

**BERNSTEIN SHUR**

COUNSELORS AT LAW

# Doing Business in Maine

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# INTRODUCTION

## The Maine Economy

### MANUFACTURING

Maine's economy relies principally on its natural resource based industries: commercial fishing, forest products, and agriculture. However, while traditional manufacturing jobs in industries such as shipbuilding and papermaking still dominate, there are growing biotechnology and service sectors in the state that benefit from the outstanding telecommunications infrastructure already in existence. The loss of manufacturing jobs in the textile and shoemaking sectors has been significant, but growth in the semiconductor manufacturing industry has helped to reduce the impact of that decline.

### TOURISM

Maine is characterized by a vast wilderness and a dramatic coastline. Over 2,000 islands have made Maine legendary for boaters. Skiing, hunting, and fishing are among the activities that have drawn millions to Maine for vacations. Outdoor recreational activities are widely varied and year-round. For example, the state is home to two of the top golf courses in the country and its traditional sporting camps have been drawing sportsmen to the Maine woods for over a century. Every year, tourists visiting Maine spend nearly \$3 billion in the state.

### ENERGY

Water power has played a vital role in the economic development of Maine. Initially, water power from Maine's rivers was harnessed to operate paper mills. In the late 19th century water power was applied to the generation of electric power. Hydropower continues to be central to Maine's energy infrastructure; however, the growing need for electricity has resulted in the operation of almost twenty steam-driven power plants, including bio-mass fuel fired plants. In addition, the development of two natural gas pipelines in eastern and western Maine has led to the development of five combined cycle natural gas fired generating plants. Due to the existence of both deep water ports and the natural gas pipelines, the liquefied natural gas industry has shown a great deal of interest in developing projects in the Downeast area of the state.

### MAINE STATE GOVERNMENT

Maine has three co-equal and independent branches of government: a bicameral legislature, a popularly elected executive, and a judiciary appointed by the Governor. Amendments to the Constitution require approval by a state convention or a two-thirds vote of both houses of the legislature, followed by the approval of the majority of the electorate. Initiative and referendum provisions were added to the Constitution in 1908.

The Maine legislature is composed of a senate with 35 members and a house of representatives with 151 members. All members are elected for two-year terms.

Constitutional officers are elected by the legislature. Maine legislators and constitutional officers are limited to four consecutive terms of office.

## **THE MAINE LEGAL SYSTEM**

The highest court in the state is the Supreme Judicial Court. It consists of a chief justice and six associate justices and serves primarily as a court of appeals. At the next level is the superior court, with sixteen members. In addition to hearing appeals, it has jurisdiction over all felony cases and important civil cases, and it handles equity cases. District courts have jurisdiction over certain cases in particular districts; there are 13 district and 20 district judges. Administrative courts handle family law matters. Each county has a probate court that deals with such matters as the settlement of estates, the adoption of children, and the guardianship of minors and mentally ill persons. Arbitration or mediation services are available throughout the state for most civil cases.

Maine law derives from the Maine Constitution and from statutes enacted by the Maine legislature and approved by the Governor. It applies only in Maine and prevails over conflicting municipal regulation. Maine law is also administered by a variety of administrative agencies, many of which have authority to adopt regulations. Maine law and regulation is important in, among other things, the areas of real estate law, corporate organization, public health and safety, environmental, and labor law and consumer protection.

Maine is a so-called "home rule" state. Municipalities have near sovereign authority to pass ordinances in areas where the state has not expressly or impliedly acted. It is most significant in areas of land-use planning and public health and safety enforcement.

The principal sources of Maine revenues are personal and corporate income taxes and a smaller variety of excises. Real estate taxes are the principal source of municipal revenues.

## **FORMS OF DOING BUSINESS**

The determination of business form is the initial step in commencing a business enterprise. State law regulates business forms. However, federal law overlaps with state law on several levels including taxation, securities law, and environmental liability. Each form has specific tax, liability, and management characteristics that make them more favorable or less favorable for different business enterprises. In choosing a form of business in Maine, the business lawyer must be certain to weigh the various pros and cons of each form available in order to ensure that she has the proper vehicle to advance her client's enterprise.

### **SOLE PROPRIETORSHIPS**

A sole proprietorship is merely an individual engaged in business. The tax return of the business and that of the individual tend to be one and the same. Creating and managing a sole proprietorship is the easiest of any business form. Commencing business operations creates a sole proprietorship. The sole proprietor has exclusive control over the business. The business ends at the pleasure of, or upon the death of, the sole proprietor.

What is gained in simplicity of management is lost in the proprietor's liability to third parties. Actions in tort and contract can be brought against the proprietor. All of the proprietor's personal assets, as well as those of the business, are accessible to the victorious litigant. In short, there is no limitation of the personal liability of a sole proprietor.

### **GENERAL PARTNERSHIPS**

A general partnership is two or more individuals or entities engaged in any business activity. General partnerships can be formed orally, in writing, or by default. Maine courts may view two or more entities engaged in business as a partnership even though they have no formal or informal partnership agreement between them.

State law governs partnerships, but most matters between partners are governed by a partnership agreement. In lieu of a partnership agreement, the Uniform Partnership Act as enacted in Maine sets the terms of the operations of the partnership and the relations of the partners. General partnerships are the second most simple business form. The partners are free to allocate rights, responsibilities, profits, and burdens as they wish. Any partner can bind the partnership. Although partnership taxation can be very complex, gains and losses are generally passed through the partnership to the partners. The pass-through feature avoids the entity level taxation characteristic of corporations.

General partners are jointly and severally liable for the actions of any one partner. There is no limited liability for general partners. Depending upon the business enterprise and the partnership agreement, terminating a partnership can be quite cumbersome. Partnerships are falling into disfavor because of these characteristics.

### **JOINT VENTURES**

A joint venture is essentially a form of general partnership that is limited to a single business venture.

## **LIMITED PARTNERSHIPS**

A limited partnership is composed of at least one general partner responsible for managing the partnership and at least one limited partner. The limited partners are required to be passive investors. Limited partners enjoy limited liability so long as they do not interfere in management and cannot be bound by the actions of the general partner beyond the level of their investment. Limited partners also enjoy limited liability in tort. Any limited partnership organized in Maine must contain the words "Limited Partnership" in its title. Limited partnerships have similar management simplicity and flexibility of general partnerships. Tax gains and losses are also passed through to the partners. The general partner usually has the sole authority to bind the partnership and manage its affairs.

## **PROFESSIONAL SERVICE CORPORATIONS**

Certain types of licensed professionals (e.g., accountants, doctors, veterinarians, and attorneys) in Maine are required to organize professional service corporations if they choose to incorporate. Other licensed professionals may choose to incorporate as either a general business corporation or a professional service corporation. The professional service corporation is treated much like general for-profit corporations except that the services of the corporation are only to be rendered through the licensed individuals and if there is liability arising out of negligent performance of these services, a shareholder who performed the services (or who directly supervised the person who performed the services) is personally liable. In addition, shares in the professional corporation may be issued only to the licensed professionals.

The application process for incorporation is much the same as with general profit corporations, and the names of professional corporations must be distinguishable upon the record from other entities registered in the State. In addition, the name of professional corporations must contain the words "chartered," "professional corporation," "professional association," or "service corporation" or the abbreviation "P.C.," "P.A.," or "S.C."

## **LIMITED LIABILITY COMPANIES**

Maine is among the majority of states that have adopted the Limited Liability Company (LLC) business form. An LLC is a relatively new form of business that provides the flexibility and tax advantages of a partnership without sacrificing limited liability. LLCs establish the rights and responsibilities of "members" in an operating agreement. The LLC is controlled by managers that may or may not be members of the LLC. LLCs are gradually taking the place of general partnerships because of the flexibility and limited liability the form offers. Maine LLCs are formed by filing Articles of Organization with the Secretary of State, and are governed by the Maine Limited Liability Company Act.

## **CORPORATIONS**

Maine has its own corporate statute, which is based upon the Model Business Corporation Act. Corporations doing business in Maine may be organized in any of the United States. Corporations may be public or private. All corporations extend the benefits of limited liability to their shareholders.

Corporations in Maine are taxed at the entity level unless they are qualifying small business corporations. Qualifying small business corporations are taxed in a pass-through manner, similar to partnerships.

Corporations have a perpetual existence and shares may be transferred easily. However, unlike partnerships and LLCs, corporations are governed by relatively rigid laws that can sacrifice flexibility in the absence of a shareholders agreement waiving those requirements. Managing corporations, particularly public corporations, can be very costly.

#### **NAMES AND REGISTRATION REQUIREMENTS**

In Maine, as other jurisdictions, there are a number of restrictions and conditions on the use of corporate names. The Maine Business Corporation Act prohibits the use of a name which is not distinguishable on the records of the Secretary of State of Maine to any other corporation authorized to do business in the State or to a reserved name or a registered trade or service mark. The Act also prohibits the use of a name containing words or phrases which indicate that the corporation is organized for any purpose for which a corporation may not be organized under the Act (e.g., an unlawful purpose). There are other statutes in Maine that prohibit or restrict the use of certain types of names concerning the purpose or nature of a particular business. For example, Maine banking law limits the use of the words "bank" or "savings" in a corporate name without Bureau of Banking approval.

Maine does not require corporate names to contain an indication that the entity is a corporation. Professional corporations organized in Maine are required to use certain words in their names such as "professional association" or "P.A."

The Secretary of State determines whether or not a name is available for a corporation's use. Normally, the Articles of Incorporation or, in the case of a foreign corporation, the application for authority to do business, are the form used for filing for authority to use a particular name. It is possible, however, to reserve a name in advance of incorporation and such a reservation of name remains in force for a period of 120 days and may not be renewed.

A corporation existing under the laws of any state or territory of the United States may register its present corporate name in Maine. This registration, like the reservation of name, insures the availability of a name of the particular name when it begins to do business in Maine. A corporate name may be registered only if its use in Maine is permitted under the Maine Business Corporation Act (i.e., it can be distinguished upon the record from the names of other corporations, trademarks, etc.).

In addition to the name under which a domestic or foreign corporation is incorporated, the use of assumed names (d/b/a's) is permitted under the Maine Business Corporation Act. Prior to transacting any business under an assumed name, a corporation must file a statement with the Secretary of State's Office and pay the required filing fee. Assumed names are subject to the same restrictions as are the actual corporate names. It should be noted that the filing of a statement of intent to use an assumed name does not necessarily give the filer a priority of right to use that name. It is the first party to use the name that gains the priority of usage right. It should also be noted with respect to assumed names that if partnerships and individuals desire to do business under a name other than his or its own, he or it must file

with the clerk of the municipality in which the business is to be carried on a sworn certificate containing certain statutorily required information.

#### **FOREIGN ENTITIES: DIRECT INVESTMENTS**

Foreign entities are welcome to do business in Maine. Foreign corporations "doing business" in the state of Maine must qualify to do so under the Maine Business Corporation Act. Foreign corporations doing business in Maine that have failed to qualify may be restrained from doing further business by the State Attorney General. In addition, unqualified foreign corporations will generally not be permitted access to Maine's state courts.

What constitutes "doing business" in Maine is not clear, but the "safe harbors" under the Maine Business Corporation Act establish a number of activities which are not deemed to be doing business in Maine (e.g., maintaining or defending judicial actions, maintaining bank accounts, enforcing rights and collateral, and conducting an isolated transaction). Once it is determined a corporation is doing business in Maine, it must file an application for authority to do business in Maine that must be accompanied by a recent certificate of existence from the domiciliary jurisdiction of the applicant. Once the application has been accepted for filing, the foreign corporation has all the powers that may be exercised by a Maine-domiciled corporation which are authorized under the foreign corporation's charter in its domicile, unless there are limitations to its powers noted in the application. There is an annual report and annual fee necessary to maintain the qualification to do business.

If the foreign corporation changes its name in its domiciliary jurisdiction, it must file an amended application to do business in Maine within thirty (30) days of its name change. In addition, a foreign corporation's authority may be terminated if the corporation is dissolved or merged into another corporation (in the case of a merger, a new filing may then be required). In addition, failure to file annual reports or other required filings may result in a revocation of authority to do business by the Secretary of State.

# OVERVIEW OF BUSINESS LAW IN MAINE

## Business Financing

The most common form of business financing in Maine is commercial borrowing from a variety of state-chartered financial institutions, although national commercial lenders are also active in the state. Many small business loans are guaranteed either by the U.S. Small Business Administration through the 7(a) loan guarantee program or the 504/503 development company loan program, or by the Finance Authority of Maine ("FAME"), Maine's primary governmental financing agency. The rural development, business, and industry guaranty program offered by the U.S. Farmers Home Administration is also used in Maine. In addition to commercial loan guarantees, FAME offers a variety of financing programs, including the issuance of both taxable and tax-exempt revenue bonds for qualifying projects. Typically, the participation of the public agencies is coordinated through a commercial lender.

In recent years, a number of businesses have taken advantage of tax increment financing, which enables projects in a designated area within a municipality to utilize funds which would otherwise go to pay local property taxes. Borrowers with substantial investments in site improvements, machinery, and equipment have found tax increment financing particularly attractive.

There are several private lenders operating in Maine specializing in subordinated debt, which is often used to leverage conventional financing.

Maine has a small venture capital community, and venture and other equity capital is more often than not obtained from out of State sources.

## Labor and Employment Relations

A key advantage of doing business in the United States is the flexibility and mobility of its workforce. Within the United States, Maine is known for its productive and skilled labor force. In order to take advantage of the skills of Maine workers it is important to understand basic employment law.

Federal law and Maine law govern labor law in the State of Maine. Like the majority of employees in the United States, Maine employees work on an "at-will" basis at a wage established by market forces. However, federal and state law require most employers to pay their employees a minimum wage. The minimum wage required by Maine law as of October 1, 2005 is \$6.50 per hour. In addition, federal and state law require employers to pay overtime to employees at the rate of one and one-half times an employee's regular hourly rate for all hours in excess of forty in a week.

### **WORKERS' COMPENSATION ACT**

Every private employer in Maine is subject to the Maine's Workers' Compensation Act and is required to secure the payment of compensation in accordance with the Act's provisions. Compliance with the provisions of the Act also provides an employer with immunity from

civil liability for work-related injuries. Certain exceptions to coverage of workers exist with respect to prisoners, independent contractors, agricultural employees, maritime and longshore workers, and wood harvesting employees. The Act provides for a predetermination of independent contractor status through the Maine Department of Labor, which creates a rebuttable presumption that the determination is correct. In a written statement to the Board, coverage may be waived by any owner of twenty percent (20%) or more of the shares in a stock corporation, or by the owner of any amount of shares in a professional corporation. A minor employed in violation of Maine's child labor laws is not limited to Workers' Compensation as the exclusive remedy for a work-related injury.

#### **DISCRIMINATION ON THE BASIS OF DISABILITY**

Both federal and state law prohibit employment discrimination against an employee because of the employee's physical or mental disability. All employers doing business in Maine are subject to the provisions of the Maine Human Rights Act. The Americans with Disability Act (ADA) covers any employer with fifteen or more employees. The Maine Human Rights Act and the ADA prohibit discrimination in employment on the basis of disability unless the applicant is unable to perform the required job duties safely, and the employer cannot reasonably accommodate the applicant.

#### **EMPLOYMENT SECURITY LAW**

Unemployment compensation is available to employees of most employers. Employees may be disqualified for benefits for the following reasons: voluntarily leaving work; discharge for misconduct or crime; refusal to accept work; stoppage of work; receiving remuneration; falsification of application for benefits; absence from work due to incarceration; or receipt of pension.

#### **MAINE HUMAN RIGHTS ACT**

Employers may not discriminate against employees with respect to promotion, transfer, compensation, terms, conditions, or privileges of employment because of race, color, sex, sexual orientation, physical or mental handicap, religion, ancestry or national origin, or the employee's prior assertion of rights under the Workers' Compensation Act, the Whistleblower's Protection Act, or the Maine Human Rights Act.

#### **THE MAINE DRUG TESTING LAW**

Drug testing programs are subject to many restrictions under Maine law. The Maine drug testing law applies to most employers in Maine and covers all tests of bodily fluids for drugs and alcohol. Breath tests for alcohol are not covered. Covered employers in Maine are prohibited from testing applicants unless they have pre-approved drug testing programs certified by the Maine Department of Labor. To test employees, covered employers must also have pre-approved employee assistance programs certified by the Department of Human Services.

#### **MAINE FAMILY MEDICAL LEAVE LAW**

Any employer of fifteen or more employees at a permanent work site in Maine must provide employees who have been employed for twelve consecutive months up to ten consecutive weeks of unpaid leave during any two-year period for the birth or adoption of a child or for

the serious illness of the employee or her/his child, spouse, or parent. Thirty days notice is required unless precluded by medical emergency, along with medical certification. The leave may be paid or unpaid. Employees who have taken a leave are entitled to be restored to the same or an equivalent position upon their return to work except in the event of conditions unrelated to the taking of the leave. Maine law also provides leave for victims of domestic violence to the extent required for them to prepare for and attend court proceedings or receive medical or other necessary services. Employers with fifty or more employees also must comply with the Federal Family Medical Leave Act which entitles employees who have been employed for at least 1,250 hours during the prior twelve months to take up to twelve weeks of leave during any twelve month period.

#### **EMPLOYEE HANDBOOKS AND NON-COMPETITION AGREEMENTS**

Under Maine law, the terms of an employee handbook will not be construed to create any contractual obligations unless the parties express a clear intent that such obligations are to be created. Thus, a prominent disclaimer is generally sufficient to prevent the creation of contractual obligations. Maine courts will enforce non-competition agreements and other restrictive covenants to the extent that they are reasonably tailored to protect the legitimate business interests of the employer. Maine courts will enforce a restrictive covenant that is overly broad, but only to the extent that the employer's enforcement efforts are reasonable.

#### **WORK-RELATED MANSLAUGHTER LAW**

The Maine Criminal Code provides that a person is guilty of work-related man-slaughter if he/she: (1) has direct and personal management or control of any employment, place of employment, or other employee; (2) intentionally or knowingly violates any state or federal occupational safety or health standard; (3) the violation in fact causes the death of one of the employees, and; (4) the death is a reasonably foreseeable consequence of the violation.

#### **UNIONS**

In addition to the National Labor Relations Act, which protects the right of private sector employees to unionize, Maine law affords protection of the right of public employees to join labor organizations of their own choosing and to be represented by such organizations in collective bargaining for terms and conditions of employment.

#### **IMMIGRATION**

Immigration is governed exclusively by federal law. United States immigration law is complex. To enter and remain in the United States, a foreign national must qualify for and, in most instances, obtain a visa.

## Intellectual Property

There are four areas of intellectual property: patents, copyrights, trademarks, and trade secrets. Effectively developing, managing, and protecting one's intellectual property assets are critical in today's competitive business client. The following provides a brief overview of the intellectual property laws applicable to Maine businesses.

### PATENTS

A patent is a property right granted by the U.S. government to an inventor. It allows the inventor to exclude others from making, using, offering for sale, or selling the inventor's invention throughout the United States or importing the invention into the United States for a limited period of time. There are three types of patents:

- *Utility Patent.* A utility patent protects useful processes, machines, articles of manufacture, and compositions of matter.
- *Design Patent.* A design patent may be granted to anyone who invents a new, original, and ornamental design for an article of manufacture.
- *Plant Patent.* A plant patent may be granted to anyone who invents or discovers and asexually reproduces any distinct and new variety of plant.

For the most part, when a person discusses a patent, they are referring to a utility patent, which covers functional inventions. To obtain a utility patent the invention must be "new and useful"; consequently, the inventor must demonstrate the following requirements: (1) utility; (2) novelty; and (3) non-obviousness.

- *Utility.* Only "useful" inventions can be patented. These might include the following:
  - Technical processes and/or methods of doing business (so-called "business method" patents)
  - Machines
  - Articles or compositions of matter (for example a new basic material)
  - Improvements of any of the above
- *Novelty.* Only "new" inventions can be patented. Thus, no invention that is already in the public domain (i.e., the invention has already been disclosed, used, or sold) can be patented (such prior inventions being called "prior art"). This restriction applies inventors' own disclosure, use, and/or sale of their own inventions. Inventors interested in pursuing a U.S. patent must file a patent application before the one-year anniversary of the first day the inventor discloses, uses, or sells the invention. It is important to note that there is no one-year "grace period" for foreign filings; therefore, inventors interested in foreign patent protection must file an initial patent application before their inventions are disclosed, used, or sold.

- *Non-Obviousness.* Only inventions that are not "obvious" can be patented. If an invention would be obvious to a person of ordinary skill in the given field, it cannot be patented even if the invention is useful and novel. Often obviousness is established by combining numerous, albeit slightly different, items of prior art.

Patents are protected exclusively by federal law. As noted above, the owner of a patent has the right to exclude others from making, using, offering for sale, or selling the inventor's invention (as established by the claims in the patent) throughout the United States or importing the invention into the United States for a limited period of time. In short, patents give owners a monopoly to produce, use, and sell their inventions in the U.S. (foreign protection requires foreign patent filings). The term of this monopoly is seventeen years commencing on the date the patent is granted or twenty years commencing on the date the application is filed, whichever is longer. If a third party makes, uses, offers for sale or imports the invention in the U.S., the inventor has the right to sue for patent infringement and, if successful, enjoin further infringements and recover damages equal to a "reasonable royalty" (the amount the third party would have paid pursuant to a reasonable royalty agreement), together with interests and costs.

## **COPYRIGHTS**

Similar to a patent, a copyright is a right granted by the U.S. government. In this case, the right is granted to an "author" of an original work of authorship and provides the author with the following exclusive rights for a limited period of time:

- Reproduce (copy) the work
- Prepare derivative works based upon the work
- Distribute copies of the work (by sale, license, etc.)
- Perform the work (e.g., a play)
- Display the work (e.g., a movie)
- Transmit the work (e.g., digital audio transmission)

Original works of authorship include the following types of works:

- Literary works (includes software source code)
- Musical works (including any accompanying words)
- Dramatic works (including any accompanying music)
- Pantomimes and choreographic works
- Pictorial, graphical, and sculptural works

- Motion pictures and other audiovisual works
- Sound recordings
- Architectural works

To be protected, the work must be original (only *de minimis* originality is needed) and affixed to a tangible medium of expression (i.e. a medium that can reproduce the work, for example, paper, film, or electronic computer storage).

The following are not protected by copyright law:

- Words or short phrases (but see trademark)
- Ideas, plans, methods, systems, or devices (but see patent)
- Works entirely of information that is common property. For example, standard calendars; weight and height charts; or recipes (but see trade secret)
- Typeface as typeface
- Blank forms which record information but do not convey information

The important distinction between copyright and a patent is that although a copyright can protect the manner in which a particular idea is expressed (e.g., in a book), it cannot and does not protect the underlying idea that is being expressed.

The "author" of the work owns the exclusive rights noted above. Unless the work is a "work made for hire," the "author" of the work is the individual person who actually created the work. A "work made for hire" is a work that falls within a narrow definition under the Copyright Act. The definition includes a work that is prepared by an employee within the scope of his/her employment, such work being owned by the employer. It also includes certain commissioned works, but only if there is a written agreement between the author and the commissioning party that states that the work is a "work made for hire." Thus, unless an employee within the scope of his/her employment has created the work, there is a good chance that the work is not a "work made for hire" as defined by the Copyright Act. This may be the case even where there is a written agreement between the author and the party that has hired the author, as the definition applies only to a narrowly defined list of works. For example, software is not included on the list of works subject to the "work made for hire" provisions of the Copyright Act. Thus, if a business hires a programmer to develop software, the programmer, not the business, will own the copyright to the software. This may be true even if there is a written agreement that states that the software is a "work for hire." When a business hires a third party to develop a copyright protected work, it is important to have a document that states that, to the extent a work is not deemed to be a "work made for hire," the author assigns its copyright rights to the business.

Unlike a patent, copyright protection arises automatically once the work of authorship is affixed to a tangible medium. That being said, registering one's copyrights with the Copyright Office is advisable for the following reasons:

- *Keys to the Courthouse.* Although copyright rights arise automatically, to enforce those rights in court, one must register the copyright with the Copyright Office. The filing fee to register a copyright is \$30; however, if the filing must be completed on an expedited basis (for example, in anticipation of litigation), the filing fee is over \$600.
- *Statutory Damages and Attorneys' Fees.* If an author registers a copyright prior to an infringement, the author will have the right to seek statutory damages and recover reasonable attorneys' fees. Statutory damages can be as high as \$30,000 per infringement (or \$150,000, if the infringement is willful). If the infringement occurs prior to the copyright being registered, the author can only collect actual damages, which are normally measured as the infringing party's profits that are attributable to the infringement. Such damages can be difficult to prove and/or may be minimal. Thus, registering the copyright prior to an infringement gives teeth to the author's copyright and often makes enforcement less difficult and less costly.

## **TRADEMARKS**

Trademarks are protected under both federal and Maine state law. The primary purpose of trademark law is to protect consumers by preventing confusion as to the source of a particular good or service. Brands are intended to provide consumers with consistent information, eliminating the need to research a product or service each time it is purchased.

Under both state and federal law, generally, the first party to use a trademark in commerce has the right to prevent another party from subsequently using a "confusingly similar" brand. Generally two marks will be deemed "confusingly similar" if they are similar in appearance, have the same commercial impression, are used in relation to the same goods/services, and are marketed in the same channels of commerce.

Because the person who first uses a trademark in commerce has the right to prevent others from subsequently using a "confusingly similar" trademark, before commencing any significant marketing efforts, one should perform a comprehensive trademark availability search. A full trademark availability search should review both registered and unregistered trademarks to be sure that there are no "confusingly similar" brands already in use. Only after a trademark has been "cleared" for use, should the owner commence its marketing activities. At this time, the owner should also consider registering the trademark with the U.S. Patent and Trademark Office ("USPTO").

Although there is no requirement to register trademarks with the USPTO, a federal registration provides important benefits. The primary benefit is that a federal registration provides the owner with the presumptive exclusive right to use its mark on a nationwide basis, even if the owner's actual use is local or regional. Such exclusive, nationwide rights would not be presumed if the owner relied on his/her common law rights.

The federal registration process involves filing an application with the USPTO and paying the applicable filing fees. It is advisable to retain a skilled trademark attorney to assist with the application process. The process itself takes twelve to eighteen months to complete. The initial term of a federal registration is ten years. The registration can be renewed indefinitely for additional ten-year periods, so long as the mark continues to be used in commerce and certain maintenance filings are completed. Maintenance filings are due between the fifth and sixth year after the trademark is registered and prior to each ten-year anniversary of the registration date.

The "®" symbol provides notice to the public that the trademark has been registered with the USPTO. The "™" symbol indicates that the trademark has not been registered with the USPTO.

Maine state law provides a parallel registration process and augments the protections provided by common law. Equitable relief, monetary damages, and attorneys' fees can be recovered in trademark infringement cases.

## **TRADE SECRETS**

Trade secret protection arises under Maine's Uniform Trade Secrets Act (the "Trade Secrets Act"). Pursuant to the Trade Secrets Act, a trade secret includes any information, including (but not limited to) a formula, pattern, compilation, program, device, method, technique, or process, that:

- derives independent economic value, actual or potential, from not being generally known to and not being readily ascertainable by proper means by other persons who can obtain economic value from its disclosure or use; and
- is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

There is no registration process to protect a trade secret. The only way to protect a trade secret is to keep the information secret. Trade secret information should not be disclosed to any person (including an employee) unless that person has signed a non-disclosure agreement. Even with a non-disclosure agreement in place, one should disclose trade secret information only to those individuals with an absolute need to know.

The owner of a trade secret can prevent others from misappropriating the trade secret. Pursuant to the Trade Secrets Act, one has misappropriated another's trade secret if he:

- acquires a trade secret and knows or has reason to know that the trade secret was acquired by improper means; or
- discloses the trade secret of another without express or implied consent of the owner of the trade secret, and he:
  - used improper means to acquire knowledge of the trade secret;

- at the time of disclosure or use, knew or had reason to know that his knowledge of the trade secret was (a) derived from or through a person who had utilized improper means to acquire it; (b) acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use; or (c) derived from or through a person who owed a duty to the person seeking relief to maintain its secrecy or limit its use; or
- before a material change of his position, knew or had reason to know that it was a trade secret and that knowledge of it had been acquired by accident or mistake.

Damages for trade secret misappropriation may include both the actual loss caused by the misappropriation and/or the unjust enrichment resulting from the misappropriation. If the misappropriation is willful and malicious, the court may award exemplary damages up to two times the total damages award, plus reasonable attorneys' fees.

## **Real Estate**

The present landholding system in Maine is composed of the following estates: the fee simple absolute; three forms of qualified fees (e.g., fee simple determinable); the life estate and the estates for years; periodic tenancy at will and tenancy at sufferance; and the archaic and seldom used form of the fee tail (which may be conveyed by one seized as a tenant in tail in fee simple). Maine does not recognize the marital tenancy by the entirety or the tenancy in partnership. Under Maine law, to create any estate in real property greater than a tenancy at will, that estate must be in writing. A transfer by deed naming two or more grantees is presumed to create a tenancy in common, unless otherwise expressed, and transfers in which two or more grantees are explicitly named as joint tenants will be construed as vesting an estate in fee simple in such grantees with the right of survivorship. Real property owners may also create joint tenancies that include themselves as a joint tenant. Maine law allows that this may be accomplished without a "straw," permitting a deed from a party to himself or herself naming the other joint tenant or tenants as grantees in the conveyance deed.

### **DEEDS AND THE RECORDING SYSTEM**

In order to pass title, interests in real estate must be transferred by a written instrument, which instrument must be signed by the grantor or maker or his attorney-in-fact (with the exception of tenancies at will) and delivered to the grantee. In addition, all deeds must, by statute, contain the name of the grantee and his or her address (including street and number, municipality and state), although failure to include this information does not create a failure of title or make a deed unrecordable. Of note, a Maine trust is not recognized as a legal entity capable of holding or conveying title to real property, thus Maine trust property must be received or conveyed by the trustee or trustees of the trust, although grants to foreign (non-Maine) trusts empowered to own real estate under the law of the foreign jurisdiction are recognized under Maine law. A witness is not required for a deed to be valid, but is desirable. Acknowledgement of the grantor's signature is also not a requirement for a deed's validity, but, importantly, the acknowledgement of the grantor's signature is required for recording. Additionally, the validity of a deed is unaffected if a seal or recital of consideration is not evidenced in the deed.

As for acknowledgement forms, Maine has adopted the Uniform Recognition of Acknowledgments Act, which authorizes the use of the Short Forms of Acknowledgement. An instrument with an acknowledgment from another state or country conforming to the requirements of the Uniform Recognition of Acknowledgments Act is acceptable for recording purposes. The printed names of each grantor and of the person taking the acknowledgment are required beneath their respective signatures before a deed may be recorded.

The recording fee for deeds and most other documents in a county registry is sixteen dollars (\$16) for the first page and two dollars (\$2) for each additional page or portion thereof. There are various surcharges imposed by the county registrars depending on, among other things, number of names to be indexed and deed cross-references. Each of Maine's sixteen counties has a registry, with Aroostook and Oxford Counties having two registries. Deeds describing property crossing a county line must be recorded in both county registries.

Maine's recording law is a "race-notice" statute. A deed is effective as between the parties and persons having actual knowledge of the deed, even though it is not recorded. A deed is not effective, however, against those without knowledge of the deed unless it is acknowledged and recorded in the registry of deeds in the county or counties where the property lies. Therefore, if there are two or more persons who have been granted competing interests in the same land, the purchaser who records first without notice of the prior conveyance will have priority over the unrecorded deed.

Maine has adopted the Short Form Deeds Act, which sets forth statutory forms for a number of different types of deeds. The Short Form Deeds Act also defines certain terms, such as "warranty covenants," which when used in a deed incorporates the statutory definition by reference. The Short Form Deeds Act renders a number of technical deed requirements unnecessary (e.g., words of inheritance and explicit lists of covenants) and has greatly simplified the common law deed forms formerly widely used in Maine.

There are three commonly used types of deeds to transfer title to real estate in Maine (there are also various forms of mortgage deeds in use in Maine which are discussed below): (i) the warranty deed; (ii) the quitclaim deed with covenant; and (iii) the quitclaim or release deed (including the form of a Trustee's release deed). Under the Short Form Deeds Act, a grant including the term "warranty covenants" means that the grantor covenants with the grantee, and the grantee's heirs and assigns that the grantor is "lawfully seized in fee of the premises, that they are free of all encumbrances, that he has good right to sell and convey the same to the said grantee to hold as aforesaid, and that he and his heirs shall and will warrant and defend the same to the said grantee, his heirs and assigns forever, against the lawful claims and demands of all persons." The quitclaim deed with covenant under the Short Form Deeds Act contains only one covenant, in which grantor covenants with the grantee, and the grantee's heirs and assigns "that he will warrant and forever defend the premises to the said grantee, his heirs and assigns forever, against the lawful claims and demands of all persons claiming by, through or under him." Under the Short Form Deeds Act, the quitclaim deed is the equivalent to a release deed and, therefore, grantor warrants nothing—not even his or her own title to the land.

As a general rule, spouses may own property individually in fee simple and dispose of the same for value without the signature of the other spouse to release elective share rights which have replaced common law rights of dower and curtesy. There are, however, specific situations in which Maine law may mandate that transfers of real estate (including mortgages) require the spouse's signature or release (e.g., pending divorce and gifts).

#### **AUTHORITY AND EXISTENCE**

When an entity transfers real property, the entity's existence and authority must be determined. Normally, a recital of the type of entity and the capacity of the person executing a document or instrument on behalf of that entity is generally sufficient to satisfy this requirement according to the Maine Title Bar. This requirement of a recital applies to trusts (i.e., trustees), partnerships, limited liability companies, and corporations. It is generally recommended in transactions involving any entity that extrinsic confirmation of the existence of that entity and proper authority to enter into the transaction be documented and offered to the other party (e.g., Clerk's Certificates). The customary practice in Maine does not make the evidence of existence and authority itself part of the record title.

#### **REAL ESTATE TRANSFER TAXES AND WITHHOLDING**

A tax is imposed on transfers of property in Maine, with certain limited exemptions. The tax imposed on such transfers of real property is at a rate of \$4.40 for each \$1,000 of consideration for the property, which is by statute shared equally between the grantor and grantee, unless otherwise agreed. This tax is reported on the Maine Department of Revenue Declaration of Value form, which form is filed at the registry, along with the payment of any tax amount due, when the deed is recorded. This form must be executed by the parties to the conveyance or their authorized representatives, and must indicate, among other things, the consideration paid for the property transferred. There are certain exemptions to this tax, which include mortgage deeds and mortgage discharges, deeds between certain family members, deeds made pursuant to corporate mergers, and deeds between parent and subsidiary corporations.

The state of Maine also considers the transfer of a controlling interest in any entity owning a fee interest in real property located in Maine, whether by single or multiple step transactions, a transfer of the property itself or the portion thereof owned by the transferring entity and thus subject to the transfer tax law. "Controlling interest" is more than 50% of the total combined voting power, capital, profits, or beneficial interests in the transferring entity. The parties to the "controlling interest" transfer must execute and file at the registry of deeds a Controlling Interest Transfer Tax Return/Declaration of Value, stating, among other things, the consideration paid that is allocable to land, the parcels transferred pursuant to the transfer of controlling interest of the entity, and name and address of the transferor and transferee. The tax liability is the same as for a direct real estate transfer.

In addition to Maine's transfer tax requirement, there is a withholding requirement imposed on real estate transactions in Maine where the seller is an out-of-state resident and the consideration paid for the property transferred is \$50,000 or more. Sellers are required to notify buyers of the withholding requirement. If this requirement is triggered, buyers of real property are responsible to withhold two and one-half percent of the gross consideration for the property and transmit that amount to the State Tax Assessor within thirty days of the transfer. The out-of-state seller may avoid this requirement if it furnishes the buyer with a

certificate from the State Tax Assessor stating that no tax is due on the transaction or that the seller has provided adequate security to the state to cover any future tax liability. Buyers who improperly fail to withhold any required amount may be held personally liable for the amount of withholding. If the person responsible for handling the transaction has not informed buyer of the withholding requirement, that person may instead be personally liable for the withholding amount.

#### **PURCHASE AND SALE CONTRACTS AND BROKERS**

A purchase and sale agreement must conform to the following to be enforceable: (i) the agreement must be in writing and be signed by the party against whom the contract is being enforced, or that party's duly authorized agent; (ii) the parties to the contract must be identified; (iii) the price of the real estate must be stated; and (iv) the agreement must include a description sufficiently detailed to identify the property being sold. In addition to these basic requirements, standard purchase and sale agreements are normally far more extensive and forms frequently contain a number of detailed clauses addressing, among other things, the state of the property, the quality of title to the property being conveyed, the type of deed seller will deliver, and an allocation of taxes and other closing proration between buyer and seller. Purchase and sale agreements often provide provisions relating to inspection contingencies—particularly environmental contingencies (e.g., underground storage tanks or hazardous waste) that are typically performed in a buyer's due diligence inquiry prior to, and as a precondition to, closing on the property in question.

In a typical transaction, sellers of real property contract with a broker or sales agent to assist with finding a buyer for the property. Buyers, with increasing frequency, are also retaining the services of so-called buyer's brokers to assist in finding suitable real estate to purchase. Brokers, to be entitled to compensation in a sale transaction, must be licensed in Maine and must enter into a valid and definite contract for compensation with a seller or buyer of real estate. Maine law provides that non-licensed individuals engaging in real estate brokerage in Maine are subject to fines and possible criminal penalties. Exclusive right to sell brokerage contracts, exclusive agency contracts, and any non-exclusive contracts for residential property consisting of one-to-four-family residential properties must be in writing, signed by the party to be charged, and must contain a definite expiration date. It should be noted that "net listings" are prohibited in Maine: that is, those listings that provide a pre-determined net sum to an owner and allow the seller's broker to set the sale price and retain any proceeds above the pre-determined net amount.

The Maine Real Estate Commission is the licensing and policing body for real estate brokers. The Commission's regulations require brokers to make certain inquiries and provide certain disclosures concerning listed real property's private water supplies, heating source, known hazardous materials, underground storage tanks, insulation and private waste disposal systems. In residential transactions without the involvement of real estate brokers, similar disclosures are required to be made by the seller to the buyer.

Aside from limited disclosure requirements, Maine remains a "caveat emptor" state. There are common law protections for sellers of flawed or defective real estate, with some exceptions, including fraud and "active concealment."

## **MORTGAGES AND MORTGAGE FORECLOSURE**

Maine is a so-called "title theory" state; thus, a mortgage deed actually transfers legal title to the mortgagee, subject to a defeasance clause in the mortgage that usually makes the conveyance to the mortgagee void upon payment of the secured debt. Mortgages include those made in the usual form (i.e., one in which the condition is set forth in the deed as well as those made by conveyance appearing on its face to be absolute) with a separate instrument of defeasance executed at the same time or as part of the same transaction. It should be noted that Maine has adopted a number of "consumer-protective" provisions, which control mortgagee's rights in the consumer context (including, the Uniform Consumer Credit Code, a so-called Plain Language Law and Fair Credit Extension Laws).

There are a number of forms of mortgages in use in Maine, ranging from the Maine Statutory Short Form (used most often by holders of subordinate mortgages) to extensive commercial mortgage forms, which frequently include security agreements covering personal property in or upon the mortgaged premises. With respect to the Statutory Short Form Mortgage deed, if the recital "mortgage covenants" is used, then the recital shall have the meaning and effect of stating "the grantor covenants with the grantee, his heirs and assigns that he is lawfully seized in fee of the premises, that they are free of all encumbrances, that he has good right to sell and convey the same to the said grantee to hold as aforesaid and that he and his heirs shall and will warrant and defend the same to the said grantee, his heirs and assigns forever, against the lawful claims and demands of all persons." Mortgage deeds are exempt from real estate transfer tax and do not require an accompanying declaration of value form when being recorded.

Future advances clauses in mortgages are enforceable by statute. Generally, the statutory scheme provides that advances made under a future advances provision that allow the first mortgagee to lend additional amounts up to a stated amount take priority (up to the stated amount) over subordinate loan amounts, notwithstanding the timing of such advance. Subsequent mortgagees and lienors may limit the priority of future advances by providing a certain form of statutory notice to the first mortgagee.

Maine is unique in its methods of foreclosure and Maine law recognizes several foreclosure methods (including infrequently used forms of strict foreclosure). By far, the most common foreclosure methods are civil foreclosure and the power of sale foreclosure. Foreclosure by civil action had been the prevalent method of executing a foreclosure action, but the statutory power of sale method has become a preferred method in commercial mortgage situations. The applicability of the statutory power of sale is a permitted method for commercial transactions involving corporations, partnerships, limited liability companies, and trusts so long as certain formalities in drafting are met. There remains, however, an exclusion for transactions where the debtor uses the mortgaged premises as his or her primary residence. Mechanically, a foreclosure pursuant to the statutory power of sale proceeds in a manner similar to that in other states, and requires no judicial intervention. Under this power of sale, the mortgagor is afforded a notice provision allowing process to be completed within sixty (60) days and, moreover, there is not equity of redemption.

On the other hand, executing a foreclosure by civil complaint (which is the prevalent form in residential loan foreclosures) requires judicial action and begins with a foreclosure complaint.

Some advantages inherent in this method of foreclosure are court supervision, and a relatively short, ninety-day redemption period. After the redemption period expires, the lender must follow the strict guidelines of the civil foreclosure statute with respect to the timing of publication of notice of sale of the premises. Depending on whether the debtor asserts substantive defenses, the majority of foreclosures by civil action are resolved at the summary judgment level.

With respect to deficiency judgments, the different methods of foreclosure contain different procedures. The civil action foreclosure limits the deficiency judgment a purchasing creditor at the foreclosure sale to the difference between the fair market value of the premises at the time of the sale and the debt due to the creditor, plus costs. Unlike civil action foreclosures, there is no specific statutory procedure for collection or recovery of deficiencies established under foreclosure by the statutory power of sale or by strict foreclosure. Generally, strict adherence to the power of sale statute or the civil foreclosure statutes is a prerequisite to recovery of a deficiency, and a civil suit is necessary in order to collect.

### **CONDOMINIUMS**

In Maine, condominiums are controlled by the Maine Condominium Act. Under the Act, a condominium is created by recording, in the local registry of deeds, a Declaration of Condominium and plats and plans that meet the statutory requirements. Valid recording is a prerequisite to the creation of any condominium in Maine. The Act also provides for the governance of condominium associations and the rights of third parties (including secured lenders). In addition, there are a number of sections intended to protect condominium purchasers through controlling the procedures for the sale and re-sale of condominium units, one such protection being that condominium developers are held to strict disclosure protocols including, potentially, a public offering statement.

Lenders in Maine may hold a mortgage interest on condominium units and may foreclose on such units in the same manner as with other types of real estate. Mortgagees seeking to foreclose on a condominium unit should, however, keep in mind that under the Act, the condominium owners' association will have a lien on each unit to secure the payment of common charge assessments. The first mortgage will have priority over an association's lien, but junior mortgages will not.

### **TITLE INSURANCE/TITLE OPINIONS**

Maine's financial institutions now routinely require title insurance, but there is otherwise no legal requirement that title insurance be part of real estate transactions. Title opinions, once prevalent, have become the exception, not the rule. The major underwriters of title insurance are available in Maine and most policies are written through title companies who act as agents for these major insurance companies. Maine is a filed rate state and, therefore, insurance companies must promulgate their rate schedules annually and are bound by the rates that are published. In some larger commercial transactions, however, there is some flexibility and the rates are often times negotiable (downward) to some extent.

In the residential context, secondary market endorsements, such as inflation riders, are issued as a matter of course. Survey and mechanics lien exceptions are normally deleted in lender's policies based upon plot plans and/or seller's affidavits.

## **LANDLORD AND TENANT**

By statute, an agreement to lease real property will create nothing more than a tenancy at will unless it is evidenced by a writing. Additionally, a lease for more than two years, or for an indefinite term, is ineffective against any person except the grantor, its heirs and successors, and persons having actual notice of the lease, unless the lease or memorandum of such lease is acknowledged and recorded in the registry of deeds in the county in which the leased premises is located. The memorandum must be executed and acknowledged by one of the lessors, name all the parties to the lease, contain a description of the property leased, state the date and term of the lease, and describe provisions of the lease regarding renewals, extensions, or options to purchase. The memorandum is not required to describe any provision related to rent.

In the commercial context, there is little statutory control of leases. In the residential context, there is an extensive overlay of statutory control and regulation of the landlord/tenant relationship.

Termination of tenancies in Maine may be completed pursuant to provisions in the lease contract that are consistent with Maine law. Absent clear rights to terminate a tenancy in a lease, a landlord may not have the right to do so for some tenant defaults. Tenant evictions are a matter of judicial process, controlled solely by statute—in Maine, this process is governed exclusively by the forcible entry and detainer statute. It should be noted that removal of tenant or tenant's property by any means of self-help violates Maine's illegal eviction statute and, therefore, may subject the landlord to potential risk of extensive liability (including damages, costs, and attorneys' fees).

## **MECHANICS'/MATERIAL PERSONS' LIENS**

Under certain circumstances mechanics' liens can take priority over pre-recorded mortgages. Maine's mechanic's lien statute is generally thought to be strongly pro-lienor. Any person furnishing or performing labor, providing materials, or performing services in erecting, altering, or repairing a house, building or other structure by virtue of a contract with or by consent of the owner of that building or structure, has a lien thereon to secure the payment for such labor or services. The lienor (i.e., the person furnishing the labor, materials or services) must within ninety (90) days after last performing the labor, furnishing materials, or providing services, file a statement made under oath and in the statutorily prescribed form at the appropriate registry of deeds. In addition, to preserve such a lien, a suit for the labor, materials furnished, or services provided must be brought within 120 days after the last labor is performed, materials are furnished, or services are provided. If these filings are properly and timely made, then purchasers of the property shall take subject to these liens.

## **THE IMPROVIDENT TRANSFERS ACT**

In Maine, certain transfers by individuals sixty years or older may be voided through the operation of Maine's Improvident Transfer Act. The Act is triggered when (1) a person sixty years old or older who is dependent on others; (2) transfers real estate, completes a major transfer of personal property, or a transfer of money, all for less than full consideration, or that person executes a guaranty; (3) to a person with whom the dependent person has a confidential or fiduciary relationship. If the above elements are found, then it is presumed that the transfer or execution was the result of undue influence, unless the elderly dependent

person was represented in the transfer or execution by independent counsel. The result of such a finding is that a court may void the transfer or execution.

## **Environmental Issues**

The people of Maine consider their environment to be the centerpiece of their communities and their economy. Consequently, the field of environmental law has undergone rapid and significant changes over the past twenty years. Only a generation ago environmental risks were rarely considered in commercial transactions. Today environmental risk management is an integral component of any commercial enterprise. Although the field of environmental law is vast, the key areas of environmental law effecting commercial lawyers today are hazardous waste management, air and water quality, and land use controls.

### **"CRADLE TO GRAVE" WASTE MANAGEMENT**

Hazardous waste is regulated from "cradle to grave" in Maine under both federal and state law. The federal law regulating hazardous waste is known as the Resource Conservation and Recovery Act (RCRA). RCRA provides a public and private right of action for violations of hazardous waste laws. Under the delegated authority of RCRA, Maine's Department of Environmental Protection (DEP) administers the state's own hazardous waste management program, the requirements of which can be no less stringent than the federal RCRA. The DEP, through its adjudicatory and rulemaking Board of Environmental Protection (BEP), is responsible for identifying hazardous wastes. Once a waste is identified, or "listed" as hazardous, it is regulated by the DEP rules. Listed wastes include compounds used commonly in industry such as solvents and industrial byproducts. However, wastes that are not listed may still be regulated if they are characterized by ignitability, corrosivity, reactivity, and toxicity exceeding certain thresholds. DEP rules also govern generators and transporters of hazardous waste, as well as facilities that treat or dispose of hazardous waste. Requirements include licensing for certain facilities, recordkeeping, and a "manifest" system designed to track hazardous waste from generation to disposal. The disposal of so-called "universal waste" is also subject to DEP oversight under its hazardous waste program. Universal wastes include cathode ray tubes, fluorescent lamps, and certain mercury and PCB-containing devices. These commonly produced wastes must be segregated, stored, and disposed of consistent with state regulations.

### **CONTAMINATED PROPERTY**

The improper disposal of hazardous substances, including hazardous waste, is also regulated under both state and federal law. The federal Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), popularly known as the Superfund, is the principal tool to compel property owners and users to clean up property contaminated by hazardous substances. Liability under CERCLA is both strict and joint and several, and always costly. For a person to be liable under CERCLA the regulatory authorities or affected private party need only show that a release, or threatened release, of hazardous substances has occurred, that response costs have been incurred, and that the defendant is a "covered person." Covered persons are broadly defined in the statute to include owners and operators of the property, and those who arranged for the transport disposal or themselves transported disposal of the hazardous substances at issue, regardless of the individual's fault in causing the contamination.

The Maine Uncontrolled Hazardous Substance Sites law funds and enforces the clean up of contaminated properties in Maine. The Maine law is modeled after CERCLA but tends to be broader and more stringent in several key areas. The scope of potentially responsible parties is broader than under CERCLA and more substances are identified as hazardous. Liens for clean-up costs attach to properties remediated by Maine authorities. These liens are known as "superliens" as they have priority over all other encumbrances on the remediated property recorded after July 7, 1987. Maine has established a Voluntary Response Action Program (VRAP), pursuant to which eligible contaminated or "brownfield" properties may be investigated and a voluntary response action plan approved by the DEP for the remediation of some or all of the contamination. Completion of an approved plan results in liability protection against certain governmental claims, and private contribution claims, related to the contamination for defined eligible parties.

### **WATER QUALITY**

Water quality is regulated under both state and federal law in Maine. Maine has been delegated authority to administer permitting under the federal Clean Water Act's National Pollution Discharge Elimination System (NPDES) program. By means of this permitting program and the regulatory scheme contained in its Protection and Improvement of Waters Act, Maine regulates discharges of pollutants into surface and ground water. Any discharge into waters will require a Maine Pollution Discharge Elimination System (MEPDES) license from the DEP. Licenses detail limits on the amount, timing, and type of pollutants that may be discharged by the licensee as well as pollution control equipment required. The inland and coastal waters of Maine have been classified by the state according to their respective water quality and the uses made of those waters. Discharge limitations and pollution control requirements are designed to ensure the protection of these water classifications. The DEP also regulates the quantity and quality of storm water discharge from certain sites. Generally speaking, projects that will result in one or more acres of impervious area or five acres or more of disturbed area will require a permit from the DEP. Projects located within the watershed of bodies of water most at risk from new development, as designated by the DEP, are subject to more stringent jurisdictional triggers and comprehensive storm water standards.

### **AIR QUALITY**

In accordance with the federal Clean Air Act, Maine has adopted a State Implementation Plan (SIP) to provide for the implementation, maintenance, and enforcement of regional air quality standards. Key provisions of Maine's SIP regulate the source and type of emissions permissible. Industrial facilities that are sources of air emissions must receive licenses from the DEP. Licenses are generally issued for five-year terms and may mandate the use of certain pollution control equipment. The extent to which a source of air emissions is regulated depends upon whether it is qualified as a "minor" or "major" source of pollutants. A general guideline is that a "minor source" is a facility that has the potential to emit less than fifty tons per year of volatile organic compounds, less than one hundred tons per year of any other regulated pollutant, less than ten tons per year of a single hazardous air pollution and less than twenty-five tons per year of all hazardous air pollutants combined. Sources emitting in excess of these limits will typically constitute the more heavily regulated "major" sources.

## **LAND USE**

Land use is primarily regulated at the municipal level in Maine. Many municipalities have comprehensive plans to guide development in the community. While local town governments determine zoning, permitting, and site review, authority is usually overseen by local planning boards. Consequently, the business lawyer in Maine must be familiar with local processes and regulations. In addition to this local regulation, state law mandates that municipalities observe certain state-wide minimum standards regarding subdivisions, junkyards, development, and activities within the inland and coastal shoreland areas and adjacent to wetlands, septic systems and the prevention of hazardous discharge into waterways. As discussed below, the state also regulates certain large projects under the Site Location of Development Act. Over fifty percent (50%) of the state's land area is unorganized territory that is not governed by a municipal entity. Land use in these areas is overseen by the Land Use Regulatory Commission (LURC) a state agency that serves as a super-planning board, performing certain zoning functions and promulgating and administering land use regulations.

## **NATURAL RESOURCE PROTECTION**

Natural resources are protected pursuant to federal, state, and local regulation. Federal law prohibits the disruption of certain wetlands, associated with navigable waters, without a permit. The State Natural Resource Protection Act regulates activities in, on, over or adjacent to (within seventy-five feet) designated protected natural resource areas, including any fresh water or coastal wetland, great pond, river, stream, brook, sand dunes, and significant wildlife habitat.

Permits to alter wetlands or impact other protected natural resources may be granted if the applicant can satisfy the DEP that the activity will not unreasonably impact the resource. The standards the applicant must satisfy are both broad and stringent, frequently requiring an analysis of alternative designs and locations and a mitigation of harm to the resource.

## **SITE LOCATION OF DEVELOPMENT ACT**

In addition to applicable municipal and LURC regulation of development, the Maine DEP regulates significant developments, including subdivisions, to ensure compatibility with the development's surroundings and appropriate planning, and to minimize environmental impacts. Generally speaking, developments that result in the creation of more than three acres of impervious surface, which occupy a land or water area in excess of twenty acres, involve commercial subdivisions of five or more lots or residential subdivisions involving fifteen or more lots within a five year period that occupy more than thirty acres are subject to a relatively rigorous permitting process under the Maine Site Location of Development Act. Developers of such projects must demonstrate to the Maine DEP that their project meets certain environmental standards addressing air and water quality, erosion and sedimentation control, scenic character, historic sites, and wildlife and fisheries resources.

## Taxation

### INDIVIDUAL INCOME TAX

Maine imposes an income tax on each resident individual based on the individual's federal adjusted gross income less certain statutory adjustments and credits. Maine imposes an income tax on each non-resident individual based on income "sourced" in Maine. This tax liability is computed by treating the non-resident individual as a resident and then multiplying resident tax liability by a fraction of the adjusted income "sourced" in Maine to all adjusted gross income.

The Maine income tax rate is imposed at graduated rates beginning at 2.0% and rising to 8.5% for Maine taxable income in excess of \$17,700 for single individuals and \$35,450 for joint returns. These amounts are indexed each year.

Each resident individual who is required to file a federal income tax return must file a Maine income tax return (Form 1040-ME). Each non-resident individual who has income "sourced" in Maine resulting in Maine income tax liability must file a Maine income tax return (Form 1040-ME and Schedule NR).

The Maine withholding tax rules are similar to the federal withholding tax rules. Every employer who maintains an office or transacts business in Maine, and who is required to withhold federal income tax from a particular payment, must also withhold Maine income tax if such payment is subject to taxation under the Maine income tax laws. The employer may rely on the number of federal withholding exemptions when withholding Maine income tax. The withholding rules also require withholding from certain pensions, annuities, and other payments. Amounts withheld are reported to the Maine Bureau of Taxation on Form 941L-ME for eighth monthly reporting and Form 941-ME for any other reporting.

### CORPORATE INCOME TAX

Maine imposes an income tax on a corporation based on its federal taxable income, allocated or apportioned, to Maine, as modified for statutory adjustments and credits. The Maine corporate income tax rate is imposed at graduated rates beginning at 3.5% and rising to 8.93% for Maine taxable income in excess of \$250,000.

For multi-state corporations, the apportionment formula to determine the percentage of income apportioned to Maine is a four-factor formula based on a property factor, a payroll factor, and twice the sales factor.

Maine requires combined reporting for members of a unitary business group. A unitary business group is evidenced by unity of ownership, functional integration, centralization of management, and economies of scale.

Maine has a corporate alternative minimum tax system similar to the federal alternative minimum tax system. The corporate alternative minimum tax is not applicable to corporations (financial institutions) subject to the Maine franchise tax. The Maine alternative

minimum tax is the excess of the tentative minimum tax over the regular income tax. The tentative minimum tax for corporations is 5.4% of the alternative minimum taxable income attributable or apportioned to Maine.

#### **FRANCHISE TAX**

Maine imposes a tax upon the franchise or privilege of doing business in Maine of financial institutions, financial institution holding companies, and subsidiaries of financial institutions. The amount of the tax is the sum of one percent (1%) of the entity's net income or loss on its books as required to be reported on its federal income tax return and apportioned to Maine, plus eight cents per \$1,000 of its year end Maine assets as shown on its federal income tax return. Special rules apply for financial institutions involved in a unitary business, financial institutions with subsidiaries incorporated outside of Maine, and financial institutions sustaining a net operating loss.

#### **PROPERTY TAX**

All real property situated in Maine is subject to a property tax. In addition, all tangible personal property of Maine residents and all tangible personal property located in Maine owned by non-residents are subject to a property tax. The property tax is imposed on the "just value" of the property.

The property tax is assessed by the cities, towns, and plantations (unorganized territories) and covers the twelve-month period beginning April 1st of the assessing year.

The Maine property tax rules provide several exceptions, including exceptions for property owned by federal, state, and local governments, certain property of charitable organizations, houses of religious worship, and property of certain war veterans and their families. Taxpayers acquiring certain types of business property may seek to obtain a reimbursement of any or all property taxes paid under the Maine business equipment tax reimbursement program (BETR).

Several special excise taxes and valuation rules apply to owners of forestland. Excise taxes are imposed on owners of land within the budworm spraying zones of Maine, and for the privilege of using land in a commercial forestry enterprise. Any land used primarily for the growth of trees to be harvested for commercial purposes may be valued on its potential for annual wood production rather than under the general valuation procedures. This special valuation encourages the owner to continue the unique use of the land.

#### **SUBCHAPTER S CORPORATIONS IN MAINE**

Maine recognizes S corporation status. An S corporation doing business in Maine or that has Maine resident shareholders must file informational form 1120S-ME (a similar rule applies to partnerships and limited liability companies; these entities file a form 1065-ME).

Similar to Federal income tax rules, an S corporation is subject to tax on certain investment income and built-in gains from the sale of certain appreciated property. If an S corporation is subject to tax, the S corporation must file a Maine corporate income tax return (Form 1120-ME).

With the permission of the State Tax Assessor, an S corporation (or a partnership or limited liability company) may file an income tax return on behalf of each of its non-Maine shareholders (a composite filing) who authorizes such filing and whose only income subject to Maine income taxes is income from the S corporation. See Rule No. 805 (September 2, 1987). Each electing shareholder (or partner) is responsible for the payment of taxes shown on the composite filing.

#### **PASS-THROUGH ENTITY WITHHOLDING**

All pass-through entities with Maine source income must withhold income taxes from each non-resident owner and remit the amount of the withheld income taxes quarterly to Maine Revenue Services. The amount withheld is calculated at the highest marginal income tax rate (8.93% for regular corporations and 8.5% for all other non-resident owners).

For these purposes, a pass-through entity includes a partnership, S corporation, and a limited liability company (that is treated as a partnership for income tax purposes) and any other entity where the income of the entity passes through to its owners.

There are automatic, conditional, and requested exemptions to the withholding requirement. For example under the automatic exemption category, the withholding requirement does not apply if the amount of Maine source income allocated to a non-resident owner is less than \$1,000.

#### **SALES AND USE TAX**

Maine imposes a sales tax on the value of all tangible personal property and taxable services sold at retail in Maine. Taxable services include the rental of living quarters, the short-term rental of automobiles, custom computer programming, and the rental of videotapes and equipment. Maine imposes a use tax on the storage, use, or consumption of tangible personal property and taxable services if the sale of these products in Maine would have been subject to sales tax.

The rate of tax is seven percent (7%) on liquor sold, ten percent (10%) on the value of the short-term rental of automobiles, seven percent (7%) on the value of living quarters, seven percent (7%) for prepared foods, and five percent (5%) for all other purposes.

Maine sales and use tax rules provide numerous exemptions to the sales and use tax liability, including sales to certain charitable organizations, sales of machinery and equipment used by the purchaser to produce tangible personal property, and sales of certain food products.

The retailer is required to collect the sales tax from the consumer and remit the tax collected to the Maine Bureau of Taxation. The retailer need not collect a sales tax if the consumer produces a valid certificate of exemption.

In general, each retailer files a sales tax return monthly (Form ST-7). The State Tax Assessor may allow annual, semiannual, or seasonal reporting in special circumstances.

## Antitrust

The key federal antitrust statutes are known as the Sherman and Clayton Acts. The Clayton Act endows the Department of Justice with authority to review mergers and other practices of publicly traded corporations for anticompetitive practices. The Sherman Act has two principle components.

A violation of Section 1 of the Sherman Act consists of two elements: (1) a contract, combination, or conspiracy (2) that is an unreasonable restraint of trade. Two standards are applied by the courts to review anticompetitive arrangements: Per Se review and Rule of Reason analysis. Per Se violations of the Sherman Act encompass the most egregious anticompetitive practices and are, therefore, per se unreasonable. Such violations include price fixing and market allocations. The consequences of applying the Per Se label to an activity can be severe. The plaintiff need only prove that the practice occurred, and is not required to prove competitive unreasonableness. Defendants of Per Se actions are precluded from attempting to justify the restraint as being reasonable. Due to its harsh results, the courts apply the Per Se label to trade practices sparingly.

The second and predominant standard of review is the Rule of Reason. Under this rule, the fact finder weighs all of the circumstances of a case to decide whether a restrictive practice is an unreasonable restraint of trade. The test of legality under the Rule of Reason is whether the restraint imposed merely regulates competition, and perhaps thereby promotes competitive behavior between adversaries, or whether it is such that it may suppress or even destroy competition.

Section 2 of the Sherman Act addresses attempted monopolizations. Three basic elements compose a violation of Section 2 of the Sherman Act: (1) establishing the product and geographic dimensions of the relevant market; (2) a specific intent to acquire monopoly power, as opposed to a more neutral intent to simply engage in vigorous competition; and (3) the defendant's actions must have reached the stage such that there is a dangerous probability that, if left unchecked, an actual monopoly position will ultimately be achieved.

Maine's antitrust laws essentially replicate federal antitrust law. Consistent with this close parallel between the state statutes and federal antitrust law, the Maine courts generally look to federal case law to define the meaning and scope of the Maine law.

In addition, Maine has a few additional and unique prohibitions that might broadly be categorized as antitrust laws. For instance, Maine law prohibits "enhancing the price," "restricting the supply," or permitting the "preventable waste" of "necessities of life." Those necessities include food (both for humans and "domestic animals"), clothing, shoes, building materials, gas, electricity, fertilizer, and manufacturing machinery and equipment. Maine law also prohibits profiteering in rents by charging unreasonable or "unjust" rents. Both of these sections appear to have their origin in depression era populist legislation.

More recently, the Legislature has enacted a provision which requires that any person intending to purchase the "controlling stock" or the "substantial assets" of any entity involved in the sale of automobile gasoline or home heating oil must give thirty days advance notice to the Attorney General. This latter statute was enacted in response to the perceived threat to Maine consumers from large oil refining and distributing interests in the Canadian maritime

provinces and was intended to be utilized as a tool to assist in the enforcement of Maine's equivalent to the Clayton Act.

All of the foregoing laws are enforceable by the Attorney General and by private causes of action. Any person, including the state and municipalities, injured "directly or indirectly" by a violation of Maine antitrust law may sue for treble damages and attorneys fees. The right to recover for direct and indirect damages legislatively abrogates the prohibition on suits for indirect damages established by the Supreme Court under federal antitrust law. Thus, for example, an injured consumer may bring a price fixing suit against a manufacturer or wholesaler, even though the consumer purchased from a retailer. In addition, the Attorney General may file suit to enjoin any prohibited practice and may seek either civil or criminal penalties. However, the Attorney General may not seek both criminal and civil penalties.

As an aid to enforcement, the Attorney General, either on his own initiative or "upon petition of fifty or more citizens," shall investigate all "seeming violations" of antitrust law. To this end the Attorney General may issue summonses for testimony before his staff. The testimonial examinations, much like civil depositions, are private or public, at the option of the summonsed party. The Attorney General's summonses are enforceable by court order.

The Maine Attorney General has a small but very active Consumer Antitrust Division. Over the years they have been active in the wood products, magazine distribution, milk, fishing, and health care industries.

## Energy

### ELECTRICITY

In the early twentieth century Maine, like most states, embraced the regulation of electric utilities. Throughout most of the twentieth century, Maine's vertically integrated electric utilities were treated as natural monopolies whose rates were established through traditional cost of service ratemaking. The utilities quickly developed the state's extensive hydroelectric potential, and little opportunity exists for projects at new sites. Maine has actually taken down dams whose economic viability did not justify re-licensing.

In the 1980s, Maine, like the rest of New England, was highly dependent upon foreign oil. The impact of oil embargoes of the late 1970s had a devastating impact on Maine's economy, which had few alternative energy suppliers. The primary federal law promoting diversity, known as PURPA (Pub. L. No. 95-617, 92 Stat. 3117), encouraged public utilities to purchase power from independent power producers who co-generated or used renewable resources. Maine embraced PURPA enthusiastically and undertook elaborate rulemakings to establish the method of setting the "avoided cost" which was the price to be paid the private producers. The price was to be no greater than the cost utilities would pay if they generated power from existing and new power plants, but given the poor planning by the utilities, the price for power was established at a relatively high level. As a result many renewable energy plants were built in Maine including hydroelectric, biomass, and waste to energy plants.

During the 1980s, renewable energy became one of Maine's most significant economic sectors. In the late 1980s and early 1990s New England's economy suffered a downturn. The

region's receding economy left behind an energy surplus that created significant problems for Maine's electric utilities with respect to their private power contracts with renewable suppliers. Electricity was overabundant and market prices fell, but utilities continued to pay scarcity prices under fixed-price contracts pegged to alternative costs, which assumed high oil prices, and capital costs similar to nuclear power generation. These "stranded costs" contributed to public pressure to restructure the electric industry in Maine.

In 1997, the Maine Legislature adopted landmark electric utility restructuring legislation, found at 35-A M.R.S.A. §§3201-3217. The restructuring act became effective on March 1, 2000 and required that Maine's three investor-owned electric utilities divest all interest in electric generation plants and other generation resources. The utilities continue to own transmission and distribution facilities and remain regulated as "T&D" utilities. T&D utility rates are regulated, but the Maine Public Utilities Commission (PUC) has implemented performance-based ratemaking for the utilities. Unregulated competitive suppliers provide generation service to customers who can choose among various suppliers. In the first years of deregulation in Maine, most residential and small customers have taken generation service through a default supply arrangement known as "standard offer service." The Maine PUC selects standard offer providers through a periodic bid process. Most large customers in Maine now purchase generation supply through negotiated bilateral contracts with competitive suppliers. The T&D utilities recover generation-related stranded costs, such as costs of remaining power purchase contracts and nuclear investments, through surcharges on customers' T&D bills. T&D rates have fallen in recent years due to the high prices obtained in the sale of utility generation facilities as well as the expiration or restructuring of power purchase agreements.

It is expected that stranded costs will decrease annually as remaining power purchase contracts expire, and will be paid off in full by approximately 2015. However, generation supply costs are expected to rise in the near future in response to oil and gas price increases. Maine's experience with electric utility restructuring has been largely positive, and is viewed as one of the more successful such restructuring efforts in the United States.

The mix of generation in Maine has also expanded beyond renewable power developed under PURPA. In the mid to late 1990s a number of gas-fired combined cycle plants were built. Some were stand alone generators and some were integrated into paper mills. Combined with power imported from Canada through the state's link with New Brunswick Power, Maine has an overabundance of power for its load and has limitations on the export of that power to southern New England. As a result Maine consumers actually benefit from the region's nodal pricing structure, which credits users with a discount off of regional prices.

Other than within the paper industry, Maine has limited experience with distributed generation, and back up rate issues have continued to retard the development of local self supply. The law prohibits the charging of an exit fee, but utilities continue to fight projects which would reduce their T&D load and thus increase their stranded costs. Maine has undertaken extensive demand side management in the commercial and industrial sector.

## **GAS**

Maine has two natural gas pipelines which run through the state from Canada. The Portland Natural Gas pipeline carries western Canadian gas and the Maritimes and Northeast pipeline

carries Sable Island gas. While these pipelines made the development of combined cycle power plants possible, the domestic use of gas is still limited to a few metropolitan areas where regulated utilities distribute and sell gas. LNG terminals proposed in Canada may increase availability and proposals for terminals in Maine may create opportunities for additional expansion of domestic and commercial gas use. Propane is widely used in rural areas.

## Creditors' Rights

### **FRAUDULENT TRANSFER LAW**

Maine, like most states, has adopted a version of the Uniform Fraudulent Transfer Act. The Maine Fraudulent Transfer Act provides that a transfer made by a debtor is fraudulent with respect to both present and future creditors if the debtor does not receive reasonably equivalent value and the debtor was engaged in or about to engage in business with a unreasonably small assets, or when the debtor believed or should have reasonably believed that it would incur debts beyond its ability to pay as they became due.

A transfer is fraudulent as to an existing creditor if the debtor made the transfer without receiving a reasonably equivalent value for the transfer debtor, and the debtor was insolvent at the time or became insolvent as a result of the transfer. Maine law also allows a creditor to avoid a transfer on the traditional grounds that the transfer was made with the actual intent to hinder delay or defraud any creditor. When attempting to prove actual fraudulent intent, the Maine law recognizes several badges of fraud including transfers to insiders, retention of control or possession of the property, removal or concealment of assets or the concealment of the transfer itself. The Maine Act allows an injured creditor to seek avoidance of a fraudulent transfer within six years after the transfer was made or the obligation was incurred. Maine law contains a provision allowing an injured creditor damages up to double the value of the property transferred.

### **DEBTOR'S EXEMPTIONS**

Maine has opted out of the federal exemption scheme provided by the Federal Bankruptcy Code. State law provisions will govern the appropriate exemptions available to individual debtors in Maine subject to the limitations set forth in the federal Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. These same exemptions will apply to any attempt by a creditor to either attach or execute against property of a debtor pursuant to state law unless the debtor fraudulently conveyed the property. The following are among the more important exemptions provided for by Maine law:

- A homestead exemption of debtor's aggregate interest not to exceed \$35,000 in value in real property or in a cooperative that owns property that the debtor or dependent uses as a residence; \$70,000 in value if minor dependents of the debtor have their principal place of residence with the debtor; and \$70,000 if the debtor or a dependent of the debtor is either a person sixty years of age or older or a person physically or mentally disabled and because of such disability is unable to engage in substantial gainful employment and whose disability has lasted or can be expected to last for at least twelve months or can be expected to result in death.

The homestead exemption amount may be reduced if the debtor's interest is held jointly with any other person or persons, and the proceeds from the sale of a property exempt under the homestead exemption provisions are exempt for a period of six months for the purpose of reinvesting in a residence within that period.

- Debtor's interest in a motor vehicle not to exceed \$5,000.
- Debtor's interest in a boat, not to exceed five tons, used by the debtor primarily for commercial fishing.
- The debtor's right to receive a social security benefit, unemployment compensation, a veteran's benefit, disability or unemployment benefit, alimony support, or separate maintenance reasonably necessary for the support of the debtor and any dependents of the debtor.
- The debtor's right to receive payment under a stock bonus, pension, profit-sharing, annuity, or similar plan on account of illness, disability, death, age or length of service, to the extent reasonably necessary for the support of the debtor and any dependents of the debtor.
- The debtor's right to receive payment under an IRA or similar plan on account of illness, disability, death, age, or length of service, to the sum of \$15,000 or to the extent reasonably necessary for the support of the debtor and any dependents of the debtor, whichever is greater.
- A payment under a life insurance contract that insured the life of an individual of whom the debtor was a dependent on the date of the individual's death, to the extent reasonably necessary for the support of the debtor and any dependents of the debtor.

#### **PRE-JUDGMENT ATTACHMENT**

The Maine Rules of Civil Procedure governing civil litigation provide that pre-judgment attachment by judicial lien may only be ordered "upon a finding by the court that it is more likely than not that the plaintiff will recover judgment, including interest and costs, in an amount equal to or greater than the aggregate sum of the attachment and any liability insurance, bond, or other security ... shown by the defendant to be available to satisfy the judgment." In applying the "more likely than not standard," the Maine Supreme Judicial Court has held that before an attachment may be ordered "[a] court must find by a preponderance of the evidence that the moving party will [both] succeed on its claim and [prevail] in an amount equal to or greater than the amount of the attachment sought."

A creditor seeking attachment must support its motion with affidavits setting forth "specific facts sufficient to warrant the required findings and [which] shall be upon the affiant's own knowledge, information or belief." General, unsubstantiated allegations of liability in an affidavit will not establish the requisite grounds for attachment and/or trustee process under the preponderance standard. A moving creditor, therefore, must state precise factual allegations in its supporting affidavits in order to increase the chances for success.

The Maine Rules of Civil Procedure also allow for ex parte motions for attachment under certain limited circumstances. In addition to satisfying the "more likely than not" test, a creditor moving ex parte must also establish either that "(i) there is a clear danger that the defendant if notified in advance of attachment of the property will remove it from the state or will conceal it or will otherwise make it unavailable to satisfy the judgment, or (ii) there is immediate danger that the defendant will damage or destroy the property to be attached."

Finally, a creditor must also follow similar requirements in seeking trustee process to obtain a judicial lien on money and deposits.

#### **EXECUTION ON A JUDGMENT**

Upon obtaining a judgment against the debtor, a creditor may seek a writ of execution from the court issuing the judgment. A judgment creditor should file its writ of execution in any county registry of deeds where the debtor owns property and in the Secretary of State's office accompanied by a completed UCC-1 form indicating the creditor's secured status. In addition, a judgment creditor may obtain discovery from the debtor through a disclosure hearing process held in the state District Court.

#### **RECEIVERSHIP**

Pursuant to their power to grant equitable relief, the Justices of the Maine State Superior Court may order the appointment of a receiver under appropriate circumstances. Most often, the appointment of a receiver will arise out of a specific contractual term agreed to by the creditor and debtor in either a mortgage or other document. For instance, the Maine Supreme Judicial Court has concluded that contractual language allowing a creditor to seek the appointment of a receiver upon the happening of certain default events should be enforced according to its terms. Consequently, a creditor with specific contractual language in hand should expect success in seeking the appointment of a receiver provided that all the contractual prerequisites are satisfied.