidly states:

I have no crystal ball. Undoubtedly, at least some of the issues upon which I have ventured a view will be decided differently in the facts of some case. My only hope is that this book will have contributed to raising the important issues and subissues, and to the future resolution of cases to come.¹⁸

As explanations go, however, this treatise provides an excellent one. Given the dearth of Maine case law noted above, it is destined to be a frequently consulted authority, and I am confident that *Maine Corporation Law & Practice* will leave its mark on the practice of corporate law in Maine for many years to come.

may provoke litigation.”). My own assessment is that both statutes were deliberately drafted in broad terms, both were quickly enacted by the Legislature with little debate, both are triggered by nearly identical events, and both have spawned litigation in takeover contests involving Maine corporations (although in neither case was a decision reached on the merits). The question of which statute is more protective of shareholder interests or represents the wiser public policy is highly debatable but irrelevant. As Zimpritch points out, Section 611-A was intended to complement the shareholder protections afforded by Section 910.

18. *Id.* at xxii.

