RCW 23B.01.500
DOMESTIC CORPORATIONS – NOTICE OF DUE DATE FOR PAYMENT OF ANNUAL LICENSE FEE AND FILING ANNUAL REPORT

CURRENT SECTION

Not less than thirty nor more than ninety days prior to July 1st of each year or to the expiration date of any staggered yearly license, the secretary of state shall send, by postal or electronic mail as elected by the domestic corporation, to each domestic corporation, at its registered office within the state, or to an electronic address designated by the corporation in a record retained by the secretary of state, a notice that its annual license fee must be paid and its annual report must be filed as required by this title, and stating that if any domestic corporation fails to pay its annual license fee or to file its annual report it is dissolved and ceases to exist. Failure of the secretary of state to provide any such notice does not relieve a corporation from its obligations to pay the annual license fees and to file the annual reports required by this title. The option to receive the notice provided under this section by electronic mail may be selected only when the secretary of state makes the option available.

HISTORY AND COMMITTEE COMMENTARY

ORIGINAL SECTION Laws 1989, ch. 165, §16 (eff. 7-1-90)

Not less than thirty nor more than ninety days prior to July 1st of each year or to the expiration date of any staggered yearly license, the secretary of state shall mail to each domestic corporation, at its registered office within the state, by first-class mail, a notice that its annual license fee must be paid and its annual report must be filed as required by this title, and stating that if any domestic corporation shall fail to pay its annual license fee or to file its annual report it shall be dissolved and cease to exist. Failure of the secretary of state to mail any such notice shall not relieve a corporation from its obligations to pay the annual license fees and to file the annual reports required by this title.

OFFICIAL LEGISLATIVE HISTORY

None.

AMENDMENTS TO ORIGINAL SECTION

Laws 2011, ch. 183, §3 (eff. 7-22-11)

Not less than thirty nor more than ninety days prior to July 1st of each year or to the expiration date of any staggered yearly license, the secretary of state shall send, by postal or electronic mail as elected by the domestic corporation, to each domestic corporation, at its registered office within the state, ~~by first-class mail,~~ or to an electronic address designated by the corporation in a record retained by the secretary of state, a notice that its annual license fee must be paid and its annual report must be filed as required by this title, and stating that if any domestic corporation ~~shall~~ fails to pay its annual license fee or to file its annual report it ~~shall be~~ is dissolved and ceases to exist. Failure of the secretary of state to ~~mail~~ provide any such notice ~~shall~~ does not relieve a corporation from its obligations to pay the annual license fees and to file the annual reports required by this title. The option to receive the notice provided under this section by electronic mail may be selected only when the secretary of state makes the option available.

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RCW 23B.01.510
FOREIGN CORPORATIONS – NOTICE OF DUE DATE FOR PAYMENT OF ANNUAL LICENSE FEE AND FILING ANNUAL REPORT

CURRENT SECTION

Not less than thirty nor more than ninety days prior to July 1st of each year or to the expiration date of any staggered yearly license, the secretary of state shall send by postal or electronic mail, as elected by the foreign corporation, to each foreign corporation qualified to do business in this state, addressed to its registered office within this state, or to an electronic address designated by the corporation in a record retained by the secretary of state, a notice that its annual license fee must be paid and its annual report must be filed as required by this title, and stating that if it fails to pay its annual license fee or to file its annual report its certificate of authority to transact business within this state may be revoked. Failure of the secretary of state to send any such notice does not relieve a corporation from its obligations to pay the annual license fees and to obtain or file the annual reports required by this title. The option to receive the notice provided under this section by electronic mail may be selected only when the secretary of state makes the option available.

HISTORY AND COMMITTEE COMMENTARY

ORIGINAL SECTION Laws 1989, ch. 165, §17 (eff. 7-1-90)
Not less than thirty nor more than ninety days prior to July 1st of each year or to the expiration date of any staggered yearly license, the secretary of state shall mail to each foreign corporation qualified to do business in this state, by first-class mail addressed to its registered office, a notice that its annual license fee must be paid and its annual report must be filed as required by this title, and stating that if it shall fail to pay its annual license fee or to file its annual report its certificate of authority to transact business within this state may be revoked. Failure of the secretary of state to mail any such notice shall not relieve a corporation from its obligations to pay the annual license fees and to obtain or file the annual reports required by this title.

OFFICIAL LEGISLATIVE HISTORY
None.

AMENDMENTS TO ORIGINAL SECTION
Laws 1990, ch. 178, §3 (eff. 7-1-90)
Not less than thirty nor more than ninety days prior to July 1st of each year or to the expiration date of any staggered yearly license, the secretary of state shall mail to each foreign corporation qualified to do business in this state, by first-class mail addressed to its registered office within this state, a notice that its annual license fee must be paid and its annual report must be filed as required by this title, and stating that if it shall fail to pay its annual license fee or to file its annual report its certificate of authority to transact business within this state may be revoked. Failure of the secretary of state to mail any such notice shall not relieve a corporation from its obligations to pay the annual license fees and to obtain or file the annual reports required by this title.

CARC COMMENTARY
Notice of annual license fees for a foreign corporation will be sent to its registered office in Washington (the Proposed Act simply sent notice to the corporation's registered office).

* * * * *

Laws 2011, ch. 183, §4 (eff. 7-22-11)

Not less than thirty nor more than ninety days prior to July 1st of each year or to the expiration date of any staggered yearly license, the secretary of state shall send by postal or electronic mail, as elected by the foreign corporation, to each foreign corporation qualified to do business in this state, ~~by first-class mail~~ addressed to its registered office within this state, or to an electronic address designated by the corporation in a record retained by the secretary of state, a notice that its annual license fee must be paid and its annual report must be filed as required by this title, and stating that if it ~~shall~~ fails to pay its annual license fee or to file its annual report its certificate of authority to transact business within this state may be revoked. Failure of the secretary of state to ~~mail~~ send any such notice ~~shall~~ does not relieve a corporation from its obligations to pay the annual license fees and to obtain or file the annual reports required by this title. The option to receive the notice provided under this section by electronic mail may be selected only when the secretary of state makes the option available.

* * * * *

RCW 23B.02.060
BYLAWS

CURRENT SECTION

(1) The incorporators or board of directors of a corporation shall adopt initial bylaws for the corporation.

(2) The articles of incorporation or bylaws must either specify the number of directors or specify the process by which the number of directors will be fixed, unless the articles of incorporation dispense with a board of directors pursuant to RCW 23B.08.010.

(3) Unless its articles of incorporation or its bylaws provide otherwise, a corporation is governed by the following provisions:

(a) The board of directors may approve the issuance of some or all of the shares of any or all of the corporation's classes or series without certificates under RCW 23B.06.260;

(b) A corporation that is not a public company shall hold a special meeting of shareholders if the holders of at least ten percent of the votes entitled to be cast on any issue proposed to be considered at the meeting demand a meeting under RCW 23B.07.020;

(c) A director need not be a resident of this state or a shareholder of the corporation under RCW 23B.08.020;

(d) The board of directors may fix the compensation of directors under RCW 23B.08.110;

(e) Members of the board of directors may participate in a meeting of the board by means of a conference telephone or similar communication equipment under RCW 23B.08.200;

(f) Corporate action permitted or required by this title to be approved at a board of directors' meeting may be approved without a meeting if the corporate action is approved by all members of the board under RCW 23B.08.210;

(g) Regular meetings of the board of directors may be held without notice of the date, time, place, or purpose of the meeting under RCW 23B.08.220;

(h) Special meetings of the board of directors must be preceded by at least two days' notice of the date, time, and place of the meeting, and the notice need not describe the purpose of the special meeting under RCW 23B.08.220;

(i) A quorum of a board of directors consists of a majority of the number of directors under RCW 23B.08.240;

(j) If a quorum is present when a vote is taken, the affirmative vote of a majority of directors present is the act of the board of directors under RCW 23B.08.240;

(k) A board of directors may create one or more committees and appoint members of the board of directors to serve on them under RCW 23B.08.250; and

(l) Unless approved by shareholders, a corporation may indemnify, or make advances to, a director only for reasonable expenses incurred in the defense of any proceeding to which the director was a party because of being a director to the extent such action is consistent with RCW 23B.08.500 through 23B.08.580 under RCW 23B.08.590.

(4) The bylaws of a corporation may contain any provision for managing the business and regulating the affairs of the corporation to the extent the provision does not infringe upon or limit the exclusive authority of the board of directors under RCW 23B.08.010(2)(b) or otherwise conflict with this title or any other law, the articles of incorporation, or a shareholders' agreement authorized by RCW 23B.07.320.

HISTORY AND COMMITTEE COMMENTARY

ORIGINAL SECTION Laws 1989, ch. 165, §31 (eff. 7-1-90)

(1) The incorporators or board of directors of a corporation shall adopt initial bylaws for the corporation.

(2) The articles of incorporation or bylaws must either specify the number of directors or specify the process by which the number of directors will be fixed, unless the articles of incorporation dispense with a board of directors pursuant to RCW 23B.08.010;

(3) Unless its articles of incorporation or its bylaws provide otherwise, a corporation is governed by the following provisions:

(a) The board of directors may authorize the issuance of some or all of the shares of any or all of the corporation's classes or series without certificates under RCW 23B.06.260;

(b) A corporation that is not a public company shall hold a special meeting of shareholders if the holders of at least ten percent of the votes entitled to be cast on any issue proposed to be considered at the meeting demand a meeting under RCW 23B.07.020;

(c) A director need not be a resident of this state or a shareholder of the corporation under RCW 23B.08.020;

(d) The board of directors may fix the compensation of directors under RCW 23B.08.110;

(e) Members of the board of directors may participate in a meeting of the board by means of a conference telephone or similar communication equipment under RCW 23B.08.200;

(f) Action permitted or required by this title to be taken at a board of directors' meeting may be taken without a meeting if action is taken by all members of the board under RCW 23B.08.210;

(g) Regular meetings of the board of directors may be held without notice of the date, time, place, or purpose of the meeting under RCW 23B.08.220;

(h) Special meetings of the board of directors must be preceded by at least two days' notice of the date, time, and place of the meeting, and the notice need not describe the purpose of the special meeting under RCW 23B.08.220;

(i) A quorum of a board of directors consists of a majority of the number of directors under RCW 23B.08.240;

(j) If a quorum is present when a vote is taken, the affirmative vote of a majority of directors present is the act of the board of directors under RCW 23B.08.240;

(k) A board of directors may create one or more committees and appoint members of the board of directors to serve on them under RCW 23B.08.250; and

(l) Unless approved by shareholders, a corporation may indemnify, or make advances to, a director only for reasonable expenses incurred in the defense of any proceeding to which the director was a party because of being a director to the extent such action is consistent with RCW 23B.08.500 through 23B.08.580 under RCW 23B.08.590.

(4) The bylaws of a corporation may contain any provision, not in conflict with law or the articles of incorporation, for managing the business and regulating the affairs of the corporation, including but not limited to the following:

(a) A restriction on the transfer or registration of transfer of the corporation's shares under RCW 23B.06.270;

(b) Shareholders may participate in a meeting of shareholders by any means of communication by which all persons participating in the meeting can hear each other under RCW 23B.07.080; and
(c) A quorum of the board of directors may consist of as few as one-third of the number of directors under RCW 23B.08.240.

OFFICIAL LEGISLATIVE HISTORY Senate Journal 51st Legis. 2991 (1989)
Section 2.06 Bylaws.
The responsibility for adopting initial bylaws of a corporation has been placed on the persons completing the organization of the corporation under Proposed section 2.05.

The power to amend or repeal bylaws, or adopt new bylaws after the formation of the corporation is completed, is addressed in Proposed sections 10.20, 10.21.

* * * * *

Laws 2009, ch. 189, §4 (eff. 7-26-09) *(amends only subsections (3)(a) and (3)(f))*
(3) Unless its articles of incorporation or its bylaws provide otherwise, a corporation is governed by the following provisions:
(a) The board of directors may ~~authorize~~ approve the issuance of some or all of the shares of any or all of the corporation's classes or series without certificates under RCW 23B.06.260;

(f) Corporate ~~A~~action permitted or required by this title to be ~~taken~~ approved at a board of directors' meeting may be ~~taken~~ approved without a meeting if the corporate action is ~~taken~~ approved by all members of the board under RCW 23B.08.210;

CARC COMMENTARY
The term “corporate action” is defined and used throughout the Washington Business Corporation Act for consistency and to clarify the distinction between the matter being approved versus the action of approving.

* * * * *

Laws 2011, ch. 328, §1 (eff. 7-22-11) *(amends only subsection (4))*
(4) The bylaws of a corporation may contain any provision~~, not in conflict with law or the articles of incorporation,~~ for managing the business and regulating the affairs of the corporation~~, including but not limited to the following:~~
~~(a) A restriction on the transfer or registration of transfer of the corporation's shares under RCW 23B.06.270;~~
~~(b) Shareholders may participate in a meeting of shareholders by any means of communication by which all persons participating in the meeting can hear each other under RCW 23B.07.080; and~~
~~(c) A quorum of the board of directors may consist of as few as one-third of the number of directors under RCW 23B.08.240~~ to the extent the provision does not infringe upon or limit the exclusive authority of the board of directors under RCW 23B.08.010(2)(b) or otherwise conflict with this title or any other law, the articles of incorporation, or a shareholders’ agreement authorized by RCW 23B.07.320.

CARC COMMENTARY
RCW 23B.02.060 places responsibility for adopting the initial bylaws on the board of directors, or the person or persons completing the organization of the corporation; sets forth a series of provisions which govern a corporation unless the articles of incorporation or bylaws provide otherwise; and references the relevant sections containing the substantive provisions. The power to amend or repeal bylaws, or adopt new bylaws after the formation of the corporation is completed, is addressed in RCW 23B.10.200, 10.205, and 10.210. Currently, RCW 23B.02.060(4) permits any bylaw provision that is not in conflict with law or the articles of incorporation. The amendment to 23B.02.060(4) adds a cross reference to 23B.08.010(2)(b) to make clear that a bylaw provision may not conflict with the authority of the board of directors to manage the business and affairs of the corporation granted under that statutory

provision. The amendment also adds a cross reference to a shareholders agreement adopted under RCW 23B.07.320 to clarify that any conflicting provision in such a shareholders agreement will supercede a bylaw on the same subject. Subsections (4)(a), (4)(b) and (4)(c) have been deleted because the bylaw provisions referred to in those subsections are but a few examples of the many possible bylaw provisions that are permissible under subsection (4). It was determined that this short list of illustrations is not comprehensive enough to be particularly helpful to the practioner. The proposed changes constitute a clarification of what the Committee believes is the current law.

* * * * *

Title 23B RCW
Washington Business Corporation Act

Chapter 23B.08 RCW
DIRECTORS AND OFFICERS

Title 23B RCW
Washington Business Corporation Act

Chapter 23B.08 RCW
DIRECTORS AND OFFICERS
(continued)

RCW 23B.08.010
REQUIREMENT FOR AND DUTIES OF BOARD OF DIRECTORS

CURRENT SECTION

(1) Each corporation must have a board of directors, except that a corporation may dispense with or limit the authority of its board of directors by describing in its articles of incorporation, or in a shareholders' agreement authorized by RCW 23B.07.320, who will perform some or all of the duties of the board of directors.

(2) Subject to any limitation set forth in this title, the articles of incorporation, or a shareholders' agreement authorized by RCW 23B.07.320:

(a) All corporate powers shall be exercised by or under the authority of the corporation's board of directors; and

(b) The business and affairs of the corporation shall be managed under the direction of its board of directors, which shall have exclusive authority as to substantive decisions concerning management of the corporation's business.

HISTORY AND COMMITTEE COMMENTARY

ORIGINAL SECTION Laws 1989, ch. 165, §80 (eff. 7-1-90)

(1) Except as provided in subsection (3) of this section, each corporation must have a board of directors.

(2) All corporate powers shall be exercised by or under the authority of, and the business and affairs of the corporation managed under the direction of, its board of directors, subject to any limitation set forth in the articles of incorporation.

(3) A corporation may dispense with or limit the authority of its board of directors by describing in its articles of incorporation who will perform some or all of the duties of the board of directors.

OFFICIAL LEGISLATIVE HISTORY Senate Journal 51st Legis. 3033-34 (1989)

Section 8.01 Requirement For and Duties Of Board of Directors.

Proposed section 8.01 requires that every corporation have a board of directors except that a corporation may dispense with or limit the authority of the board of directors by describing in the articles "who will perform some or all of the duties of a board of directors." Proposed subsection 8.01(c).

Obviously, some form of governance is necessary for every corporation. The board of directors is the traditional form of corporate governance but it need not be the exclusive form. Patterns of management may be tailored to specific needs in connection with family controlled enterprises, wholly or partially owned subsidiaries, or corporate joint ventures. The persons who perform some or all of the duties of the board of directors may be designated "trustees," "agents," or "managers," and they may be selected in ways other than the traditional election by the shareholders. It is necessary, however, that some person or group perform these duties, and the designated persons, while performing them, are subjected to the same duties as directors.

Proposed subsection 8.01(b) states that if a corporation has a board of directors "all corporate powers shall be exercised by or under the authority of, and the business and affairs of the corporation managed under the direction of," the board of directors. The quoted language is chosen to reflect the role and functions of boards of directors in all varieties of corporations. In a small corporation and in some larger corporations where the board of directors is composed entirely of persons actively involved in the management of the corporate business, it may be reasonable to describe management as being "by" the board of directors. But a different model is appropriate for the boards of directors of publicly held corporations, which usually include individuals not actively involved in management. In these corporations the appropriate model is that the business and affairs be managed "under the direction of" the board of directors, since the role of the board of directors consists principally of the formulation of major management policy with little or no direct involvement in day-to-day management.

As a corollary, in large and complex publicly held corporations it is generally recognized that boards of directors delegate to appropriate officers those powers not required by law to be exercised by the board of directors itself. Although delegation does not relieve the board of directors from its responsibilities of oversight, directors should not be held personally responsible for actions or omissions of officers, employees, or agents of the corporation so long as the directors have acted reasonably in delegating authority to others.

Proposed subsection 8.01(b) also recognizes that the powers of the board of directors may be limited by express provisions in the articles of incorporation.

In the event a corporation elects, pursuant to Proposed subsection 8.01(c), to dispense with the board of directors, its articles of incorporation must describe who will perform some or all of the duties of the board of directors. (E.g., "the corporation has no board of directors. Its corporate powers shall be exercised by or under the authority of, and its business and affairs shall be managed under the direction of, its shareholders.") Proposed section 16.22 requires that the annual report to be filed with the secretary of state must set forth the names and addresses of persons performing the directors' functions.

* * * * *

Laws 2011, ch. 328, §2 (eff. 7-22-11)

(1) ~~Except as provided in subsection (3) of this section, e~~Each corporation must have a board of directors~~.~~

(~~2) All corporate powers shall be exercised by or under the authority of, and the business and affairs of the corporation managed under the direction of, its board of directors, subject to any limitation set forth in the articles of incorporation.~~

(~~3) A~~, except that a corporation may dispense with or limit the authority of its board of directors by describing in its articles of incorporation, or in a shareholders' agreement authorized by RCW 23B.07.320, who will perform some or all of the duties of the board of directors.

(2) Subject to any limitation set forth in this title, the articles of incorporation, or a shareholders' agreement authorized by RCW 23B.07.320:

(a) All corporate powers shall be exercised by or under the authority of the corporation's board of directors; and

(b) The business and affairs of the corporation shall be managed under the direction of its board of directors, which shall have exclusive authority as to substantive decisions concerning management of the corporation's business.

CARC COMMENTARY

The amendments to 23B.08.010 are intended to clarify that, absent provisions in the articles of incorporation or a shareholder agreement pursuant to RCW 23B.07.320 to the contrary, all corporate powers are exercised by or under the authority of the board of directors; the business and affairs of the corporation are managed under the direction of the board; and the board has the exclusive authority as to substantive decisions concerning management of the corporation's business. The statement that a board of directors has exclusive authority as to substantive decisions is not intended to limit the board's historical and well-settled practice of delegating to an officer or agent the authority to make a substantive decision is a particular area so long as the board retains the ultimate authority and responsibility as to such decision. The amendments reflect the analysis of the respective roles of the board and shareholders in the business and affairs of the corporation articulated by the Delaware Supreme Court in *CA Inc. v. AFSCME Employees Pension Plan*, 953 A 2d 227 (Del. 2008). The proposed amendment to RCW 23B.08.010(2) also adds a cross reference to the existing provision in RCW 23B.07.320 to make it clear that the authority of the board of directors can also be dispensed with or limited by a unanimous shareholder agreement that complies with the requirements set forth in RCW 23B.07.320. The proposed changes constitute a clarification of what the Committee believes is current law.

* * * * *

RCW 23B.08.245
CORPORATE ACTION – VOTE OF SHAREHOLDERS

CURRENT SECTION

A corporation may agree to submit a corporate action to a vote of its shareholders whether or not the board of directors determines at any time subsequent to approving such a corporate action that it no longer recommends the corporate action.

HISTORY AND COMMITTEE COMMENTARY

ORIGINAL SECTION Laws 2011, ch. 328, §4 (eff. 7-22-11)
Same as above.

CARC COMMENTARY
Proposed RCW section 23B.08.245 is intended to clarify that a corporation may enter into an agreement, such as merger agreement, containing a "force the vote" provision. Proposed section 23B.08.245 makes it clear that the board of directors may authorize the corporation to agree with another person to submit a corporate action to the shareholders for approval, but reserve the ability to change its recommendation with respect to the corporate action. This provision is not intended to relieve the board of directors of its duty to consider carefully the proposed corporate action and the interests of the shareholders.

* * * * *

RCW 23B.08.603
INDEMNIFICATION OR ADVANCE FOR EXPENSES – LATER AMENDMENT OR REPEAL OF SUBJECT PROVISION

CURRENT SECTION

The right of a director, officer, employee, or agent to indemnification or to advancement of expenses arising under a provision in the articles of incorporation or a bylaw shall not be eliminated or impaired by an amendment to or repeal of that provision after the occurrence of the act or omission that is the subject of the proceeding for which indemnification or advancement of expenses under that provision is sought, unless the provision in effect at the time of such an act or omission explicitly authorizes the elimination or impairment of the right after such an action or omission has occurred.

HISTORY AND COMMITTEE COMMENTARY

ORIGINAL SECTION Laws 2011, ch. 328, §9 (eff. 7-22-11)
Same as current.

CARC COMMENTARY
Proposed RCW 23B.08.603 is new. Many Washington corporations include provisions in their articles of incorporation and/or bylaws that mandate indemnification of and advancement of expenses to directors and, sometimes, officers, employees and other agents (subject to any limitations that may apply under RCW 23B.08.500-.08.590). Proposed RCW 23B.08.603 addresses the question of when rights to indemnification and advancement of expenses under provisions in a Washington corporation's articles of incorporation or bylaws vest. The proposed new section is based on an amendment to Section 145(f) of the Delaware General Corporation Law that was adopted in 2009. The purpose of that amendment was to adopt a different rule relating to vesting of rights under provisions in a corporation's charter documents than the approach articulated in *Schoon v. Troy Corp.*, 948 A. 2d 1157 (Del. Ch. 2008). The court in *Schoon* held that a former director's rights under a provision in the corporation's bylaws that entitled him to advancement of expenses could be amended to eliminate that right after the occurrence of the acts and omissions that were at issue in the proceeding for which advancement of expenses was sought (but before the former director had been named as a party in the proceeding). In other words, the *Schoon* decision articulated a rule that rights of a director, officer, employee or agent to indemnification or advancement of expenses under a provision in the charter documents do not vest until the person becomes a party to a proceeding. In response to the *Schoon* case, Section 145(f) of the Delaware General Corporation Law was amended to provide that rights to indemnification or advancement of expenses under a provision in the certificate of incorporation or blaws cannot be impaired or eliminated after the fact (i.e., after the occurrence of the act or omission that is the subject of the proceeding), unless the provision specifically authorizes after-the-fact impairment or elimination of such rights. Similar to the 2009 amendment to Section 145(f), proposed RCW 23B.08.603 is intended to provide directors, officers, employees and other agents who serve Washingotn corporations greater certainty that rights to indemnification and/or advancement of expenses created under provisions in the articles of incorporation or bylaws can be counted on to protect them after the occurrence of acts or omissions that may lead to their involvement in threatened or actual judicial, administrative or investigative proceedings. Corporations can retain the flexibility to eliminate or impair such rights after the fact by expressly authorizing after-the-fact amendment or repeal of such rights in the

articles or bylaws provisions that establish indemnification or advancement of expenses rights. However, in any case, once a director, officer, employee or agent becomes a party to a proceeding, no after-the-fact amendment or repeal of a provision in the articles of incorporation or bylaws that previously afforded him or her rights to indemnification or advancement of expenses should be effective to eliminate or impair such rights.

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RCW 23B.10.030
AMENDMENT OF ARTICLES OF INCORPORATION BY BOARD OF DIRECTORS AND SHAREHOLDERS

CURRENT SECTION

(1) A corporation's board of directors may propose one or more amendments to the articles of incorporation for submission to the shareholders.

(2) For the amendment to be adopted:

(a) The board of directors must recommend the amendment to the shareholders unless (i) the board of directors determines that because of conflict of interest or other special circumstances it should make no recommendation or (ii) RCW 23B.08.245 applies, and in either case the board of directors communicates the basis for so proceeding to the shareholders; and

(b) The shareholders entitled to vote on the amendment must approve the amendment as provided in subsection (5) of this section.

(3) The board of directors may condition its submission of the proposed amendment on any basis, including the affirmative vote of holders of a specified percentage of shares held by any group of shareholders not otherwise entitled under this title or the articles of incorporation to vote as a separate voting group on the proposed amendment.

(4) The corporation shall notify each shareholder, whether or not entitled to vote, of the proposed shareholders' meeting in accordance with RCW 23B.07.050. The notice of meeting must also state that the purpose, or one of the purposes, of the meeting is to consider the proposed amendment and contain or be accompanied by a copy of the amendment.

(5) In addition to any other voting conditions imposed by the board of directors under subsection (3) of this section, the amendment to be adopted must be approved by two-thirds, or, in the case of a public company, a majority, of the voting group comprising all the votes entitled to be cast on the proposed amendment, and of each other voting group entitled under RCW 23B.10.040 or the articles of incorporation to vote separately on the proposed amendment. The articles of incorporation may require a greater vote than that provided for in this subsection. The articles of incorporation of a corporation other than a public company may require a lesser vote than that provided for in this subsection, or may require a lesser vote by separate voting groups, so long as the required vote is not less than a majority of all the votes entitled to be cast on the proposed amendment and of each other voting group entitled to vote separately on the proposed amendment. Separate voting by additional voting groups is required on a proposed amendment under the circumstances described in RCW 23B.10.040.

HISTORY AND COMMITTEE COMMENTARY

ORIGINAL SECTION Laws 1989, ch. 165, §122 (eff. 7-1-90)

(1) A corporation's board of directors may propose one or more amendments to the articles of incorporation for submission to the shareholders.

(2) For the amendment to be adopted:

(a) The board of directors must recommend the amendment to the shareholders unless the board of directors determines that because of conflict of interest or other special circumstances it should make no recommendation and communicates the basis for its determination to the shareholders with the amendment; and

(b) The shareholders entitled to vote on the amendment must approve the amendment as provided in subsection (5) of this section.

(3) The board of directors may condition its submission of the proposed amendment on any basis.

(4) The corporation shall notify each shareholder, whether or not entitled to vote, of the proposed shareholders' meeting in accordance with *RCW 23B.07.050. The notice of meeting must also state that the purpose, or one of the purposes, of the meeting is to consider the proposed amendment and contain or be accompanied by a copy of the amendment.

(5) Unless this title, the articles of incorporation, or the board of directors, acting pursuant to subsection (3) of this section, require a greater vote or a vote by voting groups, the amendment to be adopted must be approved by each voting group entitled to vote thereon by two-thirds, or, in the case of a public company, a majority, of all the votes entitled to be cast by that voting group. The articles of incorporation of a corporation other than a public company may provide for a lesser vote by separate voting groups, so long as the vote provided for each voting group entitled to vote separately on the amendment is not less than a majority of all the votes entitled to be cast on the amendment by that voting group.

OFFICIAL LEGISLATIVE HISTORY Senate Journal 51st Legis. 3075-76 (1989)

Section 10.03 Amendment of Articles of Incorporation By Board of Directors and Shareholders.

Significant amendments to articles of incorporation must be approved by the shareholders after being proposed by the board of directors. When proposing an amendment, the board of directors must make a recommendation to the shareholders that the amendment be approved, unless it determines that because of conflict of interest or other special circumstances it should make no recommendation. If the board of directors so determines, it must describe the conflict or circumstance, and communicate the basis for its determination, when presenting the proposed amendment to the shareholders.

Proposed subsection 10.03(c) codifies existing practice by expressly permitting the board of directors to submit an amendment to the shareholders on a conditional basis. This power of the board of directors does not alter the balance of power between the board of directors and shareholders since the board of directors may always withhold its approval entirely and not submit an amendment. Examples of conditions commonly imposed are that the amendment not be approved unless (1) a favorable vote by a specified proportion (larger than ordinarily required) of the shareholders is obtained, (2) no more that a specified fraction of the shareholders file written dissents, or (3) a class or series of shares must approve the amendment as a separate voting group. These conditions may be used, for example, to discourage unwise depletion of corporate assets by the adoption of the amendment. The board of directors is not limited to conditions of these types, however, and may condition the submission on any basis.

Proposed subsection 10.03(e) imposes a requirement that two-thirds (or in case of a public company, a majority) of the votes entitled to be cast by any voting group entitled to vote as a voting group be cast in favor of the amendment. Such requirements are similar to those in old RCW 23.16.020(3). The Committee rejected the RMA approach (which would have reduced the required vote for all corporations to a majority) on grounds that many small corporations had developed control patterns based on the old requirements, and thus that any change would affect the operation of large numbers of corporations. However, the Committee gave such corporations the option to reduce the required vote to a majority of votes entitled to be cast on the amendment. See proposed subsection 10.03(e). Under Proposed section 7.27, the vote required to make such a reduction would be the vote then in effect (i.e., two-thirds of all the votes entitled to be cast).

The articles of incorporation or the board of directors may require that a proposed amendment be approved by a class or series of shares voting as a separate voting group; such a requirement may only be in addition to that otherwise required by Proposed section 10.04.

AMENDMENTS TO ORIGINAL SECTION

Laws 2003, Ch. 35, §4 (eff. 7-27-03)

(1) A corporation's board of directors may propose one or more amendments to the articles of incorporation for submission to the shareholders.

(2) For the amendment to be adopted:

> (a) The board of directors must recommend the amendment to the shareholders unless the board of directors determines that because of conflict of interest or other special circumstances it should make no recommendation and communicates the basis for its determination to the shareholders with the amendment; and
>
> (b) The shareholders entitled to vote on the amendment must approve the amendment as provided in subsection (5) of this section.

(3) The board of directors may condition its submission of the proposed amendment on any basis, including the affirmative vote of holders of a specified percentage of shares held by any group of shareholders not otherwise entitled under this title or the articles of incorporation to vote as a separate voting group on the proposed amendment.

(4) The corporation shall notify each shareholder, whether or not entitled to vote, of the proposed shareholders' meeting in accordance with RCW 23B.07.050. The notice of meeting must also state that the purpose, or one of the purposes, of the meeting is to consider the proposed amendment and contain or be accompanied by a copy of the amendment.

(5) ~~Unless this title, the articles of incorporation, or~~ In addition to any other voting conditions imposed by the board of directors ~~, acting pursuant to~~ under subsection (3) of this section, ~~require a greater vote or a vote by voting groups,~~ the amendment to be adopted must be approved ~~by each voting group entitled to vote thereon~~ by two-thirds, or, in the case of a public company, a majority, of the voting group comprising all the votes entitled to be cast ~~by that voting group~~ on the proposed amendment, and of each other voting group entitled under RCW 23B.10.040 or the articles of incorporation to vote separately on the proposed amendment. The articles of incorporation may require a greater vote than that provided for in this subsection. The articles of incorporation of a corporation other than a public company may ~~provide for~~ require a lesser vote than that provided for in this subsection, or ~~for~~ may require a lesser vote by separate voting groups, so long as the required vote ~~provided for each voting group entitled to vote separately on the amendment~~ is not less than a majority of all the votes entitled to be cast on the proposed amendment ~~by that voting group~~ and of each other voting group entitled to vote separately on the proposed amendment. Separate voting by additional voting groups is required on a proposed amendment under the circumstances described in RCW 23B.10.040.

> ***CARC COMMENTARY***
>
> The proposed changes to RCW 23B.10.030 are meant to clarify that the requirement of separate approval by voting groups is in addition to, and not in lieu of, the required approval of articles of amendment by the requisite percentage of all shareholders.

* * * * *

Laws 2011, ch. 328, §5 (eff. 7-22-11) *(amends only subsection (2)(a))*

(a) The board of directors must recommend the amendment to the shareholders unless (i) the board of directors determines that because of conflict of interest or other special circumstances it should make no recommendation ~~and~~ or (ii) RCW 23B.08.245 applies, and in either case the board of directors communicates the basis for ~~its determination~~ so proceeding to the shareholders ~~with the amendment~~; and

CARC COMMENTARY

The proposed changes to RCW 23B.10.030(2)(a) are meant to clarify that when the corporation has agreed with another person to submit an amendment to the articles of incorporation to the shareholders for approval, the board of directors may submit the amendment for approval by the shareholders whether or not the board of directors determines at any time subsequent to approving the amendment that it no longer recommends the amendment.

* * * * *

RCW 23B.10.200
AMENDMENT OF BYLAWS BY BOARD OF DIRECTORS OR SHAREHOLDERS

CURRENT SECTION

(1) A corporation's board of directors, subject to the limitations set forth in RCW 23B.02.060(4), may amend or repeal the corporation's bylaws, or adopt new bylaws, except to the extent that:

(a) This power is reserved exclusively to the shareholders pursuant to the articles of incorporation or a shareholders' agreement authorized by RCW 23B.07.320, or pursuant to RCW 23B.10.205, 23B.10.210, or any other provision of this title; or

(b) The shareholders, in amending, repealing, or adopting a particular bylaw under subsection (2) of this section, provide expressly that the board of directors may not amend or repeal that bylaw.

(2) A corporation's shareholders, subject to the limitations set forth in RCW 23B.02.060(4), may amend or repeal the corporation's bylaws, or adopt new bylaws, even though the bylaws may also be amended or repealed, or new bylaws may also be adopted, by its board of directors.

HISTORY AND COMMITTEE COMMENTARY

ORIGINAL SECTION Laws 1989, ch. 165, §129 (eff. 7-1-90)

(1) A corporation's board of directors may amend or repeal the corporation's bylaws, or adopt new bylaws, unless:

(a) The articles of incorporation or this title reserve this power exclusively to the shareholders in whole or part; or

(b) The shareholders, in amending or repealing a particular bylaw, provide expressly that the board of directors may not amend or repeal that bylaw.

(2) A corporation's shareholders may amend or repeal the corporation's bylaws, or adopt new bylaws, even though the bylaws may also be amended or repealed, or new bylaws may also be adopted, by its board of directors.

OFFICIAL LEGISLATIVE HISTORY Senate Journal 51st Legis. 3078 (1989)

Section 10.20 Amendment of Bylaws By Board of Directors or Shareholders.

In the absence of a provision in the articles of incorporation, the power to amend or repeal bylaws is shared by the board of directors and shareholders. Amendment of bylaws by the board of directors is often simpler and more convenient than amendment by the shareholders and avoids the expense of calling a shareholders' meeting, a cost that may be significant in publicly held corporations.

Proposed subsection 10.20(a) provides, however, that the power to amend or repeal bylaws (or adopt new bylaws) may be reserved exclusively to the shareholders by an appropriate provision in the articles of incorporation. This option may appropriately be elected by a closely held corporation -- for example, where control arrangements appear in the bylaws but one shareholder or group of shareholders has the power to name a majority of the board of directors. In such a corporation, the control arrangements may alternatively be placed in the articles of incorporation rather than the bylaws if there is no objection to making them a matter of public record.

Proposed subsection 10.20(a)(1) provides that the power to amend or repeal the bylaws (or adopt new bylaws) may be reserved to the shareholders "in whole or part." This language permits the reservation of power to be limited to specific articles or sections of the bylaws or to specific subjects or topics addressed in the bylaws. It is important that the areas reserved exclusively to the shareholders be delineated clearly and unambiguously.

Proposed subsection 10.20(a)(2) permits the shareholders to adopt or amend a bylaw and reserve exclusively to themselves the power to amend or repeal it later. This reservation must be expressed in the action by the shareholders adopting or amending the bylaw. This option is also included for the benefit of closely held corporations.

Proposed subsection 10.20(b) states that the power of shareholders to adopt, amend or repeal bylaws exists even though that power is shared with the board of directors. This section makes inapplicable the holdings of a few cases (e.g., Somers v. AAA Temporary Services, Inc., 284 N.E.2d 462 (Ill. App. 1972) under differently phrased statutes that shareholders do not have a general or residual power to amend bylaws or that the power to amend bylaws may be vested exclusively in the board of directors. Under the Proposed Act the shareholders always have the power to adopt, amend or repeal the bylaws.

The Committee decided not to include RMA section 10.21 in the Proposed Act. Other sections in the Proposed Act make clear that the quorum or voting requirements for shareholders can be increased by provisions in the corporation's articles of incorporation. RMA section 10.21 would have provided a mechanism to accomplish that end in the bylaws. However, its requirements are complex and appeared to outweigh any advantage of the provision.

AMENDMENTS TO ORIGINAL SECTION

Laws 2007, ch. 467, §7 (eff. 7-22-07) *(amends only subsection (1)(a))*

(a) The articles of incorporation, RCW 23B.10.220, or, if applicable, RCW 23B.07.290, or any other provision of this title reserve this power exclusively to the shareholders in whole or part; or

CARC COMMENTARY

See generally commentary to 2007 amendments to RCW 23B which appears under RCW 23B.08.050.

This amendment is proposed as a conforming change to recognize the proposed new section RCW 23B.10.220, which limits the power of directors to repeal a bylaw adopted by shareholders which opts in to the provisions of that section. See section RCW 23B.10.220 and the Comment thereto.

* * * * *

Laws 2009, ch. 189, §35 (eff. 7-26-09)*(amends only subsection (1)(a))*

(1)(a) The articles of incorporation, RCW ~~23B.10.220~~ 23B.10.205, or, if applicable, RCW ~~23B.07.290~~ 23B.10.210, or any other provision of this title reserve this power exclusively to the shareholders in whole or part; or

CARC COMMENTARY

This is merely a correction in the cross reference number to the applicable WBCA subsection. The section that was inserted in the 2007 bill as passed erroneously refers to another newly adopted section providing for an inspector of elections; this should have been a reference to 23B.10.210, not to 23B.07.035.

* * * * *

Laws 2011, ch. 328, §3 (eff. 7-22-11)

(1) A corporation's board of directors, subject to the limitations set forth in RCW 23B.02.060(4), may amend or repeal the corporation's bylaws, or adopt new bylaws, ~~unless~~except to the extent that:

(a) This power is reserved exclusively to the shareholders pursuant to ~~T~~the articles of incorporation~~,~~ or a shareholders' agreement authorized by RCW 23B.07.320, or pursuant to RCW 23B.10.205, ~~or, if applicable, RCW~~ 23B.10.210, or any other provision of this title~~ reserve this power exclusively to the shareholders in whole or part~~; or

(b) The shareholders, in amending, ~~or~~ repealing, or adopting a particular bylaw under subsection (2) of this section, provide expressly that the board of directors may not amend or repeal that bylaw.
(2) A corporation's shareholders, subject to the limitations set forth in RCW 23B.02.060(4), may amend or repeal the corporation's bylaws, or adopt new bylaws, even though the bylaws may also be amended or repealed, or new bylaws may also be adopted, by its board of directors.

CARC COMMENTARY
Under RCW 23B.10.200, the board and shareholders independently and concurrently possess the power to adopt, amend and repeal the bylaws; however, a careful review of RCW 23B reveals that the powers of the board and the shareholders to adopt, amend and repeal bylaws are not coextensive. Currently, RCW 23B.10.200 makes it clear that the board of directors may amend or repeal the corporation's bylaws, but then goes on to state that the board's power to adopt, amend and repeal bylaws may be restricted by provisions in the articles of incorporation, or pursuant to RCW 23B. 10.205 and 10.210, or by a shareholder-adopted bylaw which expressly provides that it may not be amended or repealed by the board of directors.

Less clear from the language of existing RCW 23B.10.200(1)(b) is whether the shareholders' power to adopt bylaws that expressly cannot be amended or repealed by the board is subject to any limitation arising under other statutory sections – specifically, whether shareholders can adopt this type of unamendable bylaw provision to the extent that it would infringe upon the authority given to the board of directors to manage the business and affairs of the corporation under RCW 23B.08.010.

Existing RCW 23B.10.200(1)(b) must be read together with existing RCW 23B.08.010, and should not be interpreted in a manner that would prevent a board of directors from fully discharging its duties or exercising its authority to manage the corporation's business affairs as outlined in existing RCW 23B.08.010. Accordingly, existing RCW 23B.10.200 should not be interpreted to mean that shareholders have the authority to adopt a bylaw that irrevocably limits or eliminates the board's authority to manage the corporation's business affairs. Such a bylaw would conflict not only with RCW 23B.08.010, but also with the mandate of RCW 23B.02.060(4) which requires that bylaws relating to management of the corporation's business not be in "conflict with law."

The proposed amendments to RCW 23B.10.200 will conform the language in RCW 23B.10.200 to proposed RCW 23B.02.060(4) and proposed RCW 23B.08.010, confirming that neither the board nor the shareholders may amend or adopt a bylaw that infringes upon the board's authority to manage the business and affairs of the corporation. In particular, with respect to shareholders, the proposed amendment to RCW 23B.10.200(2) will make it abundantly clear that the general authorization of shareholders to adopt irrevocable bylaws in RCW 23B.10.200(1)(b) does not override the demarcation of the board's authority established by RCW 23B.08.010, and does not authorize a shareholder-adopted bylaw that would irrevocably infringe upon or restrict the scope of substantive authority granted to the board of directors under RCW 23B.08.010(2). The proposed amendments to RCW 23B.08.010(2) and 23B.10.200(2) are intended to give notice that there is a line between the permissible procedural or process-oriented bylaw provisions and impermissible ones that encroach upon the board's substantive managerial authority. A bylaw can establish or regulate a process for substantive director decision making, but cannot mandate the decision itself. Because of the variety and range of possible situations and provisions in bylaws which might infringe on the authority of the board under RCW 23B.08.010(2), the proposed amendment makes no attempt to specify particular illustrations. Rather, it is designed to recognize the existence of an allocation of powers between directors and shareholders that is already inherent in RCW 23B, and to confirm that Washington law on this subject has been and will continue to be consistent with the principles that have been judicially developed under the corporate law of Delaware with respect to improper infringements of the substantive authority and fiduciary duty of the board of directors. *See, CA, Inc. v. AFSCME Employees Pension Plan*, 953 A. 2d 227 (Del. 2008). It is the Committee's expectation that Washington courts will determine where the line should be drawn between the permissible and impermissible exercise of board or shareholder power to adopt or amend bylaws under RCW 23B.10.200 in specific factual situations.

In proposing these amendments to RCW 23B.08.010 and 10.200, the Committee is mindful of the recent amendments to the Delaware General Corporation Law ("DGCL") adopted by the Delaware General Assembly in 2009, which specifically permit adoption of proxy access and proxy reimbursement bylaws. The Committee believes that both the board of directors and the shareholders of a Washington corporation currently have wide latitude to adopt proxy access and reimbursement bylaws under RCW 23B.02.060(4), both in its current form and under the proposed amendments, without further specific statutory authorization. However, as noted above, the shareholders in adopting such bylaws, which contain provisions that would restrict the board from amending or repealing them, would be effective only to the extent the bylaws do not improperly infringe upon the exercise by the board of its subtantive responsibilities and authority under RCW 23B.08.010(2)(b). Nevertheless, the provisions in DGCL sections 112 and 113, and in sections 2.06(c) and (d) in the Revised Model Business Corporation Act, should be instructive as to the type of bylaws that could be adopted by either the board or shareholders and possible areas of amendment that would be consistent with the board's authority and responsibility in exercising its fiduciary duties in managing the business and affairs of the corporation.

In addition to limitations on board powers that may permissibly be set forth in the articles of incorporation, there is one other means by which a corporation's shareholders may eliminate or restrict the discretion or powers of the board of directors, namely, by an agreement among all shareholders adopted in accordance with the requirements set forth in RCW 23B.07.320. The proposed amendment includes a cross-reference to RCW 23B.07.320 in RCW 23B.10.200(1)(a), conforming the latter statute to proposed RCW 23B.02.060(4) and RCW 23B.08.010 in which similar cross-references are proposed to be added.

* * * * *

RCW 23B.11.030
ACTION ON PLAN OF MERGER OR SHARE EXCHANGE

CURRENT SECTION

(1) After adopting a plan of merger or share exchange, the board of directors of each corporation party to the merger, and the board of directors of the corporation whose shares will be acquired in the share exchange, shall submit the plan of merger, except as provided in subsection (7) of this section, or share exchange for approval by its shareholders.

(2) For a plan of merger or share exchange to be approved:

(**a) The board of directors must recommend the plan of merger or share exchange to the shareholders unless (i) the board of directors determines that because of conflict of interest or other special circumstances it should make no recommendation or (ii) RCW 23B.08.245 applies, and in either case the board of directors communicates the basis for so proceeding to the shareholders; and**

(b) The shareholders entitled to vote must approve the plan, except as provided in subsection (7) of this section.

(3) The board of directors may condition its submission of the proposed plan of merger or share exchange on any basis, including the affirmative vote of holders of a specified percentage of shares held by any group of shareholders not otherwise entitled under this title or the articles of incorporation to vote as a separate voting group on the proposed plan of merger or share exchange.

(4) The corporation shall notify each shareholder, whether or not entitled to vote, of the proposed shareholders' meeting in accordance with RCW 23B.07.050. The notice must also state that the purpose, or one of the purposes, of the meeting is to consider the plan of merger or share exchange and must contain or be accompanied by a copy or summary of the plan.

(5) In addition to any other voting conditions imposed by the board of directors under subsection (3) of this section, the plan of merger must be approved by two-thirds of the voting group comprising all the votes entitled to be cast on the plan, and of each other voting group entitled under RCW 23B.11.035 or the articles of incorporation to vote separately on the plan, unless shareholder approval is not required under subsection (7) of this section. The articles of incorporation may require a greater or lesser vote than that provided in this subsection, or a greater or lesser vote by separate voting groups, so long as the required vote is not less than a majority of all the votes entitled to be cast on the plan of merger and of each other voting group entitled to vote separately on the plan. Separate voting by additional voting groups is required on a plan of merger under the circumstances described in RCW 23B.11.035.

(6) In addition to any other voting conditions imposed by the board of directors under subsection (3) of this section, the plan of share exchange must be approved by two-thirds of the voting group comprising all the votes entitled to be cast on the plan, and of each other voting group entitled under RCW 23B.11.035 or the articles of incorporation to vote separately on the plan. The articles of incorporation may require a greater or lesser vote than that provided in this subsection, or a greater or

lesser vote by separate voting groups, so long as the required vote is not less than a majority of all the votes entitled to be cast on the plan of share exchange and of each other voting group entitled to vote separately on the plan. Separate voting by additional voting groups is required on a plan of share exchange under the circumstances described in RCW 23B.11.035.

(7) Approval by the shareholders of the surviving corporation on a plan of merger is not required if:

(a) The articles of incorporation of the surviving corporation will not differ, except for amendments enumerated in RCW 23B.10.020, from its articles of incorporation before the merger;

(b) Each shareholder of the surviving corporation whose shares were outstanding immediately before the effective date of the merger will hold the same number of shares, with identical designations, preferences, limitations, and relative rights, immediately after the merger;

(c) The number of voting shares outstanding immediately after the merger, plus the number of voting shares issuable as a result of the merger, either by the conversion of securities issued pursuant to the merger or the exercise of rights and warrants issued pursuant to the merger, will not exceed the total number of voting shares of the surviving corporation authorized by its articles of incorporation immediately before the merger; and

(d) The number of participating shares outstanding immediately after the merger, plus the number of participating shares issuable as a result of the merger, either by the conversion of securities issued pursuant to the merger or the exercise of rights and warrants issued pursuant to the merger, will not exceed the total number of participating shares authorized by its articles of incorporation immediately before the merger.

(8) As used in subsection (7) of this section:

(a) "Participating shares" means shares that entitle their holders to participate without limitation in distributions.

(b) "Voting shares" means shares that entitle their holders to vote unconditionally in elections of directors.

(9) After a merger or share exchange is approved, and at any time before articles of merger or share exchange are filed, the planned merger or share exchange may be abandoned, subject to any contractual rights, without further shareholder approval, in accordance with the procedure set forth in the plan of merger or share exchange or, if none is set forth, in the manner determined by the board of directors.

HISTORY AND COMMITTEE COMMENTARY

ORIGINAL SECTION Laws 1989, ch. 165, §133 (eff. 7-1-90)

(1) After adopting a plan of merger or share exchange, the board of directors of each corporation party to the merger, and the board of directors of the corporation whose shares will be acquired in the share exchange, shall submit the plan of merger, except as provided in subsection (7) of this section, or share exchange for approval by its shareholders.

(2) For a plan of merger or share exchange to be approved:

(a) The board of directors must recommend the plan of merger or share exchange to the shareholders, unless the board of directors determines that because of conflict of interest or other special circumstances it should make no recommendation and communicates the basis for its determination to the shareholders with the plan; and

(b) The shareholders entitled to vote must approve the plan.

(3) The board of directors may condition its submission of the proposed merger or share exchange on any basis.

(4) The corporation shall notify each shareholder, whether or not entitled to vote, of the proposed shareholders' meeting in accordance with RCW 23B.07.050. The notice must also state that the purpose, or one of the purposes, of the meeting is to consider the plan of merger or share exchange and contain or be accompanied by a copy or summary of the plan.

(5) Unless this title, the articles of incorporation, or the board of directors, acting pursuant to subsection (3) of this section, require a greater vote or a vote by voting groups, the plan of merger to be authorized must be approved by each voting group entitled to vote separately on the plan by two-thirds of all the votes entitled to be cast on the plan by that voting group. The articles of incorporation may provide for a lesser vote than that provided in this subsection, or for a lesser vote by separate voting groups, so long as the vote provided for each voting group entitled to vote separately on the plan of merger is not less than a majority of all the votes entitled to be cast on the plan of merger by that voting group. Separate voting by voting groups is required on a plan of merger if the plan contains a provision that, if contained in a proposed amendment to articles of incorporation, would require action by one or more separate voting groups on the proposed amendment under RCW 23B.10.040.

(6) Unless this title, the articles of incorporation, or the board of directors acting pursuant to directors, subsection (3) of this section, require a greater vote or a vote by voting groups, the plan of share exchange to be authorized must be approved by each voting group entitled to vote separately on the plan by two-thirds of all the votes entitled to be cast on the plan by that voting group. The articles of incorporation may provide for a lesser vote than that provided in this subsection, or for a lesser vote by separate voting groups, so long as the vote provided for each voting group entitled to vote separately on the plan of share exchange is not less than a majority of all the votes entitled to be cast on the plan of share exchange by that voting group. Separate voting by voting groups is required on a plan of share exchange by each class or series of shares included in the exchange, with each class or series constituting a separate voting group.

(7) Action by the shareholders of the surviving corporation on a plan of merger is not required if:

(a) The articles of incorporation of the surviving corporation will not differ, except for amendments enumerated in RCW 23B.10.020, from its articles of incorporation before the merger;

(b) Each shareholder of the surviving corporation whose shares were outstanding immediately before the effective date of the merger will hold the same number of shares, with identical designations, preferences, limitations, and relative rights, immediately after the merger;

(c) The number of voting shares outstanding immediately after the merger, plus the number of voting shares issuable as a result of the merger, either by the conversion of securities issued pursuant to the merger or the exercise of rights and warrants issued pursuant to the merger, will not exceed the total number of voting shares of the surviving corporation authorized by its articles of incorporation immediately before the merger; and

(d) The number of participating shares outstanding immediately after the merger, plus the number of participating shares issuable as a result of the merger, either by the conversion of securities issued pursuant to the merger or the exercise of rights and warrants issued pursuant to the merger, will not exceed the total number of participating shares authorized by its articles of incorporation immediately before the merger.

(8) As used in subsection (7) of this section:

(a) "Participating shares" means shares that entitle their holders to participate without limitation in distributions.

(b) "Voting shares" means shares that entitle their holders to vote unconditionally in elections of directors.

(9) After a merger or share exchange is authorized, and at any time before articles of merger or share exchange are filed, the planned merger or share exchange may be abandoned, subject to any contractual rights, without further shareholder action, in accordance with the procedure set forth in the plan of merger or share exchange or, if none is set forth, in the manner determined by the board of directors.

OFFICIAL LEGISLATIVE HISTORY Senate Journal 51st Legis. 3080-82 (1989)
Section 11.03 Action on Plan of Merger or Share Exchange.
Proposed section 11.03 requires mergers or share exchanges to be approved by the shareholders as follows:

In the case of a merger:
(1) the transaction must always be approved by the shareholders of the disappearing corporation (unless the merger is between parent and subsidiary pursuant to Proposed section 11.04); and
(2) the transaction must be approved by the shareholders of the surviving corporation only if the number of voting or participating shares authorized in its articles of incorporation is increased as a result of the transaction.

In the case of a share exchange:
(1) the transaction must always be approved by the shareholders of the corporation whose shares are being acquired; and
(2) the transaction need not be approved by the shareholders of the corporation acquiring the shares.

Proposed section 11.03 requires the board of directors to propose the plan of merger or share exchange and then submit the proposal to the shareholders. When proposing a plan of merger or share exchange, the board of directors must make a recommendation to the shareholders that the plan be approved, unless it determines that because of conflict of interest or other special circumstances it should make no recommendation. If the board of directors so determines, it must describe the conflict or circumstances, and communicate the basis for its determination, when presenting the proposed plan of merger or share exchange to the shareholders.

Proposed subsection 11.03(c) permits the board of directors to condition its submission of a plan of merger or share exchange on any basis; for example, the board may direct that the plan is approved only if it receives a favorable vote of specified percentage of the disinterested shareholders voting on the plan or that shareholders holding no more than a specified number or percentage of shares file notice of intent to demand payment under chapter 13.

Proposed subsection 11.03(d) requires the notice to shareholders to contain or be accompanied by a copy or summary of the plan. Any summary provided to shareholders must contain sufficient detail regarding the transaction to allow the shareholder to make an informed decision whether to approve the transaction and whether to exercise dissenters' rights pursuant to chapter 13. In the event a copy of the plan is included, it will not usually be necessary to include supporting exhibits and schedules in order for a shareholder to make an informed decision. A copy of the agreement and supporting exhibits and schedules should be provided to any shareholder requesting such in writing.

A plan of merger or share exchange, to be approved, generally must be approved by each voting group entitled to vote on the merger by two-thirds of all the votes entitled to be cast on the plan. However, the articles of incorporation may provide for a lesser vote than two-thirds, or for a lesser vote by separate voting groups, so long as the vote provided for each voting group entitled to vote separately on the plan of merger or share exchange is not less than a majority of all the votes entitled to be cast on the plan of merger or share exchange by that voting group. The Committee rejected a general majority vote standard set forth in the RMA on the ground that the two-thirds requirement in the old law had become an important feature in planning control structures of small corporations. It concluded that the optional article of incorporation provision gave most of the advantages of the RMA provision, without the potential for disrupting control structures.

The articles of incorporation of either corporation may require a greater vote by one or more voting groups of that corporation, and if the transaction involves an amendment to the articles of incorporation of the surviving corporation which affects the voting requirements for future amendments, the transaction must also be approved by the vote required by Proposed section 7.27. See Proposed subsections 11.03(e) and (f). In addition, voting by more than one voting group may be required by Proposed subsections 11.03(e) and

(f) or by the articles of incorporation. Finally, the board of directors may require a greater vote or a vote by voting groups under their power to make conditional submissions to shareholders described above. The articles of incorporation or the board of directors, however, may only require a vote by separate voting groups in addition to that otherwise required by this title.

Proposed subsection 11.03(g) describes when approval by the shareholders of the surviving corporation is not required. The Committee considered the requirement in RMA sections 11.03(g)(3) and (4) that shareholders of the surviving corporation vote on merger only if the number of outstanding participating or voting shares is increased by more than 20 percent as a result of the transaction. That requirement is consistent with provisions in a number of states (e.g., Delaware, Michigan, Pennsylvania) and with the requirements of the various stock exchanges. But the requirement generally is not applied to other acquisition forms (e.g., acquisition of assets; triangular mergers) that will achieve the same consequences as a merger. Thus, the Committee concluded that a vote by shareholders of the surviving corporation should only be necessary if an amendment to its articles of incorporation is required to authorize additional shares to consummate the merger. Listed corporations will, of course, continue to be subject to requirements imposed by particular exchanges related to voting.

Proposed subsection 11.03(e) requires voting by voting groups on a plan of merger if the plan contains a provision that "if contained in a proposed amendment to articles of incorporation, would require action by one or more separate voting groups on the proposed amendment." See Proposed section 10.04. Under this provision, voting by voting groups may be required for one or more classes or series of shares of the surviving corporation as well as for one or more classes or series of the disappearing corporation.

Proposed subsection 11.03(f) requires voting by voting groups in a share exchange, with each class or series of shares that is to be acquired in a share exchange entitled to vote as a separate voting group. This provision protects all classes of shareholders when more than one class or series of shares are being acquired on different terms.

In a merger transaction that involves an increase in the number of authorized shares of the surviving corporation, Proposed subsection 11.03(g) requires a shareholder vote. Proposed subsections 11.03(g)(3) and (4) separately apply the authorized share test to increases in the "voting shares" (as defined in Proposed subsection 11.03(h)(2)) and increases in "participating shares" (as defined in Proposed subsection 11.03(h)(1)). If the number of authorized shares of either type is increased in connection with the merger transaction, the transaction must be approved by the shareholders.

Under the definitions in Proposed subsections 11.03(h)(1) and (2), the authorized share requirement may be applied to shares with preferential rights if they are either voting or fully participating, and to deferred or contingent shares issued as a result of the merger. On the other hand, it is typically not applicable to shares issuable under antidilution clauses to balance share splits or share dividends; these shares would not become issuable "pursuant to the merger," but by virtue of later corporate action authorizing the split or dividend.

Proposed subsections 11.03(g)(3) and (4) only determine when a shareholders' vote is required; they do not relate to voting by voting groups. Whether or not a class or series of shares is entitled to vote as a separate voting group is determined by Proposed subsections 11.03(e) and (f).

Proposed subsection 11.03(i) makes it clear that the corporations may abandon without shareholder approval a merger or share exchange even though it has been previously approved by the shareholders. Abandonment under this section does not affect contract rights of third parties. The plan, however, may require that abandonments be approved by shareholders before they are effective.

AMENDMENTS TO ORIGINAL SECTION
Laws 2003, ch. 35, §6 (eff. 7-27-03) *(amends only subsections 2-6)*
(2) For a plan of merger or share exchange to be approved:

(a) The board of directors must recommend the plan of merger or share exchange to the shareholders, unless the board of directors determines that because of conflict of interest or other special circumstances it should make no recommendation and communicates the basis for its determination to the shareholders with the plan; and
(b) The shareholders entitled to vote must approve the plan, except as provided in subsection (7) of this section.
(3) The board of directors may condition its submission of the proposed plan of merger or share exchange on any basis, including the affirmative vote of holders of a specified percentage of shares held by any group of shareholders not otherwise entitled under this title or the articles of incorporation to vote as a separate voting group on the proposed plan of merger or share exchange.
(4) The corporation shall notify each shareholder, whether or not entitled to vote, of the proposed shareholders' meeting in accordance with RCW 23B.07.050. The notice must also state that the purpose, or one of the purposes, of the meeting is to consider the plan of merger or share exchange and must contain or be accompanied by a copy or summary of the plan.
(5) ~~Unless this title, the articles of incorporation, or~~ In addition to any other voting conditions imposed by the board of directors~~, acting pursuant to~~under subsection (3) of this section, ~~require a greater vote or a vote by voting groups,~~ the plan of merger to be authorized must be approved by ~~each voting group entitle to vote separately on the plan by~~ two-thirds of the voting group comprising all the votes entitled to be cast on the plan ~~by that voting group~~, and of each other voting group entitled under RCW 23B.11.035 of this act or the articles of incorporation to vote separately on the plan, unless shareholder action is not required under subsection (7) of this section. The articles of incorporation may ~~provide for a~~ require a greater or lesser vote than that provided in this subsection, or ~~for~~ a greater or lesser vote by separate voting groups, so long as the required vote ~~provided for each voting group entitled to vote separately on the plan of merger~~ is not less than a majority of all the votes entitled to be cast on the plan of merger ~~by that voting group~~ and of each other voting group entitled to vote separately on the plan. Separate voting by additional voting groups is required on a plan of merger ~~if the plan contains a provision that, if contained in a proposed amendment to articles of incorporation, would require action by one or more separate voting groups on the proposed amendment under RCW 23B.10.040.~~ under the circumstances described in RCW 23B.11.035 of this act.
(6) ~~Unless this title, the articles of incorporation, or~~ In addition to any other voting conditions imposed by the board of directors ~~acting pursuant to~~ under subsection (3) of this section~~, require a greater vote or a vote by voting groups,~~ the plan of share exchange to be authorized must be approved by ~~each voting group entitled to vote separately on the plan by~~ two-thirds of the voting group comprising all the votes entitled to be cast on the plan ~~by that voting group~~, and of each other voting group entitled under RCW 23B.11.035 of this act or the articles of incorporation to vote separately on the plan. The articles of incorporation may ~~provide for a~~ require a greater or lesser vote than that provided in this subsection, or ~~for~~ a greater or lesser vote by separate voting groups, so long as the required vote ~~provided for each voting group entitled to vote separately on the~~ ~~plan of share exchange~~ is not less than a majority of all the votes entitled to be cast on the plan of share exchange ~~by that voting group~~ and of each other voting group entitled to vote separately on the plan. Separate voting by voting groups is required on a plan of share exchange ~~by each class or series of shares included in the exchange, with each class or series constituting a separate voting group~~ under the circumstances described in RCW 23B.11.035 of this act.

CARC COMMENTARY

The proposed changes to RCW 23B.11.030 effect two general changes to the rules governing group voting on mergers and share exchanges:

(1) The proposed changes abandon the linkage of group voting on a plan of merger or share exchange to the confusing question of whether group voting would be required if the provisions of the plan were effected through an amendment to the articles of incorporation. Subsection (5) is modified to include a cross-reference to a proposed new section 23B.11.035 in place of the current cross-reference to the amendment sections.

(2) The proposed changes recognize that there is no particular reason for shareholders who receive stock of another corporation in a fundamental transaction to have different voting group rights

depending on whether the transaction is structured as a merger or as a share exchange. Accordingly, subsection (6) is modified so that shareholders are entitled to group voting as to a plan of share exchange in exactly the same circumstances as they would be relative to a plan of merger, under proposed new section 23B.11.035.

Language is also added to clarify that the requirement of separate approval by voting groups is in addition to, and not in lieu of, the required approval of a plan of merger or share exchange by the requisite percentage of all shareholders.

* * * * *

Laws 2009, ch. 189, §38 (eff. 7-26-09) *(amends only subsections (5), (6), (7) (introductory paragraph only), and (9))*
(5) In addition to any other voting conditions imposed by the board of directors under subsection (3) of this section, the plan of merger ~~to be authorized~~ must be approved by two-thirds of the voting group comprising all the votes entitled to be cast on the plan, and of each other voting group entitled under RCW 23B.11.035 or the articles of incorporation to vote separately on the plan, unless shareholder ~~action~~ approval is not required under subsection (7) of this section. The articles of incorporation may require a greater or lesser vote than that provided in this subsection, or a greater or lesser vote by separate voting groups, so long as the required vote is not less than a majority of all the votes entitled to be cast on the plan of merger and of each other voting group entitled to vote separately on the plan. Separate voting by additional voting groups is required on a plan of merger under the circumstances described in RCW 23B.11.035.
(6) In addition to any other voting conditions imposed by the board of directors under subsection (3) of this section, the plan of share exchange ~~to be authorized~~ must be approved by two-thirds of the voting group comprising all the votes entitled to be cast on the plan, and of each other voting group entitled under RCW 23B.11.035 or the articles of incorporation to vote separately on the plan. The articles of incorporation may require a greater or lesser vote than that provided in this subsection, or a greater or lesser vote by separate voting groups, so long as the required vote is not less than a majority of all the votes entitled to be cast on the plan of share exchange and of each other voting group entitled to vote separately on the plan. Separate voting by additional voting groups is required on a plan of share exchange under the circumstances described in RCW 23B.11.035.
(7) ~~Action~~ Approval by the shareholders of the surviving corporation on a plan of merger is not required if:
(9) After a merger or share exchange is ~~authorized~~approved, and at any time before articles of merger or share exchange are filed, the planned merger or share exchange may be abandoned, subject to any contractual rights, without further shareholder ~~action~~approval, in accordance with the procedure set forth in the plan of merger or share exchange or, if none is set forth, in the manner determined by the board of directors.

CARC COMMENTARY
The term "corporate action" is defined and used throughout the Washington Business Corporation Act for consistency and to clarify the distinction between the matter being approved versus the action of approving.

* * * * *

Laws 2011, ch. 328, §6 (eff. 7-22-11) *(amends only subsection (2)(a))*
(a) The board of directors must recommend the plan of merger or share exchange to the shareholders~~,~~ unless (i) the board of directors determines that because of conflict of interest or other special circumstances it should make no recommendation ~~and~~ or (ii) RCW 23B.08.245 applies, and in either case the board of directors communicates the basis for ~~its determination~~ so proceeding to the shareholders ~~with the plan~~; and

CARC COMMENTARY

The proposed changes to RCW 23B.11.030(2)(a) are meant to clarify that when the corporation has agreed with another person to submit a plan of merger or share exchange to the shareholders for approval, the board of directors may submit the plan of merger or share exchange for approval by the shareholders whether or not the board of directors determines at any time subsequent to approving the plan of merger or share exchange that it no longer recommends the plan of merger or share exchange.

* * * * *

RCW 23B.12.020
SALE OF ASSETS OTHER THAN IN REGULAR COURSE OF BUSINESS

CURRENT SECTION

(1) A corporation may sell, lease, exchange, or otherwise dispose of all, or substantially all, of its property, otherwise than in the usual and regular course of business, on the terms and conditions and for the consideration determined by the corporation's board of directors, if the board of directors proposes and its shareholders approve the proposed transaction.

(2) For a transaction to be approved:

(a) The board of directors must recommend the proposed transaction to the shareholders unless (i) the board of directors determines that because of conflict of interest or other special circumstances it should make no recommendation or (ii) RCW 23B.08.245 applies, and in either case the board of dirctors communicates the basis for so proceeding to the shareholders; and

(b) The shareholders entitled to vote must approve the transaction.

(3) The board of directors may condition its submission of the proposed transaction on any basis, including the affirmative vote of holders of a specified percentage of shares held by any group of shareholders not otherwise entitled under this title or the articles of incorporation to vote as a separate voting group on the proposed transaction.

(4) The corporation shall notify each shareholder, whether or not entitled to vote, of the proposed shareholders' meeting in accordance with RCW 23B.07.050. The notice must also state that the purpose, or one of the purposes, of the meeting is to consider the sale, lease, exchange, or other disposition of all, or substantially all, the property of the corporation and contain or be accompanied by a description of the transaction.

(5) In addition to any other voting conditions imposed by the board of directors under subsection (3) of this section, the transaction must be approved by two-thirds of the voting group comprising all the votes entitled to be cast on the transaction, and of each other voting group entitled under the articles of incorporation to vote separately on the transaction. The articles of incorporation may require a greater or lesser vote than provided in this subsection, or a greater or lesser vote by any separate voting groups provided for in the articles of incorporation, so long as the required vote is not less than a majority of all the votes entitled to be cast on the transaction and of each other voting group entitled to vote separately on the transaction.

(6) After a sale, lease, exchange, or other disposition of property is approved, the transaction may be abandoned, subject to any contractual rights, without further shareholder approval, in a manner determined by the board of directors.

(7) A transaction that constitutes a distribution is governed by RCW 23B.06.400 and not by this section.

HISTORY AND COMMITTEE COMMENTARY

ORIGINAL SECTION Laws 1989, ch. 165, §139 (eff. 7-1-90)
(1) A corporation may sell, lease, exchange, or otherwise dispose of all, or substantially all, of its property, otherwise than in the usual and regular course of business, on the terms and conditions and for the consideration determined by the corporation's board of directors, if the board of directors proposes and its shareholders approve the proposed transaction.
(2) For a transaction to be authorized:
(a) The board of directors must recommend the proposed transaction to the shareholders unless the board of directors determines that because of conflict of interest or other special circumstances it should make no recommendation and communicates the basis for its determination to the shareholders with the submission of the proposed transaction; and
(b) The shareholders entitled to vote must approve the transaction.
(3) The board of directors may condition its submission of the proposed transaction on any basis.
(4) The corporation shall notify each shareholder, whether or not entitled to vote, of the proposed shareholders' meeting in accordance with RCW 23B.07.050. The notice must also state that the purpose, or one of the purposes, of the meeting is to consider the sale, lease, exchange, or other disposition of all, or substantially all, the property of the corporation and contain or be accompanied by a description of the transaction.
(5) Unless the articles of incorporation or the board of directors, acting pursuant to subsection (3) of this section, require a greater vote or a vote by voting groups, the transaction to be authorized must be approved by two-thirds of all the votes entitled to be cast on the transaction. The articles of incorporation may provide for a lesser vote than that provided for in this subsection, or for a lesser vote by separate voting groups, so long as the vote provided for each voting group entitled to vote separately on the transaction is not less than a majority of all the votes entitled to be cast on the transaction by that voting group.
(6) After a sale, lease, exchange, or other disposition of property is authorized, the transaction may be abandoned, subject to any contractual rights, without further shareholder action.
(7) A transaction that constitutes a distribution is governed by RCW 23B.06.400 and not by this section.

OFFICIAL LEGISLATIVE HISTORY Senate Journal 51st Legis. 3085-86 (1989)
Section 12.02 Sale of Assets Other Than in the Regular Course of Business.
The scope of the phrase "all or substantially all" is discussed in the Comment to Proposed section 12.01. All transactions that involve the sale or transfer of "all or substantially all" the corporate property must be approved by the shareholders unless they fall within one of the exceptions of Proposed section 12.01

Proposed section 12.02 requires the board of directors to propose the sale and then submit the proposal to the shareholders. The board of directors must make a recommendation to the shareholders that the transaction be approved, unless the board determines that because of conflict of interest or other special circumstances it should make no recommendation. If the board so determines, it must describe the conflict or circumstances, and communicate the basis for its determination, to the shareholders when it presents the proposed sale.

The proposed sale, to be approved, generally must receive two-thirds of all the votes entitled by the articles of incorporation to be cast on the proposal. The Committee rejected the RMA approach that would have required only a majority vote on the ground that the two-thirds approval present in the old law had become such an important part of control structure planning that a reduction to a majority requirement would greatly upset expectations in numerous small corporations. However, the Committee added a provision permitting articles of incorporation to provide for a vote as low as a majority of all the votes entitled to be cast on the transaction by any voting group entitled to vote separately. It felt that such provision permitted the flexibility sought by the RMA provision without endangering control patterns generally.

Nonvoting classes of shares are not given a statutory right to vote on proposed sales (either as separate voting groups or together with voting shares) by the Proposed Act on the theory that classes or series of shares that are made nonvoting by the articles of incorporation generally did not retain a voice in the areas of business the corporation may engage in the future. The articles of incorporation, however, may stipulate that specified classes or series of shares are entitled to vote by separate voting groups. Thus, in the absence of special provision in the articles of incorporation, only the shares of the corporation entitled to vote generally by the articles of incorporation are entitled to vote on sales of substantially all the assets of the corporation. The articles of incorporation may also specify that a greater percentage of votes is required to approve the proposal than specified in Proposed section 12.02.

The board of directors may condition its submission of a proposal to the shareholders under Proposed subsection 12.02(c) on any basis--for example, on its receiving a certain percentage of shareholders' affirmative votes or that specified classes or series of shares, voting by separate voting groups, must approve the transaction or on some other basis.

Proposed subsection 12.02(d) requires the notice to shareholders to contain or be accompanied by a description of the transaction. The description of the transaction must provide sufficient detail so that a shareholder can make an informed decision whether to approve or disapprove the transaction or to exercise dissenters' rights pursuant to chapter 13. In some circumstances it may be appropriate to accompany the description with a copy of the assets sale agreement, although ordinarily supporting exhibits and schedules would not be necessary to allow the shareholder to make an informed decision. In any event, a copy of the asset sale agreement and supporting exhibits and schedule should be provided to a shareholder upon written request.

The approval of most sales of "all or substantially all" of the corporation's assets gives rise to dissenters' rights under chapter 13 to shareholders who are entitled to vote on the transaction and avail themselves of the procedures described in that chapter. Sales subject to Proposed section 12.02 that do not give rise to dissenters' rights even for voting shares include (1) sales pursuant to a court order and (2) sales that require all or substantially all of the net proceeds to be distributed to the shareholders in accordance with their respective interests within one year after the date of sale. See Proposed section 13.02. Shares not entitled to vote on the transaction do not have dissenters' rights by statute; the articles of incorporation may grant those rights or the board of directors may elect to make them available.

Proposed subsection 12.02(f) authorizes a board of directors to abandon a proposed sale without shareholder approval after it has been previously approved by the shareholders. An abandonment does not affect contractual rights that third persons may have against the corporation.

Certain corporate divisions, often called "spin offs," "split offs," or "split ups," sometimes involve transactions that may be formally characterized as sales of "all or substantially all" the corporate assets when in fact they are only a step in a corporate division that does not give rise to the problem of a major change in corporate direction and therefore does not need shareholder approval. Proposed subsection 12.02(g) is designed to make clear that transactions like this, which actually constitute a distribution, are not subject to Proposed section 12.02. See Siegal, "When Corporations Divide: A Statutory and Financial Analysis," 79 HARV. L. REV. 534 (1966).

AMENDMENTS TO ORIGINAL SECTION

Laws 2003, ch. 35, §8 (eff. 7-27-03) *(amends only subsections 3,5, and 6)*

(3) The board of directors may condition its submission of the proposed transaction on any basis, including the affirmative vote of holders of a specified percentage of shares held by any group of shareholders not otherwise entitled under this title or the articles of incorporation to vote as a separate voting group on the proposed transaction.

(5) ~~Unless the articles of incorporation or~~ In addition to any other voting conditions imposed by the board of directors~~, acting pursuant to~~ under subsection (3) of this section, ~~require a greater vote~~

~~or a vote by voting groups,~~ the transaction to be authorized must be approved by two-thirds of the voting group comprising all the votes entitled to be cast on the transaction, and of each other voting group entitled under the articles of incorporation to vote separately on the transaction. The articles of incorporation may ~~provide for a~~ require a greater or lesser vote than ~~that~~ provided ~~for~~ in this subsection, or ~~for~~ a greater or lesser vote by any separate voting groups provided for in the articles of incorporation, so long as the required vote ~~provided for each voting group entitled to vote separately on the transaction~~ is not less than a majority of all the votes entitled to be cast on the transaction ~~by that voting group~~ and of each other voting group entitled to vote separately on the transaction.

(6) After a sale, lease, exchange, or other disposition of property is authorized, the transaction may be abandoned, subject to any contractual rights, without further shareholder action, in a manner determined by the board of directors.

CARC COMMENTARY

The proposed changes to RCW 23B.12.020 are meant to clarify that the requirement of separate approval by voting groups is in addition to, and not in lieu of, the required approval of an asset sale by the requisite percentage of all shareholders.

* * * * *

Laws 2009, ch. 189, §40 (eff. 7-26-09) *(amends only subsections (2)(introductory paragraph only), (5) and (6))*

(2) For a transaction to be ~~authorized~~approved:

(5) In addition to any other voting conditions imposed by the board of directors under subsection (3) of this section, the transaction ~~to be authorized~~ must be approved by two-thirds of the voting group comprising all the votes entitled to be cast on the transaction, and of each other voting group entitled under the articles of incorporation to vote separately on the transaction. The articles of incorporation may require a greater or lesser vote than provided in this subsection, or a greater or lesser vote by any separate voting groups provided for in the articles of incorporation, so long as the required vote is not less than a majority of all the votes entitled to be cast on the transaction and of each other voting group entitled to vote separately on the transaction.

(6) After a sale, lease, exchange, or other disposition of property is ~~authorized~~approved, the transaction may be abandoned, subject to any contractual rights, without further shareholder ~~action~~approval, in a manner determined by the board of directors.

CARC COMMENTARY

The term “corporate action” is defined and used throughout the Washington Business Corporation Act for consistency and to clarify the distinction between the matter being approved versus the action of approving.

* * * * *

Laws 2011, ch. 328, §7 (eff. 7-22-11) *(amends only subsection (2)(a))*

(a) The board of directors must recommend the proposed transaction to the shareholders unless (i) the board of directors determines that because of conflict of interest or other special circumstances it should make no recommendation ~~and~~ or (ii) RCW 23B.08.245 applies, and in either case the board of directors communicates the basis for ~~its determination~~ so proceeding to the shareholders ~~with the submission of the proposed transaction~~; and

CARC COMMENTARY

The proposed changes to RCW 23B.12.020(2)(a) are meant to clarify that when a corporation has agreed with another person to submit a proposed transaction to the shareholders for approval, the board of directors may submit the proposed transaction for approval by the shareholders whether or not the board of directors determines at any time subsequent to approving the proposed transaction that it no longer recommends the proposed transaction.

* * * * *

RCW 23B.14.020
DISSOLUTION BY BOARD OF DIRECTORS AND SHAREHOLDERS

CURRENT SECTION

(1) A corporation's board of directors may propose dissolution for submission to the shareholders.

(2) For a proposal to dissolve to be approved:

(a) The board of directors must recommend dissolution to the shareholders unless (i) the board of directors determines that because of conflict of interest or other special circumstances it should make no recommendation or (ii) RCW 23B.08.245 applies, and in either case the board of directors communicates the basis for so proceeding to the shareholders; and

(b) The shareholders entitled to vote must approve the proposal to dissolve as provided in subsection (5) of this section.

(3) The board of directors may condition its submission of the proposal for dissolution on any basis, including the affirmative vote of holders of a specified percentage of shares held by any group of shareholders not otherwise entitled under this title or the articles of incorporation to vote as a separate voting group on the proposed dissolution.

(4) The corporation shall notify each shareholder, whether or not entitled to vote, of the proposed dissolution either (a) by giving notice of a shareholders' meeting in accordance with RCW 23B.07.050 and stating that the purpose or one of the purposes of the meeting is to consider dissolving the corporation, or (b) in accordance with the requirements of RCW 23B.07.040 for approving the proposed dissolution without a meeting.

(5) In addition to any other voting conditions imposed by the board of directors under subsection (3) of this section, the proposed dissolution must be approved by two-thirds of the voting group comprising all the votes entitled to be cast on the proposed dissolution, and of each other voting group entitled under the articles of incorporation to vote separately on the proposed dissolution. The articles of incorporation may require a greater or lesser vote than provided in this subsection, or a greater or lesser vote by any separate voting groups provided for in the articles of incorporation, so long as the required vote is not less than a majority of all the votes entitled to be cast on the proposed dissolution and of each other voting group entitled to vote separately on the proposed dissolution.

HISTORY AND COMMITTEE COMMENTARY

ORIGINAL SECTION Laws 1989, ch. 165, §155 (eff. 7-1-90)

(1) A corporation's board of directors may propose dissolution for submission to the shareholders.

(2) For a proposal to dissolve to be adopted:

(a) The board of directors must recommend dissolution to the shareholders unless the board of directors determines that because of conflict of interest or other special circumstances it should make no recommendation and communicates the basis for its determination to the shareholders; and

(b) The shareholders entitled to vote must approve the proposal to dissolve as provided in subsection (5) of this section.

(3) The board of directors may condition its submission of the proposal for dissolution on any basis.

(4) The corporation shall notify each shareholder, whether or not entitled to vote, of the proposed shareholders' meeting in accordance with RCW 23B.07.050. The notice must also state that the purpose, or one of the purposes, of the meeting is to consider dissolving the corporation.
(5) Unless the articles of incorporation or the board of directors, acting pursuant to subsection (3) of this section, require a greater vote or a vote by voting groups, the proposal to dissolve must be approved by two-thirds of all the votes entitled to be cast on that proposal in order to be adopted. The articles of incorporation may provide for a lesser vote than that provided for in this subsection, or for a lesser vote by separate voting groups, so long as the vote provided for each voting group entitled to vote separately on the proposal to dissolve is not less than a majority of all the votes entitled to be cast on the proposal by that voting group.

OFFICIAL LEGISLATIVE HISTORY Senate Journal 51st Legis. 3093-94 (1989)
Section 14.02 Dissolution By Board of Directors and Shareholders.
A corporation that has issued shares and commenced business may dissolve voluntarily only with the approval of its shareholders. Proposed section 14.02 requires the board of directors to propose dissolution and then submit the proposal to the shareholders. The board of director [sic] must make a recommendation to the shareholders that the proposal to dissolve be approved, unless it determines that because of conflict of interest or other special circumstances it should make no recommendation. If the board of directors so determines, it must describe the conflict or circumstances, and communicate the basis for its determination, to the shareholders when presenting the proposal to dissolve to the shareholders.

Dissolution, to be approved, generally must receive the vote of two-thirds of all the votes entitled by the articles of incorporation to vote on the proposal. As with other organic changes, the Committee rejected the RMA majority vote requirement in favor of generally continuing the two-thirds standard in the old law. However, provisions in the articles of incorporation may reduce the required vote to a majority of all shares of any voting group entitled to vote separately in the proposal.

Nonvoting classes of shares are not given a statutory right to vote on proposals to dissolve (either as separate voting groups or together with voting shares) by the Proposed Act on the theory that, upon dissolution, the rights of all classes or series of shares are fixed by the articles of incorporation. The articles of incorporation, however, may stipulate that specified classes or series of shares are entitled to vote by separate voting groups. Thus, in the absence of specific provision in the articles of incorporation, only the shares of the corporation entitled to vote generally by the articles of incorporation are entitled to vote on dissolution. The articles of incorporation may also specify that a greater percentage of votes is required to approve the proposal than is required by Proposed section 14.02.

The board of directors may condition its submission of a proposal to the shareholders under Proposed subsection (c) on its receiving a specified percentage of the votes of shareholders of one or more classes or series, voting by separate voting groups, or on some other basis.

Proposed section 14.04 permits the corporation to revoke the dissolution under the circumstances described.

The Committee agreed with the determination of the RMA drafters to omit a provision authorizing voluntary dissolution by consent of shareholders. See old RCW 23A.28.020. The only unique feature that that provision offered that the Proposed Act does not offer is dissolution without action of the board of directors. The Proposed Act provides for action by both directors (see Proposed section 8.21) and shareholders (see Proposed section 7.04) without a meeting. Those provisions were thought to offer sufficient flexibility to small corporations. Thus, voluntary dissolution by consent of shareholders was thought to be unnecessary.

AMENDMENTS TO ORIGINAL SECTION

Laws 2003, ch. 35, §10 (eff. 7-27-03) *(amends only subsections (3) and (5))*

(3) The board of directors may condition its submission of the proposal for dissolution on any basis, including the affirmative vote of holders of a specified percentage of shares held by any group of shareholders not otherwise entitled under this title or the articles of incorporation to vote as a separate voting group on the proposed dissolution.

(5) ~~Unless the articles of incorporation or~~ In addition to any other voting conditions imposed by the board of directors~~, acting pursuant to~~ under subsection (3) of this section, ~~require a greater vote or a vote by voting groups,~~ the proposal to dissolve must be approved by two-thirds of the voting group comprising all the votes entitled to be cast on ~~that~~ the proposal ~~in order to be adopted~~, and of each other voting group entitled under the articles of incorporation to vote separately on the proposal. The articles of incorporation may ~~provide for a~~ require a greater or lesser vote than ~~that~~ provided ~~for~~ in this subsection, or ~~for~~ a greater or lesser vote by any separate voting groups provided for in the articles of incorporation, so long as the required vote ~~provided for each voting group entitled to vote separately on the proposal to dissolve~~ is not less than a majority of all the votes entitled to be cast on the proposal ~~by that voting group~~ and of each other voting group entitled to vote separately on the proposal.

* * * * *

Laws 2006, ch. 52, §6 (eff. 6-7-06) *(amends only subsection (4))*

(4) The corporation shall notify each shareholder, whether or not entitled to vote, of the proposed dissolution either (a) by giving notice of a shareholders' meeting in accordance with RCW 23B.07.050~~. The notice must also state~~ and stating that the purpose~~,~~ or one of the purposes~~,~~ of the meeting is to consider dissolving the corporation, or (b) in accordance with the requirements of RCW 23B.07.040 for taking action on the proposal without a meeting.

> ***CARC COMMENTARY***
>
> Amendment clarifies RCW 23B.14.020 by specifically recognizing that shareholders may approve the proposed dissolution of a corporation without a shareholders' meeting, pursuant to RCW 23B.07.040.

* * * * *

Laws 2009, ch. 189, §50 (eff. 7-26-09) *(amends only subsections (2)(introductory paragraph), (4), and (5))*

(2) For a proposal to dissolve to be ~~adopted~~ approved:

(4) The corporation shall notify each shareholder, whether or not entitled to vote, of the proposed dissolution either (a) by giving notice of a shareholders' meeting in accordance with RCW 23B.07.050 and stating that the purpose or one of the purposes of the meeting is to consider dissolving the corporation, or (b) in accordance with the requirements of RCW 23B.07.040 for ~~taking action on the proposal~~ approving the proposed dissolution without a meeting.

(5) In addition to any other voting conditions imposed by the board of directors under subsection (3) of this section, the ~~proposal to dissolve~~ proposed dissolution must be approved by two-thirds of the voting group comprising all the votes entitled to be cast on the ~~proposal~~ proposed dissolution, and of each other voting group entitled under the articles of incorporation to vote separately on the ~~proposal~~ proposed dissolution. The articles of incorporation may require a greater or lesser vote than provided in this subsection, or a greater or lesser vote by any separate voting groups provided for in the articles of incorporation, so long as the required vote is not less than a majority of all the votes entitled to be cast on the ~~proposal~~ proposed dissolution and of each other voting group entitled to vote separately on the ~~proposal~~ proposed dissolution.

> ***CARC COMMENTARY***
>
> The term "corporate action" is defined and used throughout the Washington Business Corporation Act for consistency and to clarify the distinction between the matter being approved versus the action of approving.

* * * * *

Laws 2011, ch. 328, §8 (eff. 7-22-11)*(amends only subsections (2)(a))*
(a) The board of directors must recommend dissolution to the shareholders unless (i) the board of directors determines that because of conflict of interest or other special circumstances it should make no recommendation ~~and~~ or (ii) RCW 23B.08.260 applies, and in either case the board of directors communicates the basis for ~~its determination~~so proceeding to the shareholders; and

CARC COMMENTARY
The proposed changes to RCW 23B.14.020(2)(a) are meant to clarify that when a corporation has agreed with another person to submit dissolution to the shareholders for approval, the board of directors may submit dissolution for approval by the shareholders whether or not the board of directors determines at any time subsequent to approving dissolution that it no longer recommends dissolution.

* * * * *

Title 23B RCW
Washington Business Corporation Act

Chapter 23B.17 RCW
MISCELLANEOUS PROVISIONS

RCW 23B.17.015
ALTERNATIVE QUORUM AND VOTING REQUIREMENTS

CURRENT SECTION

(1) A corporation that meets the following requirements is subject to the alternative quorum and voting requirements set forth in subsection (2) of this section:

(a) As of the record date of the annual or special meeting of shareholders:

(i) The corporation is a public company;

(ii) Shares of its common stock are admitted to trading on a regulated market listed on the list of regulated markets notified to the European commission by the member states under Article 16 of the investment services directive (93/22/EEC), as such list is amended from time to time; and

(iii) At least twenty percent of the shares of the corporation's common stock are held of record by the depository trust company and are deposited securities, as defined in the rules, bylaws, and organization certificate of the depository trust company, credited to the account or accounts of one or more stock depositories located in a member state of the European Union;

(b) At the time that such shares were initially listed on the regulated market, shares of the corporation's common stock were listed on the New York stock exchange or the nasdaq stock market;

(c) At the time that such shares were initially listed on the regulated market, such listing was a condition to the acquisition of one hundred percent of the equity interests of a foreign corporation or similar entity where:

(i) The securities of the foreign corporation or similar entity were admitted to trading on the regulated market immediately prior to the acquisition;

(ii) The consideration for the acquisition was newly issued shares of common stock of the corporation; and

(iii) The shares issued in connection with the acquisition equaled before the issuance more than forty percent of the outstanding common stock of the corporation; and

(d) At the corporation's most recent annual or special meeting of shareholders less than sixty-five percent of the shares within the voting group comprising all the votes entitled to be cast were present in person or by proxy.

(2) At any annual or special meeting actually held, other than by written consent under RCW 23B.07.040, by a corporation meeting the requirements of subsection (1) of this section:

(a) The required quorum of the voting group consisting of all votes entitled to be cast, and of each other voting group that includes common shares of the corporation which is entitled to vote separately with respect to a proposed corporate action, shall be the lesser of:

(i) A majority of the shares of such voting group other than shares credited to the account of stock depositories located in a member state of the European Union as described in subsection (1)(a)(iii) of this section, provided the number of votes comprising such majority equals or exceeds one-sixth of the total votes entitled to be cast by the voting group; or

(ii) One-third of the total votes entitled to be cast by the voting group.

(b) The vote required for approval by any voting group entitled to vote with respect to any amendment of the corporation's articles of incorporation or bylaws, or any plan of merger or share exchange to which the corporation is a party, or any sale, lease, exchange, or other disposition of all or substantially all of the corporation's property otherwise than in the usual and regular course of business, or dissolution, shall be a majority of the votes actually cast by such voting group with respect to the proposed corporate action, provided that the votes approving the proposed corporate action equal or exceed fifteen percent of the votes within the voting group.

(3) The alternative quorum and voting requirements specified in subsection (2) of this section shall, with respect to any corporation meeting the requirements of subsection (1) of this section, control over and supersede any greater quorum or voting requirements that may be specified in the corporation's articles of incorporation or bylaws or in RCW 23B.02.020, 23B.07.250, 23B.07.270, 23B.10.030, 23B.11.030, 23B.12.020, or 23B.14.020.

HISTORY AND COMMITTEE COMMENTARY

ORIGINAL SECTION Laws 2011, ch. 42, §1 (eff. 4-13-11)
Same as current.

OFFICIAL LEGISLATIVE HISTORY
None.

* * * * *

APPENDIX A

SIGNIFICANT DISCUSSION OF RCW 23B PROVISIONS
WASHINGTON DECISIONS
(Cases follow alphabetically)

RCW 23B.02.040
Equipto Division (SC 1998)
White (App. Div. I 1995)

RCW 23B.03.040
Spokane Concrete (SC 1995)

RCW 23B.05.040
Crystal, China & Gold (App. Div. I 1999)

RCW 23B.06.220
Woods (App. Div. II 2004) (unpub)

RCW 23B.06.400
Metropolitan Mortgage (BR, ED 2006)
Spokane Concrete (SC 1995)
Woods (App. Div. II 2004) (unpub)

RCW 23B.07.400(1)
Sound Infinite (SC 2010)

RCW 23B.07.400(2)
Cray, Inc. (WD 2006)
Fernandes (WD 2006)
F5 Networks (SC 2009)

RCW 23B.08.010(3)
Evans (SC 1994)

RCW 23B.08.300
Spokane Concrete (SC 1995)

RCW 23B.08.310
Grassmueck (WD 2003)
Metropolitan Mortgage (BR, ED 2006)
Woods (App. Div. II 2004) (unpub)

RCW 23B.08.320
Grassmueck (WD 2003)

RCW 23B.08.400
Woods (App. Div. II 2004) (unpub)

RCW 23B.08.410
Woods (App. Div. II 2004) (unpub)

RCW 23B.08.420
Woods (App. Div. II 2004) (unpub)

RCW 23B.08.520
Skarbo (App. Div. I 2005) (unpub)

RCW 23B.13.010(3)
Matthew G. Norton Co. (App. Div. I 2002)

RCW 23B.13.020(1)
China Prods. (App. Div. I 1993)

RCW 23B.13.020(2)
Matthews (App. Div. III 1998)
Sound Infiniti (App. Div. III 2009)

RCW 23B.14.050
Ballard Square (SC 2006)
Woods (App. Div. II 2004) (unpub)

RCW 23B.14.200
Equipto Division (SC 1998)

RCW 23B.14.220
Equipto Division (SC 1998)

RCW 23B.14.300(2)
Scott (SC 2003)
Skarbo (App. Div. I 2005) (unpub)

RCW 23B.14.340
Ballard Square (SC 2006)
Smith v. SeaVentures (App. Div. I 1999)

RCW 23B.15.010
Washington Equipment (App. Div. III 1997)

RCW 23B.15.070
Washington Equipment (App. Div. III 1997)

SIGNIFICANT WASHINGTON DECISIONS

Annotation to: RCW 23B.07.400 (1)
RCW 23B.13.020(2)(exclusivity of appraisal)

Sound Infiniti, Inc, ex rel. Pisheyar. v. Snyder, 169 WN. 2d 199 (2010)

Pisheyar purchased 19 percent of the shares of Sound Infiniti, Inc. ("Sound"), an incorporated Washington automobile dealership in which Snyder and Hannah owned the remaining shares. The parties agreed that Pisheyar would have no role of the management of Sound. Pisheyar asserted, and Snyder and Hannah vigorously disputed, that a result of a subsequent transaction between the parties was that Snyder orally agreed to include Pisheyar and Hannah in future dealerships that Snyder acquired. The following year, the three (along with another small investor) formed Infiniti of Tacoma, Inc. ("Tacoma"), Pisheyar again acquiring 19 percent of the shares; the parties agreed again that Pisheyar would have no management role in Tacoma. Both corporations prospered; but nevertheless relations between Snyder and Pisheyar soured after a confrontation between the two, apparently over the decision to have the two corporations loan Snyder $900,000 to purchase land for a new dealership from which Pisheyar was to be excluded. Pisheyar then demanded a more active role in the management of both dealerships, a request Snyder and Hannah refused, citing the original understanding that Pisheyar would not have a managerial role in the corporations. Pisheyar sued, alleging Snyder and Hannah had engaged in oppression, converted corporate assets, breached fiduciary duties, and breached the alleged oral agreement that Pisheyar would continue to participate in new ventures. Snyder and Hannah then voted to amend the articles of incorporation of each corporation to reduce the number of authorized shares in each to four, and to authorize cash payments by the corporations in lieu of issuing fractional shares. Pisheyar obtained a temporary restraining order against implementation of the reverse stock split; but the trial court, after clarifying Pisheyar's claims as consisting of four derivative claims and three individual claims, vacated the temporary restraining order finding Pisheyar had not demonstrated a likelihood he could succeed on the merits of any of his claims. Snyder and Hannah effected the reverse stock splits, Pisheyar dissented, and ultimately the corporation filed a separate appraisal proceeding. Snyder and Hannah then moved to dismiss Pisheyar's derivative and individual claims. The trial court held that Pisheyar could not maintain independent, individual claims against Snyder and Hannah for breach of fiduciary duty in relation to either the decision to eliminate his interest in the corporation, or for prior wrongdoing giving rise to corporate harm, as his right to dissent to the reverse stock split under RCW 23B.13.020(2) was his sole remedy. The trial court declined to dismiss Pisheyar's claims for deprivation of certain shareholder perquisites finding them valid individual claims. Both parties appealed. The court of appeals held that RCW 23B.13.020 provides the exclusive remedy for a minority shareholder whose ownership of shares in a closely held corporation is eliminated in a reverse stock split, that Pisheyar's shareholder perquisite claims were derivative in nature, and hence that these should have been dismissed. The court said the "unambigious text of the statute [RCW 23B.13.020(2)], its legislative history, and controlling case law all compel the conclusion that appraisal is the exclusive remedy for dissenting shareholders in such a circumstance" unless the dissenters allege facts satisfying elements for a common law fraud action. The court dismissed Pisheyar's derivative claims for lack of standing as a shareholder. Pisheyar appealed; a divided Washington Supreme Court affirmed the appeals court's decision and dismissal of the Pisheyar's derivative claims, with four justices dissenting.

Both the justices in the majority and the dissenting judges agreed that the court of appeals erred by defining the word "fraudulent" in the exception to appraisal exclusivity in RCW 23B.13.020(2) to encompass only common law actual fraud. The majority opinion says that the legislature's omission of the words "unlawful or" (words present in the RMBCA source provision for 23B.13.020) did not mean that the fraudulent exception in subsection (2) should be limited to common law actual fraud. "Our own legislative history and Delaware's influential jurisprudence both contemplate a definition of 'fraudulent' broader than common law actual fraud." But the majority opinion then states that plaintiff must make "some showing that the corporate action itself (here, the reverse stock split) is 'fraudulent with respect to the shareholder or the corporation';" it concludes that Pisheyar did not meet this requirement by alleging that defendants' use of a procedure (a reverse stock split) explicitly recognized by title 23B simply to get rid of him constitutes a breach of fiduciary duty. "These actions … are expressly allowed by Washington law and not fraudulent by any definition." The majority then adopts analysis from the dissenting opinion in a New York case, Walter J. Schloss Associates v. Arkwin Industries, Inc.,* to limit exceptions from the appraisal process in terms of the nature of primary relief sought – if plaintiff's claims can only give rise to monetary damages, those claims must be adjudicated in the appraisal proceeding; but claims seeking certain types of equitable relief (the dissent in Schloss "mentions fraud or breach of fiduciary duty") can be brought outside appraisal. The majority holds that Pisheyar's equitable claims (for an accounting, an injunction enjoining the stock split, and injunctions to restore Pisheyar's role in the corporations)

> "do not allege the type of fraudulent behavior that should be brought outside the appraisal proceeding … It is illogical to have an appraisal remedy for determining the fair value of shares due a dissenter from a valid reverse stock split and then also have a separate proceeding for equitable relief that would enjoin that reverse stock split from occurring in the first place. We hold that a separate proceeding for equitable relief is appropriate only when there is evidence of some fraud beyond the mere fact that a reverse stock split took place."

The dissenting justices saw no reason or legal support for the majority's erection of a barrier that limits relief for a shareholder involuntarily divested of shares through a reverse stock split.

The majority also affirmed the appellate court's determination that Pisheyar could not maintain his corporate derivative claims for two reasons: he was no longer a shareholder (relying on Haberman v. Washington Public Power Supply System)** and he did not fairly or adequately represent the interests of shareholders similarly situated in the corporations. The dissenting justices distinguished Haberman as involving a potential plaintiff's loss of shareholder status before the lawsuit was initiated, cited Delaware authority which recognizes an exception to the share- owning standing rule when the corporate action is undertaken to deprive shareholders of standing, cited Oregon case law that allows derivative suits to continue if the loss of standing is the result of a corporate action in which the holder did not acquiesce, and argued that clearly Pisheyar adequately represented the interests of minority shareholders (himself) in the corporations.

* 455 N.Y.S. 2d 844, 847-852 (App. Div. 1982), reversed, with adoption of dissenting opinion, 472 N.Y.S. 2d 605 (Ct.App. 1984).
** 109 WN. 2d 107 (1987).

APPENDIX C

SIGNIFICANT DISCUSSION OF LANGUAGE IN RCW 23B PROVISIONS BY COURTS IN OTHER JURISDICTIONS
(Cases follow alphabetically)

RCW 23B.01.400
definition of "distribution"
Bonds Distributing Co. (BR, MDNC 2000)
C-T of Virginia (4th Cir. 1992) (Va law)
definition of "shareholder"
Barber (Va. 2006)
definition of "voting group"
Murray (Ind. 2003)

RCW 23B.02.040
Harris (Ark. App. 1993)
Jamal (Ga. App. 1999)
Miller (Ut. 2001)
Sivers (Ore. App. 1993)
Weir (Ga. App. 1994)
Woodroffe (Iowa 2007)

RCW 23B.04.010
Aronson (Ind. 1994)

RCW 23B.06.270
Barber (Va. 2006)
F.B.I. Farms (Ind. 2003)
Pearson (Tenn. App. 1992)

RCW 23B.06.400
Bonds Distributing Co. (BR., MDNC 2000)
C-T of Virginia (4th Cir. 1992) (Va law)
Paratransit Risk (Colo. App. 2007)
Vista Eyecare (BR, ND Ga. 2002)

RCW 23B.07.220
Bamford (Neb. 2010)
Reynolds Health Care (Ark. 2005)

RCW 23B.07.300
Bamford (Neb. 2010)

RCW 23B.07.310
Reynolds Health Care (Ark. 2005)

RCW 23B.07.320
Pearson (Tenn. App. 1992)

RCW 23B.07.400(1)
Damerow Ford (Or. App. 1994)
Frank (7th Cir. 1996) (Ill. law)
G&N Aircraft (Ind. 2001)
Kaplus (Fla. App. 1998)
Massey (7th Cir. 2006) (Ind. law)
Simmons (Va. 2001)
Small (Ill. App. 1999)
Timko (Fla. App. 2005)
Trieweiler (Neb. 2004)
Woods (Wy. 2004)

RCW 23B.07.400(2)
Notz (Wis. 2009)

RCW 23B.07.400(3)
Lewis ex rel. Citizens Sav. (Tenn. App. 1992)

RCW 23B.08.010
Woods (Wy. 2004)

RCW 23B.08.030
Curley (Va. 1993)

RCW 23B.08.080
Murray (Ind. 2003)

RCW 23B.08.090
Neiman (Neb. 2007)
Taylor (Ark. 2004)

RCW 23B.08.300
Commonwealth Trans. (Va. 1997)
Paratransit Risk (Colo. App. 2007)
Sadler (Neb. 2004)
Trieweiler (Neb. 2004)

RCW 23B.08.310(1)
Commonwealth Trans. (Va. 1997)
Curley (Va. 1993)
Paratransit Risk (Colo. App. 2007)

RCW 23B.08.310(5)
Geren (SDNY 1993) (Va law)

RCW 23B.08.410
WBM, LLC (Va. 2005)
Woods (Wy. 2004)

RCW 23B.08.500
Kramer (Md. App. 2009)

RCW 23B.08.510
Weisbart (Colo. App. 2001)

RCW 23B.08.520
Damerow Ford (Or. App. 1994)
Internet Navigator (8^{th} Cir. BAP 2003) (Ia. law)
Mollfulleda (N.D. Ill. 1996)
Waskel (Colo. App. 2000)

RCW 23B.08.530
Kramer (Md. App. 2009)

RCW 23B.08.540
Weisbart (Colo. App. 2001)

RCW 23B.08.570
Waskel (Colo. App. 2000)

RCW 23B.08.700
McLaughlin (Utah 2009)

RCW 23B.08.710(2)
Kim (Colo. App. 2007)

RCW 23B.08.720
Fisher (11^{th} Cir. 2002) (Ga. law)

RCW 23B.11.060
Notz (Wis. 2009)

RCW 23B.12.020(1)
Hansen (Mt. 1998)
Intl. Specialty Prods. (D.Conn. 2000)
State ex rel Columbus Metal (Neb. 2006)
Sterman (Wis. App. 1990)
Trifad Entertainment (Mt. 2001)
WBM, LLC (Va. 2005)

RCW 23B.13.010(3)
"Fair Value" Methodology
Bingham Consol. Co. (Ut. App. 2004)
Boettcher (Fla. App. 2004)
Hansen (Mt. 1998)
Hogle (Ut. 1997)
Institutional Equip. (Ill. App. 1990)
Oakridge Energy (Ut. 1997)
Pro Finish USA (Az. App. 2003)
75629 Shares of Com. Stk. (Vt. 1999)
Sieg Co. (Ia. 1997)
Small (Ill. App. 1999)

"Fair Value" Discounts
Ex parte Baron Svcs. (Ala. 2003)
Blitch (Ga. App. 2000)
Brown (Wy. 2006)
Columbia Mgmt. Co. (Ore. App. 1988)
Pueblo Bancorp. (Colo. 2003)

"Fair Value" Discounts cont.
Richton Bank (Miss. 2001)
Rigel Corp. (Neb. 1994)
Security State Bank (Ia. 1996)
Weigel Broadcasting Co. (Ill. App. 1997)

RCW 23B.13.010(4)
HMO-W Inc. (Wis. App. 2003)

RCW 23B.13.020(1)
State ex rel Columbus Metal (Neb. 2006)

RCW 23B.13.020(2)
Berger (DE Ch. 2006) (Fla. law)
Bingham Consol. Co (Ut. App. 2004)
Davis-Eisenhart (Ia. 1995)
McMinn (NM 2007)
Osher (NC App. 2004)
Peters Corp. (N.M. 2008)
Stringer (Ore. 1992)
Szaloczi (Colo. 2004)
Werner (NC App. 1998)
Williams (Fla. App. 2008)

RCW 23B.13.230
VSI Enterprises (Ga. App. 1999)

RCW 23B.13.240
VSI Enterprises (Ga. App. 1999)

RCW 23B.13.250
Foard (NC App. 2005)

RCW 23B.13.280
M Life Ins. Co. (Colo. App. 1998)

RCW 23B.13.300
Riddle-Bradley, Inc. (Ga. App. 1995)

RCW 23B.13.310
Davis-Eisenhart (Ia. 1995)
Stringer (Ore. 1992)

RCW 23B.14.300(2)
Colt (Colo. App. 2003)
Foster (NC App. 1993)
Kaplan (D. Me. 2007)
Napp (Me. 2007)
Notz (Wis. 2009)

RCW 23B.15.050(2)
de Saad (Fla. App. 2003)

RCW 23B.16.020
Kelley Mfg. (Ga. App. 2009)
Panitz (Tenn. App. 2004)
Retail Property Investors (Va. 1996)

RCW 23B.16.020(2)
Nu Med Home Health (Fla. App. 1995)
Parsons (NC 1993)

RCW 23B.16.020(3)
Pagett (Conn. App. 2004)
Towle (Vt. 1998)
Wright Beauty College (Ind. App. 1991)

RCW 23B.16.020(5)
Parsons (NC 1993)

RCW 23B.16.020(6)
Kelley Mfg. (Ga. App. 2009)
World Time Corp. (Fla. App. 1997)

SIGNIFICANT DECISIONS IN OTHER JURISDICTIONS

Annotation to: RCW 23B.07.220(4)
RCW 23B.07.300

Bamford v. Bamford Inc., 777 N.W.2d 573 (Neb. 2010)

James Bamford, owner of substantially all of the shares in Bamford, Inc. (a Nebraska corporation), transferred all of the voting rights of his shares to the Bamford Irrevocable Voting Trust (Trust) shortly before his death. The Trust specified that James would be the sole voting trustee until his death, with named successor trustees thereafter (pointedly excluding James' wife, Donna, who was to receive all other rights to the shares on his death.) The Trust specified that it was to continue as long as either James, or Donna, was alive. After James' death, Donna filed a declaratory judgment action asking that the Trust be declared void, or in the alternative, revocable. The district court sustained Donna's motion for summary judgment, holding that because the Trust would not necessarily terminate within 10 years, it was void, or alternatively, if the Trust was a proxy, that it was revocable. The trustees appealed; the Nebraska Supreme Court affirmed the district court's order granting Donna's motion for summary judgment.

The court rejected the trustee's argument that the language in the Nebraska Business Corporation Act provision (identical in substance to RCW 23B.07.300) that a voting trust "shall be valid for not more than ten years after its effective date" was a substantive limitation that would terminate the trust irrespective of whether or not it was stated in the trust document. The court said that "the Trust document in this case clearly does indicate an intention to go beyond the [time period in the] statute, as its clear intent is to ensure that Donna never exercise shareholder voting rights, regardless of how long she survives James." It therefore held the Trust void as against the legislature's declared public policy.

The court rejected the trustee's argument, based on language in Oceanic Exploration Co. v. Grynberg, 428 A.2d 1 (Del. 1981), that a voting trust which did not comply with the statutory requirements could nevertheless be upheld as a stockholder pooling agreement. The court distinguished the agreement in Grynberg (which it said was a share purchase agreement that included an assignment of voting rights) from the document before it which it said fell squarely within the traditional criteria for a voting trust, and thus was governed by the statute.

The court finally rejected the trustee's argument that even if the Trust was ineffective as a voting trust, it should be enforced as an irrevocable proxy coupled with an interest under the Nebraska Act irrevocable proxy provision (identical in substance to RCW 23B.07.220(4).) The court held that the reach of the statute extended beyond the 5 stated examples of proxies coupled with an interest and incorporated the common-law test for such powers (a power to do an act beneficial to the proxyholder which was connected with an interest in the stock upon which the power is to be exercised[*]). Nevertheless, the court concluded that the current trustee with the most significant connection with the corporation (the son of James and Donna, who was a director and independent contractor employed by the corporation) did not have a proprietary interest in the corporation. Thus, it held the Trust could not be enforced as an irrevocable proxy.

[*] The court approved statements in State ex rel Everett Trust & Savings Bank v. Pacific Waxed Paper Co., 22 WN.2d 844 (1945).

SIGNIFICANT DECISIONS IN OTHER JURISDICTIONS

Annotation to: RCW 23B.13.010(3) (definition of "fair value")

Brynwood Co. v. Schweisberger, 913 N.E. 2d 150 (IL App. 2009)

Brynwood, an Illinois corporation, owned as its only asset a commercial office building that it had acquired through the issuance of industrial revenue bonds. By August 2000, Brynwood had paid off the bonds, and its board of directors began evaluating the tax and financial ramifications of alternate futures for the corporation: (1) converting the corporation from its "C" corporation federal tax status into an "S" corporation and continuing to hold the building for at least 10 years; or (2) selling the building and dissolving the corporation. Schweisberger, owner of about 26 percent of Brynwood's shares, and former officer and director of Brynwood and former tenant in the building, proposed that the corporation instead purchase Brynwood shares held by nontenant shareholders. The corporation in late 2001 made two offers to purchase Schweisberger's shares (first at $48 per share, and then at $50 per share), but Schweisberger (who wanted $60 per share) declined both offers. In July 2002 the board informed Schweisberger that it was considering the sale of the building to an unrelated person, but that it would be willing to forego the sale if he would consent to conversion of Brynwood to an "S" corporation. When Schweisberger refused to consent, the board, and all shareholders other than Schweisberger (who dissented), promptly approved the sale of the building and dissolution of the corporation. Brynwood incurred $446,593 in capital gains taxes, professional fees and other costs associated with the sale and dissolution of the corporation. The corporation notified Schweisberger that the "fair value" of his dissenting shares determined after deducting the transactions costs was $30.08 per share. Schweisberger demanded $66.31 per share (the value of the corporation's assets with no deduction). Brynwood petitioned the trial court for a determination of the "fair value" of Schweisberger's shares under an Illinois statute[*] identical to RCW 23B.13.010(3). The trial court accepted Schweisberger's argument that Brynwood on the day before the sale was a going concern. It reasoned that Brynwood's sale and dissolution costs occurred only because of the transaction to which Schweisberger had dissented and that exclusion of such costs from its determination of his shares' fair value was not inequitable. Brynwood appealed; the Illinois court of appeals held that exclusion of Brynwood's transactions costs from the determination of fair value of Schweisberger's share was inequitable, vacated the trial court's judgment, and remanded the case to the trial court for further proceedings.

The appeals court first announced three general valuation principles it considered relevant to the determination of fair value of Schweisberger's shares:

1. When dissenters' rights statutes employ the term "fair value" they require the trial court to determine the value of what the shares represent – "a percentage ownership in the intrinsic value of the corporation as a going concern …"
2. Facts that are known or that could be ascertained as of the day before the corporate action giving rise to the shareholder's dissent must be considered in determining "fair value" of the shares.
3. The determination of fair value of a dissenters' shares in a closely-held "C" corporation that owns appreciated real estate must take into account foreseeable transaction costs

[*] 805 ILCS 5/11.70(j)(i). The subsection was subsequently amended (effective January 1, 2007) to include current RMBCA language on minority discounts.

inherent in the corporate action that would be necessary to realize or monetize the shares' fair value.

The appeals court held that the amount of capital gains taxes, professional fees and other costs associated with the sale of the building by Brynwood were known or could have been ascertained on the day before the sale; therefore such costs had to be deducted in determining the fair value of the shares "to face the economic facts" and "to effectuate the purpose of the statute." On the latter point, the court stated that Schweisberger was not the victim of a freeze out by an over-reaching majority shareholder at a price fixed by the majority; indeed, the court said that Schweisberger had effectively triggered transaction costs that had to be borne by all shareholders by refusing to consent to conversion of Brynwood from "C" to "S" corporate tax status. Schweisberger argued that a number of dissenters' rights cases[**] had held that a deduction for hypothetical transaction costs from the value of assets owned by a going concern would violate statutes requiring determination of fair value – <u>not</u> the liquidation value – of the dissenters' shares. The court distinguished those cases on grounds that they each involved situations in which the majority had forced a minority shareholder out of a corporate enterprise that the majority continued to operate, whereas the case before it involved a sale of the corporation's only asset to an unrelated party which resulted in distribution of net proceeds to all shareholders pro rata. Finally, the court held that the costs incurred in dissolving Brynwood should not be deducted in determining fair value of Schweisberger's shares as such costs were not a necessary result of monetizing the shareholders' investment.

[**] The appeals court cited Institutional Interiors Inc. v. Hughes, 562 N.E. 2d 662 (IL App 1990); Hansen v. 75 Ranch Co., 957 P.2d 32 (MT 1998); In re Glosser Bros. Inc., 555 A.2d 129 (PA 1989); and In re 75,629 Shares of Trapp Family Lodge, Inc., 725 A.2d 927 (VT 1999). Hansen and Trapp Family Lodge are summarized in cases in other jurisdictions section.

SIGNIFICANT DECISIONS IN OTHER JURISDICTIONS

Annotation to: RCW 23B.14.300(2)

Kaplan v. First Hartford Corp., 484 F.Supp.2d 131 (D. Me. 2007)

First Hartford Corporation (FHC), a publicly-held, but thinly traded, Maine corporation engaged in the development, ownership and management of commercial real estate, was controlled by a shareholder holding approximately 43% of the outstanding shares of stock. The plaintiff, a 19% shareholder, sued in an effort to realize fair value from his shares, which he believed held a value higher than the price the market was willing to pay for his shares. During several years of poor financial condition, FHC failed to follow corporate formalities as it struggled to stay in business. Eventually, the controlling shareholder nursed FHC back to profitability using his own funds and credit. By October 2003, with its financial performance improving, FHC planned to hold its first shareholders meeting in 18 years, primarily to institute a stock option plan for employees. In advance of this meeting, the controlling shareholder refused to provide the plaintiff with a list of FHC's shareholders. The plaintiff sued to enforce his inspection rights and was granted inspection; the trial court also awarded plaintiff's attorneys' fees because the list had been withheld in bad faith. Over the next two years, the plaintiff questioned what he considered to be self-dealing transactions between FHC and the controlling shareholder that had been disclosed in FHC's SEC filings. The plaintiff was unable to obtain information about the transactions from FHC and sued in three different lawsuits alleging inadequate disclosure. The plaintiff obtained findings that FHC's disclosures were inadequate, but he was awarded no damages. The court found that following FHC's emergence from bankruptcy in 1981, the controlling stockholder had treated FHC as part of a common enterprise with other companies that he owned and caused FHC to enter into numerous inter-company transactions that were poorly documented. The court also found that the controlling shareholder had caused FHC to enter into several self-dealing transactions with the controlling shareholder that benefited the controlling shareholder and members of his family with limited or no benefit to FHC. The plaintiff claimed that the controlling shareholder had been operating FHC oppressively for the benefit of the controlling shareholder, his family and other wholly-owned entities, and sought the appointment of a receiver to explore remedies under the Maine corporation statute on the grounds that the "directors or those in control of the corporation have acted, are acting, or will act in a manner that is illegal, oppressive or fraudulent."[*] The court found that, since the Maine corporate oppression statute did not become effective until it was enacted July 1, 2003, FHC's and the controlling shareholder's inability to demonstrate the fairness of a conflicting-interest transaction that occurred before that date was relevant to oppression only if it helps "color the disputed manner in which FHC has been acting since July 1, 2003," but that actions before such time were not independently actionable under the oppression statute. The court also found that the Maine corporate oppression statute, which is based on §14.30 of the Model Business Corporation Act (MBCA), was not limited to closely held corporations as some commentators had suggested. The court reasoned that changes to the MBCA, proposed in 2005, would limit the remedy of dissolution for oppression explicitly to nonpublic corporations, but that Maine had not adopted the proposed amendment that would eliminate shareholder dissolution suits for public corporations. As a result, in Maine, the standard of oppressive conduct governs all corporations, and the court must apply it even to publicly-held corporations.

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[*] 13-C Maine Rev. Stat. § 1430(2)(B). RCW 23B.14.300(2)(b) has identical language.

The court reviewed three recognized tests for oppression: (1) the “general oppression” test that looks for “burdensome, harsh and wrongful conduct”; (2) the test that mirrors the fiduciary duty of good faith and fair dealing that applies to a controlling shareholder; and (3) the “reasonable expectations” test that defines oppression as “a violation by the majority of the reasonable expectations of the minority.” The court noted that neither the Maine legislature nor Maine case law had given any direction to as to the choice of approach for determining oppression, but that case law from other jurisdictions recognize that certain courts apply more than one test, that sometimes the circumstances determine which test will be used, and that in many cases the tests produce the same result. The court cited Scott v. Trans-System, Inc., 148 Wn.2d 701, to explain that the tests are not mutually exclusive and that more than one may be used in the same case depending on the facts. The court believed that choosing among these three tests would not add predictibility to the outcome, and instead chose to turn directly to the particular facts of this case demonstrating oppressive conduct, using the word in its “ordinary sense.” It held that the following factors established oppressive conduct in this case:

1. The controlling shareholder had treated FHC as his own property, moving money back and forth among his various companies including FHC, as he thought beneficial while ignoring the rules of corporate governance;
2. The controlling shareholder withheld FHC’s shareholder list in bad faith in an effort to hinder the plaintiff’s attempt to elect independent directors;
3. FHC issued proxy statements that were negligently misleading in their statements and omissions regarding the full nature of the controlling shareholder’s self-dealing transactions;
4. The controlling shareholder directed payments from FHC to the controlling shareholder’s daughters and other family members;
5. FHC provided management services with respect to a property owned by the controlling shareholder’s without a written management agreement and under which the management fees paid to FHC had decreased even though the revenues generated by the property had not decreased;
6. The controlling shareholder directed the transfer of funds away from FHC to benefit companies owned by the controlling shareholder; and
7. The controlling shareholder directed FHC to pay him a large bonus, even while the current litigation was pending.

The court held that “no one of these actions alone would meet the oppression standard for a shareholder dissolution suit - each has its own remedy, ranging from the remedies that Kaplan has pursued successfully in Maine state court and in federal court in Massachusetts, to other remedies such as a derivative lawsuit, which Kaplan had not pursued. Instead, it is the *pattern* of abusive conduct that establishes oppression. Kaplan has successfully sued FHC four times, yet the pattern of oppressive conduct continues. The Maine oppression statute should relieve minority shareholders, facing a pattern of abusive conduct, from having a new lawsuit for each individual instance.”

The court found that when the statutory grounds for dissolution are met, dissolution is not mandatory but lies within the sound discretion of the court. The court noted that Maine law lists several alternative options short of outright dissolution.

SIGNIFICANT DECISIONS IN OTHER JURISDICTIONS

Annotation to: RCW 23B.16.020

Kelley Mfg. Co., v. Martin, 674 S.E.2d 92 (Ga. App. 2009)

Martin, and another plaintiff Maxwell, were named CEO and president, respectively, of Kelley Mfg. Co. (KMC)(a Georgia corporation), following the October 2006 retirement of its former CEO, Carson. All of the shares of KMC were owned by KMC's Employees' Stock Ownership Plan. Martin and Maxwell were voted by KMC's employees to be co-trustees of the ESOP. Carson soon became angry with Martin and Maxwell over their operation of KMC's farm. In March 2007, both were terminated by KMC's board of directors and removed as trustees of the ESOP, both actions based on Carson's vote of proxies and powers of attorney received from 135 employees. Carson was then voted by the employees to be the sole trustee of the ESOP and the chair of KMC's board of directors, and later was appointed by the board to be KMC's CEO. In May, 2007, Martin and Maxwell (both had retained large interests in the ESOP) sent a letter requesting to inspect and copy various KMC documents, including the proxies/powers of attorney relied on by the board to terminate them, and a list of the shareholders at the time. KMC allowed inspection of "minutes and other documentation of corporate meetings which a <u>shareholder</u> is entitled to review," but refused to allow them access to the proxies/powers of attorney and the list of shareholders. Martin and Maxwell petitioned the court, pursuant to Georgia statutes identical in substance to RCW 23B.16.020-.040, for inspection of a list of corporate documents, and access to the proxies/powers of attorney and the shareholders' list. The trial court entered an order allowing inspection. KMC appealed; the court of appeals affirmed the trial court's judgment.

The court of appeals rejected KMC's argument that Martin and Maxwell did not have standing to sue for inspection of corporate documents because they were not "shareholders" as defined by the Georgia inspection statute (identical in substance to RCW 23B.16.020(6).) The court acknowledged that the ESOP was the record owner of all KMC's shares, and that neither Martin and Maxwell was technically a "beneficial owner whose shares are held in a voting trust or by a nominee on the beneficial owner's behalf." Nevertheless, the court concluded that ESOP participants were "equitable owners" of KMC shares and therefore entitled to inspect KMC books and records (a conclusion undoubtedly supported by various references in KMC documents to ESOP participants as "shareholders".)

The court also affirmed the trial court's finding that Martin and Maxwell stated a "proper purpose" for the inspection ("to enforce KMC's bylaws, by ensuring proper corporate governance, and determining if corporate waste, mismanagement, and other breaches of fiduciary duty were occurring; to inspect corporate records to protect their substantial ownership interest as well as the interest of other shareholders; and to inspect records related to their removal as trustees, directors, officers and employees of KMC.")

The court also held that ERISA did not preempt the inspection petition by Martin and Maxwell as their claims did not relate to rights or benefits bestowed upon them by the ESOP.

SIGNIFICANT DECISIONS IN OTHER JURISDICTIONS

Annotation to: RCW 23B.08.710(2)

Kim v. Grover C. Coors Trust, 179 P.3d 86 (Colo. App. 2007)

Jeffrey Coors, William Coors, and three trusts established by Coors family members together owned 47 percent of the shares, and thereby controlled the operations of Graphic Packaging International Corp. (GPK), a Colorado corporation. Jeffrey Coors, William Coors and 4 persons described by the court as independent made up GPK's board of directors; Jeffrey Coors was its CEO. In 1999, GPK financed the purchase of a folding carton company by means of a credit agreement that required GPK to pay $525 million within one year of the purchase. GPK had intended to use proceeds from the sale of a paperboard mill to pay most of the debt; but when the sale fell through GPK had to arrange alternate financing on short notice. After some consideration of alternatives (including restructuring of the debt), it decided to raise $100 million by issuing convertible preferred shares to a Coors family trust of which Jeffrey Coors and William Coors were trustees. GPK's board formed a special committee of the 4 independent directors to evaluate the transaction. The committee met 4 times, received a fairness opinion on the issuance from Solomon Smith Barney (said to be familiar with GPK and its problems), declared the terms of the issuance to be fair to GPK, and approved the share issuance. Kim, a minority shareholder of GPK, brought suit on behalf of its public shareholders alleging GPK's directors breached their fiduciary duties in approving the issuance. The trial court found the issuance to be fair to GPK, and that its directors had not breached their fiduciary duties. Kim appealed. The Colorado court of appeals affirmed the trial court's judgment.

The appeals court first affirmed the trial court's determination that the injury Kim had alleged – that the share issuance had been for inadequate consideration and therefore had diluted the public shareholders' interests in GPK – stated a direct (rather than a derivative) claim. It then rejected Kim's argument that the fairness of the issuance should be determined using fiduciary standards applied by Delaware courts to transactions between a corporation and its controlling shareholders, and not by using (as the trial court had) standards applied by various courts to directors' conflicting interest transactions. The appellate court affirmed the trial court's analysis citing the directors' conflicting interest transaction provisions in the Colorado Business Corporation Act (generally modeled on Revised Model Business Corporation Act §§8.60-8.61; RCW 23B.08.700-.08.710 are identical in substance to the RMBCA provisions). The court said that the Colorado statute did not exempt from its coverage conflicting interest transactions where the directors involved were also either controlling shareholders or appointed by controlling shareholders (not noting that the commentary to RMBCA §8.60 specifically excepts such transactions from its conflicting interest provisions). The court also said that it could not discern "any functional difference" between applying controlling shareholder fiduciary rules to the transaction, rather than the directors' conflicting interest rules. It held that under the Colorado conflicting interest provision (as under RCW 23B.08.710(2)) the issuance could not be set aside, or give rise to damages, if it was "fair to the corporation." It reviewed tests for fairness set forth in a legal encyclopedia, RMBCA commentary, Colorado cases and commentary, and a Delaware "entire fairness" case*, and concluded that the test should be whether "under all the

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* The court quotes language from Kahn v. Lynch Communication Systems, 638 A.2d 1110 (DE 1994); a leading Delaware interpretation on the burden of proof rules applicable to controlling shareholder transactions.

circumstances [the transaction] carries the earmarks of an arm's length bargain" (citing Pepper v. Litton, 308 U.S. 295 (1939)). The court then rejected all of Kim's arguments that the trial court's findings were not supported the record, including importantly:

a. Kim argued that the independent directors had not been provided material information about the share issuance citing a trial court finding that because of time pressure committee members were not fully informed when they approved the transaction. The appeals court rejected Kim's argument finding from testimony of 3 of the independent directors that they had access to all the information they required but that they had not had time to review it fully.
b. Kim argued that the issuance should have been determined to be unfair because the independent directors had relied on Jeffrey Coors, or an employee beholden to him, to negotiate terms for the transaction. The court rejected the argument saying that the record indicated that the terms had been negotiated had been negotiated on behalf of the special committee by a representative of Solomon Smith Barney [the firm later providing the fairness opinion on the issuance] and a GPK employee other than Jeffrey Coors.
c. Kim argued that the transaction should have been held unfair because the independent directors did not consider alternate means of financing the funds required. The appellate court rejected Kim's argument, relying on testimony of Jeffrey Coors that he had considered a number of alternatives and rejected them either for cost or infeasibility, on testimony of a GPK expert to the same effect, and on testimony of 2 of the independent directors that convertible preferred shares could not have been sold in the public market at the time. The court also said that since no independent director was personally interested in any of the alternatives, the independent directors' decision was protected by the business judgment rule.
d. Kim argued that the terms of the issuance were unfair, citing testimony of his experts that the stock issued should have been valued as control shares (when the preferred shares were converted, the Coors family would own an increased percentage [the court does not state whether the percentage would be over 50] of GPK's outstanding shares), and that even if treated as non-control shares the shares should not have been discounted 19 percent for lack of marketability. The appellate court said the decision to use methodology of GPK's experts throughout was within the trial court's discretion.

SIGNIFICANT DECISIONS IN OTHER JURISDICTIONS

Annotation to: RCW 23B.08.500
RCW 23B.08.530

Kramer v. Liberty Property Trust, 968 A.2d 120 (Md. App. 2009)

Kramer and Grigg co-owned RPC, a Maryland real estate developer. In October 2004, RPC entered into a Professional Services Agreement (PSA) with the West Plam Beach Community Redevelopment Agency (CRA). In November 2004, Grigg, acting on behalf of RPC and with the advice of an attorney, Sanders, entered into a consulting agreement with Liberti, a West Palm Beach Commissioner and a member of CRA. After Liberti became consultant to RPC, CRA voted to amend the PSA to the benefit of RPC. Republic Property Trust (Republic), a Maryland REIT, was formed in July 2005 with Kramer as a chair of its board of trustees, and Grigg as its President and Chief Development Officer. On December 19, 2005, CRA approved the assignment of the PSA from RPC to a Republic affiliate, and on the next day Republic completed an initial public offering. In May 2006, after federal prosecutors charged Liberti with corruption in abuse of his office, the press reported prosecutors knew that RPC had paid consulting fees to Liberti while he was voting on matters affecting RPC, and planned to conduct a grand jury investigation into Liberti's dealings with RPC. Republic's Audit Committee engaged counsel to investigate Republic's involvement in these events, with emphasis on the legality of Grigg's conduct throughout. After initial cooperation, Kramer cut short his interview with committee counsel, placed limits on Sanders' ability to answer questions about the Liberti consulting agreement, and challenged the Audit Committee's authority to conduct the investigation. Committee counsel recommended Grigg be discharged, opined that Kramer's actions could serve as the basis for obstruction of justice charges, and recommended that if Kramer would not voluntarily resign, the Audit Committee should consider further action. Kramer retained personal counsel and requested that Republic advance to him legal expenses connected with the proceeding that Republic had begun against him as trustee of Republic. Republic denied the request; Kramer sued Republic (and continued the suit after Republic merged into Liberty Property Trust). The trial court granted defendant's motion for summary judgment, finding that there was no proceeding as required by the Maryland advancement statute (based, as is RCW 23B.08.530, on the 1980 Model Business Corporation Act advancement provision.) Kramer appealed; the Maryland Court of Appeals affirmed that the trial court's judgment, finding there was a proceeding but that Kramer was not a party there to.

Relying on definitions in Black's Law Dictionary, the court restated the Maryland statutory definition of a "proceeding" ("any threatened, pending, or completed action, suit, or proceeding, whether civil, criminal, administrative, or investigative")(all words in RCW 23B.08.500(7)) to mean any stage of an actual or threatened adjudicative or administrative process, including an investigation. It stated that comments by the Model Act drafters to subsequent changes in RMBCA indemnification provisions favored a broad interpretation of proceeding to protect directors against new and unexpected forms of adversarial matters. It reviewed decisions interpreting similar language in the Delaware indemnification statute (that allowed advancement of expenses incurred by a director in an internal investigation ultimately connected with litigation) that disallowed expenses when actions taken "comprise a corporation's internal governance functions, such as the removal of an officer or director for cause" (at least where the corporation had promised no action beyond removal.) The court concluded from the authorities that when the Audit Committee engaged counsel to investigate Republic's involvement in potential criminal activityin West Palm Beach Florida, the investigation "was clearly a 'proceeding' within the meaning of Maryland's advancement statute." However, the court said that Republic's bylaws required that to be entitled to advances the trustee must have been made a party to the proceeding by reason of service in such capacity. The court said that there was no nexis between the internal investigation by the committee counsel and Kramer's status as a trustee – Grigg's activities at RPC were the focus of the Audit Committee's investigation, not Kramer's actions as a trustee at Republic. Instead, Audit Committee Counsel's investigation concerned Kramer because of his ownership in the RPC venture. Finally, the court said that threats of further action by Republic ultimately amounted only to possible removal for cause by shareholders, which the court said was a matter of internal corporate governance, and would not constitute a "proceeding."

SIGNIFICANT DECISIONS IN OTHER JURISDICTIONS

Annotation to: RCW 23B.08.700

McLaughlin v. Schenk, 220 P.3d 146 (Utah 2009)

Cookietree Inc. (CI), a closely held Utah corporation, was formed in 1981 by a group that included Schenk and his father. Schenk was appointed CI's president, a position he held throughout the following events. In 1992 Schenk hired McLaughlin for operations management work that ultimately led to his appointment as CI's CEO and vice president of operations. McLaughlin's employment contract with CI provided that he was an at-will employee – either party to the contract could terminate his employment at any time as long as 6 months' notice was given. In 1993 CI and McLaughlin entered into an Incentive Stock Option agreement which required McLaughlin to sign a share transfer restriction agreement that Schenk and his father had previously endorsed. Under the transfer restriction agreement, a signing shareholder desiring to sell, assign or pledge his or her shares had first to offer the shares to CI; if CI did not elect to purchase all of the shares offered, each of the other signing shareholders was entitled to purchase a pro rata portion of the available shares; and if at the close of the applicable option exercise periods not all available shares had been purchased, the shareholder could freely transfer all the shares. The agreement also provided that the restriction could be waived by written consent of either CI's board of directors or CI shareholders owning at least two-thirds of its shares (excluding those of the transferor). In 1998, Schenk purchased CI shares owned by his father at his death without complying with either the first refusal process or obtaining waiver of the restriction. In 2003, conflict between Schenk and McLaughlin developed where, in the process of negotiations for the sale of CI McLaughlin discovered Schenk's share purchase and asserted his right of first refusal on the shares. After a period of increasing acrimony between the two about the sale of CI, Schenk terminated McLaughlin's employment without cause. In 2004 McLaughlin sued CI and Schenk for breach of contract and breach of fiduciary duty in connection with Schenk's stock acquisition. In 2005, McLaughlin filed another suit against CI and Schenk for breach of contract and breach of fiduciary duty in connection with his employment termination. Shortly thereafter, CI's board of directors (Schenk, his wife and CI's CFO) waived the corporation's right of first refusal on part of the shares, and Schenk obtained written waivers of the restriction from CI shareholders owning approximately 90 percent of CI's shares. CI moved to dismiss McLaughlin's claims on summary judgment. The district court granted the motion, finding that Schenk did not owe any fiduciary duty to McLaughlin on matters related to his role as an employee, and that the waivers of the right of first refusal were effective as a matter of law. McLaughlin appealed. The Utah Supreme Court held that: (1) while shareholders in closely held corporations owe each other enhanced fiduciary duties, Schenk did not violate any duty owed to McLaughlin by terminating his employment; and (2) the waivers ratifying the share transfer were contaminated by a conflict of interest. The court remanded the case for a determination of whether the waivers were fair.

The court began by comparing the two divergent approaches adopted by state courts on the question of whether shareholders in closely held corporations owe a fiduciary duty to one another – the Massachusetts approach (a shareholder in a closely held corporation owes a duty of utmost good faith and loyalty to all other shareholders), and the Delaware approach (there are no special rules governing the behavior of shareholders in closely held corporations). The court adopted the Massachusetts approach, stating that shareholders in close corporations were frequently subjected to freeze outs, squeeze outs, and other forms of oppression, which the Utah Act aims to prevent. The court reasoned that adopting the broader fiduciary obligations for close corporation shareholders gives oppressed shareholders alternative remedies, such as an equitable claim for dissolution or a claim for breach of fiduciary duty. In its analysis, the court noted that breaches of the fiduciary duty owed by close corporation shareholders arise in several circumstances: unequal treatment, frustration of reasonable expectations of involvement and a freeze out or squeeze out. It then concluded that CI did not thwart McLaughlin's investment expectations by terminating his at-will employment. His primary reason for joining CI was employment, which thereafter allowed him to purchase CI shares; he was not a founding member of CI for which investment was a condition precedent to his employment.

The court then turned to McLaughlin's argument that the 2005 waivers by the CI board of directors and by CI shareholders, obtained 6 years after the stock transfer, were ineffective. The court held that the Utah Act and CI's bylaws allowed the board to act retroactively by assigning ex post-facto effective dates to its actions. It rejected McLaughlin's argument that the waivers were conflicting interest transactions (under Utah provisions identical in substance with RCW 23B.08.700-.730) stating that the conflict of interest statute did not apply because the waiver was not a transaction (*i.e.* a two-sided deal) but unilateral action by CI. However, the court held that the inapplicability of the statutory conflict of interest provisions did not mean that the waivers were free from analysis as conflict of interest eventsunder common law. Relying on language in the RMBCA commentary on the conflict of interest provisions, the court said that the procedures set forth in those provisions for affirmation of conflicting interest transactions were "a useful strategy for dealing with … [non-transaction conflicts] as a matter of common law." The Court concluded that the waivers ratifying the share transfer were tainted by a conflict of interest because Schenk clearly had an economic interest in waiving the restrictions in the shareholders agreement. It then remanded the case for a determination of whether the waivers were fair to the corporation.

SIGNIFICANT DECISIONS IN OTHER JURISDICTIONS

Annotation to: RCW 23B.13.020(2) (exclusivity of appraisal)

McMinn v. MBF Operating Acquisition Corp., 164 P.3d 41 (N.M. 2007)

McMinn and 2 other individuals formed, as equal shareholders, MBF Operating Acquisition Corp. ("MBF"), a New Mexico corporation; each agreed to devote significant time to its pipeline inspection business and to share equally in its profits. After McMinn was appointed to the New Mexico public regulation commission, he resigned from his employment and directorship with the corporation and transferred his MBF shares to a blind trust. Soon thereafter, the trustee complained that the other shareholders were oppressing McMinn by preventing MBF from paying dividends, paying themselves excessive salaries, and offering only to buy McMinn's shares for their liquidation value. When the trustee threatened to institute an involuntary dissolution suit, the other shareholders caused MBF to engage in a cash-out merger with a newly-created corporation in which they were the sole shareholders. Shares held by the trust were voted against the merger, but the trust made no demand for payment of the fair value of the shares. Instead, McMinn[*] rejected payment of the amount set as consideration for his shares in the merger, and sued the other shareholders and MBF claiming breach of fiduciary duties. The trial judge denied MBF's motion for summary judgment, holding that New Mexico's dissenters' rights statute (similar to RCW 23B.13.020(2)) was not McMinn's exclusive remedy. The jury found that the other shareholders had breached their fiduciary duties to McMinn, and awarded him the fair value of his shares and punitive damages.

MBF appealed. The court of appeals reversed the trial court's judgment, holding that the statutory appraisal process was McMinn's only remedy, and that in the circumstances he was bound by the amount offered by MBF because he failed to follow the procedures required to assert the right. The appeals court held that McMinn had failed to prove that the merger qualified for exclusion from the appraisal process as unlawful or fraudulent conduct: proof that the other shareholders acted solely to freeze out McMinn was insufficient to bring the case within the statutory exclusions and McMinn had not established dishonesty or misrepresentation by the remaining shareholders.

McMinn appealed; the Supreme Court reversed the Court of Appeals holding that the exclusivity subsection in its appraisal rights chapter was inapplicable to freeze-out transactions designed to eliminate the interest of a minority shareholder. The court began by examining New Mexico cases that recognized a fiduciary duty of intrinsic fairness in transactions between shareholders of a closely-held corporation. It also noted that a cash-out merger designed by shareholders controlling both corporations also represented a self-dealing transaction ordinarily subject to careful scrutiny regarding to fairness. It then reviewed a number of authorities – articles, statutes and court decisions from other jurisdictions – that have limited application of exclusivity provisions to arms-length mergers between unrelated corporations. It declined "to ascribe to our legislature an intent [related to scope of the exclusivity clause] that would allow controlling shareholders to escape close scrutiny typically accorded" to conflicting interest transactions. Finally, it said that even if the exclusivity were to apply to the type of transaction at issue, the express exception in the exclusivity statute for unlawful corporate actions covers applied to allegations that director misconduct had breached a fiduciary duty.

[*] When McMinn completed his commission appointed, he was substituted as plaintiff.

SIGNIFICANT DECISIONS IN OTHER JURISDICTIONS

Annotation to: RCW 23B.14.300(2)(b)

Napp v. Parks Camp Ltd., 932 A.2d 531 (Me. 2007)

Napp and five of her siblings were equal shareholders in Parks Camp Ltd. (PCL), a Maine closely held corporation that owned a campground in Rome. PCL's articles of incorporation required a unanimous vote of shareholders: (1) to amend or adopt its articles of incorporation, bylaws or general business rules applicable to directors, (2) to borrow cash or other property, and (3) to approve annual financial statements, appoint auditors, and establish material financial policies. PCL's shareholders executed a voting agreement that inter alia provided each shareholder was entitled to be elected as a director. From 1992 to 2002, PCL's shareholders held annual meetings but failed to nominate or elect a board of directors as required by the bylaws and did not distinguish between actions taken as shareholders and actions taken as directors. At a special meeting of shareholders held in August 2002, four of the shareholders voted (over the dissent of Napp and another shareholder) for an interim board of directors comprised of 2 of the 4 shareholders. From August 24, 2002 to February 9, 2003, the interim directors acted as PCL's only directors and adopted a Code of Ethics intended to bind all shareholders. On October 23, 2002, Napp informed the other shareholders that she was consulting an attorney. All 6 shareholders were then elected to the board at a shareholders meeting in February 2003; but Napp was asked to let the shareholders know whether she would continue to be represented by legal counsel. Two shareholders called for her removal as a director in March 2003, but she remained on the board until the January 2004 annual meeting when she was not elected to the board. She was however nominated to serve as PCL's president, but declined. Napp then notified the other shareholders that she had filed a complaint (under a Maine statute identical to RCW 23B.14.300(2)(b)) seeking judicial dissolution of PCL on grounds that those in control of the corporation were acting illegally or oppressively. The other directors voted to rent the camp in order to pay legal defense costs, and voted to allow shareholders to use it only if they paid rent or if the camp was not rented. In 2004, a majority of the directors voted that all shareholders had to pay an annual assessment, and that those prepaying the assessment would receive an "additional unit of ownership" if the property was later sold. The trial court entered summary judgment in favor of PCL, finding that Napp had failed to present a genuine issue of material fact regarding either illegality or oppression. The Maine Supreme Court affirmed the trial court's judgment on illegality, but vacated its judgment, and remanded for further proceedings, on oppression.

Napp argued that "illegal" actions warranting judicial dissolution under the statute should include actions taken in violation of the Maine Business Corporation Act, and that her allegations that various actions had been undertaken in violation of provisions in PCL's articles of incorporation and in the shareholders' agreement (both said by the Maine Act to be binding) therefore constituted allegations of illegal activity. The court said that the actions taken were ultra vires, not true violations of the statute, and thus were not illegal activities for purposes of the judicial dissolution statute. Napp then argued that she had alleged "oppressive" conduct by those in control of PCL, stating that her reasonable expectations with respect to use of the camp had been thwarted by renting the camp to pay for legal expenses, by removing her from the board of directors, and by adopting a code of ethics bound all shareholders, all without unanimious approval. The court endorsed statements by other courts that oppressive conduct involves “both fiduciary duty and reasonable expectation concepts.” It surveyed fact patterns in a number of decisions that found, or did not find, oppression. Finally, it concluded:

> “The facts alleged by Napp, including the majority shareholder actions that occurred following her complaint for dissolution, create genuine issues of material fact as to whether Napp was effectively frozen out of the corporation. These issues should be decided by a fact-finder and their existence precludes summary judgment. Napp was not given an opportunity to maintain a position on the board, in violation of the shareholder’s [sic] agreement. Although the affidavits reflect that Napp may still make use of the property, she may only do so when the camp is not rented. Napp’s shares in the corporation have also been diluted through the majority shareholders’ decision to allow the shareholders to garner an additional “unit of ownership” by prepaying an assessment. Therefore, we cannot say as a matter of law that Napp has presented inadequate evidence of oppression within the meaning of section 1430(2)(B).”

SIGNIFICANT DECISIONS IN OTHER JURISDICTIONS

Annotation to: RCW 23B.08.090

Neiman v. Tri R Angus, Inc., 739 N.W.2d 182 (Neb. 2007)

Neiman and Lewis, owners of approximately 12 percent of the shares in Tri R Angus, Inc. (Tri R), a Nebraska corporation, sued to have two of its directors judically removed pursuant to Nebraska statute* modeled (as is RCW 23B.08.090) to Revised Model Business Corporation Act section 8.09. Plaintiffs alleged that defendants had authorized the distribution of assets in violation of state law, inappropriately mortgaged, pledged or disposed of corporate assets and diverted or wasted corporate assets. Plaintiffs moved for summary judgment, and offered as evidence copies of pleadings and materials filed in a 2001 derivative action (and in a later dismissed bankruptcy proceeding) that related to events that occurred betweeen 1998 and 2001, and a 2005 affidavit by Neiman relating to his observations as to the condition of certain Tri R property, made after an aerial inspection. The trial court granted summary judgment, ordered defendants removed as directors, and enjoined them from serving as Tri R directors for two years. Defendants appealed. The Nebraska Supreme Court reversed the district court's judgment holding that plaintiffs had failed to establish that they were entitled to judgment as a matter of law. The court, finding no judicial interpretations of the requirements in RMBCA section 8.09, concluded from comments by the drafters of the 2000 amendments to RMBCA section 8.09 and by authors of state practice manuals that judicial removal of a director is an extraordinary remedy designed in part to prevent future abuse. Moreover, the court suggested that, because the remedy is designed to prevent future abuse, it may not be warranted where the conduct alleged is not recent. The court found support for its "high bar for removal" in the scienter requirement in common and securities law actions for fraud – "that the actor whose conduct is challenged had the requisite knowledge that his or her conduct was unacceptable or his or her representations were false." The court observed that because a person's state of mind is difficult to prove, a claim for fraud (or in this case, fraudulent conduct) may not be appropriate for disposition at the summary judgment phase. The court said it would not determine the propriety of the trial court's summary judgment from "a collection of documents that in and of themselves do not unequivocally demonstrate that the director appellants had the required state of mind and that director appellants engaged in fraudulent conduct." The court also held that there was no evidence that directors' removal would be in the best interests of the corporation. Finally, it noted that the tendered evidence did not meet the requirement that the acts complained of should be relatively recent.

* Neb. Rev. Stat. §21-2086 adds the words "or gross abuse of authority or discretion" after "dishonest conduct" and before "with respect to the corporation" in RCW 23B.08.090(1)(a). The court said only that the record on summary judgment failed to establish as a matter of law that director appellants had necessarily engaged in gross abuse of authority or discretion with respect to the corporation. The court did not discuss "dishonest conduct" in its opinion.

SIGNIFICANT DECISIONS IN OTHER JURISDICTIONS

Annotation to: **RCW 23B.07.400(2) (definition of a derivative action)**
RCW 23B.11.060(1)(d)
RCW 23B.14.300(2)(b)

Notz v. Everett Smith Group, Ltd., 764 N.W.2d 904 (Wis. 2009)

The Smith Group owned 88.9 percent, and Notz 5.5 percent, of the shares in Albert Trostel & Sons Co. (ATS), a Wisconsin corporation engaged in production of rubber and plastics. All members of ATS's board of directors were officers and/or directors of the Smith Group. ATS decided in 2003 to expand its plastics operations; it caused its principal plastics subsidiary to purchase an injection molding company and searched for other acquisitions. In 2004, ATS conducted due diligence on the possible acquisition of another plastics manufacturer, but its board of directors decided not to make the purchase. Instead, the Smith Group, which previously had no direct holdings in plastics, bought the manufacturer, and within months purchased the assets of ATS's principal plastics subsidiary. In 2006[*], Notz sued the Smith Group and 4 of its directors in a direct action alleging breach of fiduciary duty by diversion of a corporate opportunity to purchase the plastics manufacturer and by unfair purchase of ATS's plastics subsidiary's assets. Notz also requested judicial dissolution of ATS pursuant to a Wisconsin statute identical in substance to RCW 23B.14.300(2)(b) on grounds that defendants had acted in a manner that was oppressive to Notz. The trial court dismissed Notz's fiduciary duty claims reasoning that the injuries alleged were common to all ATS shareholders, and thus were derivative claims, not direct claims of injury to Notz. It declined, however, to dismiss Notz's judicial dissolution claim. Both parties appealed; but while the appeal was pending, the Smith Group effected a cash-out merger of ATS into one of its subsidiaries. Notz perfected his dissenter's right, and ultimately ATS filed a separate (and still pending) federal district court action to determine his shares' fair value. The appellate court generally affirmed the trial court's dismissal of Notz's fidiciary duty claims, but excepted his claim on due diligence expenses on grounds that the expenses were always intended only to benefit the Smith Group, and thus represented a direct injury to Notz. Finally, the appellate court dismissed Notz's judicial dissolution claim on grounds that the cash-out merger stripped Notz of his standing as a shareholder to pursue the claims. Both parties appealed; a divided Wisconsin Supreme Court affirmed the appellate court's rulings on Notz's fiduciary duty claims, but reversed its dismissal of his judicial dissolution claim.

All justices affirmed the appellate court's test for distinguishing a derivative claim from a direct claim: "whether the primary injury is to the corporation or to the shareholder." All justices except a dissenter approved the appellate court's analysis that (1) Notz's claims related to the Smith Group's acquisitions of the plastics companies were derivative claims – injuries common to all ATS shareholders; and (2) Notz's claim on the due diligence expenses alleged receipt of a

[*] Notz had previously demanded that ATS's board rescind the sale of the plastics manufacturer and permit independent directors to be elected to the board. In response, ATS elected 3 independent directors, and appointed them to a special litigation committee to investigate Notz's claims. The special litigation committee issued a report that recommended that ATS's board should continue to include 3 independent directors, the Smith Group should pay $1.5 million to ATS, and that with these concessions, it was not in ATS's best interests to pursue Notz's claims.

constructive dividend by the Smith Group – and thus stated a direct claim. The dissenter extended the second argument to the effect that all of Notz's claims were direct – in each ATS's minority shareholders had suffered a loss and the Smith Group gained.

All justices agreed with the courts below that Notz's judicial dissolution claim alleged harm to a particular shareholder and thus was a direct action. All also voted to reverse the appellate court's decision that the cash-out merger deprived him of standing to pursue judicial dissolution, citing case law and language in the Wisconsin statute ("a civil … proceeding pending … against any business entity that is a party to the merger may be continued as if the merger did not occur.")* The majority, and the dissenting judge, said the consequence of the reversal was to permit Notz's dissolution action to continue. Two justices concurred, but questioned the utility of Notz continuing the action. In their view, the majority's determination that only Notz's due diligence expenses claim was a direct claim meant that claim was Notz's only ground for claiming oppression. They argued that even if the expenses claim amounted to oppression, dissolving ATS was meaningless as the merger had already ended its existence and left Notz with a dissenter's monetary claim which was to be determined in the pending federal court proceeding.

* Essentially identical language appears in RCW 23B.11.060(1)(d).

SIGNIFICANT DECISIONS IN OTHER JURISDICTIONS

Annotation to: RCW 23B.06.400
RCW 23B.08.300
RCW 23B.08.310

Paratransit Risk Retention Gp. Ins. Co. v. Kamins, 160 P.3d 307 (Colo. App. 2007)

Kamins owned all of the shares of Colorado Transportation Services Inc. (CTS), a Colorado corporation, and was its only director. Paratransit insured CTS against automobile liability claims; its policy with CTS required CTS to pay annual premiums, to provide Paratransit with a $40,000 letter of credit, and to have a self-insured retention (SIR) of $25,000 for each claim. On May 28, 1998, CTS sold all of its assets, ceased operations, cancelled its policy with Paratransit, and began the process of liquidating. On June 3, 1998, and again on November 30, 1998, Kamins caused CTS to make distributions to him (respective amounts of $525,000 and $57,141). On both dates, CTS owed Paratransit the final premium on the policy and another small debt, and was contigently liable to it for the SIR on four accident claims. CTS also had debts to other creditors, some of which were eventually paid only after Kamins made capital contributions to CTS. No payments were made to Paratransit (apparently on the belief that the $40,000 letter of credit satisfied CTS's debts to Paratransit.) When Paratransit determined its claims exceeded that amount, Paratransit sued Kamins directly under the Colorado equivalent of RCW 23B.08.310, claiming he had approved distributions by CTS which caused it to become equitably insolvent in violation of Colorado limitation on distributions (identical in substance to RCW 23B.06.400(2)(a). The trial court entered judgment for Paratransit, and Kamins appealed. The court of appeals reversed the trial court's judgment, citing numerous errors in the trial court's analysis, and remanded the case for further proceedings.

The appellate court first upheld the trial court's decision to let Paratransit sue Kamins directly (despite language in the Colorado equivalent to RCW 23B.08.310 stating directors approving illegal distributions are liable to the corporation) on grounds that denying Paratransit – at that point CTS's only creditor - would only extend judicial proceedings, and frustrate the statute's purpose. The court then ruled on several aspects of the trial court's application of the equitable insolvency limitation to the case before it:

a. The court said that when a corporation no longer attempts to generate revenue, a trial court must ignore language in the equitable insolvency test directed toward satisfaction of debts in the "usual course of business"; instead the trial court "must consider what the company would 'be able to do in the future, that is whether it would or 'would not be able to pay its debts as they become due'."
b. The court said that federal bankruptcy courts apply an equitable insolvency test virtually identical to that in the Colorado statute therefore and provided relevant authority in interpreting the Colorado statute. It interpreted those cases to require the trial court to make findings "(1) comparing the number of CTS's debts unpaid to those paid, taking into account that payments of smaller debts do not necessarily mean the company was solvent … (2) determining the amount of CTS's delinquency and considering CTS's contingent liabilities as an element of the total debt, … (3) determining the materiality of the nonpayments, taking into account any unpaid premiums and future dates when payments would have to made on the outstanding claims, … [and] (4) evaluating CTS's

conduct of its financial affairs, considering that CTS was no longer operational, and had no source of income."

c. The court said the trial court erred in valuing CTS's contingent SIR liabilities at the maximum amount of such possible claims – instead it should have made "reasonable judgments as to the likelihood, amount, and time of recovery" focusing on CTS's history regarding amounts paid on self insured claims.
d. The court held that the trial court erred in basing its finding of insolvency on events (e.g., bills paid; contributions to capital) occuring after the date of each distribution. The court said the trial court must make findings as to the information Kamins had at the time of each distribution.
e. The court ruled that the trial court failed to consider whether Kamin's reliance on his claims manager's expertise in deciding upon the amount of the June 3, 1998 distribution was sufficient to relieve him of liability (under Colorado statutes identical in substance to RCW 23B.08.310 and RCW 23B.08.300) for breach of director's duty.
f. The court ruled that if the trial court determined that CTS was insolvent as a result of one or both of CTS's distributions to Kamins, it had to determine how much of each distribution, if any, could have been paid while leaving CTS solvent.

SIGNIFICANT DECISIONS IN OTHER JURISDICTIONS

Annotation to: RCW 23B.13.020(2) (exclusivity of appraisal)

Peters Corp. v. New Mexico Banquest Investors Corp., 188 P.3d 1185 (N.M. 2008)

New Mexico Banquest Investors Corp. (NMBIC), a closely held New Mexico holding company, was formed in 1982, in part to facilitate an investment by a Spanish bank, Banco Bilbao de Vizcaya (BBV), in a bank owned by a subsidiary of NMBIC. In 1983, certain NMBIC shareholders (including a group of minority shareholders led by Peters Corp.) executed two shareholder agreements: the first vested management and control of NMBIC in Bennett, a major NMBIC shareholder; the second required BBV, if it decided to sell its NMBIC shares, to first offer them pro rata to signing shareholders, but permitted BBV to sell the shares to a third party if any signing shareholder refused to transfer, or exercise, its option to purchase. In 1995, BBV notified Bennett of its intent to sell its NMBIC shares. Bennett discussed the sale with corporate counsel, members of NMBIC's board of directors, and some signing shareholders (specifically excluding members of the Peters group.) Bennett decided for legitimate business purposes that NMBIC should attempt to redeem the shares as a third party, decided, along with a number of directors, not to transfer or exercise his/their option rights, and negotiated terms for NMBIC's redemption of shares held by BBV. At a shareholders' meeting, all signing shareholders except members of the Peters group and one other small shareholder voted not to transfer or exercise their option rights, and voted to ratify NMBIC's redemption of BBV's shares as a third party, subsequent transfer of the shares to an ESOP, and issuance of additional shares to any shareholder at a favorable price. Members of the Peters group voted against the redemption, and asserted dissenters' rights. NMBIC petitioned the district court for an appraisal of the fair value of the shares held by members of the Peters group; Peters Corp. counterclaimed and filed a third party complaint against Bennett, asserting breach of fiduciary duties and asking for rescission and punitive damages. After trial, the court declined to award any relief beyond statutory appraisal to shareholders in the Peters group; while the court held that Bennett breached his fiduciary duty to members of the Peters group by not informing them of BBV's intent to sell its shares, it found that the breach did not cause damage to them or provide a windfall to NMBIC or Bennett.

The Peters group appealed the district court's denial of any remedy for Bennett's breach of fiduciary duty. The court of appeals affirmed the court's denial, but relying on its opinion in McMinn v. MBF Operating Inc. (133 P.3d 875 (2006)) (later <u>reversed</u> by the Supreme Court after the appeals court's opinion in this case), held that Bennett's breach occurred in the type of "freeze out" transaction for which statutory appraisal was the dissenting shareholders' exclusive remedy.

The Peters group appealed; the Supreme Court affirmed the decisions of courts below that shareholders dissenting to the redemption transaction were not entitled to punitive damages or disgorgement beyond the appraisal remedy of fair value for their shares. The court relied heavily on its decision in McMinn v. MBF Operating, Inc. (164 P.3d 41 (2007)). The court said that the redemption transaction did not "freeze out" the Peters group – the group elected to surrender their shares by pursuing their dissenters' rights; had the group retained their NMBIC shares, they would have received such benefits or suffered such losses as shareholders who approved the redemption. The court noted that NMBIC's stock redemption was the result of arms' length bargaining between two unrelated entities, and that because it did not involve self-dealing, the exclusivity subsection in the appraisalstatute applied. The court held that the Peters group had failed to prove Bennett's breach of fiduciary duty rose to the level of unlawful or fraudulent conduct (exceptions to the exclusivity subsection), and failed to show a causal connection between Bennett's failure to notify them of BBV's intention to sell its shares and the benefits they allege were obtained by Bennett and NMBIC.

SIGNIFICANT DECISIONS IN OTHER JURISDICTIONS

Annotation to: RCW 23B.15.020(3)

Trevek Enterprises, Inc. v. Victory Contracting Corp., 945 A.2d 1056 (CN App. 2008)

Trevek, a New York corporation, filed an action in a Connecticut Superior Court against Victory, a Connecticut corporation, to recover unpaid fees for roofing services that Trevek had performed for Victory in Connecticut. Victory challenged Trevek's authority to pursue its claim on grounds that Trevek had been transacting business in Connecticut without a certificate of authority, and thus under a Connecticut statute identical in substance (as is RCW 23B15.020) to RMBCA §15.02 could not maintain the suit until it acquired the certificate. Trevek then formed a Connecticut corporation, Trevek CT, and assigned its claim against Victory to it. The trial court granted Trevek CT's motion to be substituted as plaintiff in the action, and denied Victory's motion that the action be stayed pursuant to the Connecticut statute (and RCW 23B.15.020(3)) until Trevek obtained a certificate of authority. After judgment for Trevek CT, Victory appealed. The Connecticut court of appeals reversed, holding that the trial court had improperly denied Victory's motion for stay to compel Trevek CT to obtain from Trevek the required certificate of authority.

The appeals court rejected Trevek CT's argument that its status as a Connecticut corporation categorically exempted it from having to procure a certificate of authority, citing language in the statute, the statute's legislative history, authority elsewhere, and practical implications of a contrary decision. The court said that the language in the stay subsection did not support Trevek CT's position as the statute did not distinguish between assignees which were Connecticut corporations from those that were not. It noted that commentary on the source RMBCA provision had characterized it as remedial, and cited Connecticut authority that exemptions from remedial statutes should be narrowly construed. It found language in comments by the Connecticut committee in adopting the provision specifically requiring the foreign corporation/assignor to obtain a certificate of authority before the assignee could maintain suit on a claim. It saw no reason why simply incorporating a Connecticut corporation should relieve Trevek of paying the fees, taxes, and penalties it would have incurred had Trevek itself continued the action against Victory. Finally, it cited cases from other jurisdictions interpreting statutes similar to the Connecticut statute to require either the foreign corporation, or the assignee, to obtain a certificate of authority before any action could proceed.

SIGNIFICANT DECISIONS IN OTHER JURISDICTIONS

Annotation to: RCW 23B.13.020(2) (exclusivity of appraisal)

Williams v. Stanford, 977 So.2d 722 (Fla. App. 2008)

On October 23, 2002, Paul and James Williams ("the Williams brothers"), owners together of 30 percent of the shares of a Florida corporation, Brown & Stanford, Inc. ("B&S"), filed a derivative action on B&S's behalf against its 70 percent shareholder, John Stanford, and his wife, claiming that the Stanfords had breached their fiduciary duties as B&S directors by paying personal expenses with B&S funds. On November 1, 2003, the Stanfords without notice to the Williams brothers, began a two-month process whereby they transferred B&S's assets to a new corporation in which they were the only shareholders in exchange for the new corporation's assumption of B&S's liabilities. When the Williams brothers learned that the transfer was occurring, they were told that B&S would purchase each brother's B&S shares for $25,000 and that they had a statutory right of appraisal. The Williams brothers dissented only with respect to some of their shares; they then amended their derivative complaint allege that the Stanfords had breached their fiduciary duties by transferring B&S assets for inadequate consideration to the new corporation. The amended complaint asked the court to establish a constructive trust on the new corporation's profits, and to rescind the transfer of B&S's assets to the new corporation. The trial court first declared that the Williams brothers' exercise of dissenters' rights with respect to less than all shares owned by each was void. It later granted the Stanfords' motion to strike the demand for a constructive trust and granted their motion for summary judgment on the rescission claim.

The Williams brothers appealed; the Florida court of appeals reversed both rulings. The court, finding no Florida court interpretation of the exclusivity provision in the Florida appraisal statute, turned to the major Delaware Supreme Court decisions on the subject (Weinberger v. UOP, Inc. (457 A.2d 703 (1983)) and Rabkin v. Phillip A. Hunt Chemical Corp. (498 A.2d 1099 (1985)) and to the Delaware Chancellor's application of those precedents to the Florida exclusivity clause in Berger v. Intelident Solutions, Inc.[*] (911 A.2d 1164 (2006). The court concluded:

> We are inclined to align our interpretation of section 607.1302 (4)(b) with that of the Berger court, which interpreted the phrase "fraud or material misrepresentation" in the statute essentially synonymously with "unfair dealing."
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> * * *
>
> We interpret the " fraud or material misrepresentation" exception in section 607.1302(4)(b) to mean that a minority shareholder who alleges specific acts of "fraud, misrepresentation, self-dealing, [or] deliberate waste of corporate assets," Weinberger (457 A.2d at 714), may be entitled to equitable remedies beyond an appraisal proceeding if those allegations are proven true and if the alleged acts have so besmirched the propriety of the challenged transaction that no appraisal could fairly compensate the aggrieved minority shareholder.

The court said that appraisal of the Williams brothers' shares at the time of the transfer of B&S's assets to the new corporation would not allow them to recoup the diminished value caused by the Stanfords' alleged mismanagement and misappropriations of corporate funds.

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[*] The Chancellor's opinion is summarized in the case summary on Berger.

SIGNIFICANT DECISIONS IN OTHER JURISDICTIONS

Annotation to: RCW 23B.08.310(5)

Wilson v. Paine, 288 S.W.3d 284 (KY 2009)

Franklin Career Services, Inc. (FCS), a Kentucky corporation, filed a Chapter 7 petition in 2006 with the Bankruptcy Court for the Western District of Kentucky. In late 2007, Wilson, trustee in bankruptcy for FCS, filed suit against Paine and Newton, former officers and directors of FCS, alleging in one claim that unlawful distributions had been made by FCS for which they were liable under a Kentucky statute similar to RCW 23B.08.310. Paine and Newton filed motions to dismiss the claim on grounds that it was barred by the two-year statute of limitations set forth in a subsection of its statute identical in substance to RCW 23B.08.310(5) as it existed prior to its amendment in 2006[10]. Wilson responded to the defense by arguing that the equitable tolling doctrine of "adverse domination" applied to toll the statute of limitations. Finding no Kentucky decision on the doctrine, the Bankruptcy Court requested certification of the law by the Kentucky Supreme Court on the following question: "whether the equitable rule of adverse domination applies to toll the statute of limitations" on liability for illegal distributions. The Supreme Court answered the question "yes" and specified how two questions on application of the doctrine that had divided other courts should be answered.

According to the court, the "adverse domination" doctrine – the doctrine that the accrual date for causes of action against corporate officers and directors should be deferred as long as those in power control the information necessary to institute an action on behalf of the corporation – is widely accepted by federal and most state courts. The court described the doctrine as a corollary of the discovery doctrine that Kentucky courts have long applied to toll statutes of limitation in cases of medical malpractice – "a cause of action will not accrue until the plaintiff discovers, or in the exercise of reasonable diligence should have discovered, not only that he has been injured but also that his injury may have been caused by the defendant's conduct." In addition, the court said that the "adverse domination" doctrine is consistent with well-established agency law principles that hold that knowledge in possession of an agent will not be imputed to the principal if the agent is acting adversely to the interests of the principal. Thus, the court approved the statement by the court in Hecht v. Resolution Trust Corp., 635 A.2d 394, 405 (MD 1994) that "because, in most cases, defendants' control of the corporation will make it impossible for the corporate plaintiff independently to acquire the knowledge and resources necessary to bring suit, the adverse domination rule presumes that actual notice will not be available until the corporate plaintiff is no longer under the control of the erring directors." The court then answered two questions related to application of the doctrine:

1. <u>The degree of domination of the board that is required in order for the corporation to claim protection of the doctrine.</u> The court rejected as too restrictive the position of some courts that plaintiff must show full, complete and exclusive control of the corporation by the directors or officers charged; it accepted instead the "disinterested majority test" – requiring plaintiff only to show that a majority of the board members were wrongdoers – stating that

[10] RCW 23B.08.310(5) as originally enacted in 1989 stated: "A proceeding under this section is barred unless it is commenced within two years after the date on which the effect of the distribution was measured under RCW 23B.06.400(4)." The subsection was amended to its current form by Laws 2006, ch. 52, §3 (eff. 6-7-06).

the mere existence of a culpable majority is likely to preclude the corporation from suing the wrongdoers as long as they are in control.

2. <u>The required level of culpability that plaintiff must allege against the directors.</u> The court rejected the view of some courts that negligent conduct by a majority of the corporation's directors is sufficient to toll the statute of limitations on grounds that an allegation that a majority was negligent could almost always be made whenever a number of directors failed to discover wrongdoing by a few. Instead, it said that plaintiff must show that a majority of directors were active participants in intentional wrongdoing.

SIGNIFICANT DECISIONS IN OTHER JURISDICTIONS

Annotation to: RCW 23B.02.040

Woodroffe v. Woodroffe (In re Estate of Woodroffe), 742 N.W.2d 94 (Iowa 2007)

Decedent's will bequeathed "all machinery, equipment and inventory owned by me at the time of my death" to his wife, and bequeathed all the stock he owned in an Iowa corporation to his son. The corporation's existence had expired 25 years before his death when decedent and his attorneys failed to file documents extending its duration; but its business was continued, and numerous items of machinery, equipment and inventory were acquired in its corporate name during the 25 year period. Decedent's executor (his wife) filed a probate inventory listing all such items as property owned by decedent's estate. Decedent's son sought a declaratory judgment that all items concerned were instead owned by the corporation at the time of decedent's death. The district court declared the items were owned by decedent's estate; decedent's son appealed. The Supreme Court of Iowa affirmed the trial court's judgment, holding that "the only corporation Iowa law recognizes is one created pursuant to law – a de jure corporation." The court said that under Iowa common law when a corporation's existence ended pursuant a time limit stated in its charter, and no renewal documents were filed, it could not continue to exist as a de facto corporation or corporation by estoppel. The court held that the legislature did not repeal this common law rule when it enacted in 1989 provisions identical in substance to Revised Model Business Corporation Act sections 2.03 and 2.04. It cited comments by the RMBCA drafters that such sections abolished the doctrines of de facto corporation and corporation by estoppel. It then cited 10 decisions by courts in states with statutes modeled on the RMBCA provisions (including Equipto Div. Aurora Equip. Co. v. Yarmouth, 134 Wash. 2d 356 (1998), noted elsewhere in Washington decisions) to the same effect.